IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO.76 OF 2019

PETER LEINA ASSENGA ..... PLAINTIFF

VERSUS

1. NATIONAL HOUSING CORPORATION

2. NOEL ESTATE COMPANY LIMITED ..... DEFENDANTS

RULING

Date of Last Order: 04/05/2021 &
Date of Ruling: 02/07/2021

S.M KALUNDE, J:-

The present suit was filed on 24th June, 2019 and the record of the Court show that the 1st and 2nd defendants were served on 12th June, 2019 and 19th June, 2019 respectively. The matter was adjourned several times by the Deputy Registrar before being placed before me. When parties appeared before me for the first time on 20th July, 2020 **Mr. Roman Masumbuko**, learned advocate for the plaintiff prayed to proceed ex-parte as the 1st defendant had not filed their defence. On his part, **Mr. Aloyce Sekule**, learned counsel for the 1st defendant intimated that the defence had not been filed because parties had not appeared before a trial judge so that he can make the necessary prayers in

terms of **sections 2 and 6** of **the Arbitration Act, Cap. 15 R.E. 2002.**

Mr. Sekule argued that in accordance with the respective sections, a party to a submission may, before filing a Written Statement of Defence (WSD), apply to the court to stay the proceedings; so that parties may refer the matter to arbitration. Conversely, Mr. Masumbuko insisted that the 1st defendant had failed to file their defence as required by law. As for the prayer to refer the matter to arbitration, the counsel insisted that the prayer cannot be made by an oral prayer. His view was that the 1st defendant must file a petition or application. In light of the argument by the parties I ordered the controversy be argued by written submissions. Submissions were duly filed.

Mr. Sekule submissions was brief, he argued that on 15th September, 2016 the plaintiff entered into a Tenancy Agreement (**"the agreement"**) with the 1st defendant in respect of apartment No. 001 on Plot No. 1278/84, Zanaki Street within Ilala Municipality for commercial use. He added that in accordance with Clause 4.3 of the agreement the plaintiff ought to have referred the dispute through a dispute settlement mechanism agreed in the agreement. He stated that, in accordance with the respective clause, any dispute between the parties was to be referred to negotiations, then the ADR under Tanzania Institute of Arbitrators, then

Arbitration and if the previous mechanisms fail, the recourse to the High Court is open.

The counsel for the 1st defendants cited the provisions of section 6 of the Arbitration Act, Cap. 15 R.E. 2002 and contended that in order for a party to be able to move the Court to invoke the said section there must be **one**, an arbitration clause in the agreement; **two**, either of the parties files a suit before the Court against the other; and **three**, the other party must move the Court to refer the matter to ADR before filing a WSD. He contended that once the above conditions have been complied with the Court would normally stay the proceedings pending referral to the dispute settlement mechanism pursuant to the arbitral clause. To support his position he cited the case of **National Housing Corporation vs. Herkin Builders Limited & 2 Others**, Civil Application No. 290 of 2018 (unreported).

Mr. Sekule concluded that in the present circumstances, the 1st defendants have complied with the requirements of section of Cap. 15 and if they filed a WSD they would be estopped from making a prayer to refer the matter to ADR. He reasoned that it appropriate for the 1st defendant not to file WSD since they intended to stay the proceedings within the meaning of section of Cap. 15.

Mr. Masumboko, strongly objected to the request to stay proceedings. His contention was that, in terms of **Order VII of**

the Civil Procedure Code, Cap. 33 R.E. 2019, the 1st defendant ought to have filed a WSD within 21 days of service. He went on to argued that section 6 of the Arbitration Act, Cap. 15 R.E. 2002 was not the applicable law in the present circumstances as it has since been repealed and replaced by **the Arbitration Act, Cap. 15 R.E. 2019.** He added that the new section 6 does not speak of stay of proceedings instead section 13 (3) of the Act requires the defendant to have taken has taken appropriate procedural step to acknowledge the legal proceedings against him or he has taken any step in those proceedings to answer the substantive claim. He insisted that the 1st defendant has failed to comply with the requirement of section 13(3) of the revised Cap. 15.

