

DECIDED
4 July 1997

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3. That the plaintiff is not properly verified and therefore fatally defective.
4. That at the relief sought in paragraph 9(b) of the plaint it is bad in law. In the Yrittm State, Department of Defence - the plaintiff stated: "That the suit is not premature as the Defendant; repeatedly refused to refer the matter for arbitration as per annexure Ib and Ic of the plaint. ___ That it is the Defendant and not the plaintiff who purported to terminate the contract."
3. That the verification in the plaint by the plaintiff is proper and not fatally defective.
4. That to the extent that the extra travel and accommodation expenses had to be incurred as a result of non-fulfilment of the contract the defendant is liable.. • 2 In the said contract wherein the Plaintiff, Panafrikan Corporation Limited agreed to purchase 15,000 bales of cotton lint from the defendant - E. Shinyanga Region Cooperative Union (1984) Ltd., there is an arbitration clause contained in paragraph 6. It is to the effect of "all disputes or differences concerning or arising out of, or under this contract shall be settled in the country of the seller and according to the Arbitration Rules applicable" Of by Arbitration Ordinance Cap. 15, of the Laws of Tanzania. Now I will take, for the defendant's submission that the plaintiff filed this suit, before the Hatter was referred to arbitration and therefore the suit should -- be dismissed as premature. I will take for the plaintiff, apart from its statement that the defendant refused twice to refer the matter to an

arbitrator, submits that this application is properly before the court. It does not comply with Rule 5 of the Arbitration Rules, 1957 and also section 6 of the Arbitration Ordinance, Cap. 15 of the Laws of Tanzania. It submits that Rule 5 of the Arbitration Ordinance, 1957, Government Notice No. 427 of 1957 states that all applications made under this ordinance shall be made by way of petition, not by a preliminary objection. Section 6 of the Arbitration Ordinance also provides that such an application shall be made by or on behalf of the defendant in writing, and any other steps in the proceedings are taken by the applicant. I have learned from other learned judges in the case of *Liwi v. VJ, Sh. n. 7a.r.; a Rejoinder to Ooopera-ivo Union (1924) Lii, ii ted: (IIC) Civil Case No. 6 of 1996 (Ta00:ra Re-iss-h, - L b u " 9 not -ye- I. I rp, or' ar,) -l- t, ..., w_ ' where the defendant applied for dismissal of the suit for non-compliance with the arbitration clause of the contract, in stead of a petition as provided in section 6 of the Arbitration Ordinance, 1957, dismissed the preliminary objection as not being properly before the court. I agree with the learned Justice Hackanja in the above cited case that the only way a party can seek under the Arbitration Ordinance for non-compliance with the arbitration clause of the contract by the adverse party is stay of the proceedings not their dismissal for non-compliance with the arbitration clause does not oust the jurisdiction of the court. As to the defendant's refusal to appoint an arbitrator, I have found in favour of the plaintiff. I find that the defendant has not, the annexures relevant to this point in the pleadings (a) (b) (c) and (d) of the States inter alia that you are therefore hereby given 14 days from the date of this letter within which to appoint an arbitrator as provided for under clause 6.1 of the agreement. Our client shall let you know of his choice of an arbitrator as soon as he receives your letter. In reply to the defendant's letter of 22.1.2011, I have found in favour of the plaintiff which reads in the relevant part of the above contract never materialized. and thus we feel quite uncomfortable to appoint an arbitrator for an indefinite contract, in Annexure I(c) is an emphasis to I(b), above that the defendant is not in a position to appoint an arbitrator as requested due to the fact that the Agreement, 3.3.2011, is not valid and is invalidated as per clause 9.0 of the contract, is to the effect that clause 9.0, materialized, according to the plaintiff, that is a dispute between the parties, but that the plaintiff cannot force the defendant to appoint an arbitrator. Paragraph 1 of the Written Statement of Defence states that the suit is premature as the parties have referred the dispute to arbitration. This is a contradiction to the effect of the defendant's letters at paragraphs (b) and (c) that the arbitrator is not fit for reference to arbitration as clause 9.0 of the contract, The defendant's letters, in paragraphs (b) and (c), are to the effect that the defendant "thinks there is no valid contract between the parties as clause 9.0 of the agreement was not complied with. The defendant may have been misled then in good faith that the arbitration clause is inapplicable for that reason. As I have stated earlier, learned counsel for the plaintiff abandoned this ground in his submission so we heard no reply on this from the defendant's counsel. In the Written Statement of defence the defendant raises the non-compliance with the*

arbitration clause as one of his 'preliminary objections'. This clearly shows that the defendant at last 'by the time he filed the Written Statement of Defence recognizes that this is a "Disputable difference" requiring compliance with the arbitration clause. Therefore both parties now seem to be ready and willing to refer their dispute to arbitration. 4 The defendant's next submission is that the suit is premature - the non-compliance with the arbitration clause, and the plaintiff by submitting that the suit should be stayed pending the submission to arbitration rather than be dismissed. Paragraph 6 of the judgment, which I cite. I have quoted above, only states that a final dispute or differences concerning or arising in connection with or under this contract shall be settled either amicably or by arbitration. It does not state who shall appoint the arbitrator or arbitrators. So one cannot tell whether the party is liable for non-appointment of the arbitrators. One of the duties of the court in contract cases is to interpret and decide by the contract the parties' intentions. Paragraph 6 of the parties' agreement shows that the parties' intention to be that a final dispute and differences arising out of or in connection with or under the contract the defendant objects to the suit being heard before first being referred to arbitration, and that it should be dismissed if the plaintiff submits that rather than dismiss the suit for non-compliance with the arbitration clause, it should be stayed pending the reference to arbitration. This submission neither purports to be unwilling to refer the matter to arbitration nor as per their agreement. I agree with the learned counsel for the plaintiff that this suit should be stayed and not dismissed. In my view, that this court has the discretion to proceed in its own order on application of a party to the stay or grant of an order of stay where it is a dispute between the parties to the agreement to refer to arbitration and they are ready and willing to refer the matter to arbitration as required in the parties' contract. I recommend such a discretion.

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