

UGANDA / JUDGMENT

Sumadhura Technologies Ltd. v Advan Mbabazi (Miscellaneous Application No. 2399 of 2024) [2025] UGCommC 159 (5 May 2025)

[2025] UGCommC 159

COURT

Commercial Court of Uganda

BEFORE

Ocaya, J

CASE / FILE NUMBER

Miscellaneous Application No. 2399 of 2024

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5 THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION) MISCELLANEOUS APPLICATION No. 2399 OF 2024
(ARISING FROM CIVIL SUIT No. 550 OF 2024)

SUMADHURA TECHNOLOGIES LTD.] APPLICANT

VERSUS

15 ADVAN MBABAZI] RESPONDENT

Before: Hon. Justice Ocaya Thomas O. R

RULING.

Introduction:

- 20 This application was brought by way of Notice of Motion under Section 98 of the Civil Procedure Act; Section 33 of the Judicature Act, Order 36 Rules 3 and 4, Order 52 Rules 1, 2, and 3 of the Civil Procedure Rules, seeking the following orders: -
- (1) That the Applicant be granted unconditional leave to appear and defend the respondent's main suit vide Civil Suit No. 550 of 2024
- 25 (2) That the Costs be provided for.

Background:

The grounds in support of the Application are contained in the affidavit in support of the Applicant deposed by K. Venkateshwar Reddy, the Director of the Applicant Company, and 30 he stated that the Applicant contracted the Respondent to conduct an Environmental compliance audit, a change of name, and an extension of certificate No. NEMA/EIA/3870 at UGX 100,000,000/= and UGX 1,000,000/= was advanced to the respondent, who, in breach of her contractual obligations, did not perform his obligations.

5 That the Applicant has a plausible defense to defend the main suit and that the Applicant is not indebted to the Respondent as alleged in the tune of UGX 68,500,000/=. That the Respondent filed the main suit prematurely, contrary to clause 6 of the Agreement, before taking the arbitration and reconciliation courses. Further, that once an illegality is brought before the Court, it overrides all the pleadings, and that it is just and equitable that this

10 Application be granted.

The Respondent's affidavit in reply was deposed by himself, and he stated that the Applicant advanced UGX 1,500,000/= to him as per clause 1(a) of the contract and not UGX 1,000,000/= as stated in the affidavit in support. Further that, the Respondent prepared a 15 scoping report and terms of reference for undertaking the Environmental Compliance Audit for the Applicant, which was approved by NEMA and delivered to the Applicant upon which the Applicant was to pay UGX 30,000,000/= as per clause 1 (b) of the contract but the Applicant failed to do so. Further that he also prepared a final Environmental Compliance Audit report for the Applicant, which was approved by NEMA and delivered to the Applicant,

20 who was supposed to pay UGX 38,500,000/= per clause 1(c) and still failed to do so. That in total, the Applicant is indebted to the tune of UGX 68,500,000/=.

Further that the he sought an out-of-court/alternative dispute resolution in line with the contract by demanding through notices and letters for payment of the balance, but the 25 Applicant failed or refused to pay.

That the Applicant, through her agents, proposed and held a meeting in respect of payment of the debt, wherein the Applicant acknowledged being indebted, and that the Applicant's officials also promised to settle the debt before 15th October 2023. Further that he believes

30 the Applicant has no plausible defense, nor do they have any bona fide triable issues, and that the suit was not brought prematurely before this court.

That this Application is brought in bad faith, intended to frustrate him, and that it is in the interest of justice that the same be disallowed with costs.

5 Representation:

The Applicant was represented by the law firm of M/S Ahamark Advocates, while the Respondent was represented by the law firm of M/S Kabibi and Co. Advocates.

Evidence and Submissions:

10 The parties' cases were supported by the affidavits sworn by the individuals stated above, and the Court directed counsel to file written submissions, which they did, and the same were considered in arriving at this ruling.

Decision:**15 PART ONE: DECISION ON PRELIMINARY POINT OF LAW.**

The Applicant raised a preliminary point of law, namely;

In paragraph 7 of the affidavit in support, the Applicant averred that the main suit was filed prematurely contrary to clause 6 of the Agreement before taking arbitration and reconciliation courses; this raises a preliminary point of law on the propriety of the suit from

20 which this Application originates and as such, Court shall resolve the preliminary objection first to establish the propriety of the main suit and this Application consequentially.