It was Mr. Masumbuko contention that the 1st defendant was required to make a formal application by way of a Petition and not by making an oral application as was the case in the present circumstances. to support this contention he cited rule 5 of the Arbitration Rules, G.N. 427 of 1957. He added that, in terms of section 13 (4) and (5) of Cap. 15, the Court has the discretion to refuse an application for stay of proceedings where it is satisfied that the arbitration clause is incapable of being performed. Citing **DB Sharpriya & Co. Ltd vs. Yara Tanzania Ltd**, Commercial Case No. 37 of 2016 (unreported), he invited this Court grant judgement in favour of his client.

Based on the above exposition, the question for my determination is whether the 1st defendant has made out a case for stay of proceedings under Cap. 15.

Before proceeding further, I wish address the issue of the applicable law raised by Mr. Masumbuko, if I got him right, he meant that the applicable law was the **Arbitration Act, No.2 of 2020**. By reference he had referred it as Arbitration Act, Cap. 15 R.E. 2019. Indeed, the applicable law was Cap. 15. R.E. 2019 as published through **the General Laws Revision Notice, 2020, G.N. No. 140 of 28th February, 2020.** However, the revised edition 2019 as published through G.N. No. 140 of 2020 included the 1931 Act, and not Act No. 2 of 2020.

The Arbitration Act, No.2 of 2020 was assented to by the President on 14th February, 2020 and in terms of section 1 of the Act, it became operational on 18th January, 2021, through **Government Notice No. 101 published on 15th January, 2021** replacing the 1931 Act. Until then, the Arbitration Act, Cap. 15 R.E. 2002 as revised through G.N. No. 140 of 2020 to R.E. 2019 was applicable. With respect Mr. Masumbuko's argument is misplaced.

I now proceed to the merits, as intimated above the Court has been moved under section 6 of Cap. 15 R.E. 2002. The section reads:

> *"Where a party to a submission to which this Part applies, or a person claiming under him, commences a legal proceedings against any other party to the submission or any person claiming under him in respect of any matter agreed to be referred, a party to the legal proceedings may,* ***at any time after appearance and before filing a written statement or taking any other steps in the proceedings apply to the court to stay the proceedings****; and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary for the proper conduct of the arbitration, may make an order staying the proceedings." [Emphasis mine]*

My understanding of the above section is that, where parties to a written agreement have submitted to a present or future reference to arbitration and one of them commences a legal proceeding against any other party, a party against whom the legal proceedings have been commenced may, at any time after appearance and before filing a written statement or taking any other steps in the proceedings apply to the court to stay the proceedings. The additional requirement here is that the Court must be satisfied that there are no reasons why the matter should not be referred in accordance with the agreement.

In the present case it is not in dispute that on 15th September, 2016 the plaintiff and the 1st defendant entered into a Tenancy Agreement with respect of apartment No. 001 on Plot No.

1278/84, Zanaki Street within Ilala Municipality for commercial use. It was also not disputed that Clause 4.3 of the agreement **(Dispute Resolution)** parties agreed on the dispute settlement mechanism, that is ADR and Arbitration before institution of a suit. the respective clause reads:

> ***"4.3 Dispute Resolution:***
>
> *4.3.1. The parties shall attempt to resolve any dispute arising out of or relating to this contract through negotiations between senior executive of the parties, who have authority settle the same.*
>
> *4.3.2. If the matter is not resolved by negotiation within 7 days of receipt of a written "invitation to negotiate", the parties will attempt resolve the dispute in good through an agreed* ***Alternative Dispute Resolution (ADR)*** *procedure, or in default of agreement, though an ADR procedure as recommended to the parties by the President or the Deputy President, for the time being, of the Tanzania Institute of Arbitrators.*
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> *4.3.3 If the matter has not been resolved by an agreed or recommended ADR procedure as stipulated in clause 4.3.2 above or if any party will not participate in such an agreed or recommended ADR procedure, within 60 days of the initiation of that procedure, the dispute may be referred to arbitration by any party. The seat of the arbitration shall be Tanzania Mainland. Arbitration shall be governed by both the* ***Arbitration Act 1996 and Rules*** *as agreed between the parties. Should the parties be unable to agree on an arbitrator or arbitrators or be unable to agree on the Rules for Arbitration, any party may, upon giving*

