Kimbau alias Sarah Martin Simbaulanga v. DPP (1) cited to me by Mr Kimomogoro.

In the end result, the appellant's conviction is quashed and sentences set aside. Since they are already out in bail I will not make an order for their immediate release from prison. In the light of the evidence on records it is also clear that the other accused persons who are not appealing were wrongly convicted. Accordingly, in exercise of my revisional powers I quash their conviction and set aside the sentences imposed on them. These accused persons for example Decabuye, Enock Thomas, Samay Hau and Warse Qayami shall be released from prison forthwith unless they are lawfully held therein in connection with other lawful causes.

EAST AFRICAN BREWERIES LTD *v.* GMM COMPANY LTD

HIGH COURT OF TANZANIA
AT MWANZA
(Mroso, J.)

CIVIL CASE No. 67 OF 1999

Contract – Freedom of contract – Parties to a contract are free to choose the law that should govern their contract.

Contract – Arbitration clause – Arbitration clause ousting jurisdiction of Courts – Whether an arbitration clause can operate to oust jurisdiction of the Courts – Section 18 of the Civil Procedure Code, 1966.

Arbitration – Arbitration clause in a contract – Whether such arbitration clause can operate to oust jurisdiction of the Courts.

Civil practice and procedure – Preliminary point of objection – Parties subjecting themselves exclusively to the jurisdiction of the Kenya Courts – Objection to Tanzania Courts' having jurisdiction – Whether such objection can be sustained.

Civil practice and procedure – Preliminary point of objection – Party filing a suit in defiance of an arbitration clause – Objection as to competence of such suit –Whether such objection can be sustained.

Civil practice and procedure – Arbitration – Arbitration clause in a contract – Whether such arbitration clause can operate to oust jurisdiction of the Courts.

Civil practice and procedure – Arbitration clause – Party filing a suit in court in defiance of an arbitration clause – Remedy open to the other party – To apply for stay of proceedings at an appropriate time and before taking 'a step in the proceedings.'

Interpretation – Meaning of 'a step in the proceedings.'

The plaintiff, a Kenyan company, entered into a distribution agreement with the defendant, a Tanzanian company, with registered place of business in Tanzania. The parties agreed that the distribution agreement would be governed by the Laws of Kenya and submitted to the "exclusive jurisdiction of the Kenya Courts". The Distribution Agreement contained an arbitration clause that required the parties, in the event of any dispute arising out of or relating to the agreement or in case of breach thereof, and failure of an amicable solution, to refer such dispute or breach to arbitration in accordance with the arbitration Laws of Kenya. Upon the defendant allegedly breaching a term of the distribution agreement the plaintiff filed a suit in the High Court of Tanzania. The defendant filed a written statement of defence disputing the claim, did not apply for stay of the proceedings and for an order for the parties to submit to arbitration but raised two preliminary points of objection in the alternative. The first point of objection was to the effect that the High Court of Tanzania had no jurisdiction to entertain the suit because the parties had submitted exclusively to the jurisdiction of Kenya Courts. The second point of objection challenged the competence of the suit in light of the mandatory arbitration clause in the distribution agreement. The High Court of Tanzania considered whether its jurisdiction to entertain the suit

had been ousted in view of the fact that the parties had exclusively submitted to the jurisdiction of Kenya Courts. In addition the Court considered the competence of the suit before it in view of the parties' submission to mandatory arbitration.

Held: (i) Parties to a contract are free to choose the law that would apply in the event of a dispute and that the parties in this case were free to agree that the law that was to govern their distribution agreement was Kenya law;

(ii) The parties were not competent in law to agree to oust the jurisdiction of Tanzania Courts.

