THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS CAUSE NO 11 OF 2012

IN THE MATTER OF A REFERENCE TO ARBITRATION AND STAY OF HIGH COURT CIVIL SUIT NO 73 OF 2012

AND

IN THE MATTER OF AN APPLICATION FOR AN INTERIM MEASURE OF PROTECTION

UNDER THE ARBITRATION AND CONCILIATION ACT

1. **INTERNATIONAL INVESTMENT HOUSE COMPANY LLC)**
2. **EMIRATES AFRICA LINK FOR STRATEGIC ALLIANCE LLC)..APPLICANTS**

VERSUS

1. **AMOS NZEYI)**
2. **HON. RUHAKANA RUGUNDA}**
3. **NATIONAL BANK OF COMMERCE (U) LTD)………………… RESPONDENTS**

BEFORE HON. JUSTICE CHRISTOPHER MADRAMA

RULING

The Applicants application was brought by a chamber summons under sections 5, and 6 of the Arbitration And Conciliation Act, rule 13 of the Arbitration Rules, section 98 of the Civil Procedure Act, article 126 (2) and 139 of the Constitution of the Republic of Uganda and section 33 of the Judicature Act. It is for orders that the court be pleased to issue an interim measure of protection by issuing a temporary injunction restraining the Respondents, their servants, agents or otherwise from enforcing, effecting or otherwise implementing the entire rights issue of 13th of January, 2012 in respect of the Applicant and the Applicant's shares totalling to 48.702519% and which affects the Applicants by the third Respondent specifically and that the same be suspended until the hearing and determination of an arbitration between the parties.

Secondly it is for orders that the court grants an interim measure of protection by issuing a temporary injunction restraining the Respondents, their servants, agents or otherwise from issuing, reissuing, allotting, transferring, selling, disposing or otherwise dealing with the shares

held by them and or acquired by the Applicant and or in dispute until the determination of the arbitration and for costs of the application to be provided for.

The grounds of the application are that the Applicants duly contracted for the purchase of 76% of the issued and paid up share capital of the third Respondent from the Respondents. The Applicant duly paid up a sum of **US$6,053,027.20** towards the acquisition of 76% of the issued and paid-up capital of the third Respondent. The Respondents purported to create a rights issue allocating to the Applicants only 25.40% which is less than the shareholding that the Applicants are entitled to as compared to the amounts paid to date. The rights issue will result in a dilution and loss of the Applicant's shareholding.

The Applicant filed civil suit number 73 of 2012 in the High Court claiming inter alia for specific performance for transfer of the shares acquired from the Respondents. The suit was stayed pending arbitration by order of the court on the 27th of March 2012. The Applicants plead that it is just and equitable for an injunction to issue to preserve the status quo pending resolution of the dispute. The Applicant will suffer irreparable loss if an injunction is not issued because the Respondents are seeking to enforce the rights issue and to dispose of, sell and transfer all or part of their shares to third parties.

The application is supported by the affidavit of Dr Alan Shonubi a senior partner with Messrs Shonubi Musoke and Company Advocates. The affidavit confirms the grounds in the chamber summons and additionally some facts. On the 1st of June 2008 the Applicants/plaintiffs executed an agreement in which the Applicants/plaintiffs acquired 76% of the issued and paid-up share capital in the third Respondent/defendant Company. The Applicant was supposed to provide management expertise, knowledge and human capital and board support to the third Respondent and be given access to assess the needs and requirements of the third defendant in its business activities. The parties prepared a strategic plan to implement the provision of, recruitment, evaluation, retention, governance and other business development ideas and goals for the purpose of uplifting the third defendant to a world-class financial institution and Islamic finance bank. The Respondents have not complied with the strategic plan made and agreed upon between the Applicants and the Respondents and the Respondents have been frustrated by the breach of contract and failure of the Respondents to fulfil the terms of the sale agreement and any subsequent collateral agreements relating to the sale and acquisition of 76% of the issued and paid-up capital of the third defendant. The Applicants paid to the Respondents including Hon. Amama Mbabazi a sum of **US$6,053,027.20** towards the acquisition of 76% of the issued and paid-up capital of the defendant. The amount represents a shareholding of 48.702519% of the issued and paid-up share capital of the third Respondent. The Applicants are still entitled to 27.29% of the issued and paid-up shares in the third defendant which they are able and willing to finalise payment for upon the Respondents/defendants performing their respective express and oral conditions precedent for the finalisation of the acquisition and purchase of 76% issued and paid-up capital of the third Respondent. Despite payments made by the Applicants, the defendants have not availed to the Applicants/plaintiffs share certificates representing the actual

