

TANZANIA / JUDGMENT

CRDB BANK PLC VS STELLA ANDREW COMM CASE NO

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (COMMERCIAL DIVISION) AT
PAR ES SALAAM COMMERCIAL CASE NO. 3666 OF 2024 CRDB BANK
PLC..... PLAINTIFF VERSUS STELLA ANDREW
MHENGA & SAIDI RASHIDI HASSANI T/A RSKY PROPERTY ENTERPRISES.....
DEFENDANT

RULING

Date of Last Order: 17/04/2024 Date of Ruling: 26/07/2024 GONZI, J. The Plaintiff and the Defendants executed a loan facility agreement on 18th September 2020 under which the Plaintiff advanced to the Defendants TZS 118,000,000/= (Tanzanian Shillings One hundred eighteen Million only) to facilitate working capital for execution of Local Purchase Order no.5097, 5098, 5093 and 5094 for supply of material for truck restoration and safety gear. An interest of 20% per annum was imposed on the loan which was repayable with 6 months. Under the Credit Facility Letter, two securities secured the loan. The first was a letter of hypothecation of goods over i business stocks, book debtors and others issued to secure TZS 118,000,000/=. The second security was a deed of assignment from purchase orders numbers 5098, 5097,5093 and 5094 for supply of material for truck restoration and safety gear. The loan was subsequently restructured upon request by the Defendants who still did not manage to pay and the Board of Directors of the Plaintiff resolved to institute a case against the Defendants. The facility letter of 17th September 2020 was attached as Annexure CRDB 1 to the Plaintiff. The Loan Facility First Deed of Variation dated 18th June, 2021 was attached as Annexure CRDB 2 and the Deed of Assignment of receivables/proceeds between the parties herein dated 18th September, 2020 was attached as annexure CRDB 3 to the plaintiff. Copy of Standard Terms and Conditions agreed between the parties on 18th September 2020 was attached as annexure CRDB 4 while request for restructuring of the loan by the Defendant to the Plaintiff was attached as annexure CRDB 5. Copy of Board resolution by the Plaintiff company authorizing institution of the suit was attached as Annexure CRDB 6. When served with the Plaintiff, the Defendants filed their Written Statement of Defence and raised a Preliminary Objection on a point of law that: 2 "In as much as the alleged cause of action arises out of deed of assignment, then this Court has no jurisdiction to entertain and determine the suit" With leave of the Court, the objection was argued by way of written

submissions, the Defendant was represented by Mr. John Chuma, learned Advocate while the Defendants were represented by Mr. Nuhu Mkumbukwa, learned Advocate. I thank both counsel for the well-reasoned submissions. Mr. Chuma essentially argued that in terms of Clause 9 of the Deed of Assignment of Receivable/Proceeds dated 18th September 2020 the parties had agreed that: "Any dispute arising from or in connection with this Deed shall be resolved amicably failing of which; the aggrieved party may take action at any Court of competent jurisdiction in Tanzania." Mr. John Chuma, learned Advocate for the Defendant submitted that the present suit was filed straight in Court upon the occurrence of the dispute in violation of the above contractual provision that requires prior resort to an amicable settlement of their dispute. He argued that the entire Plaintiff does not indicate that any attempt was ever made to try to secure an amicable resolution of the dispute between the parties. 3 Mr. Chuma argued that the Clause does not oust jurisdiction of the Court, but that it provides what is to be done first once a dispute arises, that is to say, parties must resolve the matter amicably through mediation or reconciliation as an alternative way for resolving disputes between the parties and then thereafter, if there is failure to resolve the dispute amicably, the dispute could be taken to Courts of competent jurisdiction. He relied on the case of Sunshine Furniture Co. Ltd versus Maersk (China) Shipping Co. Ltd and Nyota Tanzania Limited Civil Appeal No.98 of 2016 decided by the Court of Appeal. He also referred the Court to the case of Carl Rouning versus Societe Navale Chargeurs Delmas Vieljeux, Civil Appeal No. 16 of 1982. He argued that the two cases insisted on the need for Courts to respect and give effect to the parties' agreement on choice of dispute resolution forum and applicable laws. He prayed that the suit be struck out with costs. Mr. Mkumbukwa, learned Advocate, submitted in reply that the cause of action in the present case does not arise from the Deed of Assignment of Receivables rather from the Loan Facility Agreement. He argued that the loan facility agreement does not have such dispute resolution clause as in Clause 9 of the Deed of Assignment of Receivables. He argued that the Loan 4 facility Agreement was restructured from time to time as it is acknowledged by the Defendants in their Written Statement of Defence. He distinguished the case of Sunshine Furniture Co.Ltd versus Maersk (China) Shipping Co.Ltd (supra) in that the case was decided on the basis of existence of an agreement by the parties to choose a forum in respect of their dispute that arose out of that contract while in the case at hand, the dispute arose in another contract other than the one in which the parties had agreed on a dispute resolution forum. Mr. Mkumbukwa argued in alternative that in the event the Court finds that the dispute at hand is connected to the dispute resolution clause in the Deed of Assignment of receivables, then it should ignore the requirement for parties to engage in prior amicable settlement because the dispute resolution Clause was phrased in a loose way signifying non-bindingness. He relied on PIL Trade & Services Enterprises Ltd versus Tanzania Investment Bank (TIB) and another, Land Case No. 16 of 2019 decided by the High Court of Tanzania. He argued that in that case the Court held that: "This Clause although coined in mandatory terms does not preclude the parties from pursuit of rights in Court. The phraseology used is attendant to 5 similar agreements to encourage parties to pursue amicable settlement before resorting to Courts. Most often, in similar agreements the parties tend to include similar clause as an encouragement to try an amicable settlement". Mr. Mkumbukwa, learned Advocate therefore argued that the Clause 9 in the Deed of Assignment of receivables is not binding as the parties