(iii) Since the defendant has a registered place of business in Tanzania, the plaintiff has a right under section 18 of the Civil Procedure Code, 1966 to bring a suit against the defendant in the High Court of Tanzania because the parties were not competent in law to agree to oust the jurisdiction of the Tanzania Courts;

(iv) In filing the suit in court without reference to arbitration, the plaintiff clearly breached article 14.9 of the Distribution Agreement which contained the arbitration clause;

(v) Where a party to a contract has filed a suit in contravention of an arbitration clause the remedy open to the other party is to apply for stay of the proceedings at the appropriate time and before taking 'a step in the proceedings';

(vi) Since the defendant did not apply for stay of the proceedings and for an order for the parties to submit to arbitration but instead filed a defence, such filing of defence amounted to taking 'a step in the proceedings'

Both preliminary points of objection dismissed

Cases referred to:

1) *Zagoritis Estates Ltd v. WJ Tame Ltd and another* [1960] EA 384

2) *Theodore Wendt v. Chhaganial Jiwan and Harida Munji Trading in Partnership Under the Style Chhaganial Jiwan and Company* 1 T.L.R. (R) 460

3) *Romain v.Besson,* Civil Appeal Number 17 of 1921 E.A.C.A. (unreported)

4) *Motoko v. Auto Garage Ltd and another* [1970] HCD 19.

5) *Contruction Engineers and Builders Ltd v. Sugar Development Corporation* [1983] T.L.R. 13

Statutory provisions referred to:

1. Civil Procedure Code 1966, sections 18, 18(*a*) and rule 18 of the Second Schedule

2. Arbitration Act Chapter 49 of the Laws of Kenya

3. Law of Contract Ordinance Chapter 433 of Tanzania, sections 28, 37, 37(1),

4. Arbitration Ordinance Chapter 15 of the Laws, section 6

Mr Galati, for the Plaintiff

Mr Magongo, for the Defendant

RULING

(Dated 22 May 2000)

Mroso, J.: The plaintiff, a Kenyan Company, which brews beers of different brands, entered into a distribution agreement with the defendant, a Tanzanian Company. It was agreed between the parties that the plaintiff would supply beers to the defendant and the latter would distribute those beers in certain areas in Tanzania. The distribution agreement also provided, among other things, that the law governing the agreement was Kenyan and that the parties submitted to the exclusive jurisdiction of the Kenya Courts. In the event of any dispute arising out of or relating to the agreement or in case of breach thereof the parties would try in the first instance to arrive at an amicable settlement. But, should that fail the dispute or breach would be referred to and finally settled by an arbitrator agreed by the parties. Such arbitration would be held in Nairobi in accordance with the Arbitration Act Chapter 49 of the Laws of Kenya and "all the rules prevailing thereunder". The ruling of the arbitrator would be final and binding on both parties.

The defendant allegedly breached a term of the distribution agreement and the plaintiff brought this suit in this Court. The defendant filed a written statement of defence, disputing the claim. It also raised

two preliminary points of objection in alternative. First, that this Court has no jurisdiction in view of the agreement by the parties that they submitted exclusively to the jurisdiction of the Kenya Courts. Second, that, also by the distribution agreement, the suit was incompetent because the parties had submitted to mandatory arbitration.

At the hearing of the preliminary objections Mr Galati, learned advocate for the plaintiff, resisted the preliminary objections. He argued that the distribution agreement was purporting to oust the jurisdiction of the Courts, which it could not do. According to section 18(*a*) of the Civil Procedure Code 1966 a suit relating to a dispute under the distribution agreement had to be filed in Tanzania, not in Kenya, because the defendant company has a registered office, and carries on business in Tanzania. Furthermore section 28 of the Law of Contract Ordinance Chapter 433 of the Tanzania Revised Laws prohibits agreements which restrict parties absolutely from enforcing their rights under a contract by the usual legal proceedings in the ordinary tribunals, such agreements would be void. The parties could not agree to oust the jurisdiction of the Courts. Mr Galati, therefore, prayed the Court to dismiss the first preliminary point of objection.

