IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND CASE APPLICATION NO. 641 OF 2020

ABDULKADIR ELMANZI RASHID & 135 OTHERS ..... APPLICANTS

VERSUS

1. **THE BOARD OF TRUSTEES OF THE NATIONAL SOCIAL SECURITY FUND**
2. **THE HONOURABLE ATTORNEY GENERAL**
3. **YONO AUCTION MART & COURT BROKERS**

..... RESPONDENTS

RULING

Date of Last Order: 13/08/2021 &
Date of Ruling: 20/08/2021

S.M. KALUNDE, J.:

Through distinct hire purchase agreements **("the agreement")**, each of the applicants purchased houses from the housing estate developed by the 1st respondent. The houses are located at Mtoni Kijichi NSSF Housing Project within Kigamboni Municipality, Dar es Salaam Region **("the suit premises")**. After execution of the agreement, each of the applicants continued to make payments of the monthly instalments in accordance with the payment schedule agreed in the respective agreements. The applicants defaulted in making monthly payments in accordance with the agreement

prompting the 1st respondent to issue Default Notices requiring the applicants to vacate from the suit premises.

The applicants were aggrieved by the decision of the 1st respondent in issuing Default Notices, in response they issued a 90 days statutory notice of intention to sue the 1st and 2nd respondents. Together with the alleged notice, the applicant filed the present application seeking for orders that **Mselemu Ally Ngondya** and **Alex Godfrey Dalali** be authorized to sue on their behalf upon expiry of the 90 days' Notice. The application is preferred under **Order I (a) Rules 8(1)** and **12 (1)** and **(2)** of the **Civil Procedure Code, Cap. 33 R.E. 2019**.

On being served the 1st and 2nd respondents filed a Notice of Preliminary Objection on a point of law couched in the following terms:

> *"The application is premature and bad in law as the applicants have not exhausted the remedies as provided under clause 10.0 of the sale agreement."*

Hearing of the preliminary objection was conducted by way of written submissions. The 1st and 2nd respondents were represented by **Ms. Jacquiline Kinyasi**, learned State Attorney, whilst the applicants were being represented by learned council **Mr. Benitho L. Mandele**.

In support of the preliminary objection, Ms. Kinyasi submitted that the present application was filed contrary to **Clause 10.0 of the agreement** which made it mandatory for all disputes between the parties, relating to the agreement, to be determined amicably and should amicable settlement fail any of the parties was at liberty to refer the matter to arbitration. To support her position, she referred to the case of **Tanzania Motor Services Ltd and Others v Mehar Singh t/a Thaker Singh** (Civil Appeal No. 115 of 2005) [2006] TZCA 5; (21 July 2006); **East African Breweries Ltd. v GMM Company Ltd** [2002] TLR 12; and **Yuko's enterprises (E.A) Ltd v Regional Administrative Secretary of Mwanza Region & Another** (Revision No. 6 of 2019) [2020] 1; (26 February 2020). On the strength of the above authorities, the learned State Attorney prayed that the application be dismissed with costs.

In response, Mr. Mandele argued that the preliminary objections raised by the 1st and 2nd respondents were unfounded for several reasons. Firstly, that the present care was a mere application not a suit. His view was that, since this was a mere application and not a suit, then the arbitration clause did not apply to the case. In distinguishing the cited authorities, the counsel submitted that, in all those cases, there was a proper suit filed before the Court. Secondly, the counsel reasoned the 90 days' statutory notice of intention to

sue was issue to avoid catching the 2nd respondent off-guard. Citing **Tanzania Motor Services Ltd and Others v Mehar Singh t/a Thaker Singh** (Supra), the counsel argued that arbitrary proceedings fell squarely within the definition of a suit for purposes of maintaining the present application.

Further to that, Mr. Mandele argued that arbitral proceedings against the 1st and 2nd respondents have proved futile since the respondents have refused to participate in the same. He added that, as a result of the respondents conduct, the applicants have been forced to file **Land Application No.540 of 2020**, before this Court under section 4 of the **Arbitration Act, Cap. 15 R.E. 2019**, seeking to revoke the arbitration clause so that an ordinary or normal suit may be preferred against the respondents. The counsel concluded that the preliminary objection was unfounded and baseless and ought to be dismissed with costs.

With that extrapolation of argument by the parties, the crucial question for my determination is whether the preliminary objection is merited.

I have gone through the affidavit filed in support of the application. It is not a disputed fact that, the applicants did purchase and occupy several houses from the second respondent through the agreements executed by each of them. Paragraph 2 of the affidavit provides:

"2. *That we are purchasers and occupiers of several premises (houses) from the second respondent.*

Copies of Hire Purchase Agreements are attached hereto as Annexures "A" collectively forming part of this affidavit."

Clause 10 of each of the agreements attached as **Annexure's "A"** has the following wording:

"10. Any dispute and controversies arising out of otherwise relating to this agreement shall, in the first instance be settled amicably between the parties and failing of such amicable settlement, the parties hereto shall resort to arbitration which shall be conducted in accordance with the Arbitration Act, Cap. 15 R.E. 2002."