loosely used the term "amicable settlement" without specifying the specific mode of settlement they had intended. He argued that if it had been stipulated that parties would refer to arbitration, then the phrase would have been capable of being implemented as there is a specific law namely the Arbitration Act. In a further alternative, Mr. Mkumbukwa submitted that upon occurrence of the dispute, the Plaintiff sent the Defendants several letters and Notices as seen in Annexure CRDB 7 attached to the Reply to the Written Statement of Defence. He argued that the Notices and letters can be taken as compliance with the need to settle the dispute amicably, in the case the Court finds that there was such a need. He argued that since the Defendant was sent with letters and notices and yet did not settle the outstanding amounts, he should be taken to have failed to cooperate in amicable dispute settlement. He argued that where a party does not cooperate in amicable dispute resolution process, the Court should assume jurisdiction over the matter and proceed to entertain it. He relied on the case of Construction Engineering and Builders Limited versus Sugar Development Corporation (1983) TLR 13 for that position. Mr. Mkumbukwa concluded by arguing that in the event the Court finds that the suit was filed prematurely without exhausting the agreed dispute resolution procedure, still the outcome is not to dismiss or strike out the case as the Court has jurisdiction over the case. He relied on the case of Scova Engineering SPA & Irtec SPA versus Mtibwa Sugar Estates Limited and 3 Others, Civil Case No. 133 of 2017 for the position that the jurisdiction of the Court in any matter is conferred by a statute and therefore it cannot be ousted by parties' agreement. Mr. Mkumbukwa prayed for dismissal of the preliminary objection with costs. In this case, there is no dispute that the Deed of Assignment of receivables annexed to the Plaint as Annexure 3, contains a dispute resolution clause under Clause 9 thereof which requires parties to engage in amicable dispute resolution before submitting their dispute to Courts of competent jurisdiction. The issue is whether or not that dispute resolution clause applies to the dispute at hand? If it applies, what is the consequence thereof to the present suit. Mr. John Chuma, learned Advocate for the Defendants submitted that the alternative dispute resolution Clause applies to the present dispute and that non-conformity thereto renders the suit incompetent and that it should be struck out. Mr. Nuhu Mkumbukwa, learned counsel for the Plaintiff has argued that the dispute arises purely from breach of loan facility agreement and hence not covered by the Deed of Assignment of receivables which contains the alternative dispute resolution clause. Mr. Mkumbukwa has argued that even if the alternative dispute resolution clause is found to apply to the dispute at hand, non-conformity thereto should not be fatal to the present proceedings because the alternative dispute settlement clause is couched in a loose phraseology intimating only an encouragement rather than an obligation and that it does not specify any specific mode of alternative dispute resolution chosen. Also, he added that there is no specific law envisaged which sanctions such a clause. In my Ruling I find that when the Plaintiff and the Defendants entered into the Credit Facility Agreement on 18th September 2020 they simultaneously also entered into two other ancillary and incidental supporting agreements namely the agreement in the form of a letter of hypothecation of goods over business stocks, book debtors and others issued to secure TZS 118,000,000/= and the agreement in the form of deed of assignment from purchase orders numbers 5098, 5097, 5093 and 5094 for supply of material for truck restoration and safety gear. The three agreements formed a single transaction with common objective and involving the

