IN THE SUPERIOR COURT OF JUDICATURE

IN THE COURT OF APPEAL
ACCRA

CORAM: BRIGHT MENSAH JA (PRESIDING)
NOVISI ARYENE JA
JENNIFER DADZIE JA

SUIT NO. H1/52/2023

DATE: 4TH MAY, 2023

LARRY ETTAH .... PLAINTIFF/RESP/RESP

VS.

1) **WONDA WORLD PROPERTY LTD.**
2) **NANA KWAME BEDIAKO ….. ….. DEF/APPL./APPEL**

J U D G M E N T

NOVISI ARYENE JA:

Section 6 of the Alternative Dispute Resolution Act 2010, (Act 798) provides:

> *(1) Where there is an arbitration agreement and a party commences an action in court, the other party may on entering appearance, and on notice to the Party who commenced the action in court, apply to the court to refer the action or a part of the action to which the arbitration agreement relates, to arbitration.*

(2) The court on hearing an application made under subsection 1, shall, if satisfied that the matter in respect of which the application has been made is a matter in respect of which there is an arbitration agreement, refer the matter to arbitration.

(3) The grant of an application shall serve as stay of the proceedings in the court.

This is an appeal against the Ruling of the High Court (Commercial Division) delivered on 6th of May 2022, dismissing the application for stay of proceedings in suit no CM/RPC/0306/2022. Appellants' prayer before us is for an order setting aside the said ruling and to stay the proceedings, and a further order for the matter to be referred to arbitration as per the arbitration clause in the agreement between the parties.

Events culminating in the instant appeal are that, sometime in December 2017, respondent invested a total amount of USD1,343,750.00 in two projects (the Kwarleyz Apartment and the Vynyard Apartment), the construction of which was being undertaken by 1st appellant, a real estate development company. Per the terms of the agreement, Respondent was to receive an investment appreciation of 25% on the Kwarleyz Apartment and 20% on the Vynyard Apartment by November 2019. 2nd appellant, the owner of 1st appellant company, undertook to personally pay the investment appreciation interest accruing on respondent's investment. Respondent averred per his statement of claim that appellants made some part payment on the investment but defaulted leading to the restructuring of the terms of the agreement.

Per the terms of the restructured agreement dated 1st November 2019, appellants undertook to pay respondent a cumulative amount of USD981,875.00 on or before 1st November 2020. 1st appellant used its two townhouses (of four bedrooms each) situate at Ringway Estates Accra, as security for the restructured agreement.

Sometime in February 2021, appellants made part payment of USD300,000.00 out of the amount due but has failed to pay the outstanding balance of USD681,875.00 despite

repeated demands. Alleging that appellants have breached the restructured agreement by persistently defaulting in the settlement of the debt, respondent sued appellants jointly and severally for the following reliefs:

1. *An order for the recovery of the sum of USD681,875.00 being the outstanding balance due the respondent from his investment in Vynyard Apartments and Kwarleyz Residences.*
2. *Interest on the said sum at the prevailing bank lending rate from the 1st of March 2021 till date of final payment.*

IN THE ALTERNATIVE

3. *An order directed at the 1st appellant to transfer title and interest in the two townhouses of 4 bedrooms each in good tenantable condition that was used to secure the restructured agreement to the plaintiff.*
4. *An order directed at the 1st appellant to grant the respondent access to the two townhouses of 4 bedrooms each in good and tenantable condition in a manner set out in the restructured agreement dated the 1st of November 2019.*
5. *Payment of respondent's legal fees*

On being served with the writ of summons and statement of claim, appellant entered appearance and applied for proceedings to be stayed and an order made for the dispute to be referred to arbitration under section 6 of the Alternative Dispute Resolution Act, 2010, (Act 798). In the supporting affidavit, appellants referred the trial court to the arbitration agreement between the parties dated 1st November 2019, and submitted that per the terms of the agreement, the parties agreed to settle all disputes by arbitration. Counsel prayed for the court to enforce the arbitration clause in accordance with the Arbitration Act.

Section 8 of the agreement between the parties provide;

> *"The parties agree to subject any dispute arising from the interpretation and enforcement of this agreement to arbitration per the provisions of the ALTERNATIVE DISPUTE RESOLUTION ACT, 2010, ACT 798.*
>
> > *The parties agree that the dispute shall be resolved in accordance with the Arbitration Rules of the Ghana Arbitration Hub by 1 arbitrator who shall be appointed by the Ghana arbitration Hub. The seat of arbitration shall be Accra, Ghana."*

The application was vehemently resisted by respondent who submitted that there was no dispute to be referred to arbitration. Referring to the correspondence between the parties attached to the affidavit in opposition as exhibit SNYM 2, respondent contended that appellants admitted owing respondents and requested for extension of time to repay the debt due. Respondent further contended that per the terms of the restructured agreement, there was no dispute about the nature of the properties to be possessed by the respondent in event of the failure of appellants to meet their repayment obligations.

