IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(CORAM: MKUYE, J.A., NDIKA, J.A., And MWAMBEGELE, J.A.)

CIVIL APPEAL NO. 133 OF 2017

SCOVA ENGINEERING S.p.A ..... FIRST APPELLANT

IRTEC S.p.A ..... SECOND APPELLANT

VERSUS

MTIBWA SUGAR ESTATES LIMITED ..... FIRST RESPONDENT

KAGERA SUGAR LIMITED ..... SECOND RESPONDENT

SUPER STAR FORWARDERS COMPANY LIMITED ..... THIRD RESPONDENT

GENERAL MOTORS INVESTMENT LIMITED ..... FOURTH RESPONDENT

(Appeal from the Ruling and Order of the High Court of Tanzania, Commercial Division at Dar es Salaam)
(Mruma, J.)

dated the 22nd day of June, 2016
in
Commercial Case No. 43 of 2016

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JUDGMENT OF THE COURT

8th February & 12th March, 2021.

NDIKA, J.A.:

The appellants, SCOVA Engineering S.p.A. and IRTEC S.p.A., are companies incorporated under the laws of Italy while the respondents, Mtibwa Sugar Estates Limited, Kagera Sugar Limited, Super Star Forwarders Company Limited and General Motors Investment Limited, are limited liability companies incorporated under the laws of Tanzania. The appellants now appeal against the ruling and order of the High Court, Commercial Division

(Mruma, J.) dated 22nd June, 2016 dismissing with costs their claim against the respondents, jointly and severally, for payment of an outstanding sum of money for goods supplied, interests and costs on the ground that it lacked jurisdiction to try the suit.

Briefly, the present dispute arose as follows: the appellants instituted their joint suit in the High Court, Commercial Division claiming that sometime in mid-2011, they entered into an agreement with the first respondent for the supply of irrigation machines with accessories. It was further averred that the appellants also entered into two Guarantee and Indemnity Agreements dated 10th June, 2011 with the second, third and fourth respondents under which the said respondents undertook to pay any amount due under the supply agreement between the appellants and the first respondent.

Moreover, it is alleged that the appellants supplied the machines to the first respondent as agreed but the latter failed to pay the amount due in full and that demands to the guarantors to pay the outstanding sum went unheeded. Thus, the appellants sought judgment and decree as follows:

1. Payment of the outstanding sum of € 1,278,148.60 for the supplied goods;

2. Payment of interest at the commercial rate of 12% per annum from 30th September, 2014 to the date of judgment;
3. Payment of interest on the decretal sum at the court's rate of 7% per annum from the date of judgment until final payment; and
4. Costs of the suit.

In their joint defence, the respondents denied liability and prayed for dismissal of the suit with costs. Besides, while the first respondent, on its part, admitted existence of the alleged supply agreement with the appellants, it partly denied its terms. On the part of the rest of the respondents, they denied having guaranteed the payment of the amount due under the supply agreement. They also raised three points of preliminary objection upon which they moved the High Court to dismiss the suit with costs as follows:

> *"1. This Honourable Court is not vested with jurisdiction to hear the parties and to try and determine the suit, alternatively, the Plaintiffs' institution of the suit in this Honourable Court contravenes the terms of Clause 1.9 (Law and Jurisdiction) of the Guarantee and Indemnities purportedly issued by the 2nd, 3rd and 4th defendants in favour of the Plaintiffs and referred to in paragraph 11 of the Plaint marked "SI 3";*

2. The Plaint is bad in law for offending and contravening the mandatory provisions of Order VI, rule 14 and 15 sub-rule (1) and sub-rule (2) read together with the provisions of Order XXVIII, rule 1 of the Civil Procedure Code Act, Chapter 33 of the Laws of Tanzania, Revised Edition, 2002 (the "CPC"), by being signed and verified by an advocate of the Plaintiffs who is incompetent person and unauthorized by law to sign and verify pleadings on behalf of corporations; and

3. The suit is bad for misjoinder of the Plaintiffs and misjoinder of causes of action."

It is noteworthy that the first point above was based upon Clause 1.9 of the Guarantee and Indemnity Agreement ("the Agreement") stipulating the following:

"1.9 Law and Jurisdiction

1.9.1 This Guarantee shall be governed by and construed in accordance with Italian law.

1.9.2 Without prejudice to cases when jurisdiction (competenza) may not be derogated from, the Court of Rome shall have exclusive jurisdiction (including as to its existence, validity, termination or the consequences of its

nullity) to settle any dispute which may arise from or in connection with it."