written notice to other parties, apply to the President or the Deputy President, for the time being, of the Tanzania Institute of Arbitrators for the appointment of an Arbitrators and for any decision on rules that may be necessary.

Nothing in clauses 4.3.1. – 4.3.3. shall be construed as prohibiting a party or its affiliate from applying to a Court to interim injunctive relief.

4.3.4. Should all the ADR procedure referred to in clause 4.3.1. – 4.3.3 above fail to resolve the dispute with stipulated time then parties shall submit themselves to the court of competent jurisdiction."

It is on record that, the present suit was filed on 24th June, 2019 and the 1st defendants were duly served and appeared on 11th December, 2019 before **Hon. Ngunyale, DR** (as he then was). The matter was adjourned and scheduled for mention on 26th March, 2010. On the 26th March, 2010 and 02nd June, 2020 the matter was adjourned before me in the absence of the parties due to Covid-19 pandemic. The counsel for the parties, subsequently, appeared before me for the first time on the 20th July, 2020, the day when Mr. Sekule intimated that he wanted to move the Court to stay the proceeding in terms of section 6 cited above.

Mr. Masumbuko objected to the prayer on the ground that, first, the applicable law was section 13 of the Arbitration Act and not section 6; and second, that the 1st defendant ought to have filed a defence first before making the prayer to have the suit stayed. Having made a finding that the applicable law was the

Arbitration Act, Cap. 15 R.E. 2002 as revised through G.N. No. 140 of 2020 to R.E. 2019, the first limb of the counsel's argument becomes obsolete.

As for the second limb, the law is clear that "***... a party to the legal proceedings may, at any time after appearance and before filing a written statement or taking any other steps in the proceedings apply to the court to stay the proceedings...".*** From the records it is clear that, parties first made appearance before the trial judge on the 20th July, 2020, prior to that the matter had been adjourned before Hon. DR. and twice before the trial judge due to the pandemic, parties did not have a forum before that to make any prayers. There is nothing in the Act to prohibit an oral application to be made before a trial judge. In the circumstances, I entertain no doubt that the application made before me was properly made. Mr. Masumbuko placed reliance on **DB Sharpriya & Co. Ltd** (supra), I have read that case and I think it does not apply to the present circumstances as in that case an application for stay of proceedings had initially been rejected.

As observed above, parties, by their own consent, subjected themselves to an elaborate dispute settlement mechanism under the agreement. In accordance with clause 4.3.1 parties agreed to resort to negotiations between senior executive of the parties as of first instance. Upon failure they agreed to proceed to **Alternative**

Dispute Resolution (clause 4.3.2) and if ADR failed then an option for **Arbitration** was open (clause 4.3.3). it was until the above remedies have been exhausted a party was to submit to a court of competent jurisdiction (clause 4.3.4). I think parties are bound by their agreement as that would uphold the principle of sanctity of contracts otherwise there would be no need to have contracts.

I am satisfied that the 1st defendants have shown that they are ready and willing to do all things necessary for the proper conduct of the arbitration. There is nothing in Mr. Masumbuko submissions to suggest that they 1st defendant have ill intention in their application. After all, our Civil Procedure Code has been amended to promote amicable settlement of disputes.

That said, the present proceedings are stayed to afford parties to resolve their dispute in accordance with the agreed framework in the Agreement. No order for costs is made.

DATED at **DAR ES SALAAM** this **02ND** day of **JULY, 2021**.

S.M. KALUNDE

JUDGE