

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM
MISC. CIVIL CAUSE NO.348 OF 2021
(From Civil Case No. 176 of 2018)**

IN THE MATTER OF ARBITRATION ACT, CAP 15 RE 2020

AND

**IN THE MATTER OF AN APPLICATION FOR STAY OF PROCEEDINGS
PENDING REFERENCE OF DISPUTE TO ARBITRATION**

BETWEEN

**VOCATIONAL EDUCATION AND TRAINING AUTHORITY...1ST PETITIONER
ATTORNEY GENERAL.....2ND PETITIONER**

AND

HERKIN BUILDERS LIMITED.....RESPONDENT

RULING

13th & 30th May 2022

MASABO, J.:-

In a civil case currently pending before me, Herkin Builders Limited, the respondent herein, has sued the applicants in Civil Case No. 176 of 2018 for breach of agreement vide which she was contracted by the 1st respondent to construct a vocational training centre at Ludewa at consideration of Tshs 9,862,384,221.46. Disgruntled, the applicants have filed this application seeking for the indulgence of this court to stay the suit pending reference of the dispute to arbitration. In their application, they have alleged that the contract from which the suit emanates contains

an arbitration clause by which the parties agreed to resolve their dispute amicably through arbitration. Thus, by instituting the suit prior to submission to arbitration, the respondent has acted contrary to the agreement and the suit is due for stay pending reference to arbitration. In the view thereof, they have prayed that the proceedings in Civil Case No. 176 of 2018 be stayed so that the matter can go for arbitration as both parties are bound by the terms and condition of the contract. The application was contested by the respondent who, while not disputing the existence of the arbitration clause, averred that reference to arbitration is impracticable as in his suit against the applicants she has also impleaded the Commercial Bank of Africa (Tanzania Limited) who is a third party to the agreement.

Hearing of the application proceeded ex parte the respondent after she forfeited her right to hearing by negligently filing a reply submission which was totally irrelevant to the application at hand.

The applicants represented by Ms. Careen Masonda, learned State Attorney, adopted the contents of the application and proceeded to submit that, the contract for construction of a vocational training centre in Ludewa district in Njombe Region (Contract No.

DA/024/2014/2015/HQ/W/24) from which the respondent's prayers in Civil Case No.176 of 2018 has originated has an arbitration agreement binding upon the parties herein to resolve their dispute through arbitration. Of specific is clause 27 of the General Conditions and clause 11 of the Special Conditions. These two provisions, she argued, imposes a mandatory obligation to the parties to resolve their dispute amicably through an adjudication and arbitration process. Thus, Civil Case No. 176 of 2018 was prematurely instituted prior to referring the dispute to arbitration. In support she cited the decision of this court (Commercial Division), in **Honda Motors Japan & Another v. Quality Motors Limited** Misc. Commercial Cause No. 25 of 2019. Regarding the presence of a thirty party in the original suit, Ms. Masonda submitted that, such presence is not a bar for arbitration as it neither vitiates the agreement between the parties nor supersedes the mutually agreed reference to adjudication.

I have keenly considered the submissions by the applicants. The only issue for determination is whether there exists an arbitration agreement between the parties and if so, whether it warrants the stay of proceedings in Civil Case No. 176 of 2018 pending reference arbitration?

In answering the first question, I have keenly examined the construction agreement appended to the application to discern the arbitration agreement if any. In my scrutiny of the agreement, I was attracted to two clauses of the General Conditions of Contract (clause 26 and 27). These two clauses appear to be specifically relevant as they deal with dispute resolution between the parties. For clarity and convenience, I will reproduce them below:

26.1 If the contractor believes that a decision taken by the project Manager was either outside the authority given to the Project Manager by the Contract or the decision was wrongly taken, the decision shall be referred to the adjudicator 14 days of the notification of the Project Manager `s decision.

