

UGANDA / JUDGMENT

Balagi Group (E.A) Limited v Housing Finance Bank (Miscellaneous Application 1018 of 2022) [2024] UGCommC 95 (30 April 2024)

[2024] UGCommC 95

COURT
Commercial Court of Uganda

BEFORE
Mutesi, J

CASE / FILE NUMBER
Miscellaneous Application 1018 of 2022

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA (COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION NO. 1018 OF 2022 ARISING FROM CIVIL SUIT NO. 0685 OF 2020

BALAGI GROUP (E. A.) LIMITED ::::::::::::::::::::::::::::::

VERSUS

HOUSING FINANCE BANK ::::::::::::::::::::::::::::::

(Before: Hon. Justice Patricia Mutesi)

RULING

Introduction

This application has a protracted history. The Respondent extended 4 (four) multi-units construction facilities and an equity release facility on 1st March 2012, 27th December 2012, 28th June 2013, 15th October 2015 and 24th April 2015, respectively, to the estate of the late Samwiri Mishambi Kwesiga represented by the late Ida May Kwesiga, as Administratrix appointed vide High Court Administration Cause No. 1672 of 2005. The facilities were secured by, inter alia, mortgages over 40 condominium units and the land comprised in FRV Folio 22 Plot 35 Kyadondo Road (collectively referred to as the "suit land").

It appears that the estate defaulted on the repayment of the facilities. The Respondent issued notices of default to the estate but the estate still failed to repay the facilities. In exercise of its power of sale, the Respondent duly advertised the suit land, then comprising of 16 developed condominium units, 24 undeveloped/unbuilt up condominium units and FRV Folio 22 Plot 35 Kyadondo Road, for sale on 15th October 2019.

The Applicant expressed its willingness to purchase the suit land and the Respondent accepted its bid. Accordingly, on 14th August 2020, the Respondent entered into the Land Sale Agreement ("the Agreement") selling all the suit land to the Applicant at an agreed purchase price of USD 2,400,000. The Applicant made part payment of USD 2,000,000. On 31st August 2020, the Applicant was

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registered as proprietor for majority of the units. It took constructive possession thereof and started receiving rent from some of the tenants.

Background to the application

In August 2020, the late Ida May Kwesiga filed a suit against the Respondent and the Applicant in the Land Division which was subsequently transferred to this Division and re-designated as Civil Suit No. 685 of 2020 ("the main suit"). This Court issued interim orders preserving the status quo on the suit land but the late Ida May Kwesiga soon passed on in November 2020. The interim orders lapsed and the main suit was adjourned sine die pending the appointment of a new legal representative for the estate of the late Samwiri Mishambi Kwesiga.

On 1st December 2020, Mr. Mugasha Rodney, a son of the late Ida May Kwesiga, filed Misc. Application No. 1132 of 2020 in this Court seeking to substitute his late mother as the plaintiff in the main suit and to further preserve the status quo on the mortgaged properties. On 29th December 2020, this Court ruled that the status quo on the suit land should be preserved until a new administrator for the estate of the late Samwiri Mishambi Kwesiga. The Court also halted any changes in the proprietorship of the suit land.

In February 2021, the Applicant and the Respondent jointly filed and prosecuted Misc. Application No. 205 of 2021 in which they obtained an order against Mr. Mugasha restraining him from collecting rent from the suit land and requiring him to account for all the rent he had collected since the demise of his mother and to deposit all future rent into Court. In May 2021, Mr. Mugasha filed a notice of appeal against the ruling in Misc. Application No. 205 of 2021. He also filed Misc. Application No. 668 of 2021 seeking leave to appeal and a stay of execution. This latter application has since been heard and allowed.

On 7th February 2022, the Applicant unilaterally terminated the Agreement. A series of correspondences then ensued in which the Respondent rejected the Applicant's said termination while the Applicant insisted that the Agreement was void for mistake and, in the alternative, that it had been frustrated.

The Application

On 22nd July 2022, the Applicant brought this application by Chamber Summons under Sections 5 and 9 of the Arbitration and Conciliation Act Cap 4 and Rule 13 of the Arbitration Rules. The application seeks orders that the dispute between the Applicant and the Respondent be referred to arbitration, that proceedings in the main suit be stayed pending the outcome of the arbitration and that costs of this application be provided for.

