IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., KOROSSO, J.A. And KEREFU, J.A.)

CIVIL APPEAL NO. 98 OF 2016

SUNSHINE FURNITURE CO. LTD ..... APPELLANT

VERSUS

1. MAERSK (CHINA) SHIPPING CO. LTD ..... RESPONDENTS

2. NYOTA TANZANIA LIMITED

(Appeal from the decision of the High Court of Tanzania (Commercial Division) at Dar es Salaam)

(Songoro, J.)

Dated the 13th day of May, 2016

in

Commercial Case No. 113 of 2015

JUDGMENT OF THE COURT

21st August, 2019 & 23rd January, 2020

MWARIJA, J.A.:

The appellant, Sunshine Furniture Co. Ltd. filed a suit in the High Court of Tanzania, Commercial Division (the Commercial Court) against the respondents, Maersk (China) Shipping Co. Ltd and Nyota Tanzania Limited (the 1st and 2nd respondents respectively). In the suit, Commercial Case No. 113 of 2015, the appellant (who was the plaintiff in the trial court) claimed for special and general damages arising from what the appellant described as the respondent's act of

negligence in handling the bill of lading in shipment of the appellant's cargo. The appellant claimed that on 10/2/2015 it entered into a contract with the respondents for shipment of the appellant's six containers from the port of Yantian, Guangdong, China to Dar es Salaam, Tanzania. It claimed that, although the six containers were listed in the bill of lading, only four containers were shipped to the port of destination, that is; the Dar es Salaam Port. It claimed further that, apart from such negligent act, the respondents refused to issue short landed certificate for the other two containers making it difficult for the appellant to clear the dipped cargo thus causing it to suffer damages. In paragraphs 4 and 10 of the plaint, the appellant states as follows:-

> *"4. That the plaintiff's claim against the Defendants jointly and severally is for payment of US$ 84,830.10 (United States Dollars Eighty Four Thousand Eight Hundred Thirty Cents Ten) being special damages resulting from defendant's acts and negligence in handling the bill of lading, payment of storage charge of US$ 160 per day*

from the date of demand notice, that is; 23rd May, 2015 to the date of removal of the two containers and general damages to be assessed by the Court as the shipping line negligently mishandled and refused to issued short landed certificate of two containers as required by wharf, Customs & Excise Department Long Room.

10. *That contrary to what was stated in bill of lading, out of negligence and recklessly the shipping line shipped and manifested only 4 (four) containers and to the surprise of the plaintiff, the Defendant refused to issue short landed certificate of those two container (sic) as required by wharf, Customs & Excise Department Long Room..."*

The respondents denied the claim that they acted negligently in handling the bill of lading thus causing the appellant to suffer the alleged damages. Apart from that denial, the respondents raised a preliminary objection challenging the jurisdiction of the court of first instance. The objection was to the following effect:

"This Hon. Court lacks jurisdiction to try this suit as the bill of lading under which the plaintiff's cause of action arises specifically vests jurisdiction in the High Court of Justice of England in London."

Having heard the preliminary objection, the learned High Court Judge (Songoro, J.), found that the objection was meritorious. He arrived at that finding after he had considered the contents of clause 26 of the bill of lading and previous decisions of the High Court which interpreted similar provisions in the bills of lading relied upon in those cases. The authorities included the cases of **Afriscan Group (T) Ltd v. Pacific International**, Civil Case No. 14 of 2001 and **Jamila Sawaya v. M/S Royal Marine Shipping of Dubai and 3 Others**; Commercial Case No. 30 of 2006 (both unreported). In his decision, the learned judge observed as follows:-

"The key issue for consideration on the Jurisdiction of the Court is whether or not this Court may hear and determine the plaintiff's suit which is based on a bill of lading which vests exclusive jurisdiction of resolving any dispute to the Court in England .... I have well

considered the plaintiff's request to depart from previous decisions of this Court in line with section 7 of the ***Civil Procedure Act Cap. 33 [R.E. 2002]*** *and find the above mentioned provisions statutorily instruct that, the court including this Court has jurisdiction to try all suits of a civil nature, except suits which their cognizance is either expressly or impliedly barred. Thus bearing in mind any dispute on the bill of lading is barred to be heard by this Court and jurisdiction is conferred to English Court, I find and decide that, this Court has no jurisdiction and uphold the objection."*

The appellant was aggrieved by that decision hence this appeal which is predicated on three grounds as follows:

"1. That the learned Trial Judge erred in law by holding that the Court had no jurisdiction to entertain and adjudicate the case between the Appellant and the Respondents basing on the bill of lading of the 1st Respondent, and wrongly held

that the jurisdiction is conferred to the English Court [English High Court of Justice in London].