Having heard the parties on the above points, the learned High Court Judge sustained the preliminary objection on the first point but found no pressing need to determine the other two points. In his ruling, the learned Judge observed, at first, that courts in Tanzania have exclusive jurisdiction to administer justice and that any clause in a contract derogating from that general rule and public policy would have no effect. He then expressed the view, as shown at pages 406 and 407 of the record of appeal, that:

"The role of the court and particularly the Commercial Court is to enforce agreements or contracts of the parties. The court can intervene and determine where a suit should be instituted where there is no prior agreement between the parties but where the parties have expressly agreed where to institute their dispute the court cannot intervene to vindicate one's wish to derogate from their agreement."

The learned Judge rejected the submission for the appellants that Tanzania was the proper forum for the dispute on the ground that it was both the place of business of the respondents and performance of the agreement (the place of delivery of the goods). He reasoned that:

"To say the least, this is an afterthought. Both plaintiffs are companies incorporated under the laws of Italy. In their guarantee and indemnity agreement which they entered with the defendants they chose the laws and the court which would govern and settle any dispute between them arising from the said agreement to be Italian law and the Court of Rome respectively. The fact that the agreement was performed and possibly breached in Tanzania is immaterial."

The learned Judge ultimately concluded, as shown at page 410 of the record, that:

"In the event, I agree with the submission by counsel for the defendants that ***the jurisdiction of this court is ousted by Clause 1.9.2 and accordingly this court does not have jurisdiction to try the matter****."*
[Emphasis added]

The appellants resent the above conclusion, which they now challenge on three grounds:

"1. The learned trial Judge erred in law in holding that the jurisdiction of the High Court of Tanzania was ousted by Clause 1.9.2 of the Contract between the appellants and the 2nd, 3rd and 4th respondents.

2. The learned trial Judge erred in law in holding that the High Court of Tanzania had no jurisdiction to determine the matter.

3. The learned trial Judge erred in law and fact in dismissing the suit against the respondents while the Contract of Guarantee was entered between the appellants and the 2nd, 3rd and 4th respondents only."

At the hearing, Ms. Miriam Bachuba, learned counsel, prosecuted the appeal for the appellants while Messrs. Edward Mwakingwe and Sylivatus S. Mayenga, learned advocates, stood for the respondents.

In her oral and written submissions, Ms. Bachuba addressed the first and second grounds conjointly. In essence, she censured the High Court for misconstruing Clause 1.9.2 of the Agreement, contending that the said clause permitted the parties to submit themselves to the jurisdiction of the Court of Rome except for the *"cases when jurisdiction (competenza) may not be derogated from."* She strongly argued that the trial court did not take into account that the aforesaid clause could not oust the jurisdiction of Tanzanian courts as it had specifically reserved the jurisdiction of other courts in cases when jurisdiction may not be derogated from.

Ms. Bachuba then posited, relying on the authority of the case of **Theodore Wendt v. Chhaganlal Jiwan and Haridas Munji Trading in Partnership under the Style Chhaganlal Jiwan and Company**, 1 TLR (R) 460 at page 461, that the High Court's jurisdiction "is not capable of being ousted." She elaborated that the High Court's unlimited jurisdiction as stipulated by Article 108 (2) of the Constitution of the United Republic of Tanzania, 1977 and restated by section 2 (1) of the Judicature and Application of Laws Act, Cap. 358 RE 2002 is non-derogable and so parties cannot agree to oust it.

