IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA
CIVIL CASE NO. 35 OF 2021

M & R AGENCY LIMITED .....PLAINTIFF

VERSUS

MWANZA CITY COUNCIL..... 1ST DEFENDANT

HON. ATTORNEY GENERAL ..... 2ND DEFENDANT

RULING

Date of last order: 6/7/2021
Date of Ruling: 20 /08/2021

F. K. MANYANDA, J.

This ruling is in respect of a preliminary objection raised by the Defendant to the hearing of this case. The Plaintiff in this case is suing the Defendants for payment of TShs. 46,619,020 due to breach of terms of a contract for provision of consultancy and general damages and punitive damages.

The Defendants raised a preliminary objection on one point of objection as follows: -

> *"The suit is premature for failure of the plaintiff to exhaust dispute resolution as provided in the contract."*

Later on, the Defendant with leave of the Court added another ground of preliminary objection which reads as follows: -

"The suit is bad in law for being time barred."

Hearing of the preliminary objection, with leave of the Court, was conducted by way of written submissions. The written submissions for the Defendants were jointly drawn and filed by Mohamed M. Omary and Subira Mwandambo, learned State Attorneys and those of the Plaintiff were drawn and filed by Joseph Kiyumbi Sungwa, learned Advocate.

In respect of the first ground of objection, the State Attorneys submitted that in this case, the Plaintiff is suing on breach of a contract. That, since there is a dispute resolution clause in the contract, then the same binds the parties to submit the disputes to the dispute resolution process before resorting to court of law. The Counsel cited the provisions of Rule 18 of the Second Schedule to the **Civil Procedure Code**, (CPC), [Cap. 33 R. E. 2019] which require a party who refers a disputed arising out of a contract to court to apply to the court for stay of the proceedings pending resolution of the dispute by an arbitrator. The Counsel also referred this Court to the case of **Tanzania Motor Service Ltd and Presidential Parastatal Sector Reform Commission vs.**

Mehar Singh t/a Thaker Singh, Civil Appeal No.115 of 2005 where Nsekela, Justice of Appeal, as then was, referring the decision of Lord Macmillan to the case of **Heyman vs. Darwins Ltd,** (1942) AC at page 375 which, in respect of distinction of the importance of arbitration clause from other clauses of a contract stated as follows: -

> *"An arbitration clause is quite distinct from other clauses, the other set out the obligation which parties undertake towards each other but the arbitration clause does not impose on one of the parties an obligation in favour of the other. But it embodies the agreement of both parties that if any dispute arises with regard to the obligation which the one party has undertaken to the other, such dispute shall be settled by a tribunal of their own constitution."*

It was the views of the State Attorneys that the Plaintiff is required to invoke the dispute resolution mechanisms before embarking into filing

On the other hand, the Counsel for the Plaintiff in his reply conceded that the Plaintiff is suing for damages arising from breach of contract and that the said contract contain an arbitral clause. Therefore, the Counsel pointed out that Section 13(1) of the **Arbitration Act,** No. 2 of 2020 comes into play which require parties to refer a dispute to an

arbitrator. He further submitted that the Plaintiff exhausted the process required for arbitration but the Defendants were adamant. He stated that the Plaintiff has no problem to have the suit stayed but relying in **Travelport International Limited vs. Precise Systems Ltd,** Misc. Commercial Application No. 359 of 2017, requested for time frame. In that case this Court, Commercial Division, when setting time limit for arbitration, gave a guided order as follows: -

> *"In the end result, the petition has merit and it is hereby granted. The matter is referred to arbitration in accordance with clause 38 and in particular clause 38.2 of the Operators Agreement and Section 6 of the Arbitration Act. The petitioner is ordered to initiate the arbitration proceedings within two months from the date of this order. The arbitration proceedings shall not take more than six months from the date it is referred to an arbitrator."*

As regard to the second ground of objection, the State Attorneys submitted stressing on the function of statutes of limitations as being to protect the parties to a suit from unfair legal actions which may be overtaken by events and maintenance of the doctrine that there must be an end to every litigation.

Relying on the provisions of section 3(1) of the **Law of Limitation Act,** [Cap. 89 R. E. 2019] and Item 7 of Part I of the Schedule to the Law of Limitation Act, the State Attorneys submitted that the time limit for a suit on contract, not otherwise specifically provided for, is six years. They argued this suit emanates from contractual relations; therefore, time limit is six years. They reckoned the time from September, 2014 and argued that the six years elapsed in September, 2020 while the suit was lodged on 20/01/2021, hence out of time.

As to the way forward, they relied on the authority of this Court in the case of **Thomas Ngawaiya vs. the Attorney General and 3 Others,** Civil Case No. 177 of 2013 where it held as follows: -

> *"The law imposes mandatory obligation on the courts to dismiss the proceedings instituted after the prescribed period of limitation."*

On the other hand, the Counsel for the Plaintiff opposing the contention that the suit is time barred argued that since the contract that gave rise to the dispute in this suit contains an arbitration clause, then the proper forum for adjudication of this dispute is to the arbitrator. The Counsel added that in such a situation, the option available to the

Court is found in section 12(1) of the **Arbitration Act,** No. 2 of 2020 which reads: -

> *"12(1) A court, before which an action is brought in a matter which is the subject of an arbitration agreement shall, where a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement of claim on the substance of the dispute, and notwithstanding any judgment, decree or order of the superior court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists."*

The Counsel also submitted that this Court after learning that the suit concerns a contract which has an arbitration clause, has only on option, that is to stay the proceedings and refer the parties to arbitration. He relied in the authority in the case of **Scova Engineering S.P.A. and Another vs. Mtibwa Sugar Estates Limited and 3 Others,** Civil Appeal No. 133 of 2017 (CAT) where the Court of Appeal of Tanzania stated as follows: -

> *"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 it. 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."