2. *The learned Trial Judge erred in law and in fact in equating the bill of lading [to] Agreement capable of ousting the court's Jurisdiction without taking into the consideration parties to the bill of lading, the 2nd Respondent's residence and the place where the cause of action arose.*

3. *That the learned trial Judge erred in law and in fact in enforcing the bill of lading as having the effect of ousting the Court's jurisdiction and wrongly invoked the law, without looking at other clauses in the bill of lading, like the discriminatory clauses which allow the 1st Respondent to institute proceedings in the same Court."*

At the hearing of the appeal, the appellant was represented by Mr. Tazan Keneth Mwaiteleke, learned counsel while the respondents had the services of Mr. Gerald Nangi, also learned counsel.

Mr. Mwaiteleke who had filed the appellant's written submission in compliance with Rule 106 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) adopted the same and went on to make oral submission highlighting on the matters which he found to be of significant importance to the appeal. In his written submission, the learned counsel submitted that the learned High Court Judge erred in upholding the preliminary objection basing on clause 26 of the bill of lading. That clause states as follows:-

> *"26.* ***Law and Jurisdiction****:*
>
> *For shipments to or from the U.S. any dispute relating to this bill of lading shall be governed by U.S. law and the United States Federal Court of the Southern District of.New York is to have exclusive jurisdiction to hear all disputes in respect thereof. In all other cases, this bill of lading shall be governed by and construed in accordance with English law and all disputes arising hereunder shall be determined by the English High Court of*

Justice in London to the exclusion of the jurisdiction of the Courts of another country. Alternatively and at the carrier's sole option, the carrier may commence proceedings against the Merchant at a competent court of a place of business of the Merchant."

Mr. Mwaiteleke argued that, since the cause of action arose in Tanzania and the 2nd respondent who was the agent of the 1st respondent, had its place of business in Tanzania, the agreement in the bill of lading which ousted the jurisdiction of Tanzanian courts is void because it is against the law and public policy.

The learned counsel argued that, clause 26 of the bill of lading restricted the appellant from enforcing his right in Tanzanian courts and therefore, that clause contravenes the provision of s. 28 of the Law of Contract Act [Cap. 345 R.E 2002] (the LCA) as well as Article 107 (1) and (2) of the Constitution of the United Republic of Tanzania, 1977. Relying also on the case of **Tanzania Electric Supply Company Limited (TANESCO) v. Independent Power Tanzania Ltd (IPTL) [2000]** TLR 324 in which, the Court

reiterated the principle that, parties cannot by agreement confer jurisdiction to a court, Mr. Mwaiteleke argued that the learned High Court Judge erred in deciding that, by virtue of the provisions of clause 26 of the bill of lading, the courts in Tanzania lacked jurisdiction to entertain the appellant's suit. He said that, by parity of reasoning, if the parties cannot confer jurisdiction upon a court, they cannot likewise, oust its jurisdiction. According to Mr. Mwaiteleke, the learned High Court Judge misinterpreted s. 7 of the Civil Procedure Code [Cap 33 R.E. 2002] (the CPC) thus arriving at a wrong decision.

On the 2nd ground of appeal, the appellant's counsel raised the issue of unilateralism of contracts. He argued that, since the bill of lading is a document which contains the terms of carriage of goods prepared by the 1st respondent without any input thereto from the appellant, it was wrong for the learned High Court Judge to consider it to be an agreement capable of ousting the jurisdiction of the courts in Tanzania. He stressed that, because the cause of action arose in Tanzania, which is the place of residence of the 2nd respondent, the Commercial Court had jurisdiction to entertain the suit.

Submitting further, the learned counsel questioned the legality of clause 26 of the bill of lading. He contended in the 3rd ground of appeal that, the learned High Court Judge erred in relying on that provision of the bill of lading which, on one hand ousts the jurisdiction of all other courts as regards institution of a suit against the respondents thereby vesting exclusive jurisdiction in the U.S and English Courts but on the other hand, gives them the right to institute a suit at a competent court of the place of business of the appellant/merchant. The appellant's counsel contended that the said clause is a discriminative provision and for that reason, he argued that the same should not have been acted upon to dismiss the appellant's suit for want of jurisdiction. He prayed that the appeal be allowed with costs.

Responding to the arguments made by the counsel for the appellant, Mr. Nangi submited that the High Court properly found that, in terms of clause 26 of the bill of lading, the courts in Tanzania did not have jurisdiction to entertain the appellant's suit. He contended that the learned High Court Judge's interpretation of s. 7 of the CPC was proper because parties to the contract are at liberty

to choose the court to which a dispute arising from implementation of the terms of their contract may be referred. The only restriction, he argued, is that the chosen court must be competent to entertain the suit.