same parties. It was conditional before the Credit Facility Agreement could be signed that the parties also signed the security agreements to secure the same sum. The letter of credit facility, the hypothecation agreement and the deed of assignment of receivables formed part and parcel of a single agreement by which the Plaintiff granted the loan of TZS 118,000,000/= to the Defendants. In the circumstances of the present case here is no way the security agreements could have stood alone without the letter of credit facility and the letter of credit facility could not have stood alone without the two agreements of security for the loan. Each agreement had provisions conditioning the particular agreement upon the other agreement and they all covered the same transaction were intertwined with the subject matter. The Deed of Assignment of receivables /proceeds boldly speaks of it "being security in respect of credit facility of the amount of TZS 118,000,000/= 9 extended to Stella Sndrew Mhenga and Said! Rashidi Hassan T/A RSKY property Enterprises together with interest and other charges thereon." The recitals to the Deed of Assignment also indicate that it is one of the conditions of the facility agreement that the Assignor creates the deed of assignment in favour of the bank as one of the securities for the loan. In short there was a connection or nexus between the credit facility letter and the deed of assignment. Clause 9 of the Deed of Assignment was drafted broadly such that it also captured not only the disputes arising out of but also disputes connected to the deed of assignment. The clause stated "Any dispute arising from or in connection with this Deed shall be resolved amicably". The learned author R. Doak Bishop, in his work Practical Guide for Drafting International Arbitration Clauses, King & Spalding, Houston, Texas, at page 14 describes the implications of the broad-form clauses with reference to the Standard Dispute Resolution Clause under the International Chamber of Commerce (ICC) Arbitration Rules. The clause provides: "AH disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of 10 Commerce by one or more arbitrators appointed in accordance with the said Rules." Commenting on the scope of the above clause the learned author observed that: This clause has been said to contain the three "key expressions" for an arbitral clause "AH disputes" ..."in connection with"..."finallysettled". The term "all disputes" encompasses all types of controversies, without exception. The language, "in connection with", creates a broad form clause that will cover non-contractuai claims such as tort and fraud in the inducement. While "finally settled" indicates the parties intend the arbitrator's ruling to be final so a court will not try the case de novo. funderlining supplied for emphasis)" In this regard, I find that even if I were to agree with Mr. Mkumbukwa, learned Advocate, in his argument that the dispute at hand arose from the Credit Facility Agreement, still the dispute inevitably arose in connection with the Deed of Assignment of Receivables as well. There is no way that the dispute at hand can be said to be not connected with the deed of assignment. Therefore, while I understand that the loan facility agreement and the security agreement securing the loan are ii two distinct agreements in the process of securing the loan, it is a fact that once a default by the borrower to repay the loan occurs, the default triggers off the remedies of the lender under the security for the loan agreement which is inevitably connected to the loan facility agreement .In this case the security agreement securing the loan was the agreement in the form of the Deed of Assignment of receivables /Proceeds. As the ensuing dispute transcended from the Credit Facility Agreement to the Deed of Assignment of receivables /Proceeds, I therefore hold that Clause 9 of