The above clause is specific and clear that all disputes between the parties, in connection to the agreement, were to be resolved amicably or through arbitration. My understanding of clause 10 above is that, though clause 10, the parties agreed not to sue each other. Instead, they agreed to have two options, first, settle the dispute amicably, secondly, resort to arbitration where amicable settlement had failed. There was no option to resort to filing a suit. The above clause thus addresses the parties' rights and options in the event of any dispute over the agreement. In view of clause 10 above, the

Parties have, by this clause, positively rejected the jurisdiction of this Court, with regard to disputes arising out of the Loan Agreement.

The present application is brought under **Order I (a) Rules 8(1)** and **12 (1)** and **(2)** of the **Civil Procedure Code** (Supra). The respective provisions provide:

> *"8.-(1) Where there are numerous person having the same interest in one suit, one or more of such persons may, with the permission of the court, sue or be sued, or may defend, in such suit, on behalf of or for the benefit of all persons so interested; but the court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct."*

Order **I (a) Rules 12 (1)** and **(2)** of the **Civil Procedure Code** (Supra) provides:

> *"12.-(1) Where there are more plaintiffs than one, any one or more of them may be authorised by any other of them to appear, plead or act for such other in any proceeding; and in like manner, where there are more defendants than one, any one or more of them may be authorised by any other of them to appear, plead or act for such other in any proceeding.*

(2) The authority shall be in writing signed by the party giving it and shall be filed in court."

As I understand, the provisions of Order I (a) Rules 8(1) and 12 (1) and (2) of the CPC are specifically laying down the procedures for a representative suit. Unless one complies with the procedure laid there in one cannot be allowed to file a representative suit. [See **Lujuna Shubi Ballonzi, Senior vs Registered Trustees of Chama Cha Mapinduzi** [1996] TLR 203 (HC)]. In his submission, the counsel for the respondent argued that the meaning of a suit under the respective provisions was wide enough to encompass any proceeding in a Court of Justice. He was of the view that, the application should be allowed as the applicants have not stated specifically that they are going to file a civil suit. On another limb, the counsel argued that arbitral proceedings may be considered as a suit. Hence the application was valid.

On my part, having considered the rival submissions, I have to say I am satisfied that the present application is premature. In accordance with the agreement entered by the parties, all disputes arising out of the contract were to be resolved in the first insistence through amicable settlement or arbitration in the second instance. It is well settled that parties are bound by the agreements they freely executed. The basis of that position is what makes the foundation of the doctrine of sanctity of contracts. The agreement to refer the matter to

arbitration is binding upon the parties. [See **Simon Kichele Chacha vs Aveline M. Kilawe** (Civil Appeal No.160 of 2018) [2021] TZCA 43; (26 February 2021 TANZLII)].

Further to that in **Yukos Enterprises E.A Ltd vs Regional Administrative Secretary of Mwanza Region & Another** (Revision No.06 of 2019) [2020] TZHC 162; (26 February 2020), this Court held that:

> *"I think in exercise of its judicial discretion, the court is bound to consider what had the parties agreed upon. Much as it is trite law that parties are bound by terms and conditions of their contract. In their ambiguity free contract, the parties are on record having agreed*
>
> > *"Clause 43.1 -* ***If any dispute arise between the employer and the service provider in connection with****, or arising out of* ***the contract*** *or the provisions of the service,* ***whether during carrying out the service or after their completion, the matter shall be referred to the Adjudicator".***
>
> *It means therefore if anything, that the parties had no option other than referring their dispute to the arbitrator."*

On another limb, Mr. Mandele argued that the respondent have filed **Land Application No.540 of 2020**, before this Court under section 4 of the **Arbitration Act,**

Cap. 15 R.E. 2019, with a view to revoke the arbitration clause so that an ordinary or normal suit may be preferred against the respondents. That is indeed the correct procedure in situations where arbitration have failed to take place. The section reads:

> *"4. Unless a different intention is expressed therein a submission shall be irrevocable, except by leave of the court, and shall be deemed to include the provisions set forth in the First Schedule hereto, in so far as they are applicable to the reference under submission."*

However, unless the applicant has made that application and the same has been granted revoking the arbitration clause, parties are required to comply with the agreement which required them to resolve their disputes amicably or through arbitration. With that understanding, the present application is premature. Mr. Mandele argument that the application was still relevant because an arbitration proceed may be equally referred to as a suit is misplaced. The appropriate procedure to be followed was the parties to resort the procedure included under clause 10 of the agreement. When either of the parties believes, the process has failed to materialize that is when an appropriate recourse may be preferred within the meaning of section 4 of Cap. 15. Until the recourse in the contract is complied with, the applicant has no

option to this Court through a representative suit. It would therefore be untimely to grant the present application.

On that understanding, the preliminary objection raised by the 1st and 2nd respondent has merits, the same is sustained. The application is struck out with costs.

It is so ordered.

DATED at **DAR ES SALAAM** this **20th** day of **AUGUST, 2021**.

S.M. KALUNDE

JUDGE