On hearing both counsel, the trial judge relying on the admissions of appellants in exhibit SNYM 2, ruled that there was no dispute in respect of the amount respondent had sued for, and that appellants have by the said exhibit acknowledged their default and the debt. The court ruled that the mere fact that there was an arbitration clause in the agreement did not mean that even where there was no dispute, a matter should be referred to arbitration. The learned trial judge proceeded to draw a distinction between "disputes" and "matters" and ruled that the parties agreed that all disputes and not all matters will be referred to arbitration. The application was dismissed and appellants were ordered to file their statement of defence within 14 days.

It is the refusal of the application which has triggered the instant appeal. The ruling is assailed under the following grounds of appeal:

I. *That the judge erred when he held that the action commenced by the plaintiff/respondent/respondent was outside the scope of the arbitration agreement between the parties.*
II. *That the judge erred when he held that the High Court has jurisdiction at first instance to entertain the action.*
III. *That the judge erred when he ordered the defendants/applicants/appellants to file their statement of defence in the action.*

No further grounds of appeal were filed.

After a careful consideration of the grounds of appeal and reading submissions filed by counsel for appellant, we are of the view that the three grounds of appeal are interrelated so we shall consider them together. The appeal turns on whether or not on the totality of the case, the court below should have stayed proceedings and made a referral to arbitration.

In determining issues raised under the grounds of appeal, this court will ascertain whether the conclusions of the trial court are supported by the affidavit evidence on record. We shall also ascertain whether or not in refusing the application, the trial court applied wrong principles of law.

Counsel's submissions are anchored on the arbitration clause in the agreement between the parties. It was variously argued that once there was an arbitration agreement between the parties, the trial court was bound to refer the dispute to arbitration. And that it was not for the trial court to determine whether it had jurisdiction to hear the case or not and that the court erred in ordering the appellant to file a statement of defence.

It was submitted that in executing the agreement, the parties agreed on a specific method by which future disputes between them were to be resolved. And that the court is enjoined to give effect to the intention of the parties as per the dispute resolution clause. Referring to the arbitration agreement and section 6(1) and (2) of Act 798, it was submitted on behalf of appellants that the trial judge erred when he ruled that the suit which is intended to enforce an alleged breach of contract, does not qualify as a dispute to be referred to arbitration.

Counsel submitted further that the trial court failed to cite any authority in support of the ruling that it was "disputes" and not "matters" which were to be referred to arbitration. Referring to the definitions of "dispute" and "matter" at pages 505 and 999 respectively of Black's Law Dictionary, counsel invited this court to reject the distinction drawn by the trial court because the definitions do not lend support to the trial court's distinction.

Our attention was also drawn to a ruling by the Singapore Court of Appeal in the case of **Tomolugen Holdings ltd & Anor v Silica Investors ltd [2015] SLR 373** where on when to stay proceedings pending referral to arbitration, the court ruled thus:

> *"…….a court hearing an application for a stay should grant it, deferring the actual determination of the tribunal's jurisdiction to the tribunal, if the applicant is able to establish a prima facie case that:*
>
> *a) There is a valid arbitration agreement between the parties to the court proceedings.*
> *b) The dispute in the court proceeding falls within the scope of the arbitration agreement; and*
> c) *The arbitration agreement is not null and void inoperative or incapable of being performed."*

Counsel also cited the case of **George Kodua v Interbeton BV, Civil Appeal No H1/53/2004 dated 26th November 2004,** where the Court of Appeal discussed the duty of the trial court in an application for stay of proceedings pending referral to arbitration.

On authority of above decisions, it was argued that the application for stay of proceedings satisfied the test and trial court ought to have referred the dispute to arbitration.

Responding to the appeal, counsel referred to clause 8 of the Agreement and the definition of "dispute" at page 424 of Black's Law Dictionary (5th edition), and submitted that any assertion or right which is not denied or controverted by the other party, does not amount to a dispute in law and can be enforced by the court without referral to arbitration.