The learned counsel also contended that in terms of section 18 of the CPC, a plaintiff is at liberty to institute a suit at any court within whose jurisdiction the defendant resides, or carries on business or personally works for gain at the time of commencement of the suit. As it is undisputed that the respondents are companies incorporated in Tanzania with their registered offices in Tanzania, the appellants rightly instituted the suit against them in the High Court, Commercial Division which has jurisdiction to try the case.

On the third ground of appeal, Ms. Bachuba argued that based on the Doctrine of Privity of Contract, Clause 1.9 of the Agreement only bound the parties thereto (that is, the appellants as well as the second, third and fourth

respondents) but that it was not binding on the first respondent, a stranger to that contract. She referred to the decisions of the defunct East Africa Court of Appeal in **Kayanja v. New India Assurance Company Limited** [1968] EA 295; and **Tarlok Singh Nayar & Another v. Sterling General Insurance Company Limited** [1966] EA 144 on the application of the aforesaid doctrine. Since the first respondent was not bound by the aforesaid Agreement, it was submitted that the High Court erred in law and in fact in dismissing the suit against the first respondent.

In rebuttal, Mr. Mwakingwe, at first, conceded that the High Court's jurisdiction was unlimited and that it could not be ousted by agreement between parties. However, citing section 7 (1) of the CPC providing that courts (including the High Court) have jurisdiction to try all suits of a civil nature save for suits of which their cognizance is either expressly or impliedly barred, he argued that the law recognizes circumstances where the jurisdiction of the court can be expressly barred. To buttress his submission, he referred to a passage in the decision of the High Court, Commercial Division in **Jamila Sawaya v. M/S Royal Marine Shipping of Dubai & 4 Others**, Commercial Case No. 30 of 2006 (unreported) cited in **Britannia**

Biscuits Limited v. National Bank of Commerce Limited & 3 Others, Land Case 4 of 2011 (unreported) thus:

> *"In the instant case, the Bill of Lading confers exclusive jurisdiction to the High Court of Justice of England. There is no other provision to the contrary. This ousting of jurisdiction of our courts is not, in my view, in conflict with the provisions of section 7 (1) of the Civil Procedure Code, 1966."*

Mr. Mwakingwe submitted further, on the authority of **Afriscan Group (T) Ltd. v. Pacific International (T) Ltd.**, Civil Case No. 14 of 2001 (unreported), also a decision of the High Court, that agreements in which parties opt for a lawful forum with proper jurisdiction to adjudicate their disputes are not prohibited by section 28 of the Law of Contract Act, Cap. 345 RE 2002 ("the LCA"), which voids any agreement which is in restraint of legal proceedings.

The learned counsel elaborated that where two or more courts could have jurisdiction to try a suit, the parties are at liberty to choose by their agreement a particular forum to try their suit and that such choice would not be contrary to public policy nor would it be a contravention of section 28 of the LCA. He based this submission on a commentary by **Pollock and Mulla**

in the Indian Contract and Specific Reliefs Act, 11th Edition, at page 454. Further reference was made to several persuasive decisions by foreign courts including three decisions of the Supreme Court of India: **Hakam Singh v. M/S Gammon (India) Ltd.** AIR (1971) SC 740; **New Moga Transport v. United India Insurance Co. Ltd.,** Civil Appeal No. 2645/2004; and **Modi Entertainment Network & Another v. WSG Cricket Pte. Ltd.**, Civil Appeal No. 422 of 2003 referring to a holding in **British Aerospace Pic v. Dee Howard Co**. [1993 (1) LLR 368], upholding choice of law and forum clauses. On this basis, he supported the High Court's decision binding the parties to their choice of the Court of Rome as the forum for litigating the suit in terms of Clause 1.9.

Coming to the third ground of appeal, Mr. Mwakingwe argued that it was unfeasible for the appellants to proceed against the first respondent only without the rest of the respondents because the reliefs claimed arose from the same act or transaction evidenced by the Agreement. He distinguished the cases of **Kayanja** (*supra*) and **Tarlok Singh Nayar** (*supra*) on the ground that they both concerned a third party right to sue in respect of an insurance claim.

