IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 212 OF 2023

(Arising from Land Case No. 33 of 2023)

ERNEST MAGESA T/A CRUCIAL ESTATES LIMITED ..... 1ST APPLICANT

CRUCIAL INVESTMENT LIMITED ..... 2ND APPLICANT

ERNEST MAGESA ..... 3RD APPLICANT

VERSUS

NIVANCE GODFREY URIO ..... 1ST RESPONDENT

DAVIS GODFREY URIO ..... 2ND RESPONDENT

PETER PETER JUNIOR ..... 3RD RESPONDENT

RULING

Date of Last order: 29/05/2023

Date of the Ruling: 27/06/2023

A. MSAFIRI, J

This is an application for unconditional leave to stay of the suit in Land Case No. 33 of 2023 pending Arbitration as per the parties' agreement. The Application is made under Section 15(1) of the Arbitration Act, Cap 15 [R.E. 2020] and Section 95 of the Civil Procedure Code, Cap 33 [R.E. 2019] and other enabling provision of the laws.

The brief background of this matter is that, the 1st and 2nd respondents have instituted Land Case No. 33 of 2023 against the applicants and the 3rd respondent claiming among other things, the ownership of the suit property described as pieces of land located on un-surveyed area, Goba Mnadani, Ubungo Municipality, Dar es Salaam.

Before the commencement of the hearing of the said land case, the applicants have brought this application to stay the proceedings in the said land case, pending the Arbitration on the ground that it was one of their clauses in their sale agreement. That the clauses provides that, if the dispute arises between the parties to the agreement, it shall first be determined in Arbitration before it comes to the court of law. Hence, the applicants claims that the 1st and 2nd respondents were not correct to institute the matter to this Court before Arbitration process was done, therefore it is their prayers that the proceedings be stayed.

The hearing of the application was by way of written submissions, whereas, the applicants were represented by Mr Mganga Paul, learned advocate, the 1st and 2nd respondents were represented by Mr. Egbert Milanzi, learned advocate while the 3rd respondent was represented by Mr. Mlyambele Mweli, learned advocate.

Mr. Mganga Paul, learned advocate for the applicants adopted the chamber summons and the affidavit deponed by him. He contended that one of their clauses in their sale agreement under clause 6.1 of the agreement was to refer the matter to arbitration once other means have proved futile.

Mr. Paul stated that Section 15(1) of the Arbitration Act, allows this Court to stay the proceedings pending the arbitration.

He further cited the case of **NMB Bank PLC & Upanga Joint Venture Company vs. Nyumba ya Sanaa & Culture Centre Ltd,** Misc. Civil Application No. 638 of 2022, HC (Unreported) where Mkwizu, J. interpreted the requirement provided under Section 15(1)-(3) of the Arbitration Act, as thus;

> *"My holistic readings of the above provisions find that, to file an application for stay of proceedings pending arbitration, three conditions must co-exist.* ***One****, parties must have an arbitration clause in their agreement.* ***Two****, there must be in existence filed legal proceedings against the applicant and* ***lastly****, the applicant must have first acknowledged or filed an answer to the main claim".*

Basing on that position, the counsel for the applicants prayed that this Court be pleased to grant the application in order to afford an opportunity to the parties to refer the matter to Arbitration first.

In response, Mr. Egbert Milanzi for the 1st and 2nd respondents adopted counter affidavit deponed by the 1st and 2nd respondents, and further stated that the Applicants' application is full of fabricated facts intended to mislead this Court hence that the same is devoid of any merit.

Mr. Egbert admitted the existence of clause 6.1 of their sale agreement that requires the matter to be referred for Arbitration, however, that the clause does not make it mandatory for the matter to be referred for Arbitration.

He agreed that the law makes it mandatory for the Court to allow parties to go for arbitration under Section 15(1) of the Arbitration Act, however, he argued that the clause in their agreement was vague and not certain on arbitration procedures and requirements.