shares purchased. The Respondents are purporting to reduce, dilute, lower the shareholding of the Applicant/plaintiffs and are seeking to allot the Applicants only 25.40% of the issued and paid-up shares of the third Respondent despite having received payment of US$6,053,027.20 which amount represents a paid-up shareholding of 48.702519% of the issued and paid-up share capital of the third Respondents shares. The third Respondent has held an extraordinary general meeting on 13 January 2012 pursuant to which a resolution to increase the share capital of the third defendant was purportedly passed. On instructions of the Applicants/plaintiffs Messrs Shonubi Musoke and Company Advocates tried to attend the said meeting to object to the agenda as not complying with the requisition made by the Applicants and were barred by security, the chairman and secretary and all officers of the third Respondent from attending.

The third defendant has since issued an invitation to the Applicants/plaintiffs in respect of the rights issue in respect of the increased shares and based on a computation that is erroneous, unknown and incorrect and not acceptable to the plaintiffs and which seeks to give the Applicants/plaintiffs 25.40% shares which are the wrong amount of shares. The rights issue invitation letter is in respect of shareholding that is still the subject of the dispute between the parties as previously pleaded in High Court civil suit number 73 of 2012 and is intended to be laid out in the statement of claim to the arbitration which has commenced with the preliminary requirements according to the rules. To issue or accept the same would prejudice the Applicants entitlements under the contract and in respect of the consideration paid for.

Consequently it is important for the court to issue an injunction as the rights issue provided a deadline of 29 February 2012 which was previously halted by way of an interim order issued by court on 29 February 2012 by consent of the parties. The plaintiffs will suffer grave injustice and loss if the rights issue proceeds according to the notice it had received on account of the fact that: the computation of any pro rata shares is not based on the correct shareholding held by the plaintiffs on account of their paid for shares a matter that is seemingly in dispute. The period of notice granted is inconsiderably short; it is contrary to sound business principles, company law and company charter that the date of acceptance of the rights issue and date of payment fall simultaneously on the same date; the rights issue presently made will result in the dilution of the plaintiff shareholding which is in breach of the contractual provisions between the parties and out rightly dispossesses the Applicant of shares due to them. It offends the principles of fairness and equity and good conscience. If the rights issue continues in respect of the shares that are due and owing to the Applicant there will be no shares left to satisfy the Applicants/plaintiffs entitlement pursuant to the contractual acquisition of 76% or 48.702519% of the issued and paid-up capital in the third Respondent. The Applicants sought the intervention of the Bank of Uganda which has been slow to act yet the Applicant's interests are threatened. If the rights issue proceeds, it would defeat the purpose of the claim in the arbitration and thereby render the efforts of the arbitrators/arbitration nugatory. An interim measure of protection by way of a temporary injunction will restrain breach of the Applicant’s rights to receive the shareholding contractually purchased and paid for. The Applicants further capitalised the bank with US$3 million and more.

The bank of Uganda has noted that the third Respondent is beset with problems including those related to governance, management and capitalisation and all of which are affecting the Applicant’s investment. On 27 March 2012 the court issued an order referring the dispute in High Court civil suit number 73 of 2012 to arbitration at the International Chamber of Commerce, and it is imperative that the court preserves the subject matter of the dispute in respect of the shares that the Applicant is entitled to. At all material times the Applicants wanted to establish their own International and Islamic Bank but were attracted by the Respondent to invest in the third Respondent instead. The Applicant has acquired a major stake in the third Respondent in order to make an entry into the local banking sector, to make a profit and dividend and significantly set a footprint in Uganda and if an interim measure by way of injunction is not granted, the Applicant will suffer irreparable injury that cannot be adequately atoned for in damages.

The affidavit in reply is sworn by **Matthew Rukikaire** the Board Chairman of the National Bank of Commerce (U) Ltd. He contends that it is not true that the Applicants/plaintiffs have 76% of the issued and paid-up capital of the third Respondent.