the Deed of Assignment of receivables /proceeds is applicable to the present dispute between the parties. As it has been held that Clause 9 of the Deed of Assignment of receivables /proceeds is applicable to the dispute at hand, the next question is whether the same was conformed to, and if not conformed to, what are its impacts to the present proceedings? Mr. Mkumbukwa has argued that the notices of default and letters by the Plaintiff addressed to the Defendant constituted amicable settlement of dispute. I do not accept that argument. I reproduce Clause 9 of the Deed of Assignment of receivables /proceeds: "Any dispute arising from or in connection with this Deed shall be resolved amicably failing of which; the 12 aggrieved party may take action at any Court of competent jurisdiction in Tanzania." It is clear that the alternative dispute resolution mechanism envisaged was beyond mere notices and letters. It envisaged a process of dispute resolution with an outcome that one could be aggrieved by. In my view, the amicable process of dispute resolution envisaged and included include all those processes of alternative dispute settlement without a final binding decision being imposed upon the parties by a third party. If the mechanism envisaged a binding final decision like Arbitration, the clause would not envisage taking action in a Court of law against such decision. Also, such a decision would not have been reached amicably. Therefore negotiation, mediation, conciliation, early neutral evaluation and the like, can perfectly fit the intention of the parties when they drafted the Clause 9 above. Mr. Mkumbukwa, learned Advocate has argued that the clause is not binding as it was drafted loosely. To the contrary, I hold that the clause is binding and expresses the party autonomy principle wherein parties to a contract are given freedom to draft the terms of their agreement as they wish. The loose nature of the clause in my view reflects the parties autonomy to leave more flexibility in choosing the appropriate method of Alternative 13 Dispute Resolution in the event of a dispute occurring. Now that the envisaged dispute has occurred, parties have wide latitude under Clause 9 to seek an appropriate amicable method of alternative dispute resolution of their own choice and exhaust it before resorting to Court, if need be. The argument by Mr. Mkumbukwa that there is no specific law capable of enforcing such generalized loosely drafted alternative dispute resolution clause does not hold water. That clause is legally enforceable. The parties' own-chosen forum should be given prominence under the doctrine of party autonomy. Party autonomy has been a common principle in contract law; thus, it has been drafted into most of the international conventions in contract law as well as into domestic laws governing contracts. Party - autonomy entails, amongst others, the parties' freedom of contract to decide the contractual terms and to negotiate the terms of their contract for which they give their consents. According to Justice Peter Tochtermann, in his work: *Agreements to Negotiate in the Transnational Context - Issues of Contract Law and Effective Dispute Resolution*, Dispute Resolution Institute at Hamline University, St. Paul, MN (USA): "Parties regularly include dispute resolution clauses into their contracts to make provision for future 14 conflicts. Before being allowed to bring a claim in the respective state Court or file a request for arbitration, the dispute resolution clause may require the parties to resort to structured negotiations or mediation. Only after such an attempt amicably to resolve the dispute has been made may they proceed to a final and binding decision by a Court or an arbitral tribunal." I asked myself whether the rule respecting forum choice includes also the ADR processes agreed by the parties like negotiation and other amicable dispute resolution processes? My answer is in the affirmative. What matters

is not the nature of forum or the process for dispute resolution. What matters is the enforcement of the contractual obligation entered by the parties as regards their own chosen manner of dispute resolution. Parties may agree on the forum, the dispute resolution process, the applicable laws as well as the persons to resolve their disputes. Once parties have an effective agreement on dispute resolution, the Court should see to it that the parties are kept to their bargain. Bringing a dispute in Court, instead of taking it to the forum or mechanism agreed upon, amounts to a blatant breach of the parties' agreement. It is in public interest, and actually, one of the objectives 15 of the law of contract, to ensure that individuals perform their enforceable agreements. The Court should give equal recognition to the parties' choice of other forms of alternative dispute resolution to the same extent it recognizes the parties' agreement to refer their dispute to arbitration. The Constitution of the United Republic of Tanzania under Article 107 A (2) (d) enjoins the Court to facilitate amicable dispute resolution by parties. Whereas the learned Counsel for the Plaintiff argued that there is no specific law capable of enforcing the loosely drafted Clause 9 of the Deed of Assignment, actually, the Civil Procedure Code Cap 33 of the Laws of Tanzania puts much emphasis on amicable and alternative dispute resolution by insisting on parties to take bonafide steps to resolve their disputes amicably before going to Court. Section 10A of the CPC obliges parties to take bonafide steps to resolve disputes. It provides expressly that: "10A. -(1) For the purposes of this Act, a person shall be deemed to have taken bonafide steps to resolve a dispute if the steps taken by the person in relation to the dispute constitute a sincere and genuine attempt to resolve the dispute out of Court, having regard to 16 the person's circumstances and the nature and circumstances of the dispute.

- (2) For purposes of this Act, the following steps may be taken by a person as part of bonafide steps to resolve a dispute with another person-
 - (a) notifying the other person of the issues that are, or may be, in dispute, and offering to discuss them with a view to resolving the dispute;
 - (b) responding appropriately to any notification referred to under paragraph (a);
 - (c) providing relevant information and documents to the other person to enable the other person to understand the issues involved and how the dispute may be resolved;
 - (d) considering whether the dispute could be resolved by a process other than a Court action, including reconciliation, negotiation, mediation, arbitration, warning, diversion, as applicable;
 - (e) if a process referred under paragraph (d) is agreed to-
 - (i) agreeing on a particular person to facilitate the process, where feasible; and (ii) attending the process; 17
 - (f) if a process agreed under paragraph (e) is conducted but does not result in resolution of the dispute, considering a different process; or