Briefly, the grounds of this application are that a dispute has arisen between the Applicant and the Respondent regarding, inter alia, the Applicant's right to terminate the Agreement, the validity of the Agreement and the Respondent's failure to fully perform the Agreement. The Applicant asserts that there is a valid, binding and operative arbitration clause in the Agreement which requires the parties to submit all disputes arising between them to arbitration.

The application is supported by the affidavit of M. Sitaram Reddy, the Applicant's secretary. Therein, he recounted the history of the Agreement. He stated that the Applicant is aggrieved that the Respondent is unable to hand over physical possession of all the suit land and of all certificates of title. He complained that the Applicant has attempted, several times, to terminate the Agreement, but that it has been consistently thwarted by the Respondent's refusal to accept the termination. He concluded that since the agreed dispute resolution method is arbitration, this application should be allowed to enable the dispute between the Applicant and the Respondent to be settled through arbitration.

The Respondent opposed the application through an affidavit in reply sworn by Africano Bigirwaruhanga, its Manager Litigation and Recoveries. He contended that the application is incurably defective since it does not involve any of the deceased plaintiff's representative. He denied the existence of any dispute between the Applicant and the Respondent and maintained that the arbitration would have the effect of circumventing the orders in Misc. Application No. 1132 of 2020. Mr. Bigirwaruhanga also told the Court that since the Applicant has already submitted to the jurisdiction of this Court in the main suit, it has effectively waived its contractual right to arbitration.

The Applicant filed an affidavit in rejoinder also sworn by M. Sitaram Reddy reiterating the contents of the affidavit in support of the application.

Representation and hearing

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At the hearing, the Applicant was represented by Mr. Ebert Byenkya and Mr. Anthony Bazira from M/s Byenkya, Kihika & Co. Advocates while the Respondent was represented by Mr. Marvin Kushaba from M/S Kyagaba & Otatiina Advocates. I have considered the materials on record, the submissions of counsel and the law and authorities cited.

Issues arising

- 1. Whether there is an arbitration agreement between the Applicant and the Respondent.
- 2. Whether there is a dispute between the Applicant and the Respondent in respect of the Agreement.
- 3. Whether the Applicant waived its rights to seek a reference to arbitration.
- 4. Whether a reference to arbitration will have the effect of dismissing or lapsing the main suit.
- 5. Whether the dispute alleged by the Applicant is a tripartite dispute which renders the arbitration agreement inoperative and, or, incapable of being performed.
- 6. What reliefs are available to the parties.

Determination

Issue 1: Whether there is an arbitration agreement between the Applicant and the Respondent.

Section 2(1)(c) of the **Arbitration and Conciliation Act Cap 4** provides:

"**arbitration agreement**" means an agreement by the parties to \$(c)\$ submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal *relationship, whether contractual or not"

Section 3(1) of the same Act provides that an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. In **Vantage Mezzanine Fund II Partnership v Simba Properties Investment Co. Ltd & Simba Telecom Ltd, High Court Misc. Application No. 201** of 2020, this Court dealt with a contract entitled the "Mezzanine Term Facility" Agreement" through which the Respondents therein had obtained a credit facility from the Applicants therein. Clause 43 of that contract provided that the parties would have recourse to arbitration to settle any disputes arising between them. This Court reviewed the said Clause 43 and concluded that it amounted to an arbitration agreement.

In the instant case, Clause 10 of the Agreement provided for "Jurisdiction & dispute resolution". Clause 10.3 provided that if the Applicant and the Respondent fail to settle a dispute arising from the Agreement, the dispute shall be referred to, and finally resolved by, arbitration administered by the International Centre for Arbitration and Mediation in Kampala (ICAMEK). Clause 10.4 provided that a single arbitrator shall be appointed by both parties within 30 days of failure to settle the dispute amicably. Clauses 10.5 and 10.6 provided that the seat of arbitration shall be Kampala, Uganda and that the language of arbitration shall be English, respectively.

I have no doubt that Clause 10 of the Agreement constitutes "an agreement by the parties to submit to arbitration all disputes which have arisen or which may arise between them" in respect of the Agreement, within the meaning of Section 2(1)(c) of the Arbitration and Conciliation Act Cap 4 quoted above. Therefore, there is an arbitration agreement between the Applicant and the Respondent.

