

STAY OF PROCEEDINGS PENDING ARBITRATION: DOES IT APPLY TO INSOLVENCY PROCEEDINGS? By Issa Maige¹

There are two main sources of law in Tanzania Mainland regulating stay of proceedings pending arbitration namely section 6 of the Arbitration Act and section 64 of the Civil Procedure Code Act read together with the Second Schedule to the Civil Procedure Code Act. Under section 6 of the Arbitration Act, a party to a submission against whom a proceeding connected to any matter agreed to be submitted is commenced, is entitled to apply for stay of proceedings pending arbitration at any time before filing a written statement of defense or taking any step in the proceedings. The application under section 6 of the Arbitration Act can be made by a party to a submission or his privy. Section 64 of the Civil Procedure Code Act on the other hand, provides that unless there is a provision to the contrary by the Arbitration Act or any other law in force, matters pertaining to references to arbitration shall be governed by the provision of the Second Schedule to the Civil Procedure Code Act. Clause 18 of the second schedule to the civil procedure Code Act contains almost similar provision with that of section 6 of the Arbitration Act save for the time of filing the application for stay of proceedings. While the former provision requires such application to be made at any time before the filing of a written statement of defense or taking any step in the proceedings, under the latter provision the same should be filed at earliest opportunity time and in all cases where issues are settled at or before such settlement.

It would appear to be the law, according to Clause 18 of the Second Schedule to the Civil Procedure Code Act, that provided the application is made at or before settlement of issues, an application for stay of proceedings can be made after the Defendant has taken a step in the proceedings, including filing a written statement of Defense. For, settlement of issue is a step which comes after the completion of the exchange of pleadings between the parties². Be it as it may, stay of proceedings covered by the provision of the Civil Procedure Code Act is broader than that provided under the Arbitration Act.

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² Under Order 14 (1) of the Civil Procedure Code Act issues arise when a material proposition of facts or law is affirmed by one party and denied by the other.

The application for stay of proceedings under the Civil Procedure Code Act can be filed at any court where the proceedings are initiated. The Civil Procedure Code Act recognizes the High Court and subordinate courts with the exception of primary courts as courts to which its provisions apply³. It would follow that where proceedings are commenced in relation to any difference covered by an agreement to submission between the parties at any of the three courts, the court to which the proceedings are pending becomes competent to hear and determine the application for stay of proceedings. Conversely, court for the purpose of the stay of proceedings under Arbitration Act is the High Court of Tanzania. Section 3 of the Arbitration Act provides that the general provisions relating to arbitration by consent out of court contained in part II of the Act shall apply only to dispute which, if the matter submitted to arbitration formed the subject matter of a suit, the High Court only would be competent to try. It would follow therefore that where a contract contains a submission clause and a dispute covered in the clause arises between the parties, the person against whom a suit is instituted cannot be entitled to apply for stay of the proceedings unless the dispute is within the jurisdiction of the High Court⁴. If the commencement of the proceedings is at a subordinate court the application cannot be preferred. In such a situation, it is submitted, the Defendant may make use of the provision of the Civil Procedure Code Act to apply for stay of proceedings.

This would however not mean that the stay procedure under the Civil Procedure Code is an alternative to the procedure under the Arbitration Act. It is my understanding of the law that where the submission is in respect of a subject matter which is within the jurisdiction of the High Court, a party to the proceedings who misses some of the requirements under section 6 of the Arbitration Act cannot make use of the provision of the second schedule to the Civil Procedure Code Act. This is so because section 64 of the Civil Procedure Code Act expressly subjects the application of the provision of the second schedule to the CPC to the provision of the Arbitration Act so that in case of any conflict the former prevails. This position is

³ According to section 2 of the Civil Procedure Code Act, the Code applies to all proceedings in the High Court of the United Republic of Tanzania, courts of resident magistrates and District courts.

⁴ Section 3 of the Arbitration Act.

supported by the authority in the case of PRAIDHAN MULJI WALJI V. NURBAI JINA JERAJ⁵.

CONDITIONS FOR GRANT OF STAY OF PROCEEDINGS UNDER THE ARBITRATION ACT

For a person to be entitled to petition for stay of proceedings under section 6 of the Arbitration Act he must be a party to a submission or privy to a party thereto against whom a proceedings covered by a submission is commenced. The term submission being, according to section 2 of the Arbitration Act a written statement to submit present or future differences to arbitration.