With respect to the admission of the debt by appellants in exhibit SNYM 2, it was argued that there was no dispute where a party has already admitted its liability. In support of this submission, counsel cited the case of **Kano State Urban Development Board v Fanz Construction Company ltd (1990) LPELR SC. 45/1988 (Page 58-60 para. C-B)** where it was held that there is no dispute within the meaning of an agreement to refer disputes where a party already admits its liability but simply fails to pay. See also **United World Limited Inc. v Mobile Telecommunication Services [1998] 10 NWLR (Pt. 586) 106** cited by counsel for respondent. In that case, the defendant had acknowledged its indebtedness and the court ruled that the subject matter for referable to arbitration must be capable of referral to arbitration. And that "*where a party has admitted liability or compromised his stand by admission capable of altering the position of the parties in respect of the matter in dispute, the matter can no longer be for reference to an arbitration.*"

See also the case of **Sakamori Construction (Nig) Ltd v Lagos State Water Corporation [2021] LPELR 56606**, where the Supreme Court of Nigeria held thus:

> *"The dispute in which parties to an arbitration agreement consent to refer to arbitration must consist of justifiable issues triable civilly and a court or tribunal should only give effect to an arbitration clause where the dispute is unequivocally within the ambit and contemplation of the arbitration clause in question".*

With regard to the appeal, it held that the dispute which arose from an admitted debt did not fall within the purview of the dispute envisaged under the parties' arbitration agreement, especially since the debt was consistently acknowledged and admitted by the debtor.

A careful reading of the ruling at pages 37 and 38 of the ROA, will disclose that in ruling that there was nothing to refer to arbitration, the court below relied on the admissions of appellants to the debt in exhibit SNYM 2, marked "without prejudice". It has been argued that the said exhibit was correspondence between the parties on which was written "without prejudice" and that the court erred in basing its decision on it. Counsel also contended in his submission that the authenticity of the document was in doubt as there was no indication as to whether it was authored by a representative of 1st appellant, or 2nd appellant who is its Managing Director.

We shall at this stage consider whether the court erred in relying on an exhibit marked "without Prejudice".

It is a general principle of law that communication between parties in the course of negotiation should not be admissible in evidence where the negotiations break down and the parties go to court. The principle will apply to exclude all negotiations genuinely made towards settlement of a dispute between the parties.

Explaining the meaning of the words "without prejudice" in **Baiden v Solomon [1963] 1 GLR page 488,** the Supreme Court ruled that in law, the words "without prejudice" apply to negotiations between parties personally or between their solicitors in an endeavor to settle the dispute and with a view to compromising the suit.

The principle has been given statutory recognition under the Evidence Act 1975 (Act 323) with section 105 (1) providing thus:

> *"A person has a privilege to refuse to disclose and to prevent any other person from disclosing to the tribunal of fact information concerning the furnishing, offering or accepting by such person or his authorized representative of valuable consideration in compromising a claim which was disputed either as validity or amount and information concerning conduct or statements made as an integral part of such compromise negotiations."*

Discussing section 105 of the Evidence Act under the heading "*PRIVILEGE RELATING TO A COMPROMISE"* in his book **ESSENTIALS OF THE GHANA LAW OF EVIDENCE,** the learned author S.A BROBBEY wrote that section 105 relates to privilege attached to communication between parties in a dispute made in the course of genuine attempt to reach an agreement or compromise. Under the section, a litigating party can prevent the disclosure of communications made during the settlement/negotiation process. And that letters and written documents exchanged between the parties and marked "without prejudice" during the course of the negotiations, are privileged from being disclosed by the other party or third parties, when negotiations break down and the parties go to court.

It bears emphasis that the mere marking of a document as "without prejudice" does not entitle a party to an automatic privilege. In the English case of **In Re Daintrey; Ex parte Holt (1893) 2 QBD 116**, a letter marked "without prejudice" was sent by a debtor to the

creditor at a time when there was no dispute between them. Admitting the letter into evidence, the court ruled that the phrase was limited to negotiations for compromise. And that there was no dispute at the time the letter was written and no offer of compromise was made, so the letter cannot come under the protection offered under the law.

Conditions for the application of the phrase "without prejudice" was stated by the court as follows:

> *"in our opinion, the rule which excludes documents marked "without prejudice" has no application unless some person is in dispute or negotiations with another, and terms are offered for the settlement of the dispute or negotiations and it seems to us that a judge must be entitled to look at the document to determine whether the document does contain an offer of terms……."*

See also **Republic vrs Bonsu Exparte Folson [1999-2000] 1 GLR 523, and Woode v Aggrey & Another [1992]1 GLR 102**, where the court held that the rule was not so strict as to render every letter marked "without prejudice" inadmissible but was rather to enable disputants engage in discussions without prejudice for the purpose of arriving at terms of settlement.