Mr Magongo, learned advocate for the defendant, counter-argued that the distribution agreement did not oust the jurisdiction of the Courts. It specifically said that the parties submitted to the jurisdiction of the Kenya Courts. So, section 28 of the Law of Contract Ordinance was not violated. Secondly, the principle of sanctity of contracts, as enshrined in section 37 of the Law of Contract Ordinance Chapter 433 of the Laws, binds the parties to the distribution agreement to submit to arbitration under Kenyan Laws, as voluntarily agreed among themselves. Regarding the requirements of section 18 of the Civil Procedure Code, 1966, Mr Magongo submitted that it was not relevant. The provisions of the Civil Procedure Code, 1966 and the Arbitration Ordinance Chapter 15, did not apply. Rather, it was the provisions of relevant Kenyan Laws, including the Kenyan Civil Procedure Code, which applied, as the parties, by their agreement, had chosen.

It is not disputed that the parties entered into the distribution agreement by which, among other things the jurisdiction of the Tanzania Courts and the Tanzania laws by implication were excluded. They agreed that the distribution agreement would be governed by the Law of Kenya and submitted to the "exclusive jurisdiction of the Kenya Courts". So, the first issue for consideration is whether the parties can by agreement exclude the jurisdiction of this court.

While I agree with Mr Magongo that the distribution agreement did not violate the provisions of section 28 of the Law of Contract Ordinance Chapter 433 in the sense that it did not restrict a party absolutely from enforcing his right under or in respect of the agreement by the usual legal proceedings in the ordinary tribunals, that is to say the Courts, yet I do not agree that the jurisdiction of this Court could be excluded by that agreement by conferring "exclusive jurisdiction" to Kenya Courts, as it purported to do.

Let me first state emphatically that parties to a contract are free to choose the law that would apply in the event of a dispute. The Court of Appeal of Eastern Africa in the case of *Zagoritis Estates Ltd v. WJ Tame Ltd and another* (1) – a case originating in Tanzania (Tanganyika, then) in considering the proper law of a contract quoted with approval from **Russell on Arbitration** (16 ed) at page 33 under the heading "Conflict of Laws" where it is stated:

> ... whatever system of law it was intended by the parties should govern the contract.

Again, the Court quoted with approval from **Dicey's Conflict of Laws** (7 ed) at page 1061 where it was stated in reference to Arbitration proceedings:

> It is well established that the parties are free to determine what law is to govern the submission.

It follows, therefore, that the parties to the case under discussion before me were free to agree that the law that was to govern their

distribution agreement was to be Kenya Law. But could they agree, as they did by implication, to exclude the jurisdiction of this Court?

Sheridan, C.J. in the case of *Theodore Wendt v. Chhaganlal Jiwan and Haridas Munji Trading in partnership under the style of Chhaganial Jiwan and Company* (2) said at page 461 that the High Court's jurisdiction "is not capable of being ousted". It is my view, therefore, that when it is considered that the defendant in the case now under discussion has a registered place of business in Tanzania the plaintiff has a right under section 18 of the Civil Procedure Code 1966 to bring suit against the defendant in this High Court because the parties were not competent in law to agree to oust the jurisdiction of the Tanzania Courts. I proceed to dismiss the first ground of objection.

As regards the second (alternative) ground of objection I should say that usually Courts would respect and give effect to the intention of the parties to a contract that in the event of a dispute between them they must go to arbitration. See *CE and B Ltd v. SDC* (3).

In the present case, the parties agree that should an amicable settlement of a dispute or breach fail the matter would be "referred to and finally settled by arbitration". When a dispute in fact occurred between the parties the plaintiff went straight to Court without recourse to arbitration as had been agreed. The defendant argues that the suit was incompetent and that the sanctity of contract had been violated. Section 37(1) of the Law of Contract Ordinance Chapter 433 reads:

> 37(1) The parties to a contract must perform their respective promises, unless such performance is dispensed with or excused under the provisions of this Ordinance or of any other law.

In filing the suit in court without reference to arbitration the plaintiff clearly breached article 14.9 of the distribution agreement which contained the arbitration clause. It seems, however, that such a course as was followed by the plaintiff is anticipated by section 6 of the Arbitration Ordinance Chapter 15 of the Laws where it is provided:

> 6. Where any party to a submission to which this part applies, or any person claiming under him, commences any legal proceedings against any other party to the submission or any person claiming under him, in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance, and before filing a written statement, or taking any other steps in the proceedings, apply to the Court to stay the proceedings; and the Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make application for an order staying the proceedings.