The second requirement is that the filing of the petition for stay should be at any time before filing of a Written Statement of Defense or taking any other step in the proceedings. The rationale behind such requirement, in my view, is to protect the freedom of contract. According to section 62 of the Law of Contract Act⁶, parties to a contract are at liberty to vary or rescind any term or condition of contract. The commencement of proceedings in ordinary court of law is *prima facie* a breach of the agreement as to submission. Under the Law of Contract Act an innocent party is entitled to repudiate the contract or to treat it continuing where there is fundamental breach of contract⁷. The decline to file a Written Statement of Defense and take any other step, it is submitted, is tantamount to treating the contract continuing and the petition for stay is analogous to a suit for specific performance of contract. To the contrary, the filing of a Written Statement of Defense or taking any other step is a signification that the Defendant has treated the agreement to a submission repudiated and he is accepting that the dispute be dealt with otherwise than through arbitration.

What amount to taking any other steps in the proceedings was judicially considered by the High Court of Tanzania in KASSAM AHMED v. MOHAMED DEWSHI & SONS

⁵ (1962) E.A. 400.

⁶ Cap. 345 R.E 2002

⁷ Section

LTD,⁸ In this case, the Defendant having delayed to file a Written Statement of Defense, obtained, by consent, an extension of time to file a Written Statement of Defense. When the matter came for mention in the scheduled day, the Defendant had not filed a Written Statement of Defense as per consent order. He thus applied for further extension of time which again was conceded by the Plaintiff. Subsequent after the second extension of time, the Defendant applied for stay of proceedings pending arbitration, the application which was objected, by way of preliminary objection, on account of the fact that the applications for extension of time to file Written Statement of Defense was in itself taking step to the proceedings. The High Court was of the considered opinion that the applications for extension of time were signification of the desire of Defendant that an action should proceed without being referred to arbitration. In page 150 of the judgment His Lordship had the following to say:—

The question for consideration is what course the defendant adopted in this case. The entry in the file read as follows: "By consent written statement of defense to be filed on 30.10.71." What does this mean? The construction I put on it was that the defendant applied for an Order or acquiesced in an Order to file a written statement of defense because the order for filing a written statement of defense was by consent of both parties.

The similar position was made by the Supreme Court of Kenya in THE OLD EAST AFRICA CO. v. IMBRAHIM MOOSAJI & BROS⁹ where Stephen J took the view that the defendant's acquiescence, without protest, in the order giving him 21 days within which to file a written statement of defense constituted a step in the proceedings, debarring him from applying for stay of proceedings. Equally so, in the case of MOTOKOV V. AUTO GARAGE LTD¹⁰ it was held that any application to a court for an order in respect of the proceedings can be described as a step in the proceedings. The issue in the case was an application for statement of further and better particulars.

⁸ 1973 LRT No. 42

⁹ (1924-1926) 10 K.L.R. 95

¹⁰ (1970) E.A. at 253

The other requirement for the grant of stay of proceedings emanates from the clause “after appearance” in section 6 of the Arbitration Act which would suggest that for a person to be entitled to apply for stay of proceedings, he must have entered appearance. The Arbitration Act does not define what amounts to appearance for the purpose of an application for stay. Consequently, the provision of the Civil Procedure Code Act applies. The Civil Procedure Code Act does not confine appearance with physical appearance. It recognizes appearance by a duly recognized representative such as an advocate or recognized agent¹¹. In *KASSAM AHMED v. MOHAMED DEWSHI & SONS LTD*, supra, the High Court recognized appearance through advocate as appearance for the purposes of stay of proceedings pending arbitration. The logic behind appearance is, according to *MR BALDEV NORATARAM VARMA AND TWO OTHERS VS. MR ROBERT SCHELTENS AND ANOTHER*¹², is to avoid adverse orders against the petitioner before the petition is filed as well as to inform the court of the steps intended to be taken before the filing of a written statement of defense. In that case, Madame Judge Kimaro, J (as he then was) made it clear that filing a petition before entering appearance is not fatal as to render the petition improperly before the Court. In the said case, the Plaintiff in the suit had raised a preliminary objection to the effect that the petition for stay was premature for being preferred before entering appearance in terms of section 6 of the Arbitration Act.

STAY OF PROCEEDINGS IN WINDING UP; THE CASE STUDY OF LUBADA CASE¹³

In the above case, the Petitioner in the main petition, petitioned for winding up of the Respondent for the reason of inability to pay debts when they are due. Upon being served with the Petition, the Respondent petitioned for stay of proceedings pending arbitration in terms of section 6 of the Arbitration Act. The debts, the subject matter of the winding up petition, emanated from the Lease Agreement between the Petitioner and the Respondent which contained a clause to the effect that should there be differences between the parties arising from and pertaining to the Lease Agreement, the same should be referred to arbitration. The Respondent in the Petition for stay opposed the application by filing an Affidavit in Opposition as

¹¹ Order 3 of Civil Procedure Code Act.