It was agreed that subject to the terms and conditions of the agreement each of the Vendor’s were to sell and deliver and the Purchaser was to purchase and acquire sale shares free from all claims and encumbrances with all attached or accrued rights as at the completion date of the purchase. It was a further agreement that in the event the buyer and the “Arranger” (the first Applicant) default on the performance of their obligations, conditions and duties agreed upon, the seller was entitled to treat the agreement as terminated. In case of termination of the parties were to revert to the position under existing agreements defined in an agreement dated 4th of March, 2011. That agreement was terminated by breach of clause 4 by the Applicants. The Applicant failed to live up to what they had promised because in the first instance it failed to raise and pay an investment of 50,000,000 U.S. $ into the third Respondent to capitalise it as fully as possible. The Applicants further failed to pay the purchase price for the shares agreed upon. Consequently a memorandum of understanding was signed by the parties on the 4th of June 2009 and under clause 6, the Applicant was obliged to inject capital of U.S. $3,000,000 into the third Respondent before the 31st of December, 2009 and this was done. The memorandum of understanding only altered the terms of the sale and purchase agreement in respect of payment terms while the other terms remained the same.

By a variation agreement executed on the 12th of March, 2010, because of the Applicants inability to come with payments as agreed, payment terms were again revised and in particular the capital injection obligations of the Applicant was reduced from $50,000,000 to $12,500,000. Despite the reduction the Applicant again failed to comply with the terms of payment as agreed and the agreement dated 4th of March, 2011 was made. It is that agreement which introduced the second Applicant who together with the first Applicant agreed to re-scheduled payment terms. The agreement was terminated under clause 3.3 due to the default of the Applicants to meet their

payment obligations. The Applicants failed to complete the investment they undertook and as a result failed to take charge of the third Respondent and were in breach of contract.

As far as the strategic plan referred to by Dr Alan Shonubi is concerned, it was never agreed to. It was never adopted by the third Respondent's board in any case it could only be implemented after the third Respondent is fully capitalised. Because the Applicants have failed to capitalise the third Respondent bank, the strategic plan referred to by the Applicants is empty talk. Matthew Rukikaire further avers that the assertion that the Applicants have acquired 48.702519% of the third Respondent's shareholding is false. It is only the Applicants who have not fulfilled their obligations while the Respondents have fulfilled their obligations. The first Applicant was required in accordance to a variation agreement between the parties entered into on the 12th day of March 2010 to pay for the shares as follows: **$2,679,286** within 14 days from 12 March 2010 and **$3,231,499** before 31 December 2010 in order to make of the purchase price of **$9,445,714** but in breach of contract, it failed to do so.

As far as the allegation that Messrs Shonubi Musoke and company advocates were not allowed to participate in a meeting is concerned, article 99 (A) of the third Respondents articles of Association on alternate directors authorises a director to appoint any person approved by the board as his alternate to act in his place at meetings of the board at which he or she is unable to be present. Additionally the Financial Institutions Act 2004 requires any director of a financial institution to be approved by the Central Bank and Messrs Shonubi Musoke and company advocates were never approved by the board of directors of the third Respondent or the Central Bank.

The intervention of the Bank of Uganda was not for the reasons mentioned in the affidavit of Dr Alan Shonubi. By a letter dated 9th of July 2011 the first Respondent forwarded to the Applicants a Bank of Uganda approval of sale of 49% of the shares to the second Applicant. By letter dated 25th of July 2011 the first Applicant declared that the sum of $3 million it paid as capital be capitalised and allotted to all shareholders pro rata. A meeting was then held at which it was noted that the sellers and the company have completed their respective actions required of them under the agreement but the Arranger and the buyer have not completed the actions required of them under the agreement and had requested for extension of time within which the seller and the company have agreed to give certain conditions contained in an agreement dated 27th of July 2011. The Applicants failed to pay up what was agreed by letter dated 29th of November 2011 the Governor of Bank of Uganda wrote to the Respondent about complaints by the first Applicant emphasising the capitalisation of the third Respondent. Because the Applicants were no longer able to inject any capital in the third Respondent, the deponent wrote to the Governor giving the reasons for the holding of an extraordinary general meeting which came up with the rights issue. Before the rights issue came up Amos Nzeyi and Ahmed Dagher met the Governor of the Bank of Uganda in which Ahmed promised the bank of Uganda Governor to capitalise the third Respondent bank to the tune of US$2,500,000 but the promise never materialised. The Bank of Uganda wrote to the deponent in a letter dated 14th of October 2011 noting that Mr