Rejoining, Ms. Bachuba maintained that a guarantee cannot be enforced against the principal debtor but the guarantor. On the cases of **Jamila Sawaya** (*supra*) and **Britannia Biscuits Limited** (*supra*) cited by Mr. Mwakingwe, she submitted that they were not binding on this Court. She added that although the Indian decisions were persuasive, they were distinguishable on the ground that they concerned bill of lading clauses.

We have examined the record of appeal and keenly considered the oral and written submissions of the counsel from either side as well as the authorities cited. In determining the appeal, we will, like the learned counsel for the parties, address the first and second grounds of appeal together before turning to the third ground of appeal.

As a starting point, we wish to express our full agreement with the statement of principle by the learned counsel for the parties, based on **Theodore Wendt** (*supra*), that the jurisdiction of the High Court or any court for that matter, having been conferred by statute, is not capable of being ousted by agreement of the parties except by statute in explicit terms.

Central to the determination of this appeal is the construction of Clause 1.9 of the Agreement. Both parties agree that this stipulation is a choice of law and forum clause, but they disagree on its legality and effect.

Recently in **Sunshine Furniture Co. Ltd. v. Maersk (China) Shipping Co. Ltd.**, Civil Appeal No. 98 of 2016 (unreported), the Court dealt with the legality and effect of a more or less similar choice of law and forum clause expressed in a bill of lading to the effect that the said bill of lading would be governed by and construed in accordance with English law and all disputes arising thereunder must be determined by the English High Court of Justice in exclusion of the jurisdiction of the courts of another country. Citing with approval the decision of the Court of Appeal of Kenya in **Carl Ronning v. Societe Navale Chargeurs Delmas Vieljeux (The Francois Vieljeux)** [1984] eKLR, this Court held that:

> *"Basically, therefore,* ***the parties did not, by agreement, oust the jurisdiction of the courts in Tanzania.*** *They 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 parties express choice of forum of a court, that agreement***

has always been found to be binding." [Emphasis added]

We, therefore, agree with Mr. Mwakingwe that choice of law and forum clauses are not contrary to public policy nor would they be a contravention of section 28 of the LCA. Parties do not, by agreement, oust the jurisdiction of one court when they commit to submit themselves to the jurisdiction of another court competent to deal with the matter.

To cement our stance, we wish to refer to the commentary by **Pollock and Mulla in the Indian Contract and Specific Reliefs Act**, 11th Edition, at page 454, to which our attention was drawn by Mr. Mwakingwe:

> *"Where two or more courts have jurisdiction to try a suit the agreement between the parties limiting the jurisdiction to one court is neither opposed to public policy nor a contravention of s. 28 of the Contract Act. So long as the parties to a contract do not oust the jurisdiction of all courts which would otherwise have jurisdiction to decide the cause of action under the law,* ***it cannot be said that the parties have by their contract ousted the jurisdiction of the court and where the parties to a contract agreed to submit the dispute arising from it to a particular jurisdiction which would otherwise also be a proper jurisdiction under the***

law, their agreement to the extent they agreed not to submit to other jurisdictions cannot be said to be void as against public policy." [Emphasis added]

We fully subscribe to the above commentary. The same stance is reflected in **Hakam Singh** (*supra*); and **British Aerospace Plc v. Dee Howard Co.** (*supra*) relied upon by Mr. Mwakingwe. We would, however, underline that it is also settled that parties cannot by agreement confer jurisdiction to a court which otherwise does not have jurisdiction to deal with a matter – see, for instance, **New Moga Transport** (*supra*).

We recall that Ms. Bachuba fervently submitted that the catchphrase *"Without prejudice to cases when jurisdiction (competenza) may not be derogated from"* in Clause 1.9.2 meant that the clause as a whole was ineffectual as the jurisdiction of Tanzanian courts could not be derogated from. With respect, we are unable to agree with her. Primarily, the effect of the entire clause is not to oust or derogate from the jurisdiction of Tanzanian courts but to choose any one of competent courts to decide the disputes in contemplation that the courts in both countries may have jurisdiction over a dispute for one reason or another. The said catchphrase, in our view, operates in anticipation that some cases may arise between the parties that

the Court of Rome may not have competence to try them and hence the jurisdiction of the Tanzanian courts will necessarily be non-derogable.