¹² Commercial Case No. 26/2004, (Unreported)

¹³ *Rifiji Basin Development Authority vs. Kilombero Holding Limited*, Miscellaneous Commercial Case No. 34 of 2006, Commercial Division of the High Court, Unreported

well as a Notice of Preliminary Objection containing among other points of law, that the petition for stay of the proceedings has been misconceived as the Petition for Winding Up is not in the nature of the proceedings capable of being stayed in accordance with the Arbitration Act.

The centre of the contention of the Respondent was that for proceedings to be capable of being referred to arbitration, the arbitral tribunal must have jurisdiction to determine the proceedings sought to be stayed. The conclusion of the counsels for the Respondent was that as the jurisdiction to entertain winding up proceedings is exclusively conferred to the High Court, the arbitral tribunal, assuming the proceedings were stayed, was incompetent to determine whether the Respondent was solvent or otherwise. On his part, the Petitioner maintained that the phrase “any proceedings” referred in section 6 of the Arbitration Act is broader enough to cover winding up proceedings. To him, the dispute before the court was capable of being referred to arbitration because before dealing with winding up, there are questions in lease agreement liable to submissions which renders the petition for winding up premature. The counsel blamed the Respondent for filing superior proceedings prematurely so as to preempt the Respondent from exercising his right under the arbitration clause. The Commercial Division of the High Court as per Massati, J (as he then was) agreed with the counsels for the Respondent that once a winding up proceeding is commenced an arbitrator has no jurisdiction to arbitrate the parties to a submission even if there was such a reference in their agreement.

The trial judge before sustaining the preliminary objection judicially considered the provision of section 6 of the Arbitration Act and established that although the provision of section 6 read together with section 3 of the Arbitration clause would literally suggest that the rule as to stay of proceedings covers all proceedings; such interpretation would dangerously render the intention of the legislature meaningless. In that regard, His Lordship was reading the provision of section 6 of the Arbitration Act with the provision of section 275 of the Companies Act which confers winding up jurisdiction exclusively to the High Court. According to His Lordship, the intention of the legislature in enacting section 275 of the Companies Act, was to render winding up a special proceeding to be dealt with by the High Court. His Lordship adopted the Indian authority in the case of HARYANA TELECOM LTD VS. STERLITE INDUSTRIES

INDIA LTD¹⁴, in support of the proposition that an arbitrator, notwithstanding any agreement between the parties, would have no jurisdiction to order winding up of a company. In the aforesaid case, the Supreme Court was interpreting the provision of section 8 of the Indian Arbitration Act which is in *pari materia* with the provision of section 6 of the Arbitration Act of Tanzania.

In applying the Indian authority, His Lordship considered among other factors that a winding up being a multiparty proceedings, any stay order would prejudice the interests of the other parties involved besides the Petitioner and the Respondent. This contention is based on the position of the law in corporate insolvency proceedings that where a petition for winding up is filed, interested parties, especially creditors of the Respondent in the winding up proceedings, may file a notice in support or opposition of the winding up and once such a notice is served to the Petitioner and a third party has registered his interests in support or opposition of the winding up, he automatically becomes a party to the proceedings. His Lordship also considered the effect of the provision of section 283 of the Companies Act which anticipates stay of all other proceedings upon commencement of winding up proceedings. His Lordship concluded from that premises that stay of proceedings would render to multiplicity of proceedings thereby defeating the intention of the legislature which was to cure the same mischief. In his fourth reason for adopting the aforesaid Indian authority His Lordship had the following to say:-

Thirdly, under ss. 284 and 285 of the Companies Act, after the commencement of the winding up of the company, the Company substantially cannot do any valid actions/decisions arbitrator to its shares or properties. So, by necessary implication, any potential award of an arbitrator (assuming it would not be stayed) that would affect the proprietary or monetary rights of the Company would be void. Therefore referring the matter to arbitration would be no more than academic as under section 286 (2) of the Companies Act, the winding up of a Company by the court is deemed to have commenced at the time of the presentation of the petition for the winding up. The court cannot order the doing of a thing which the law expressly or impliedly forbids, or which will be useless

¹⁴ 1999 (97) Comp Cases quoted by A RAMAIYA'S in his COMPANY LAW DIGEST (1956-2004) Plus Consolidated, 7th Edition

It is now part of the law of Tanzania that the law relating to stay of proceedings pending arbitration does not apply in winding up proceedings.