He contended that the applicants had never shown interest to resolve the matter through Arbitration, but that it is the 1st and 2nd respondents who took trouble to call upon the applicants to resolve this matter amicably two times by letters dated 10.12.2022, and 23.12.2022

but in vain. He concluded that the applicants have no any intention to resolve the matter through Arbitration.

I have gone through the rival submissions of the parties and the pleadings. However before determining this application on merit, this Court, suo motu has discovered gross anomaly which raise the issue of the competency of this application before it. The anomaly is on the wrong/non-citation of enabling provisions by which this application was brought.

On that discovery, on 27/6/2023 this Court summoned the parties through their advocates to address on the raised omission by the Court suo motu. Mr Sunday Msomi, learned advocate who was holding brief of Mr Paul Mganga, advocate for the applicants, admitted that there is a wrong citation of the enabling provision. That if there is wrong citation of enabling provision, it is as if the Court has not been moved.

Mr Milanzi, advocate for the respondents readily agreed that, the application is incompetent to Court because of wrong citation and prayed that the same be struck out with costs.

It should be noted that the enabling provision helps the Court to assure itself on whether it derives its jurisdiction to determine the matter,

failure of which, the competency of the matter before the Court will be in question.

In the instant case, the application was brought under Section 15(1) of the Arbitration Act. I have gone through the enabling provision cited above and this is what it provides; -

> *'15(1) The Law of Limitation Act shall apply to arbitral proceedings as it applies to other legal proceedings.*
>
> *(2) The court may order that in computing the time prescribed by the Law of Limitation Act for the commencement of proceedings, including arbitral proceedings, in respect of a dispute which was the subject matter-*
>
> *(a) of an award which the court orders to be set aside or declares to be of no effect; or*
>
> *(b) of the affected part of an award which the court orders to be set aside in part, or declares part of the award to be in part of no effect, the period between the commencement of the arbitration and the date of the order referred to in paragraph (a) or (b) shall be excluded.*
>
> *(3) In determining for the purposes of the Law of Limitation Act when a cause of action accrued, any provision that an award is a condition precedent to the bringing of legal proceedings in respect of a matter to which an arbitration agreement applies shall be disregarded.*

It is clear that, Section 15(1) of the Arbitration Act has nothing to do with the stay of the proceedings for the purpose of paving way for

arbitration as the applicants wants this Court to believe but the provision is on the limitation of time on arbitral proceedings.

In that regard, it is my firm belief that this Court was not moved, because the cited enabling provision does not confer jurisdiction to this Court to entertain the application.

Citation of the correct or relevant enabling provision is crucial in order for the Court to be assured that it have jurisdiction to entertain that particular matter. Wrong citation of the enabling provision was found to be fatal as it was held in the case of **Said Ally Ismail vs. Republic**, (Criminal Application No.3 of 2010) at pg 5, where the Court held that,

> *"It is the citation of the relevant law which gives the court jurisdiction to grant the relief or order sought. Failure to do so is a fatal omission and/or irregularity which render the application incompetent"*

Again, in the case of **Edward Bachwa & 30 Others vs. the Attorney General & Another**, Civil Application No. 128 of 2006, CAT (Unreported), it was held as follows;

> *"Wrong citation of the law.....or non-citation of the law will not move the Court to do what it is asked and renders the application incompetent"*

The position of the law in this regard has been kept in motion by the Court of Appeal of Tanzania in several cases such as **Almas Iddie Mwinyi vs NBC & Mrs Ngeme Mbita**, Civil Application No. 88/1998 (CAT) (Unreported); **N.B.C vs Sandrudin Meghji,** Civil Application No. 20/1997(CAT) (Unreported); **Aloyce Mselle vs The Consolidated Holding Corporation**, Civil Appeal No. 11/2002 (CAT) (Unreported) (Unreported), just to name but a few.

The rationale behind citing proper provisions of the law upon which the application is made is to properly move the Court for the orders sought. Short of such compliance, the Court is not properly moved. Consequently, not only that the Court cannot grant orders sought but also the application is incurably defective.

On the basis of the above legal position, I find the application to be incompetent and it is hereby struck out with costs.

A. MSAFIRI

JUDGE

27/06/2023