To bolster his argument, the learned counsel referred the Court to the comment in **Mulla The Code of Civil Procedure,** updated 18th Ed, and argued that, where the parties agree on the court at which the dispute arising from their contract may be referred, they are bound by that choice and other courts other than that which was agreed upon by the parties, lack jurisdiction.

On the case of **TANESCO v. IPTL** (supra) cited by the appellants' counsel, Mr. Nangi submitted that the same is distinguishable because there is a difference between the choice of forum and agreement to confer to a court the jurisdiction which it does not have or take away the jurisdiction of a competent court. In this case, Mr. Nangi went on to argue, the bill of lading did not take away the jurisdiction of the courts in Tanzania, rather the parties chose at which court the dispute arising from implementation of the terms of the bill of lading may be referred. As to s. 28 of the LCA, Mr.

Nangi argued that clause 26 of the bill of lading did not breach that section because that clause does not absolutely restrict any of the parties from enforcing it rights.

On the argument based on the legality or otherwise of clause 26 of the bill of lading, Mr. Nangi submitted that, since this point was neither raised in the pleadings nor argued during the hearing of the preliminary objection in the High Court, the same is unworthy of consideration at this stage of the proceedings because it raises a new issue. On those arguments, the leaned counsel for the respondents prayed for dismissal of the appeal with costs.

In his brief rejoinder, Mr. Mwaiteleke responded to the argument based on the comment in **Mulla The Code of Civil Procedure.** It was the learned counsel's contention that the choice of forum envisaged in that passage applies where, for example, a matter may be filed in any of the courts having parallel jurisdiction, for example, where a suit may either be filed in the District Registry of the High Court or in a division of that court, not either in local courts or a foreign court. The learned counsel reiterated his prayer that the appeal be allowed with costs.

We have duly considered the submissions made by the learned counsel for the parties. We wish to begin with the 3rd ground of appeal. We hasten to state that we respectfully agree with the respondents' counsel that the same raises a new issue which was not dealt with by the High Court. The issue whether or not clause 26 of the bill of lading is discriminatory was not canvassed in the court of first instance. That ground is therefore, misconceived – See for example, the case of **Nurdin Musa Wailu v. The Republic**, Criminal Appeal No. 164 of 2004 (unreported). In that case, the Court had this to say on that principle:-

> *"...usually the Court of Appeal will only look into matters which came up in the lower courts and were decided. It will not look into matters which were neither raised nor decided by either the trial court or the High Court on appeal."*

That said and done, we now turn to consider the 1st and 2nd grounds together. In the 2nd ground, the appellant contends in essence, that the bill of lading was wrongly equated to an agreement capable of ousting the jurisdiction of a court. According to the appellant's

counsel, the determining factor in answering the issue whether or not the Commercial Court had jurisdiction was the place of residence of the 2nd respondent who was the agent of the 1st respondent.

To answer that issue, it is instructive to start by directing our mind to the definition of a bill of lading. According to **Black's Law Dictionary,** 11th edition, bill of lading is defined as:-

> *"A document acknowledging the receipt of goods by carrier or by the shipper's agent and the* ***contract for the transportation of those goods;*** *a document that indicates the receipt of goods for shipment and is issued by a person engaged in the business of transporting or forwarding goods."*
>
> [Emphasis added].

In that definition, the following passage from William R. Anson, **Principles of the Law of Contract 380** (Arthur L. Corbin ed; 3d Am. Ed. 1919) is quoted. It states as follows:-

> *"A bill of lading may be regarded in three several aspects, (1) it is a receipt given by a master of a ship acknowledging that the*

goods specified in the bill have been put on board (2) ***it is the document that contains the terms of the contract for the carriage of the goods agreed upon between the shipper of the goods and ship owner*** *(whose agent the master of the ship is) and (3) it is a document of title to the goods, of which it is the symbol. It is by means of this document of title that the goods themselves may be dealt with by the owner of them while they are still on board ship and upon the high seas."*

[Emphasis added].

It is clear from that definition that a bill of lading is *inter alia*, a contract between a ship owner and a shipper of goods stipulating the terms and conditions of carriage of the shipper's goods. In this case, by virtue of clause 26 of the bill of lading, the parties agreed on the law which will be applied and the court at which any dispute arising from implementation of their contract of carriage of goods may be referred. Section 7 (1) of the CPC which was relied upon by the learned High Court Judge to find that clause 26 of the bill of lading

barred the exercise by the Commercial Court, of its exercise of jurisdiction to entertain the suit, provides as follows:

> *"7 – (1) subject to this Act the courts shall have jurisdiction to try all suits of a civil nature* ***excepting suits of which their cognizance is either expressly or impliedly barred."***
>
> [Emphasis added].