My research on the subject discloses that it was the concessionary purpose of the correspondence rather than the expression "without prejudice" which attracted the privilege. In effect, what is important is the substance of the correspondence rather than the use of the words "without prejudice". If the statement was not made during negotiations for settlement of the matters between the parties out of court, or with a view to compromise litigation or dispute between the parties, then the addition of the words "without prejudice" is of no consequence and will not prevent the correspondence from being used in subsequent proceedings between the parties.

Having said that, the issue to address at this stage is whether the contents of exhibit SNYM 2 can be described as an offer of compromise made in furtherance of negotiated settlement of a dispute between the parties.

Without doubt, Exhibit SNYM 2 dated 17th January 2022, was issued in response to respondent's demand letter dated 17th December 2021 (attached to the affidavit in opposition as exhibit SNYM 1). The letter made detailed references to the restructured agreement between the parties, the amount due and owing as well as the security thereof and respondent's rights of possession. The exhibit also made reference to payments made by appellants in furtherance of the restructured agreement, the outstanding amount due and failure of appellants to liquidate the debt despite the expiry of the agreement on 1st February 2021.

It was in response to this demand notice that appellants wrote exhibit SNYM 2, marked "without prejudice" pleading for extension of time to pay the debt.

The terms of the impugned exhibit addressed to respondent's solicitors is reproduced hereunder as follows:

WITHOUT PREJUDICE

Dear Sir,

RE: DEMAND NOTICE

We are in receipt of your letter dated 17th December 2021 on the above subject.

We acknowledge the intimations in your letter relating to the agreements executed between the parties. However, as you are aware, we anticipated to be able to make final payments on or before the 1st of February 2021. Unfortunately, due to circumstances beyond our control in addition to the covid situation which has affected our hospitality and real estate business, we have not been able to fulfill our obligations to you.

We shall therefore be grateful if you could give us up to the end of 31st of March 2022 to make substantial payment in respect of the amount owed to you and then firm up the timeline for the payment of the rest.

We hope in the spirit of the existing working relationships between the parties, your client will accept the intimations contained in this letter."

Though marked "without prejudice", it can be inferred from the exhibit that it was not issued in furtherance of any negotiation between the parties geared towards settlement. No concessions or offers were made by appellants in the exhibit, safe a plea for extension of time to pay the debt due described in exhibit SNYM 1. In the absence of evidence of any controversy or dispute between the parties at the time exhibit SNYM 2 was written, we rule that merely marking the letter "without prejudice" does not entitle appellants to a privilege under the law.

In the circumstances, the learned judge is justified in relying on the admissions therein in concluding that there was no dispute to be referred to arbitration, and we so hold.

Arbitration is the reference of actual matters in controversy to arbitration and the test is whether the difference can be compromised lawfully by way of accord and satisfaction. It stands to reason that where a party to the arbitral agreement compromises his stand, or makes admissions of the subject matter in dispute, there is no dispute to refer to arbitration.

We buttress our conclusion with the case if **Sakamori Construction (Nig) Ltd v Lagos State Water Corporation (supra)** where the court noted that disputes which parties to an arbitration agreement agree to refer to arbitration, must consist of a justiciable issue triable civilly. Black's Law Dictionary, 9th Edition, defines "justiciable" as "a case or dispute properly brought before a court of justice; capable of being disposed of judicially" The Century Dictionary also defines "justiciable" as "proper to be brought before a court of justice or to be judicially disposed of." Obviously, the intention of parties to arbitral agreements is to refer only disputes and not non-contentious matters to arbitration.

Counsel relied heavily on the case of **George Kodua v Interbeton BV, (supra)** in support of the stance of the appellant that the trial court erred in assuming jurisdiction over the case when there was an arbitration agreement between the parties. Setting out the test and duty of the trial court in an application for stay of proceedings pending reference to arbitration, this court speaking through Anin Yeboah JA (as he then was), posited thus:

> *"……. All what the court ought to do was to address itself of the following conditions: Whether there was any arbitration agreement, the validity of the said arbitration agreement, whether the party who was applying for stay of proceedings was a party to the agreements, whether there was legal proceedings between the parties, whether the applicant had been served with copies of the legal proceedings, whether the applicant had not taken any step before challenging the legal proceedings, whether the party who is proceeding with the legal action has been served and lastly whether the agreement is not null and void, inoperative or incapable of being performed."*

We have given careful thought to above directives on the duty of the trial court and observe that the facts of the instant case are distinguishable from those of George

Kodua case. It is clear from exhibit SNYM 2, that appellants evinced an intention to pay the quantum of debt which was subsequently endorsed on the writ of summons. In the exhibit, appellants described their failure to fulfill their obligations to respondent as "unfortunate" and explained that it was due to *"circumstances beyond our control in addition to the covid situation which has affected our hospitality and real estate business."* It pertinent to note that this letter was written in response to respondent's demand notice.

