

UGANDA / JUDGMENT

**Makindye Sabagabo Municipal Council v
Busenvi
Enterprises Limited (Miscellaneous
Application
475 of 2022) [2025] UGHCCD 99 (16 July 2025)
[2025] UGHCCD 99**

COURT

HC: Civil Division (Uganda)

BEFORE

Bonny Isaac Teko, J

CASE / FILE NUMBER

Miscellaneous Application 475 of 2022

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**THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA (CIVIL
DIVISION) MISC. APPL 475 OF 2022 (ARISING FROM CIVIL SUIT NO.400 OF 2019)
MAKINDYE SABAGABO MUNICIPAL COUNCIL:.....APPLICANT VERSUS
BUSENVI ENTERPRISES LIMITED:.....RESPONDENT**

BEFORE HON. JUSTICE TEKISAAC BONNY

RULING

This application is brought under section 5(1) & (9) Arbitration and Conciliation Act Cap 5 and rule 13 Arbitration Rules.

Background

The subject matter of Civil Suit No. 400 of 2019 from which this application arose, was a contract for upgrading and periodic maintenance of St. Noah Road from murrum to bitumen standard in Bunamwaya Division signed between the Applicant and the Respondent in July 2017.

The Plaintiff/Respondent claimed that the Applicant/Defendant defaulted on payments and the Plaintiff/Respondent allegedly with the full knowledge and blessing of the Defendant/ Applicant borrowed

money from Equity Bank which loan went into default due as a result of the irregular payments by the defendant/Applicant.

The plaintiff/Respondent in its plaint claimed for UGX 685, 992,329 as outstanding contract price, bank penalties, interest charges, expenses and losses incurred. The plaintiff /Respondent also claimed for general damages, and costs of the suit.

The court referred the matter to mediation and the parties voluntarily **entered a partial consent** dated 25th February 2020 wherein the Applicant admitted and committed to pay part of the claim and the disputed balance was left for trial by the court.

At the post mediation hearing, the Defendant/Applicant raised an **oral** preliminary objection that there was a valid and enforceable arbitration agreement under the *Arbitration and Conciliation Act (ACA)* and that the case should be referred to Arbitration.

A ruling was made by Hon. Lady Justice Esta Nambayo on the preliminary objection on 1st July 2022 directing the Defendant/Applicant to file a formal application with evidence for determination of the applicability of sections 5 and 9 of the Arbitration and Conciliation Act which precludes the jurisdiction of courts from suits which have valid, operative and enforceable arbitration clauses.

That is the application before this court.

Representation

The Applicant was represented by **Nambale, Nerima & Co. Advocates** and the Respondent by **Lex Uganda Advocates & Solicitors**.

Issue

The singular issue for determination is whether this suit is barred by law for want of jurisdiction and ought to be referred to Arbitration?

Submissions of the Applicant.

The Applicant submitted that the contract executed between the Applicant and the Respondent contains *an arbitration clause* which was valid, binding, and enforceable between the parties.

The Applicant submitted that according to section 2(1)(c) of the ACA an arbitration agreement is defined as an agreement by the parties to 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.

Counsel for the Applicant contended that the contract between the Applicant and the Respondent contained an arbitration clause under General Conditions of the Contract under GCC 25.2 to 25.4.

The Applicant submitted that the Respondent filed the civil suit without complying with the dispute resolution mechanism under clause 25 of the agreement and Section 5 of the Arbitration and Conciliation Act which limits judicial intervention in arbitral proceedings.

The Applicant averred that in the case of **Vantage Mezzanine Fund II Partnership V Simba Properties Investment Co. Ltd & Another M. A of 2020** Hon. Justice Wamala stated that once the court is **satisfied** with the existence of a valid arbitration clause, it is mandated to refer the matter to arbitration.

The Applicant submitted that the issue of the disputed sum in the suit for breach of contract can only be resolved under arbitration.

The decision of the court on the disputed sum, should therefore be to dismiss the suit and refer the parties to arbitration.

Submissions of the Respondent

The Respondent cited section 5 ACA that gives exception to the rule that the matter ought to be referred to arbitration. The exception that is applicable to this case is that the particular arbitration agreement duly cited by counsel for the Applicant is that the arbitration agreement is null and void, inoperative or incapable of being performed.

The Respondent submitted that GCC 25.1 stipulated that unless otherwise specified in the Special Conditions of the Contract, the procedure for dispute resolution shall be specified in GCC 25.2 to 25.4 of the agreement.