- (9) attempting to reconcile or negotiate with the other person or otherwise engage in independent evaluation, with a view to resolving some or all the issues in dispute, or authorizing a representative to do so, before escalating the matter to mediation or arbitration.
- (3) For avoidance of doubt, the provisions of subsection (1) shall not limit the steps that may constitute taking bonafide steps to resolve a dispute.
- (4) The provisions of this section shall apply to all proceedings intended to be initiated in Court." In the case at hand, the parties under Clause 9 of their contract have agreed to settle their disputes amicably. I find no reason not to allow the parties to exercise their will as expressed through Clause 9 of the Deed of Assignment. I will use the analogy of an arbitration clause to emphasize the need to respect dispute resolution clauses drafted by the parties in their contracts. The best way to emphasize this point with a judicial touch is by quoting the 18 decision of the House of Lords (Supreme Court of UK) in *Heyman v. Darwins Ltd.* (1942) AC 356 at page 375 which was quoted with approval by the Court of Appeal of Tanzania in Civil Appeal No. 115 Of 2005, between Tanzania Motor Services Ltd & Presidential Parastatal Sector Reform Commission versus Mehar Singh T / A Thaker Singh. It was held in *Heyman v. Darwins Ltd* (1942) AC 356 at page 375 that: "I venture to think that not enough attention has been directed to the true nature and function of an arbitration clause in a contract. It is quite distinct from other clauses. The other clauses set out the obligations which the parties undertake towards each other but the arbitration clause does not impose on one of the parties an obligation in favour of the other. 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. And there is this very material difference, that whereas in an ordinary contract the obligation of the parties to each other cannot in general be specifically enforced and breach of them results only in damages, the arbitration clause can be specifically enforced by the machinery of the Arbitration Acts. The appropriate remedy for breach of the agreement to arbitrate is not damages, but is enforcement." I am of the settled view that the same reasoning in *Heyman v. Darwins Ltd* (supra) can be extended to the other forms of alternative dispute resolution whose basis is contractual. There is an obligation under the Deed of Assignment agreement in this case to refer the dispute to the agreed amicable dispute resolution process, a duty which is sanctioned not only by the Law of Contract Act, but also by Article 107A(2)(d) of the Constitution and Section 10A of the Civil Procedure Code. The remedy against the non-complying party is not a suit claiming damages for breach of the agreement to refer the dispute to the agreed mode of dispute resolution. The remedy is enforcement of what was agreed upon by the parties, that is to refer their dispute to amicable ADR process of their own agreement. By this preliminary objection to the maintainability of the suit, the Defendant is seeking the Court's help to make parties abide to their terms of contract. In this case, the Plaintiff was bound to firstly and bonafidely refer their dispute with the Defendant to an amicable ADR process as agreed under Clause 9 of their own contract. He has prematurely filed the case without having firstly 20 resorted to

amicable settlement processs as agreed in their agreement. The preliminary objection is valid. Lastly, I agree with Mr. Nuhu Mkumbukwa, learned counsel for the Plaintiff in his argument that parties by their agreement cannot confer or oust jurisdiction of the Court. In the case of Sunshine Furniture Co. Ltd Versus Maersk China Shipping Line Co.Ltd and Another, Civil Appeal No.98 of 2016 decided by the Court of Appeal of Tanzania at Dar es Salaam, confirming the decision of this Court, held that: "In the present case, it was upon the parties choice of forum that the learned High Court Judge applied the provisions of Section 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 Tanzanian Courts, rather they chose one of the Courts which have jurisdiction, to be the Court at which their dispute should be determine. In the circumstances, we agree with Mr.Nangi that the case of TANESCO versus IPPTL (supra) cited by the appellant's counsel is distinguishable." 21 It follows, therefore, that despite the parties opting for alternative dispute resolution before bringing their dispute in Court, still that does not oust the jurisdiction of this Court. The Court has to stay the suit and refer the parties to their agreed dispute resolution process or forum. In the end, I do uphold the preliminary objection raised in this case. I order that:

- a) The Plaintiff and the Defendant in this case are ordered to refer their dispute to the amicable modes of alternative dispute resolution agreed between them in terms of Clause 9 of their Deed of Assignment of Receivables Contract.
- b) Parties are ordered to exhaust the modes of alternative dispute resolution agreed between them in terms of Clause 9 of their Contract in three months from the date of this Ruling and to evidence in Court documentary proof of conformity with this order as well as the outcome thereof.
- c) Pending the processes ordered in (a) and (b) above, the present suit shall be stayed.
- d) The Preliminary Objection is upheld with costs. It is so ordered. 22 26/07/2024 Ruling is delivered in court this 26th day of July, 2024 before Hon. Ag. Deputy Registrar, K. Ndomba, in the presence of Mr. Samson Lukumay Advocate for the Plaintiff and Mr. John Chuma, Advocate for the Defendant. K. J. NDOMBA Ag. DEPUTY REGISTRAR 26/07/2024 23

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