Issue 1: Whether the main suit should be dismissed for violation of the arbitration clause?

- 25 Counsel for the Applicant submitted that it is trite law that parties are bound by their contracts. Counsel cited the case of DSS Motors Ltd v Afri Tours and Travel Ltd, HCCS No. 12 of 2013. Counsel also cited the case of Tumo Technical Services Limited v China Railway 18th Bureau Group Limited, CS No. 432 of 2022, where the court stated that the definition of an arbitration clause from Heyam and Another v Darwins Ltd (1942)1 ALLER 337, to mean a
- 30 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 the circumstances in which it was made in. Counsel also defined arbitration per Section 2 of the Arbitration and Conciliation Act, which means that an agreement by the parties to submit to arbitration all or certain disputes which have arisen or may arise between them in respect of
- 35 a defined legal relationship, whether contractual or not.

- 5 Counsel stated that clause 6 of the agreement in Annexure P.2, which provides for referral to arbitration, and that the import of clause 6 in the agreement is to the effect that all disputes, including non-payment by either party, were to be referred to Arbitration. Counsel cited the case of Yan Jian Uganda Company Ltd v Siwa Builders and Engineers Misc. App No. 1147 of 2014, where the court stated that Courts have always upheld the parties' clear intention to
- 10 have their matters determined through arbitration as indicated in their contracts.

Counsel concluded by submitting that the Civil No. 550 of 2024 is premature before this Court, and the parties should implore and exhaust the arbitration avenues as per the agreement.

Respondent's submission in reply:

Counsel for the Respondent submitted that under Article 139(1) of the Constitution of the Republic of Uganda 1995 which provides that the High Court shall have unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on

- 20 it by this Constitution or other law gives this Court jurisdiction to hear the main suit and that also under Section 14(1) of the Judicature Act Cap. Which grants the High Court original jurisdiction as conferred by the Constitution. Counsel cited the case of Baku Raphael Obudra & Another V Attorney General S. C. C. A No.1 of 2005.
- 25 Counsel further submitted that clause 4 of the Contract executed on 26th September 2022 between the parties provides that the agreement and the relationships between the parties shall be governed by the law of the Republic of Uganda, and the Ugandan Courts shall have jurisdiction over any disputes arising under or in relation to this agreement. Hence, the Applicant cannot elude liability by claiming that the matter before the Court be referred to
- 30 Arbitration when the contract executed expressly indicates that the proper forum for filing a specially endorsed plaint is the High Court.

Counsel further argued in addition to the above that the Respondent in paragraphs 8, 9, and 10 of his affidavit in reply demonstrated how he sought an out of court/alternative dispute

35 resolution in line with their agreement by demanding for his payments, which yielded no fruits and the Respondent was left with no option but to waive his right to arbitrate which

5 he did by filing Civil Suit No.550 of 2024 and this rendered the arbitration clause incapable of being performed. Counsel cited the case of National Social Security Fund V Alcon International Ltd CA No. 2 of 2008, which cited David St. John Sutton in Russell on Arbitration, (22nd Ed. Sweet & Maxwell) at page 80 that ".....a party may abandon its right to arbitrate for example by delay or inaction, or by commencing court proceedings in breach

10 of an arbitration agreement.

In conclusion Counsel submitted that the existence and the validity of an arbitration agreement should be determined primarily in light of the common intent of the parties and the requirement of good faith, as was stated in the case of *Kampala Capital City Authority V*

- 15 *Foster-A- Light Ltd*, Civil Suit No. 852 of 2014 and that the Applicant has not demonstrated good faith to have the dispute (non-payment of the Respondent) resolved and all it has done is to play delaying tactics as the Respondent continues to suffer immense financial loss. Referring the matter to arbitration would continue to cause financial loss and emotional distress to the Respondent.
- 20

Court's Decision:

Black's Law Dictionary (8th ed. 2004) on page 321, defined arbitration as a method of dispute resolution involving one or more neutral third parties who are agreed to by the disputing parties and whose decision is binding. It therefore goes without saying that arbitration is not litigation; it is an alternative dispute resolution method decided and agreed upon by the parties prior to or in the course of their relationship, whether contractual or some other civil engagement as defined in Section 2 of the Arbitration and Conciliation Act.

It is trite law in Uganda and internationally, that when disputing parties in their engagement had agreed on referring the dispute before an arbitrator, the Court cannot interfere with that agreement, solely on the principle that courts cannot interfere with contracts entered into by parties out of respect of freedom of and to contract. See **Charles Athembu v Commercial Microfinance Limited and Another, HCMA No. 001 of 2014.**

35 In this instant case, the Court is alive to Section 9 of the Arbitration and Conciliation Act, which provides that, except as provided in the Act, no court shall intervene in matters

- 5 governed by this Act. In the same Act, Section 5(1) of the Act, states that, A Judge or Magistrate before whom proceedings are being brought in a matter which is the subject of an arbitration agreement shall, if a party so applies after the filing of a statement of defense and both parties having been given a hearing, refer the matter back to the arbitration unless he or she finds: -
- 10 (a) that the arbitration agreement is null and void, inoperative, or incapable of being performed; or
- (b) that there is no dispute between the parties with regard to the matters agreed upon to be referred to arbitration.

- 15 It then follows that, the party seeking to enforce the arbitration clause must be able to demonstrate to the Court that, there is a dispute between the parties; there is a binding and enforceable arbitration agreement or clause; and that this court has no jurisdiction to determine the matter with the subsistence of the arbitration agreement or clause. See **James Simon Mpanga and Another v Marvin Paul Sebugwawo and 2 Others HCCS No. 436 of* 20 *2016.**

Is there a dispute?

Black's Law Dictionary, 11th Edition, p. 593 defines the word "dispute" thus to mean,

- "A conflict or controversy, esp. one that has given rise to a particular lawsuit." In this instant 25 case, it is not in dispute that the parties are in a dispute regarding claims of breach of contract for non-performance of obligations alleged by each party against the other, and this is evidenced by the averments in the affidavits. This, therefore, answers the first requirement of the existence of a dispute. See *NBL v Lugogo Events and Entertainment Limited HCMA 1497/2022, Newplan Limited v Mercentile Properties Limited HCMA 234/2022.*
- 30

Is there a binding and enforceable arbitration agreement?

Having perused the agreement in Annexure P.2, clause 6 provides that:

"Any doubt, dispute, difference, controversy or claims arising from, out of or in connections to the rights, duties and obligations as hereinabove or hereinafter 35 provided shall be referred to arbitration in accordance with the arbitration and

5 conciliation Act Cap 4 of the Law of Republic of Uganda and any amendments thereof shall be made from time to time."

It is trite law that some provisions of law may require that certain disputes are resolved either by conventional courts of law or by other modes of adjudication, such as specialist

- 10 tribunals or Alternative Dispute Resolution Modes under which Arbitration also falls. See **Arbitration and Contract Law. Common Law Perspectives by Neil Andrews, Pp 63-65, John Billiet, et al., International Investment Arbitration, A Practical Handbook, Maklu Publishers, 2016, p. 196;** Also see **Article 126(2) d of the 1995 Constitution as amended.**
- 15 Further, Section 3(1) of the Arbitration and Conciliation Act provides that an agreement may be in the form of an arbitration clause in a contract. See **Heyam and Another v Darwin Ltd [1942] 1 ALL ER 337**, as cited by Counsel for the Applicant. Viscount Simon LC, in defining an arbitration clause, stated that it is a written submission agreed to by the parties to the contract.

In this instant case, the contents of clause 6 of the agreement are sufficient for one to arrive at the conclusion that the parties, through that clause, intended for all purposes to submit to arbitration under the Arbitration and Conciliation Act, and there is no evidence of an amendment to the same.

The Respondent on their part did not raise any objection that the arbitration agreement/clause is null and void, inoperative, or incapable of being performed. This, equally, answers the second element of existence of an arbitration agreement or clause.