Applying the above legal position to the facts of the case, it is ineluctable that by Clause 1.9.2 of the Agreement the appellants, on the one hand, and the second, third and fourth respondents, on the other, chose in clear, explicit and specific terms that the Court of Rome, in exclusion of other courts, would be their forum for litigating any dispute between them in connection with the said agreement. That agreement bound the parties and it was not open for the appellants to resort to the High Court, Commercial Division. To that extent, the High Court was right to refuse to take cognizance of the suit and rightly bound the parties to their bargain.

Nonetheless, it is our respectful view that the High Court's ruling is riddled with an oversight in that it incorrectly held that the said court's jurisdiction was ousted by Clause 1.9.2 and, as a result, it had no jurisdiction to try the matter. As amply demonstrated above, an exclusive jurisdiction clause only allows parties to choose a forum out of two or more competent courts to try disputes between them. It does not, so to speak, oust the jurisdiction of the other competent courts not chosen as the forum. Save for

the above oversight, the first and second grounds of appeal fail as we endorse the High Court's refusal to assume jurisdiction over the matter.

We now turn to the third ground of appeal, faulting the High Court for dismissing the entire suit as against the respondents while the choice of law and forum clause did not bind the first respondent. On this ground, the thrust of the opposing submissions of the learned counsel was whether on the basis of the Doctrine of Privity of Contract the first respondent was bound by the said clause and if not, whether the claim against the first respondent ought to have been retained as the court terminated the suit against the other respondents.

It is our firm view, however, that the essence of the complaint in the ground at hand needs to be given a different consideration. At the forefront, we think that in his disposition of the suit after he declined to take its cognizance, the learned High Court Judge slipped into error by dismissing the action. It is settled that an order of dismissal connotes that a matter has been heard and disposed of on its merits – see **Ngoni-Matengo Cooperative Union Ltd. v. Alimohamed Osman** [1959] 1 EA 577. See also the unreported decisions of the Court in **Hashim Madongo & Two Others v. Minister for Industry and Trade & Two Others**, Civil Appeal No. 27 of

2003; **Mustafa Fidahussein Esmail v. Dr. Posanyi Jumah Madati**, Civil Appeal No. 43 of 2003 and **Peter Ng'homango v. Attorney General**, Civil Appeal No. 114 of 2011.

In determining what dispositive order the learned Judge should have rendered instead, a commentary by the learned author **Mulla, The Code of Civil Procedure Abridged**, 15th Edition, at page 57, which we cited with approval in **Sunshine Furniture Co. Ltd.** (*supra*), may be of assistance:

> *"**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."* [Emphasis added]

We endorse the above view by the learned author that the court in which the suit is instituted has discretion to stay the suit once it learns of existence of an agreement between the parties to sue in a particular forum, whether foreign or not. For, it neither can dismiss the suit because it has not heard and determined it on the merits nor can it strike it out because, except for the choice of a different forum, it is otherwise competent to try the matter.

The High Court in the instant matter, we think, should have stayed trying the suit pending the institution and determination of the claim in the Court of Rome. On that basis, we vacate the dismissal order and substitute for it an order staying the suit in the High Court, Commercial Division. We must hasten to say that this variation is obviously inconsequential to the outcome of the appeal.

The upshot of the matter is that the appeal is without merit as we uphold the High Court's refusal to assume jurisdiction over the matter. Accordingly, the appeal stands dismissed. However, in view of the circumstances of this matter, we leave the parties to bear their own costs.

DATED at **DAR ES SALAAM** this 11th day of March, 2021

THE COURT OF APPEAL OF TANZANIA

R. K. MKUYE
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

The Judgment delivered on this 12th day of March, 2021, in the presence of Ms. Miriam Bachuba, counsel for the Appellant and Mr. Sauli Santu, counsel for the Respondents, is hereby certified as a true copy of the original.

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL