THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA
(COMMERCIAL COURT)

MISCELLANEOUS APPLICATION NO. 202 OF 2001

(Arising from Arbitration Cause No. 02 of 2001)

JOSEPH SEKITOLEKO..... PLAINTIFF/OBJECTOR

VERSUS

GAPCO (U) LIMITED..... DEFENDANT/CROSS OBJECTOR

BEFORE: HONOURABLE MR. JUSTICE JAMES OGOOLA

RULING

Plaintiff/Objector brought this application to Court for an order to remit an arbitration award for reconsideration. The application was brought under section 11 of the Arbitration Act (Cap. 55), and under Rules 7,8 & 16 of the Arbitration Rules (S.I 55-01).

A preliminary issue concerning this application was the question whether the new Arbitration and Conciliation Act (Act No. 7/2000) – which repealed the old Arbitration Act (Cap. 55) - is applicable to this application? In response, learned counsel for the Plaintiff/Objector stated that section 75(2) of Act 7/2000 does not affect proceedings commenced before the coming into force of the new Act. That provision states as follows:

> *"75(2) The repeal of the Arbitration Act shall not affect any arbitral proceedings commenced before the coming into force of this Act."*

The arbitration claim was lodged with the arbitrators on or about 01/03/99, followed by the Respondent's reply on 20/04/99. The Act 7/2000, on the other hand, did not come into force until 19/05/2000. In these circumstances,

counsel for both parties agreed, and the arbitrators held - quite rightly – that the applicable arbitration law to the dispute at hand was Cap. 55. I completely agree with this position. In this, Court is fortified by the well-known principle enshrined in the Interpretation Decree (section 13(2)) to the effect that the repeal of an existing Act does not affect any right or privilege acquired or accrued under the repealed Act. Therefore, the instant application is governed by the provisions of Cap. 55 – as indeed both counsel have expressly and mutually admitted in their written submissions in this application.

The grounds for the instant application (to remit the arbitration award for reconsideration of the arbitrators) are three. **First,** it is contended that there is an error of law apparent on the face of the award – namely, that even though the arbitrators rightly held the parties' sub-lease agreement to be invalid *ab initio,* yet they still ordered a refund of the rents and other monies already paid under that illegal transaction. Learned counsel for the Applicant contended that the order for such a refund contravenes the principle that no money paid under an illegal agreement can be recovered – see **Mistri Singh v. Kulubya [1963] EA 408.** Accordingly, counsel submitted that this Court has power to remit the arbitrators' award (in the instant case) as it is based on a wrong understanding or interpretation of the law - see **Moledina v. Hoima Ginners [1967] EA 645.**

Second, counsel submitted that the award is uncertain, in as much as items 5, 6 and 7 of that award orders a refund of "rents and other monies", but without ascertaining the amounts thereof. Similarly, item 3 of the award ordered that the claimant (GAPCO) is the owner of the movable items on the disputed land, but without ascertaining the particular items referred to. In these uncertain circumstances, movable properties owned by the Applicant

and situate on the disputed land, are at risk of being mistaken for GAPCO's property. The intention of the award was to allow GAPCO to carry away only those properties that belong to GAPCO.

Thirdly, the Applicant contends that the arbitrators exceeded their authority, by including matters in the award which were outside their terms of reference (i.e. enforcement of the sublease agreement).

In his response to the above contentions, learned counsel for the Defendant/Cross Objector (GAPCO), averred as follows: As regards the first ground, the arbitrators were justified to order a refund of the monies paid under the illegal agreement because the Plaintiff/Objector (SEKITOLEKO) had got unjust enrichment since the parties were not in *pari delicto* in the transaction – see **Kariri Cotton Co. Ltd v. Ranchoddas Dewani [1967] EA 188;** also **Shelley v. Paddock [1980] Vol. 1 QC 348.** For the second ground, learned counsel avers that there was no error apparent on the face of the award – and none has been disclosed either in the summons or in the supporting affidavit. As regards the movable items, counsel contended that the relevant items were neither uncertain, nor did the arbitrators exceed their authority in including these items in their award.
I will now deal with the above issues in the order in which they were raised:

Issue No. 1 – error on the face of the award

Plaintiff's contention here was that once the arbitrators held (as they rightly did) that the sublease between the parties was illegal *ab initio*, they should not have ordered refund of monies hitherto paid as rent, etc under that illegal agreement; as to do so contravenes the principle in the **Mistri v. Kulubya** case *(supra)*, to the effect that money paid under an illegal agreement cannot

be recovered. On this issue, Court notes that Plaintiff, who was the registered proprietor of the suit land, clearly had some responsibility in executing the obligatory statutory consent for the transfer of the land to a non-African (Defendant). He needed to fill in and complete the required form. He does not appear to have completed that process. Somehow, the documentation process for the transfer came to a stop. Even more importantly, unbeknown to the Defendant, Plaintiff had, in any case, already encumbered the land with a prior lease of 99 years. It is quite evident that that encumberence would have adversely affected execution of any transfer to the non-African Defendant, even if one had been attempted. In my view, the Plaintiff in this transaction tried to have the best of all possible worlds: a 99-year lease, a transfer to a non-African, and failure to process the consent forms – all at the same time. It would be patently unconscionable to allow him to get away with all this. He must not be allowed to keep any ill-gotten gains from these transactions. Accordingly, I find nothing wrong with the Arbitrators' order for Plaintiff to refund to the Defendant the moneys paid under this nefarious arrangement. The Arbitrators' order is fully supported by the doctrine of unjust enrichment, on the one hand; and, on the other, by the principle that the two parties to this transaction were not in *pari delicto*. Clearly, in the instant case, Plaintiff did carry the larger burden of the guilt surrounding the illegal transaction. In view of this, I find no error of law at all on the face of the Arbitrators' award.

Issue No. 2 – Uncertain Award

Plaintiff argued that the arbitration award was uncertain. In particular, the order to refund rent and other monies did not ascertain the exact amounts thereof. Similarly, the order concerning ownership of the movable items situate on the suit property, did not ascertain the particular items, and failed

to differentiate those items that belong to Plaintiff from those that belong to Defendant. As regards ownership of the items of property, I find no uncertainty at all in the award. However, as regards the amounts to be refunded, the award is not sufficiently specific.

The order for the refund is couched in the following terms:

> " ... *whatever payments exchanged between the claimant and the respondent on the basis of the void sub-lease agreement must be refunded so that the parties revert to the original position that the parties were in before the void sub-lease."*
>
> *" The respondent must therefore refund the claimant the sum of shs.3,500,000/- paid to him by the claimant on/or about 30th January, 1999;"*
>
> *Likewise, any rent paid by the claimant to the respondent under the void sub-lease, is to be refunded by the respondent to the claimant."*
>
> *If the claimant has been paid or paid himself any money by or from the respondent on the basis of the void sub-lease agreement,... such amount, if any, is ordered to be refunded to the respondent."*

Save for the Shs.3.5m/-, which is specific, all the amounts referred to in the above-quoted arbitration order(s) are mere generalities, without any specificity whatsoever. Indeed, two of the references (i.e. rents and claimant's deductions) are no better than mere speculation. In their letter of 12/22/97, addressed to GAPCO's Legal Officer, Plaintiff's lawyers (M/S Nshimye & Co., Advocates) specified Plaintiff's claim as follows:

> " *Our client is claiming that since 31 July, 1997, when he terminated the lease agreement, you have been wrongly debiting his account with Shs.200,000/- as station rent monthly. He now claims a total refund of shs.1,000,000/- which you debited for August, September, October, November, and December 1997."*

The arbitration award makes no reference to any specific amount of or period for which the deductions were made. This silence can only lead to further disputation and litigation between the parties in a bid to determine the exact monthly deductions, and the total period over which the deductions were made. Similarly, the amount of rent and the period over which such rent was payable are indeterminate. By his affidavit of 10/05/01, Plaintiff depones that the sublease was executed on 30/06/91 for 20 years, but was terminated for non-payment of rent (see paragraphs 3 & 6). No indication is given of how much the rent was, whether it was paid on a monthly or yearly basis, nor indeed how much of that rent was paid and how much remains unpaid. GAPCO's statement of claim, on the other hand, categorically insists that the claimant paid rent regularly from 1991 to 28/8/97, when Plaintiff refused to accept GAPCO's cheque of Shs.1.115m/- for rent (see paragraphs 3(l), (n), (q) and 4 of the statement of claim). Indeed, by their letter of 29/8/97 to the Plaintiff, GAPCO contended that:

> *"(e) You were paid a premium sum for the lease and you have since then been receiving your annual rent as agreed from 1986 to date."*

It is very clear, therefore, that a real dispute existed between Plaintiff and Defendant regarding the exact amount of the annual rent agreed, the amount of rent actually paid, the amount still owing, and the total period for computing that rent. These are elements that the arbitration award did not resolve. To that extent, there remains uncertainty as to how much is to be refunded under the Arbitrators' order. That aspect of the award, therefore, leaves the possibility for further litigation between the parties. Accordingly, the award must be remitted for reconsideration by the arbitrators on the issue of the specific amounts of refunds to be made.

As regards the arbitration order to apportion ownership of the various properties on the suit land to the two parties, the position is vastly different from that pertaining to the refund of moneys. The award states (at p.132 of the Record) that:

> *" we... make an award to the effect that the respondent is the owner of the buildings and other permanent fixtures on the suit land. With regards to other movables that are not permanent fixtures we hold and award that the claimant is the owner of the same and is entitled to remove them from the land."*

Any doubts as to what was intended by the above apportionment is erased by recourse to pages 41, 43 and 61 of the Arbitration Record. At p.41, is a letter of 25/8/97 written by the Plaintiff himself, addressed to the Sales Manager of the Defendant (GAPCO), paragraph 4 of which states that:

> " *(4) The only items that belong to GAPCO <u>are movable items, which GAPCO is free to remove</u>."* [emphasis added]

In response to the above letter, GAPCO wrote only four days later (on 29/8/97, see p.43 of the Record) to say, inter alia, that:

> " *As regards the items which belong to GAPCO, the <u>Operators Agreement clearly states the properties that belong to us</u> and we do not need any further reminder."* [emphasis added]

From a reading of the above two quoted letters, it is evident that both parties knew and acknowledged which properties and which movable items belonged to whom. In particular, the list of GAPCO's items is said to be

"clearly stated" in the Operator's Agreement. Plaintiff did not challenge the existence of the Operator's Agreement, nor the list of properties contained therein. On the contrary, Plaintiff did expressly acknowledge (in his above quoted letter of 25/8/97), that movable items belong to GAPCO. That is exactly what the Arbitrators' award also states. Indeed, the award (at p.131) specifically lists the particular properties that belong to the Plaintiff, thus:

> " ... *what is on the land is an office where oil is sold, a store where there is a compressor and other accessories, a hoist i.e. lifter of vehicles, two toilets, 3 underground tanks, a service bay for lorries, four pumps and a tarmacked part of the compound.*"

With the above specificity of what properties belongs to the Plaintiff, there can be no mistaking what particular items belonged to the Defendant (GAPCO). I therefore find no uncertainty in the arbitration award concerning the apportionment and ownership of the various properties situate on the suit land.

Issue No. 3 – Ultra vires

The final issue for resolution by this Court concerns Plaintiff's contention that the Arbitrators exceeded their authority by including in their award, matters (apportionment of movable items) which were outside their terms of reference (i.e. validity of the sub-lease agreement). In this regard, it is important to recite what counsel for both parties submitted to the arbitrators as the dispute for determination. They submitted two issues, namely:

(a) whether the sub-lease agreement dated 30th January, 1991 was valid in law.