Ahmed Dagher had been represented as making further payments to bring his shareholding to 37%. The bank of Uganda advised that the share capital injection should be made immediately otherwise the third Respondent was advised to find alternative investors capable of bringing in enough capital to enable the bank comply with the minimum capital adequacy requirements and also provide much-needed funds to cushion the depositor's funds against future losses. In another letter dated 5th of October 2011 the Governor of bank of Uganda noted that the transaction between the Applicant and the Respondents had dragged on for over three years within which period the third Respondent had suffered greatly. He came to the conclusion that the third Respondent bank finds new investors who are financially strong enough to capitalise the bank adequately and provide professional management otherwise the bank of Uganda would be compelled to invoke it statutory powers to ensure that the third Respondent complies with the minimum capital requirements. By letter dated 15th of December 2011 the deponent informed the Governor of the actions the third Respondent bank was taking to comply. These included increasing share capital and sourcing a potential core investor, Commercial Bank of Africa. Consequently a meeting was called which passed an appropriate resolution increasing the third Respondents issued and paid-up share capital by Uganda shillings 5 billion made up of 500,000 ordinary shares each valued at Uganda shillings 10,000 by way of a rights issue according to the banks articles of Association, by 29 February 2012 and resolving that a new investor be sourced by the bank to enhance its capitalisation.

There is no basis for an injunction because the Applicants have no capacity to inject any capital into the Respondent and they were in breach of various agreements with the Respondents. No injustice would be suffered by the Applicants as claimed and it is to their shame that they made contracts which they were unable to perform. On the other hand it is the third Respondent who has everything to lose by the Applicants conduct and through their application to prevent the third Respondent's efforts to raise capital in accordance with the orders of the Bank of Uganda. Additionally in the plaint the Applicants aver that they would consider seeking a refund of the entire purchase price, capital paid and investment payments advanced together with interest thereon and it is not true that they would suffer irreparable loss. In any case they are in breach of the agreements.

Dr Alan Shonubi in the affidavit in rejoinder avers that the Applicants are not in breach of any terms of the agreements neither have they been terminated. On the other hand it is the Respondents who were in breach of the terms of the sale of shares agreement and have not performed several conditions precedent in that agreement. That there is a dispute as to the shares held by the Applicants and which they have paid valuable consideration for but they have neither been allotted shares nor had representative share transfer forms and certificates issued to them. The Applicants had paid a total of U.S. $6,053,027.20 representing 48.702519% and injected capital to the tune of U.S. $3,000,000 towards capitalisation plus further funding towards capital as indicated in the agreement annexed to the affidavit in support of the chamber summons. Concerns of the Applicants regarding the Respondents breach have been highlighted by the Bank

of Uganda in several legal and financial audits. He noted that owing to the sensitive nature of some of the audit reports, they would be provided with the leave of court in confidence. The Applicants have not demanded for a refund of the monies paid by them and seek to preserve their interest in the agreements, their investments and shares.

In yet a supplementary affidavit in reply filed on behalf of the Respondent Amos Nzeyi the first Respondent avers that he is a first Defendant in high court civil suit number 361 of 2010 involving Professor Dr G.W. Kanyeihamba and 321 others where he was sued with three others and the suit is still pending. On the 23rd of May, 2012 hon. Mr Justice Geoffrey Kiryabwire of the commercial court issued an order deciding that: "

(a) The National Bank of Commerce was thereby allowed to recapitalise in order to meet the Bank of Uganda statutory requirements by Friday 25th of May 2012. In this regard it was allowed to freely sell shares if need be;
(b) In accordance with the directions of Bank of Uganda which was brought to the courts attention that National Bank of Commerce appoints a new Board of Directors and senior management team immediately after re-capitalisation. If recapitalisation is successful by 25th of May 2012, then the court further ordered;
    a. A shareholder meeting is held on 1 June 2012 to appoint a new Board of Directors of National Bank of Commerce.
    b. The meeting is held at Kabale at a venue to be designated by Bank of Uganda.
    c. The meeting is held incorporating the order of the court by notice to the shareholders and radio and print media.
    d. All parties to the head suit shall desist from engaging with the media during the pendency of the main suit which shall be under the supervision of the trial Judge.
(c) The court accordingly declined to grant the prayers in miscellaneous application number 150 of 2012 and in its discretion substituted them with orders made therein.
(d) Each party was supposed to bear its own costs of miscellaneous application number 150 of 2012.
(e) The head suit was to come for further mention on 12 July 2012.