27.1 The adjudication shall give decision in writing within 28 days of receipt of a notification of dispute

27.2 The adjudicator shall be paid by the hour at the rate specified in the Tender Data Sheet and Special Conditions of Contract, together with reimbursable expenses of the types specified in the Special Conditions of Contract and the cost shall be divided equally between the Employer and the Contractor, whatever decision is reached by the Adjudicator. Either party may refer the decision of the Adjudicator to an Arbitrator within 28 days of the Adjudicator`s written decision. If neither

party refers dispute to arbitration within the above 28 days, the Adjudicator's decision will be final and binding.
27.3 The arbitration shall be conducted in accordance with the arbitration procedure published by the institution named and, in the place shown in the Special Conditions of contract. [emphasis added]

I was similarly attracted to clause 10 and 11 of the Special Conditions of Contract which exemplify the mode for enforcement of clause 27. They provide as follows:

10. Hourly rate fees payable to the Adjudicator is:
0.05% of the payment Certificate Amount

11. Arbitration will take place at Dar es Salaam in accordance with rules and regulations published by National Construction Council (NCC) using rules and regulations published by national Construction Council (NCC). Payment shall be in accordance to NCC rates pay.

These clauses read conjointly, present a precise and concise arbitration agreement which not only deals with the right to refer the matter to adjudication and arbitration but stipulates the mode by which the arbitration is to be conducted; the payment of adjudicators and arbitrations, the place and duration of adjudication and arbitration and

the remedy available to the aggrieved party. In the foregoing, the first issue is the resolved in the affirmative.

Turning to the second issue, the law in our jurisdiction attaches significant importance to the principle of sanctity of contract. Section 10 of the Law of Contract Act [Cap 345 RE 2019] specifically stipulates that, the parties should be bound by their contract. In respect of dispute resolution, the law recognizes that, the parties to a contract being free agents are inherently vested with the right to choose the mode of dispute settlement between them and the arbiter of such disputes, if they so wish. Where the parties to an agreement exercises this right and prefers to refer their dispute to a tribunal of their own choice, it is trite that they should be obliged to do so. In **Constructive and Builders Vs Sugar Development Cooperation** [1983] TLR 13, it was held that,

If is clear that the parties have agreed to submit all their "disputes or differences arising "under" the contract to an arbitrator, then the dispute must go to arbitration unless there is some good reason to justify the court to override the agreement of the parties."

A similar view was expressed in the **Board of Trustees of natural Provident Fund v. Skortland Securities Limited** (1996) IV NZR 4

(CA) cited with approval in **Honda Motors Japan & @ Others v. Quality Motors Limited**, Misc. Commercial Cause No. 25 of 2019, HC-Commercial Division, where it was stated that:

The parties particularly knowledgeable and experienced parties legally advised are to be taken as having intended what they said.

In the foregoing, since it is certain that the parties had an undertaking to refer their disputes to adjudication, the failure/omission to refer the dispute to the arbitrator prior to institution of the suit in this ordinary court was erroneous. It is offensive of both, the mutually greed arbitration agreement and the well-established principles as regard reference to arbitration.

When one of the parties of the agreement defies the terms of arbitration agreement, the other party to the contract is not left without a remedy. In our jurisdiction, such remedy is provided for under section 13(1) of the Arbitration Act No. 2 of 2020 which states that:

A party to an arbitration agreement against whom legal proceedings are brought, whether by way of claim or counterclaim in respect of a matter which under the agreement is to be referred to arbitration may, upon notice to the other party to the proceedings, apply to the court in

which the proceedings have been brought to stay the proceedings so far as they concern that matter.

The provision of this section is a replica of the provision of section 6 of the Arbitration Act, Cap 15 which was repealed and by the Arbitration Act, No.2 of 2020. The provision of section 6 of the Arbitration Act which was still enforceable on 15th November 2016 when the contested arbitration agreement was executed and in 2018 when Civil Case No. 176 of 2018 landed in court provided that:

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

Under the premises, the last two questions are answered affirmatively. The application for stay of proceedings is well premised and is hereby granted. Accordingly, the proceeding in Civil Case No 176 of 2018 is, consequently, stayed for two months pending reference to adjudication and arbitration. Costs on the respondent.

DATED at DAR ES SALAAM this 30th day of May 2022.

X 

Signed by: J.L.MASABO

J.L. MASABO

JUDGE