Mr. Mwaiteleke argued on the 1st ground of appeal, that the learned High Court Judge misinterpreted that section of the CPC. With respect, we disagree with the learned counsel. By that provision, a court may not entertain a suit, the cognizance of which has either been expressly or impliedly barred. This includes a suit arising from a dispute which by agreement, the parties have agreed to be determined by a court of their choice, being it a local or foreign court. Commenting on s. 9 of the Indian Code of Civil Procedure, 1908 which is similar to our s. 7 (1) of the CPC, the learned author of **Mulla, The Code of Civil Procedure Abridged,** 15th Ed., 2012 states as follows at page 57.

> *"When the attention of the court, in which the suit is instituted, is drawn to a contractual stipulation to seek relief in a particular (foreign) forum, the court may, in the exercise of its discretion, stay to try the suit. The prima facie leaning of the court is that the contract should be enforced and the parties should be kept to their bargain."*

We subscribe to that proposition and find that the learned High Court Judge properly interpreted the provisions of s. 7 (1) of the CPC. The argument that clause 26 of the bill of lading contravenes the provisions of s. 26 of the LCA is, in our view, equally devoid of merit. That provision states:-

> *"28. Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent..."*

In this case, clause 26 of the bill of lading did not absolutely restrict any of the parties from enforcing its rights. The parties agreed on

the court at which the dispute shall be referred for determination. In the same vein, we are unable to agree with the argument made in support of the contention that the learned High Court Judge wrongly considered the said clause of the bill of lading as an agreement ousting the jurisdiction of the trial court. As stated above, the clause expresses the parties choice of the law and forum among the courts which have jurisdiction to entertain any dispute arising from the bill of lading. With regard to shipment to or from U.S. and shipment to or from other countries.

Basically therefore, the parties did not, by agreement, oust the jurisdiction of the courts in Tanzania. They only chose the law and the court at which a dispute arising from their shipment contract shall be determined. Where in a bill of lading, the parities express choice of forum of a court, that agreement has always been found to be binding on them. In the case of **Carl Rouning v. Societe Navale Chargeurs Delmas Vieljeux (the Francois Vieljeux)**, Civil Appeal No. 16 of 1982 (unreported), the Court of Appeal of Kenya considered the effect of clause 3 of the bill of lading which provided as follows:-

> *"Any dispute arising under this Bill of Lading shall be decided in country where the carrier has his principal place of business and the law of such country shall apply except as provided elsewhere herein."*

A dispute arose and the suit giving to the appeal was filed in the High Court of Kenya which stayed the proceedings in favour of the French court. On appeal, in its majority decision, the Court of Appeal of Kenya held as follows. (Per Nyarangi, Ag. J.A.):

> *"The material choice of forum clause in the bill of lading was willingly accepted by the parties who were aware that the French Legal System might be less advantageous than that of Kenya. In the circumstances the parties should be held to their mutual undertaking."*

In the present case, it was upon the parties choice of forum that the learned High Court Judge applied the provisions of s. 7 (1) of the CPC to find that the High Court was barred from entertaining the suit. His finding was based on the parties choice of forum. The parties did not by agreement, oust the jurisdiction of Tanzania courts, rather. They chose one of the courts which have jurisdiction,

to be the court at which their dispute should be determined. In the circumstances, we agree with Mr. Nangi that the case of **TANESCO v. IPTL** (supra) cited by the appellant's counsel is distinguishable.

For the reasons which we have given above, this appeal lacks merit. The same is thus hereby dismissed with costs.

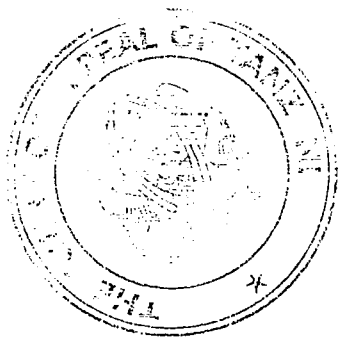
DATED at **DAR ES SALAAM** this 7th day of January, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 23rd day of January, 2020 in the presence of Mr. Zachary Daudi holding brief for Mr. Tazan Mwaiteleke counsel for the Appellant and Mr. Jeremiah Tarimo counsel for the 1st and 2nd Respondents is hereby certified as a true copy of the original.



S. J. Kainda
DEPUTY REGISTRAR
COURT OF APPEAL