(b) If yes, whether there was effective re-entry by the respondent on the suit land to extinguish the legal interests of the claimant in the suit land.

In their consideration of the above issues, the arbitrators specifically emphasized that:

> *" The arbitrators will determine these two issues. Since, however, determination will of necessity result and lead to certain consequences, the arbitrators will also determine those consequential matters that will arise as a result of the resolution of the above two issues."* [emphasis added].

In matters of an arbitrator's authority, SIR UDO UDOMA CJ, stated in **NUCCTF v. Uganda Bookshop [1965] EA 533, at p.539** that:

> *" It is trite law that it is the duty of an arbitrator to decide neither more nor less than the dispute submitted to him and to comply strictly with his terms of reference."*

It is evident, then that a cardinal doctrine in arbitrations is that the arbitrator must not exceed his powers concerning determination of the dispute as formulated in his terms of reference. At the same time, however, the law recognizes that the arbitrator's award must be sufficiently comprehensive as to dispose of the dispute with finality. In other words, the award must not be indeterminate, or leave important matters of substance still unresolved between the parties – see **Ross v. Boards (1838) Ad. & EI. 290; 112ER847.** In that case, the arbitration reference concerned a determination of the sufficiency of the vendor's title to the disputed land. The arbitrators' award was to the effect that the purchaser should take the conveyance of the title

with all its defects and receive indemnity for such defects. That award was held to be invalid as not finally settling the dispute between the parties concerning the title to the land.

In practice, the doctrine requiring an arbitrator not to act *ultra vires*, must be balanced delicately with the competing principle requiring him to act with finality and not to leave unresolved any matters of substance. In the instant case, I am satisfied that the arbitrators were fully cognizant of their responsibility to act *intra vires* – that is why they spelt out clearly the two issues before them. At the same time, however, they were also fully aware of their other responsibility to give a comprehensive award, one that had finality and which would leave no substantive matters unresolved between the parties. That is why they added a specific qualification to the two central issues before them – to the effect that determination of the two issues "will of necessity result in, and lead to certain consequential matters." These consequential matters concern

(i) which of the two parties should have ownership of the fixtures to, and the movable items on, the land in dispute; and

(ii) what moneys, if any, should be refunded to the claimant under the invalid transaction.

In my view, these two consequential matters are truly integral to the underlying issues; and were therefore of the essence to the award. If left unresolved, they would have rendered the award indeterminate and without finality. It would not have been sufficient to pronounce the land transaction valid or invalid, without at the same time determining which one of the two parties should retain or return the moneys and property items flowing from that transaction. In the circumstances of this case, the arbitrators were fully justified to pronounce on these consequential matters – see SIR UDO UDOMA's remarks in **NUCCTC v. Uganda Bookshop** case (*supra*), at p.540, para C.

In light of all the above, Court finds no major fault with the arbitration award. In particular, Court finds no error of law apparent on the face of the award; finds no excess authority on the part of the arbitrators, and no uncertainty in the award – save for a need to assess and particularize the specific amounts of rent and other moneys that are to be refunded, as well as to reconcile that amount against the amount(s) deducted by Defendant. In determining the amount(s) of refund, the arbitrators are also to consider some suitable set-off on account of Defendants' 6-year occupation and use of Plaintiff's land. Accordingly, the award is hereby remitted to the arbitrators for reconsideration of the above elements.

The costs of this application are awarded to the Applicant/Plaintiff.

Ordered accordingly.

James Ogoola
JUDGE
18/02/02

DELIVERED IN OPEN COURT, BEFORE:
Nerima Esq – Counsel for the Applicant/Objector

Yassin Nyanzi – Counsel for the Respondent/Cross-Objector

Mr. J.M. Egetu – Court Clerk

James Ogoola
JUDGE
18/02/02