There are several reported cases in which a party to a submission went to Court without going to arbitration and often the question has been what remedy the other party to the submission could have. The remedy is provided in section 6 of the Arbitration Ordinance cited above, or to rule 18 of the Second Schedule to the Civil Procedure Code, 1966 that is to say, to apply for stay of the proceedings at the appropriate time.

In the case of *Theodore Wendt* referred to earlier in this ruling there was an agreement between two merchants carrying on business in Dar es Salaam to refer every dispute under the agreement to the local Chamber of Commerce. When a dispute between the parties later occurred one of the parties filed a suit in court without first submitting to arbitration. Sheridan, C.J. in considering what the other party to the submission should have done referred to what he had said in the case of *Romain v. Besson* (4):

> Counsel for the respondent appears to have confined his argument to the Court not having jurisdiction to hear the case. The Court (High Court) decided it did not have jurisdiction and this decision does not seem to be well-founded. In my opinion Counsel for the respondent instead of making an application under section 18 of Schedule II of the Civil Procedure Decree (of Zanzibar which is in *pari materia* with our rule 18 of the Second Schedule to the Civil Procedure Code 1966) wrongly contended

> that the Court had no jurisdiction ... well it is clear from the pleadings and arguments that the case was fought on the issue of jurisdiction and the counsel for the respondent either disregarded or was unaware of the provisions of section 18 of the Schedule to the Civil Procedure Decree ... It could not, I think, be argued that the time for applying for a stay has not expired in the circumstances.

The Court ordered the suit to proceed to hearing and to be determined on the merits. In the case of *Motoko v. Auto Garage Ltd and others* (5) cited to me by Mr Magongo a party to a submission to arbitration disregarded the undertaking to submit to arbitration and filed a suit straight in court. The arbitration clause which reads very much like the one in issue in our present case said:

> All disputes arising out of this contract will be settled amicably. In default of such settlement, the said dispute will be finally settled under the Rules of the Court of Arbitration of the Chamber of Commerce of Czechoslovakia ... appointed in accordance with these Rules.

Apparently there was an application for stay under section 6 of the Arbitration Ordinance Chapter 15 of the Revised Laws. The defence objected to the grant of a stay for the reasons:

> (a) That the arbitration clause was void against public policy as it ousted the jurisdiction of the Court; and
>
> (b) That within the meaning of section 6 of the Arbitration Ordinance Chapter 15 the plaintiff(?) had taken a "step in the proceedings" and was therefore debarred from asking for a stay.

The Court (Georges, C.J.) held that even if there had been a submission to a foreign arbitrator that could not of itself constitute an ouster of jurisdiction of the Court. As regards what constitutes "a step in the proceedings" the Court held that "Any application to a court for an order in respect of the proceedings is 'a step in the proceedings' within the meaning of section 6 of the Arbitration Ordinance Chapter 15". This statement of the Court left as it is can be ambiguous; and

confusing because it might include even an application for stay made promptly, even before filing a written statement of defence.

In our present case the defendant did not apply for stay of the proceedings and for an order for the parties to submit to arbitration as per the distribution agreement. Instead, the defendant filed a defence which was "a step in the proceedings". Like in the *Wendt case (1)* the defendant preferred to challenge the jurisdiction of this Court and to the argument that the suit was incompetent because of the agreement to submit to arbitration. Had it applied (in time) for stay of the proceedings on the basis of sanctity of contract the Court might have granted the prayer, as the Court of Appeal of Tanzania in *Construction Engineers and Builders Ltd v. Sugar Development Corporation* (6) confirmed a High Court order which had granted a stay of proceedings in order to enforce an arbitration clause.

For the reasons which I have attempted to give both preliminary points of objection are dismissed with costs.