Issue 2: Whether there is a dispute between the Applicant and the Respondent in respect of the Agreement.

At page 540 of the Black's Law Dictionary (9th Edition) the word "dispute" is defined to mean:

"a conflict or controversy, especially one that has given rise to a particular lawsuit."

On the question of the calibre of disputes anticipated under Section 2(1) of the Arbitration and Conciliation Act, I have found some guidance the decision of Justice Christopher Madrama in *British American Tobacco Uganda Limited v Lira Tobacco Stores*, High Court Misc. Application No. 924 of 2013. In that case, the learned Judge contemplated that disputes concerning the validity and performance of a contract could be referred for arbitration if the contract included an arbitration agreement.

In the instant case, in paragraph 7 of the affidavit in reply, the Respondent contested the existence of any dispute with Applicant. Inter alia, it was contended that the parties were only restrained from the performance of their duties by this Court's order in Misc. Application No. 1132 of 2020. The Respondent also contended that the Applicant has never fully paid the agreed purchase price for the mortgaged and cannot also demand full performance from the Respondent. The Applicant maintained that there was a clear dispute between the parties regarding the validity and performance of the Agreement.

In *Rwenzori Hydro (Pvt) Limited & 2 Ors v VS Hydro Uganda Limited & 3 Ors*, Misc. Application No. 0212 of 2022, which has been relied on by the Respondent, the High Court found that the existence of a dispute presupposes a certain degree of communication between the parties before the initiation of proceedings, in which the parties expressed clearly opposing views concerning their contractual obligations. In the instant case, from February 2022 when the Applicant purported to terminate the Agreement, the Applicant and the Respondent have been involved in a back and forth disagreement over the validity of the Agreement and the performance of their respective obligations thereunder. The Applicant insists that the Agreement is void while the Respondent contends that it is valid. The Applicant also argues that the Respondent has failed to fully perform the Agreement while the Respondent argues that its performance has been restrained by this Court's orders. A clear conflict and controversy, therefore, exists between the parties.

Many of the Respondent's contentions on this issue go to the merits of the dispute. In trying to explain away its delayed performance, the Respondent is only arguing its side of the dispute. I cannot descend into these arguments because they are supposed to be handled by the arbitrator. At this stage, the Court's role is simply to determine if there is any conflict or controversy between the parties. In this case, there is a clear dispute between the Applicant and the Respondent regarding the validity and performance of the Agreement.

Issue 3: Whether the Applicant waived its rights to seek a reference to arbitration.

On this issue, the Respondent argued that the Applicant has been participating in the proceedings in the main suit for the last two years and that it has, therefore, effectively waived its right to seek a referral to arbitration. On its part, the Applicant maintained that its participation in the proceedings in the main suit has no bearing on its right to seek arbitration.

While dealing with a similar argument, Justice Christopher Madrama in *British American Tobacco Uganda Limited v Lira Tobacco Stores* (supra) stated that the filing of a written statement of defence does not apply as a waiver of the right to apply for reference of the matter to arbitration. On a similar note, in *AC Yafeng Construction Company Ltd v The Living World Assembly Ltd & 2 Ors*, High Court Civil Suit No. 0739 of 2021, Justice Stephen Mubiru had this to say:

"... A Court may find a waiver of an arbitration clause when one party engages in litigation of substantial issues going to the merits. Pre-trial acts such as avoiding discovery and making motions to stay court proceedings are not inconsistent with a party's right to arbitrate. However, when a party seeking arbitration has engaged in discovery methods not available in arbitration or has engaged in other intervening steps going to the merits of the case, that party will be found to have waived the right to arbitrate. Parties should not be allowed to invoke arbitration clauses at a late date after they have deliberately taken action to participate in costly litigation. To allow this would undermine the purpose of arbitration, which is to promote the efficient and *inexpensive resolution of disputes ..."* Emphasis mine.

In this case, both the Applicant and the Respondent are defendants in the main suit. They were dragged to this Court by the late Ida May Kwesiga. The Applicant did not choose this Court but it was simply dragged here and it had to defend itself against a plaintiff with whom it had no arbitration agreement. Indeed, the disagreements between the Applicant and the Respondent over the validity and performance of the Agreement did not arise until around February 2022, over one year after the main suit was filed.