Under the SCC (Special Conditions of the Contract) GCC Clause reference 25.1 stated as follows:

The procedure for disputes shall be as specified in GCC 25.2 to 25.4 for smaller contracts, where the PDE has decided not to appoint an adjudicator and 25.4 should be amended accordingly;

"no adjudicator shall be appointed under the contract and the arbitration shall not apply. If any dispute arises between the employer and the contractor in connection with or arising out of the contract, the parties shall seek to resolve any such dispute by amicable agreement, within 14 days after one party has notified the other in writing of the dispute, the disputes shall be referred by either party to the competent courts, which shall rule in accordance with the laws of Uganda on contract disputes.

The Respondent submitted that they wrote to the Applicant on two different occasions expressing dissatisfaction over the Applicant's conduct and on both occasions the Applicant ignored the Respondent.

The Respondent submitted that the specific condition clearly gave the Respondent the right to bring this matter to court without any reference to arbitration, since the PDE (the Applicant) decided not to appoint an adjudicator or arbitrator even after the Respondent sought to resolve the dispute.

The Respondent averred that it should further be noted that the SCC supersedes the General Conditions (GCC).

The Respondent submitted that the arbitration agreement or clause became inoperative and incapable of being performed by virtue of the wording of the GCC 25 of the contract which the Applicant relies upon to bring this application.

Specifically, GCC clause 25.3 stated as follows;

"any adjudicator appointed under the contract shall be paid by the hour at the rate specified in the SCC, together with reimbursable expenses of the types specified in the SCC, and the cost shall be divided equally between the employer and the contractor, whether the decision is reached by the adjudicator. Either party may refer a decision of the adjudicator to an arbitrator within 28 days of the adjudicator's written decision. If neither party refers the dispute to arbitration within the above 28 days, the adjudicator's decision will be final and binding"

The Respondent submitted that the context of GCC 25.3 dictates that the jurisdiction of arbitration or an arbitrator under the parties' contract was appellate and not a first recourse for dispute resolution. The parties could therefore not have referred the matter to arbitration before subjecting the same to adjudication as provided under SCC.

The Respondent cited **Justice Henry Peter Adonyo** in the case of **Fort Portal Municipal Council V Plinth Technical Works Ltd; HCMA 231 of 2019 (arising from CAD/ARB/No.62/2017)** emphasized the position that an arbitration agreement cannot be operational and an arbitrator does not have jurisdiction where a dispute resolution clause in an agreement requires parties to refer the dispute to adjudication before arbitration.

The Respondent submitted that the parties cannot refer a matter to arbitration when it is clearly dictated in their agreement that an **adjudicator** shall be appointed to handle the dispute in the first instance. No adjudicator was appointed and therefore no arbitration

could be operationalized. All efforts by the Respondent to resolve the matter amicably were ignored by the Applicant.

Counsel for the Respondent submitted that the Applicant attended court facilitated Mediation and entered a **consent** to pay part of the sums claimed. The consent was endorsed by court and cannot be disrespected unless set aside since it became a valid court decree

Determination and Analysis.

The application raises the issue of *jurisdiction*, a fundamental legal issue. The application seeks to deny court the jurisdiction to resolve the instant dispute and refer it to arbitration.

Jurisdiction is the first test in the legal authority of a court and its absence disqualifies the court from exercising any of its powers.

Jurisdiction means any authority conferred by the law upon the court to decide or adjudicate any dispute between the parties or pass judgment or order.

A court cannot entertain a cause which it has no jurisdiction to adjudicate upon. (*see: Miscellaneous Application 0001 of 2016 Koboko District Local Government v. Okujjo Swali)*

It is trite law that arbitration derives authority from the consent of the parties, expressed in writing either as a clause in an underlying agreement or as a separate arbitration agreement.

Essentially, an arbitration clause/agreement is a written submission agreed to by the parties to the contract, and, like other written

submissions to arbitration, must be construed according to its language and in light of the circumstances in which it was made (*See: Heyam and Another Vs Darwins Ltd [1942] 1 All ER 337 at page 342, by Viscount Simon L. C).*

The existence and the validity of an arbitration agreement should be determined primarily in light of the common intent of the parties, the requirement of good faith and the belief that the person who signed the clause had the power to bind the company. *(See: Premium Nafta Products Ltd and Others Vs Fili Shipping Company Ltd and 30 Others [2007] UKHL 40*

The **guiding principle** is that the language in the dispute settlement agreement should determine whether the dispute is to be referred to an arbitral body or to a court thus the parties agree in advance to **jurisdiction** of choice.

With respect to the present case, the dispute resolution provision contained within the agreement was at Clause 25. 1 of the GCC which stipulated that unless otherwise specified in the Special Conditions of the Contract the procedure for dispute resolution shall be specified in GCC 25.2 to 25.4 of the agreement.