We must be quick to state that the George Kodua case never established a rule cast in iron that once an applicant demonstrates that there was an arbitration agreement, the suit must necessarily be referred to arbitration as the appellant had implored us to hold. Indeed, reading the judgment in George Kodua as a whole, we do not believe that the directives are intended to cover cases where the applicant had admitted owing the debt. Such a rule would defeat the purpose of section 6(2) of the ADR Act and make nonsense of the intent of parties to settle disputes by arbitration.

The cornerstone of any arbitral agreement is that the subject matter of the dispute must be of the type referable to arbitration. A careful reading of section 6(2) of the ADR Act would show that it was not intended that once there was an arbitral agreement, an applicant was entitled to automatic stay and an order of referral. Where as in the instant case, the affidavit in opposition discloses an admission of liability the existence of a valid arbitration agreement per se will not estop the court from hearing the suit.

The decision whether or not to stay proceedings and refer a matter to arbitration depends on the peculiar facts and circumstances of each case.

While we agree with appellants that an applicant for stay of proceedings pending reference to arbitration, was not required to enter a defence to the action, we are of the view that where in opposing the application, the respondent deposes that the applicants admit owing the amount endorsed on the writ, and supports the deposition with

evidence of a letter to that effect, a mere reference to a valid arbitration agreement between the parties is not enough. It is incumbent on an applicant who is desirous of a favourable ruling, to demonstrate that the assertion was wrong. He does this by providing sufficient evidence in rebuttal in a supplementary affidavit.

It is interesting to note that in their supplementary affidavit (at pages 34 to 35 of the ROA), filed in response to the affidavit in opposition, appellants were silent on respondent's depositions relating to exhibit SNYM 2. No response was offered in rebuttal to paragraph 9 of the affidavit in opposition where respondent referred to the admission of the debt owed. In the circumstances, the trial court can hardly be faulted for relying on the admission to dismiss the application.

It has been submitted on behalf of appellant that the authenticity of exhibit SNYM 2 was in doubt. It is significant to note that nowhere in the depositions contained in the supplementary affidavit in support of the application, did appellants put the authenticity of exhibit SNYM 2 in issue. Accordingly, it is not exactly clear what informed counsel's submissions on the issue in his written submissions. Same is rejected as being an afterthought.

The gravamen of appellants' application before the trial court, and also before us in the instant appeal, is that there is a valid arbitration agreement between the parties, which must be enforced by reference to arbitration. A prayer which did not find favour with the trial court in view of the unequivocal admissions in exhibit SNYM 2 and which neither finds favour with this court.

We have thoughtfully considered the test outlined by this court in the **George Kodua v Interbeton BV, case** (supra), but as earlier discussed in this judgment, where a party admits its liability but simply fails to pay, the principle does not apply.

As regards the submissions by counsel for appellant that a determination whether or not a dispute had risen within the scope of the arbitration agreement, cannot be made by the High Court but by the arbitral tribunal under section 24 of Act 798, we have perused the case of **Anglogold Ashanti Gh. Ltd. v Mining & Building Contractors Civil Appeal No. H1/201/2015 dated 17th December 2015,** cited in support thereof and section 24 of Act 798. However, as discussed in this judgment, appellants having admitted liability as per exhibit SNYM 2, the said submissions (with all due respect to counsel for appellant), are without merit and are dismissed.

In conclusion, appellants have failed to demonstrate any reason to warrant the disturbance of the ruling of the high court dated 6th of May 2022. The ruling is sound in law and is hereby affirmed. The appeal is dismissed as lacking merit.

The appellants are hereby ordered to file their statement of defence within 21 days of this judgment. Suit to take its normal course. Costs of GH¢5,000.00 in favour of the plaintiff.

SGD

.....

JUSTICE NOVISI ARYENE
(JUSTICE OF THE COURT OF APPEAL)

SGD

I AGREE **.....**

JUSTICE P. BRIGHT MENSAH
(JUSTICE OF THE COURT OF APPEAL)

SGD

I ALSO AGREE .....

JUSTICE JENNIFER DADZIE
(JUSTICE OF THE COURT OF APPEAL)

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