

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION No. 143 of 2020

(Arising from Commercial Case No. 46 of 2019 between Quality Motors Limited v. Honda Motors Japan and Honda South Africa (Pty) Limited)

HONDA MOTORS JAPAN.....1ST APPLICANT

HONDA SOUTH AFRICA (PTY) LIMITED.....2ND APPLICANT

VERSUS

QUALITY MOTORS LIMITED.....RESPONDENT

Date of Last Order: 04/10/2021

Date of Ruling: 03/11/2021

RULING

C. P. MKEHA, J

In this application, the applicants are moving the court for dismissal of Commercial Case No. 46 of 2019 which is pending between the parties before this court, for failure of the respondent to take necessary steps to

submit to and pursue its claims by way of arbitration pursuant to the arbitration agreement existing between the parties. The said agreement entitled "*Honda South Africa (Pty) Ltd Dealer Sales and Service Agreement All Honda Products*" was entered into by the parties on or about 21 September 2010. On 18 February 2020, this court stayed proceedings in Commercial Case No. 46 of 2019 so that the parties could refer their dispute to the arbitrator for arbitration as per their agreement.

The application is made under section 95 of the Civil Procedure Act. Mr. Gaspar Nyika learned advocate represented the applicants. The respondents, who earlier filed a notice of preliminary objections to the application, did not appear to argue the same on 31/08/2021 as scheduled. Consequently, the court struck out the notice of preliminary objections and invited the applicants to prosecute their application ex parte.

Mr. Nyika learned advocate commenced his submissions by adopting contents of the affidavit supporting the application as part of his submissions. He then submitted that, the respondent had failed to pursue the matter in arbitration as ordered by this court on 18/02/2020. According to the learned advocate, the court had ordered the parties to complete arbitration within six months from the date of the order. Reference was

made to paragraphs 13 to 25 of the affidavit. In terms of the affidavit, in spite of having been given six (6) months for arbitration and in spite of repeated requests from the applicants, who are the defendants in the suit sought to be dismissed, the respondent has never confirmed the arbitrators proposed by the applicants, nor has the respondent proposed the appointment of any arbitrator. The applicants condemned the respondent for failure to take any other step to pursue its claims by way of arbitration. In view of the learned advocate for the applicants, those are sufficient reasons for dismissal of Commercial Case No. 46 of 2019.

The issue for determination is **whether dismissal of the stayed suit is a consequential order upon failure of the parties to an arbitration agreement, to submit to and pursue arbitration, pursuant to their agreement.**

It was the defendants' position that, the plaintiff had taken no action to pursue arbitration proceedings from 18/02/2020 when Commercial Case No. 46 Of 2019 was stayed to 17/09/2020 when the present application was filed. In view of Mr. Gaspar Nyika learned advocate, the plaintiff might have lost interest in the matter and it would not be fair to continue

harbouring the suit for uncertain period. The learned advocate invited the court to dismiss the suit.

It is now more than 20 months since when the suit was stayed. Counting from the filing date, the suit has remained pending for over 29 months. In terms of Rule 32 (2) of the High Court (Commercial Division) Procedure Rules, all commercial cases should proceed and be determined within a period of ten months from the date of commencement and not more than twelve months. However, for failure of the parties to take essential steps in pursuing arbitration proceedings, the suit has remained pending, in the court`s Commercial Cases Register, for more than the time permissible under the Rules.

In the case of **Allen vs. Sir Alfred Mc Alpine (1968) 1 ALL ER 543** Lord Denning MR condemned delay of cases in the following words: "*The delay of justice is a denial of justice...to no one will we deny or delay right or justice. Over the years men have protested at the law`s delay and counted it as a grievous wrong, hard to bear. Shakespeare ranks it among the whips and scorns of time (Hamlet, Act 3. SC, I). Dickens tells how it exhausts finances, patience, courage, hope (bleak house, C.I). To put right this wrong, we will in this court do all in our power to enforce expedition*

and if need be, we will strike out actions when there has been excessive delay. This is a stern measure; but it is within the inherent jurisdiction of the court and the rules of the court expressly permit it. It is the only effective sanction that they contain.” I am highly persuaded by these words.

Indeed, cases cannot remain in court indefinitely. They are filed in court so as to be determined. There has been no action from when the suit was stayed on 18/02/2020 to 17/09/2020 when the present application was filed, after expiry of the period set to pursue arbitration proceedings. Neither did the respondent consider it necessary, to appear before the court, to let it know, reasons for her failure to pursue arbitration proceedings. The affidavit in support of the present application indicates that, the respondent did not positively respond to proposals of the applicants on who ought to be their arbitrator. That, even when the defendants urged the plaintiff to name the proposed arbitrators, the plaintiff/respondent did not respond positively. In view of the learned advocate for the applicants, these are sufficient reasons for dismissal of the stayed suit before this court.

Although ordinarily the plaintiff/ claimant is expected to be the initiator of arbitration proceedings, in terms of the provisions of sections 19 (1) to (3) and 20 (1) to (3) of the Arbitration Act, 2020, both parties to an arbitration agreement are under obligation to initiate and pursue the arbitration process. In this case, none of them initiated the process within the context of the Arbitration Act, 2020. As it was held in **DB SHAPRIYA COMPANY LIMITED Vs. YARA TANZANIA LIMITED, MISCELLANEOUS COMMERCIAL CASE No. 55 of 2016**, if the parties are no longer interested to go for arbitration, there is no reason to continue staying the main suit. But that does not necessarily mean that the stayed suit has to be dismissed. To avoid further delay of the stayed suit, the court retains its inherent powers to discontinue the frustrated arbitration proceedings and thereafter resume proceedings in the stayed suit as it does when other alternative dispute resolution methods fail to yield the desired results within the time allocated for that purpose.

For the foregoing reasons, in a situation, where by their actions, the parties have demonstrated to have abandoned the arbitration process, I hereby make an order discontinuing the arbitration proceedings (if any) relating to Commercial Case No. 46 of 2019. The parties are invited to enter

appearance in respect of the stayed suit, for resumption of trial or other appropriate orders as the trial court will deem necessary. Date for the said appearance to be communicated to the parties, by His Worship the Deputy Registrar.

Dated at DAR ES SALAAM, this 03rd day of NOVEMBER, 2021.


C. P. MKEHA

JUDGE

03/11/2021

Court: Ruling is delivered this 03rd day of November, 2021 in the presence of Ms. Salah, learned advocate for the applicants.




C. P. MKEHA

JUDGE

03/11/2021