On jurisdiction, the Counsel argued that it is improper at this stage to question the validity and legality of the suit because this Court can only stay it. It is the views of the Counsel that the proceedings are now before the arbitrator to adjudicate, it cannot strike out or dismiss the same.

The Counsel argued in alternative that the suit is not time barred. He reckoned the time from evidential point of view conceding that the cause of action arose in September, 2014 but time started to run from 10/10/2014 and its expiry was on 10/10/2020. He pointed out that since the Plaintiff started demanding for arbitration in September, 2020 but in vain then issued the 90 days demand notice on 03/09/2020, it can be well said that he commenced the proceedings in time. The Counsel

prayed for the preliminary objection to be overruled with costs. There was no rejoinder.

Those were the submissions by the learned Counsel for both sides, I appreciate their well-researched works which has eased my duty in determining the controversy.

Let me start with the issue of whether this suit is time barred. It is trite law that to every civil action, there is time limit. Section 3(1) of the Law of Limitation Act provides as follows: -

> *"3(1) Subject to the provisions of this Act, every proceeding described in the first column of the Schedule to this Act and which is instituted after the period of limitation prescribed therefore opposite thereto in the second column, shall be dismissed whether or not limitation has been set up as a defence.*

Sub section (2) of Section 3 gives the circumstances entailing institution of a suit, that it is when a plaint is presented to the court having jurisdiction to entertain the suit. It reads: -

> *"3(2) For the purposes of this section a proceeding is instituted- (a) in the case of a suit, when the plaint is presented to the court having jurisdiction to entertain the*

suit, or in the case of a suit before a primary court, when the complaint is made or such other action is taken as is prescribed by any written law for the commencement of a suit in a primary court."

According to item 7 of Part I of the Schedule to the Law of Limitation Act, the time limit for instituting a suit founded on contract is six years. It follows therefore that any suit founded on contract which is institutes after expiry of a period of six years after the cause of action arose becomes time barred.

It is the contention of the Counsel for the Defendants that this suit, being founded on contract, is time barred because it was instituted after expiry of the period of six years. The Counsel argues that the plaint was filed on 20/01/2021 and according to paragraphs 10, 11, 12, 13 and 19 of the plaint; the cause of action arose in September, 2014, the Plaintiff was supposed to file this suit on or before September, 2020.

The Counsel for the Plaintiff concedes that the cause of action arose in September, 2014 but argues that time started to run from 10/10/2014 and its expiry was on 10/10/2020 because of operation of arbitration clause when coupled with the requirement of the 90 days demand notice which was served on 03/09/2020.

I have dispassionately considered the arguments by both Counsel; however, I am inclined to accept the argument by the Counsel for the Defendants. The reason is that, one, the facts as averred in paragraphs 10 and 19 makes it clear that the cause of action arose in September, 2014, a fact which is accepted by the Counsel for the Plaintiff.

Paragraph 19 of the Plaint reads as follows: -

> *"19. That due to the 1st Defendant's non-adherence to pay the outstanding balance, she owes the Plaintiff since September, 2014 pursuant to their contract.*

Second in computation of time, the issue of existence of a clause of arbitration is not relevant. I say so because, in my firm view, a mere existence of an arbitration clause in a contract does not operate to extend the time for instituting a suit. The Counsel for the Plaintiff attempts to convince this court to hold that the time he used in trying to apply arbitration proceedings be excluded from computation of time for instituting the suit, I don't think that is allowable under Part IV of the Law of Limitation Act, because it is not among the disabilities and exemptions provided therein.

Moreover, section 15(1) of the Arbitration Act, No. 2 of 2020 makes the Law of Limitation Act applicable to arbitral proceedings and in reckoning of time, sub-section (3) of section 15 requires to be disregarded 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 in determining when a cause of action accrued. For purposes of clarity, I reproduce the relevant provisions hereunder: -

> *"15 (1) The Law of Limitation Act shall apply to arbitral proceedings as it applies to other legal proceedings.*
> *(2) NA*
> *(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.*

In the result for reasons stated above, I find that this suit is unmaintainable before this Court been brought out of the prescribed time by the Law of Limitation Act.

On the remedy, the Counsel for the Defendants relies on the case of **Thomas Ngawaiya (supra)** that it is to dismiss the suit. The

Counsel for the Plaintiff relies on the authority in the case of **Scova Engineering S.P.A. and Another (supra)** urging this court to stay the suit pending outcome of the arbitration because, in the circumstances of this matter, that is, the only thing it can do. I have asked myself whether this Court can stay a suit which is not a suit in the eyes of the law. My answer to this question is in negative. It is my considered opinion that this Court can stay proceedings which are competent before it. It can not stay incompetent proceedings. The Court in Scova's case was dealing with a competent suit.

In the upshot, I find that the preliminary objection has merit, I do hereby sustain the same. Since this objection is capable of disposing of the suit, I don't see need of dealing with the other ground of objection in the preliminary objection.

Consequently, I do hereby dismiss the suit as been time barred. The Plaintiff to bear the costs of the suit. Order accordingly

F. K. MANYANDA
JUDGE
20/08/2021