For smaller contracts, where the PDE decided not to appoint an adjudicator, GCC 25.4 should be amended as below;

"no adjudicator shall be appointed under the contract and the arbitration shall not apply. If any dispute arises between the employer and the contractor in connection with or arising out of the contract, the

parties shall seek to resolve any such dispute by amicable agreement, within 14 days after one party has notified the other in writing of the dispute, the disputes shall be referred by either party to the competent courts, which shall rule in accordance with the laws of Uganda on contract disputes.

From the above SCC provision in the contract, the parties intended to have a dispute resolution mechanism which started from amicable resolution, failing which the matter would be resolved by reference to a competent court.

The SCC therefore circumscribed the arbitration clauses in the GCC 25.2 to 25.4 and rendered them unenforceable.

By introducing a window for court resolution as provided by SCC, the dispute resolution created an opportunity for any party to go to court after failing to resolve disputes through amicable means.

Whatever the case, if a dispute arose, and no adjudicator was appointed, because it was a dispute relating to a small contract, the proper procedure was for the parties to try to resolve the issues amicably, if that failed then one of the options was resolution by court.

When the Respondent tried to resolve the issues amicably, it is said the Applicant ignored and kept mute forcing the Respondent to file the matter in court.

In a letter from the Respondent to the Applicant dated 2nd July 2019, the Respondent wrote thus "Therefore pursuant to GCC 25.1 we seek to have a meeting to address the emerging disputes below,* and they listed

four issues for resolution. It is said the Applicant did not respond to this. In another letter dated 29th July 2019, the Respondents wrote to the Applicant "we are dismayed by your non response to our request to have a meeting and feel unfairly treated. In the same void, this is to request you organize a meeting in a period of not more than seven (7) days from date of receipt of this letter to resolve disputes amicably as provided under GCC 25.1 of the contract agreement"*

By deciding to go straight to court, the plaintiff /Respondent was therefore not offending any provision in the contract as there was NO clarity between the SCC and GCC on dispute resolution mechanism anymore.

Little wonder then that in C. S 400 of 2019, the parties participated in a court facilitated mediation resulting into a consent *judgement decree dated 25th February 2020 where the Defendant/Applicant agreed to pay to the Respondent a sum of 298,841,511 in 3 installments.*

Clause 2(d) of the consent decree provided specifically that "the disputed balance as per the pleadings shall be dealt with by court trial.*

By those actions, both parties were thus *estopped from denying the Court's jurisdiction which they had voluntarily and in total disregard to the arbitral clause subjected themselves to; and resolved part of their dispute leaving the remnant to litigation in court*.

Since there was no clarity anymore on the proper procedure to follow and the Procurement and Disposing Entity seemed to have abdicated its right to appoint an adjudicator, the result was that the parties

abandoned the designated dispute resolution framework frozen in the pages of the contract and traversed the open litigation highway even meddling for a while in mediation so none of them *can* now be seen to pontificate on the altar of the inviolability of the arbitration pact under the ACA. The actions of the parties violated the arbitration concordat and rendered it **inoperable** and **unenforceable**.

Article 139(1) of the Constitution provides unlimited jurisdiction for the High Court in all matters, it provides that:

The High Court shall subject to the provisions of this Constitution, have unlimited original jurisdiction in all matters and such appellate and other jurisdictions as may be conferred on it by this Constitution or other law.

It would seem reasonable to assume that the High Court's unlimited jurisdiction kicks in where any other justice framework has failed or has been mismanaged as in the instant case.

I am reluctant to refer this matter to arbitration as it will mean that the court is lending its hand to the continuance of the fiasco initiated by the parties herein, and it would give one party, the Applicant, an undeserved right to hide behind the now limply inoperable arbitral clause to the detriment of the Respondent; never mind the fact that both parties were complicit in the dismemberment of the arbitral clause in the first place.

I am therefore **not able** to refer the matter back for arbitration because the direct chain link to arbitration has been broken.

It would therefore be prudent and practical, even pragmatic; for this court to instead consider the substantive merits in this backlog of a case- *as this is a case of 2019 making over 6 years in 2025*.

I am of the view that this suit is no longer barred by law for want of jurisdiction and that court will exercise its wide discretionary powers to unfurl its jurisdiction over the case and proceed to unravel and hear the merits of the issues to a logical conclusion.

As a consequence, therefore: -

- A. The application **fails** and is **DISMISSED**.

- B. The plaintiff is directed to move court to have the matter fixed for hearing and court will issue necessary directions and timelines.
- C. The costs of this application are awarded to the Respondent.

I so order.

BONNY ISAAC TEKO

JUDGE

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