It cannot, therefore, be said that in submitting to the jurisdiction of this Court initially through its defence to the main suit, the Applicant was electing to have its future disputes with the Respondent settled through Court and not through arbitration. Additionally, the Applicant's actions so far in the main suit, primarily characterised by prosecuting and defending requests to maintain the status quo on the suit land, are not inconsistent with the Applicant's right to arbitrate. This Court finds that the Applicant is still entitled to seek a reference of its dispute with

the Respondent to arbitration.

Issue 4: Whether a reference to arbitration will have the effect of dismissing or lapsing the main suit.

The Respondent has insisted that referring the dispute to arbitration will have the effect of lapsing or dismissing the main suit yet the plaintiff and other interested parties claiming thereunder have not been given a hearing at all. Section 5 of the Arbitration and Conciliation Act allows this Court to refer a matter filed before it to arbitration. Sub-section 2 thereof specifically anticipates that arbitration proceedings may be commenced or continued, and that an arbitral award may be made, while the same case is still pending in court.

I am cognisant of the jurisprudence from this Court, in decisions like the **Vantage* Mezzanine Fund II Partnership* decision (supra), to the effect that court cases referred to arbitration usually abate. However, I find that all such cases remain distinguishable from the instant case. While it remains logical for court cases referred to arbitration to abate once the court does not anticipate that there could be any residual matters that may remain unresolved after the arbitration, it would defeat the interests of justice if the Court anticipates some residual matters which may not be resolved in the arbitration and yet it goes ahead to abate such cases after sending them to arbitration.

This application has revealed the existence of a dispute between the Applicant and the Respondent regarding the validity and performance of the Agreement. The estate of the late Samwiri Mishanga Kwesiga is not party to the arbitration agreement. If the case is sent to arbitration, the claims of the said estate in the main suit would remain unresolved. These claims would be residue matters resolvable after the arbitration. As such, in principle, a referral of the instant dispute to arbitration would not have the effect of lapsing the main suit. The main suit would be stayed, in the interests of justice, in order for the estate of the late Kwesiga to be heard on the main suit after the arbitration, if necessary.

Issue 5: Whether the dispute alleged by the Applicant is a tripartite dispute which renders the arbitration agreement inoperative and, or, incapable of being performed.

On this issue, the Respondent argued that the present dispute is a tripartite dispute which cannot be referred to arbitration. Counsel for the Respondent submitted that in all such disputes which involve a combination of parties and

non-parties to an arbitration agreement, a referral to arbitration cannot be ordered. Therefore, while acknowledging the arbitration agreement, Counsel for the Respondent maintained that this agreement was inoperative and incapable of being performed since the same also involves a 3rd party.

On its part, the Applicant submitted that the arbitration agreement is neither inoperative nor incapable of being performed. It argued that the existence of a third party does not in any way render an arbitration agreement inoperative so as to exclude parties from arbitration. It argued

that the fact that there may be unwelcome case management complications if all or parts of claims are stayed is irrelevant. The Applicant concluded that arbitration between it and the Respondent is still feasible and that it shall take between \$1-2\$ months to have the dispute resolved so that the parties can report back on the outcome.

Section 5(1)(a) of the Arbitration and Conciliation Act allows this Court to reject an application for a reference to arbitration if the arbitration agreement is null and void, inoperative or incapable of being performed. In the case of **AC Yafeng Construction Company Ltd v The Living World Assembly Ltd & 2 Ors** (supra), which has been relied on by counsel for the Applicant, this Court held that while "inoperative" covers situations where the arbitration agreement has become inapplicable to the parties or their dispute, "incapable of being performed" relates to situations where the arbitration cannot effectively be set in motion.

Regarding disputes involving several parties some of whom are not party to an arbitration agreement, the decision in **AC Yafeng Construction Company Ltd v The Living World Assembly Ltd** (supra) provided some clarity. Therein, this Court held that, as the matter of principle, arbitration agreements only bind only those who contract into them and that the scope of an arbitration agreement is limited to the parties who entered into it plus those claiming under such parties. The Court concluded that unless the non-signatory's intention to be bound by the arbitration agreement can be established, such a non-signatory cannot be referred to arbitration.