Amos Nzeyi avers that the capitalisation of the third Respondent was successfully carried out in accordance with the order of Justice Kiryabwire and over **Uganda shillings 7,000,000,000**/- was raised and shares allotted in respect thereof out of a general un allotted shares in the third Respondent bank. Although the Applicants were invited to take part in the said subscription, they declined to do so. They however participated in the extraordinary general meeting held on the 1st of June, 2012 in accordance with the order of Mr Justice Kiryabwire and the directors elected a board of directors to represent their interests. As a result of the recapitalisation and subscription the shareholding in the third Respondent bank changed.

Dr Alan Shonubi filed an additional affidavit in rejoinder to the supplementary affidavit in reply of Amos Nzeyi.

He avers that the Applicants are not parties in High Court civil suit number 361 of 2012. They were not parties to the decision of honourable Justice Kiryabwire delivered on 23 May 2012. The decision was based on the directions of the Bank of Uganda. An extraordinary general meeting was held in Kabale in accordance with the bank of Uganda directions and it followed the directions as to agenda and appointment of directors. None of the Applicants received any formal invitation to subscribe for any un – allotted or additional shares arising out of the alleged recapitalisation, other than those forming the subject matter of the suit and no other shares exist for that purpose. The alleged allotment of shares referred to in the supplementary affidavit filed on behalf of the Respondent is invalid, illegal, irregular, improper, non-existent, incorrect, ultra vires, misconceived, premature and highlights the discrepancies in the underlying dispute as to the exact shareholding in the third Respondent.

At the hearing the Respondents were represented by Dr Joseph Byamugisha and Didas Nkurunziza while the Applicant was represented by Noah Mwesigwa. The court heard oral arguments for and against the application.

Submissions of the Applicants

Learned counsel for the Applicant, Noah Mwesigwa submitted as follows:

Section 6 of the Arbitration and Conciliation Act allows an application of this nature to be made before commencement of the arbitration proceedings. The authority of **Adonic Steels Ltd –vs. – Horisa Manganese & Minerals (Indian SC 6569 of 2005)** provides that it is not incompatible with an arbitration agreement for a party to seek an interim measure in such circumstances where the arbitral tribunal has not yet been established. The assurance of interim measures by the court is the only way that assets can be saved for the future arbitration otherwise the claimant could end up with a worthless arbitral award. Furthermore, in the same case it was also pointed out that in such applications for interim measures of protection such as injunctions, although the Arbitration Act is separate from the normal basic rules of procedures, the principles governing grant of an interim injunction apply.

These principles were set out in the case of **Victor Construction Works Ltd vs. UNRA (2010)** where Lady Justice Obura held that, the Applicant must show a prima facie case with a probability of success, that it would otherwise suffer irreparable harm that cannot be atoned for by an award of damages and in case of doubt, decide the case on the balance of convenience.

As far as the prima facie case is concerned, the agreement between the parties defines what a dispute is and provides that if there is a dispute between the parties, it is referred to arbitration. Whether or not the dispute has merit, it raises a prima facie case and the standard applied in determining whether there is a prima facie case is; whether there is something that one party

avers and the other party disputes. In this case there is a dispute because one party claims breach of the agreement, and as indicated in the affidavit in support, the Applicant entered into an agreement for the purchase of shares (marked Annexure "A"), which was varied over time. Under recitals A and D of the agreement, the Applicant had to acquire 76% shares from the 1st and 2nd defendant and another person who is not a party. Clause 4.3.1 of the agreement indicates that a sum of USD 4.5m was paid, representing payment of 36.25% of the shares. Furthermore, the agreement was for 76% of the shares in the company, but Bank of Uganda allowed the Applicant to acquire 49% of the shares after the execution of the agreement, and this is reflected in paragraph 9 (a) of the affidavit in reply.

The Applicants, in a letter (marked Annex B to the application) demanded for share certificates for the shares that had been acquired but have not received the same from the Respondents. A sum of USD 6,530,027.20 was paid by the Applicant, representing a shareholding of 48.7% of the authorised issue and paid up share capital of the 3rd Respondent and the evidence of payments is Annex E to the affidavit in support. Paragraphs 4(a), 7, 9, 10 and 19(a) of the affidavit in reply admit the existence of the agreement and the payments. Clause 5.5 of the agreement shows that an additional USD 3m was paid to the 3rd Respondent and that an additional sum of money which was not quantified but recognised under Clause 5.5.2 was paid by the Applicants. The Applicants have never received a share certificate in respect of these shares. Furthermore, the Applicants acquired 48.7% shares but the Respondent is purporting to give them 25.4% of the shares, and therefore, by looking at the documents, a prima facie case is disclosed.