30 *Does this Court have jurisdiction to determine the matter with the subsistence of the arbitration agreement or clause?*

It was captured earlier in the respondent's submission that this Court has original jurisdiction under the constitution, which cannot be ousted by an arbitration clause. Jurisdiction means and includes any authority conferred by the law upon the court to decide

35 or adjudicate any dispute between the parties or pass judgment or order. A court cannot entertain a cause that it has no jurisdiction to adjudicate upon. See *Koboko Local*

5 *Government v Okujjo Swali HCMA 1/2016, Owners of Motor Vessel Lillian's" v Caltex Oil Kenya Limited [1989] KLR 1, NBL v Lugogo Events and Entertainment Limited HCMA 1497/2022.*

A Court's jurisdiction flows from the Law. Thus, a Court of law can only exercise jurisdiction 10 as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. A court ought to exercise its powers strictly within the jurisdictional limits prescribed by the law. See *Pastoli v Kabale District Local Government Council and others [2008] 2 E. A 300, Kasibante Moses v. Katongole Singh Marwaha and another, HCEP. 23/2011, Kawaga Lawrence & 2 Ors v Zziwa & Sons* 15 *Property Consultants HCCR 4/2018.*

Therefore, in my considered opinion, the High Court has original jurisdiction to determine matters, and the cause of action in the main suit is one such matter that the High Court can determine. However, as discussed at the beginning of this issue, Arbitration clauses or 20 agreements are creatures of freedom of contracts, and as such, even the High Court in exercise of its Original jurisdiction cannot intervene to change the contracting parties' intentions in a contract. Therefore, in the absence of any illegality in arriving at the arbitration agreement or clause consensus, the High Court cannot interfere with the parties' intention to submit to arbitration. See *Section 5(1) of the Arbitration and Conciliation Act*;

25 Also See *Charles Athembu v Commercial Microfinance Limited and Another(supra), and Yan Jian Uganda Company Ltd v Siwa Builders and Engineers Misc. App No. 1147 of 2014.*

Further, the Respondent submitted that the Applicant's officers and him met and they agreed to settle the payments which they did not, hence filing this suit, and that the meetings were 30 in the spirit of the arbitration clause in the contract.

Clause 6 of the agreement on arbitration was specific and, as is the intention of the parties when it stated that ... shall be referred to arbitration in accordance with the arbitration and conciliation Act Cap 4 of the Law of the Republic of Uganda (emphasis mine). In my view, the 35 meeting referred to by the Respondent cannot be the arbitration hearing as envisaged under 5 the Act or as the parties' intended, and therefore, the respondent's argument is far from the intention of clause 6.

Counsel for the Respondent also argued that the Respondent abandoned his right to arbitration, and Counsel cited and relied on the Court of Appeal decision in *National Social*

- 10 *Security Fund vs. Alcon International Ltd CACA No. 2 of 2008* where the Court cited David St. John Sutton in his book; **Russell on Arbitration, (22nd Ed. Sweet & Maxwell paragraph 2-119, page 80**, where he stated that:
- *"...a party may abandon its right to arbitrate, for example by delay or inaction, or by commencing court proceedings in breach of an arbitration agreement. However, the* 15 *courts are slow to find such repudiation or abandonment without very clear evidence of an intention to abandon the right to arbitrate, together with reliance by the other party to its detriment. Even if the right to arbitrate a particular dispute has been abandoned, that does not necessarily mean that the arbitration agreement itself has been abandoned."*

The foregoing is the full text that the Court relied on in making its observation, and as stated in the text, the party alleging such a repudiation must show evidence of a clear intention to repudiate the same. However, the Respondent has failed to show a clear evidence of his intention to repudiate the arbitration clause, and if it is the argument that in instituting the 25 main suit, the Respondent was clear in its intention, then the same is in breach of clause 6 of

the contract and the Court can only order for specific performance in remedy of the breach.

In conclusion, the aforementioned completes the requirements to be considered by the court and proven by the Applicant in seeking to rely on the arbitration clause, and It is my 30 considered view that the Applicant successful argued that the main suit is legible to be referred for arbitration in compliance with clause 6 of the undisputed Contract executed on

26th September 2022 between the parties.

The above is extremely important in the present circumstances since, a stay of proceedings by this court terminates the action itself, and consequent proceedings under this cause may be difficult if not impossible.

In the premises, I find it unnecessary to delve into the merits of the Application.

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