In my considered view, the reluctance of the courts to refer disputes involving several parties, some of whom are not subject to the arbitration agreement, to arbitration is grounded in the need to protect ³ parties from the potential prejudice that could arise when the arbitration proceeds without them and matters affecting them are decided finally by the arbitrator in their absence.

Additionally, for practical reasons, parties in cases involving several other parties are likely to have their claims and defences inextricably linked with the claims and defences of other parties. This makes it impracticable for an arbitrator to conveniently and conclusively determine a dispute in arbitration if some of the parties before him or her are justifying their actions relying on the actions of other parties to the dispute who are not party to the arbitration agreement and who, thereby, have not appeared before the arbitrator.

In the instant facts, when the main suit and this application were called on for mention, Mr. Mugasha appeared before me. In light of the narrow rule propounded by the Supreme Court of Uganda in **Israel Kabwa v Martin Banoba Musiga**, SCCA No. 52 of 1995 in which a beneficiary of an estate can temporarily represent the estate, even in court actions, in order to preserve the estate's interests pending a formal grant of administration or probate, it is my understanding that, for the time being, Mr. Mugasha tentatively represents the estate of the late Samwiri Mishambi Kwesiga as he awaits the formal grant of administration to him which is in process. During the said mention, Mr. Mugasha unequivocally told the Court that the estate has no objection to the Applicant's proposed arbitration and that he would be happy to prosecute the main suit after the conclusion of the arbitration.

The dispute between the Applicant and the Respondent relates to the validity and performance of the Agreement. The Agreement contains a clear arbitration clause which is binding on both the Applicant and the Respondent. I am satisfied that the arbitrator will be able to conclusively and conveniently deal with the dispute between the Applicant and the Respondent since they are bound by the Agreement and they are responsible for its performance. In my view, the true intention of the Applicant and the Respondent in Clause 10 of the Agreement, was that any and all disputes between them relating to, or arising from, the Agreement would be resolved in arbitration and not in the courts of law. I have not found any justification to hijack that intention.

I am also satisfied that the estate of the late Samwiri Mishambi Kwesiga will not suffer any prejudice as a result of not being party to the arbitration proceedings. Mr. Mugasha's confirmation on Court record that the estate is not opposed to this application implies that the estate is comfortable with prosecuting the main suit after the Applicant and the Respondent have resolved their dispute over the

validity and performance of the Agreement in arbitration. Again, I see no reason why this Court would not honour the position of the estate, on whose behalf the main suit was filed, as far as the progress of the main suit is concerned.

I agree with the submissions of counsel for the Applicant that, in principle, the mere fact that a dispute involves parties who are not party to the arbitration agreement does not, in and of itself, automatically render that arbitration agreement inoperative or incapable of being performed. As earlier defined, the phrases "inoperative" and "incapable of being performed" call for a situational analysis of the dispute when it arises. There is no standard form course of action in law or practice requiring courts to invariably declare arbitration agreements/ clauses inoperative simply because the disputes to which they were intended to apply involve other ³ parties. Each case is to be adjudged on its own facts.

In the instant application, I am persuaded that the unambiguous language of Clause 10 of the Agreement coupled with Mr. Mugasha's confirmation on Court record that the estate does not oppose the arbitration render this dispute to be unique and distinct from some of the earlier precedents of this Court in which arbitrable disputes involving non-signatories to the arbitration agreements were not referred to arbitration. I am convinced that the arbitrator will be able to conveniently and conclusively investigate and get to the root of the validity of the Agreement and any breach thereof, if any, in the presence of only the parties who are bound by it and who are responsible for its performance. The Court will then resolve the residue of the issues in the main suit after the delivery of the award. For those reasons, this Court must enforce Clause 10 of the Agreement by referring the Applicant and the Respondent to arbitration and by staying the main suit until the conclusion of that arbitration.

Issue 6: What reliefs are available to the parties.

Consequently, this application wholly succeeds and I make the following orders:

- $\mathbf{i}$. This application is hereby allowed.
- The dispute between the Applicant and the Respondent is referred to ii. arbitration in accordance with Clause 10 of their Land Sale Agreement of 14th August 2020.
- Civil Suit No. 0685 of 2020 is hereby stayed pending the outcome of iii. the arbitration between the Applicant and the Respondent.
- Costs of this application shall abide by the outcome of the main suit. iv.

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Patricia Mutesi

JUDGE

\$(30/04/2024)\$

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