With regard to irreparable harm/ injury, the Applicants paid a sum of USD 6m and an additional amount of money for shares amounting to 48.7% but have not received them. In addition to this, despite having failed to give the Applicants their shares, the Respondents are trying to dispose of the shares to Commercial Bank of Africa, and are in talks to sell the shares as stated in paragraph 19 of the affidavit in reply, paragraph 3 of Annexure R9 and paragraph 2 of Annexure R13.

With regard to the rights issue in prayer (a) of the application, paragraph 3 of Annexure D to the affidavit in support shows that the shareholders of the 3rd Respondent bank were invited to participate in the rights issue, to subscribe for shares equivalent to their existing shareholding. The Applicant was invited to subscribe for 12,721 ordinary shares valued at 1.27 billion shillings, which translates into 25.4% of the shares. In effect, the Applicant was invited to subscribe for a diluted amount of shares less than the 48% shares that the Applicant is entitled to, thereby causing injury to the Applicant. Although the rights issue indicates that it was to take effect until 29th February 2012, Annexure A3 to the affidavit in rejoinder of Dr Shonubi refers to a notice of meeting in the newspaper and a ratification to extend the rights issue therefore, the rights issue is still on-going and the Respondents cannot argue that it no longer applies. An injunction in as far as the Applicant is being invited to subscribe for a shareholding less than the 48% that it is entitled to should issue.

There is no danger to the Respondent if the injunction is granted, because the bank has been recapitalised as required in the letter of Bank of Uganda (marked Annexure A to the affidavit of Dr Shonubi), but the Applicant stands to suffer irreparable harm if the injunction is not granted. Furthermore, the amount of shares captured by the Applicant's percentage is a figure that would not put the Bank in problems. The balance of convenience weighs heavily in the Applicant's favour because the Applicant paid substantial sums of money and the injunction will not affect the bank even if it has to raise more capital because; the shares referred to belong to individuals and not the company, the bank has other avenues for raising capital and has already complied with the order to recapitalise.

In the premises, the court should grant the orders sought in the application.

Submissions in reply by the Respondents Counsel

In reply, learned counsel for the Respondent Dr Byamugisha assisted by Counsel Didas Nkurunziza opposed the application and submitted as follows:

The affidavits sworn by Dr Shonubi who is counsel, which the Applicant relies on are hearsay, whereas, this being a substantive and not an interlocutory application, should be supported by acceptable, substantive and sufficient evidence.

With regard to the 49% shares referred to by counsel for the Applicant, paragraph 17 and Annexure R1 of the affidavit of Matthew Rukikaire show that it was agreed that the Applicant would purchase 76% shares of the 1st and 2nd Respondent and Hon. Amama Mbabazi who is not party to the suit. In paragraph 19 of the same affidavit, it is stated that by letter, a supplementary agreement was entered into to bring in the 3rd Applicant, and Bank of Uganda had to approve the purchase of shares. Annexure RA5 to the affidavit of Matthew Rukikaire provides that the letter of 29th July 2011 was after the 1st agreement had been executed, and was giving permission to the 2nd Applicant, but the principal purchase price of shares was for 76% and therefore, it is not correct to say that only 49% of the shares were supposed to be purchased by the Applicants. This is also proved by paragraph 8 of Dr Shonubi's affidavit which states that the Applicants have since paid to the Respondents and Hon. Mbabazi a sum of USD 6m dollars for acquisition of 76% of the issued and paid up shares of the 2nd defendant.

The order staying the suit pending arbitration was given on 27th March 2012 and in paragraph 15 of Dr Shonubi's affidavit, he stated that arbitration has commenced. Counsel for the Applicant submitted that arbitration has not commenced because of on-going negotiations and the true position is that arbitration has not commenced because if it had commenced, the Respondents would have received notifications from court, which are preliminary requirements to the arbitration as provided under **Article 4(1) of the Rules.**

The Applicants have not come to court with clean hands, because they are guilty of delay, they have disobeyed the court order to refer the matter to arbitration and are in breach of the contract for failure to refer the matter to arbitration. They are therefore not entitled to the equity of court. Furthermore, an injunction cannot be sustained because there is no arbitration and the Applicants have not shown any seriousness in referring the matter to arbitration.

The rights issue was overtaken by events and the affidavit sworn by Amos Nzeyi on 6th July 2012, refers to the court order of Hon. Justice Kiryabwire which ordered the shareholders capitalise the bank in accordance with the Bank of Uganda letter annexed to the affidavit of Dr Shonubi. Consequently, the bank was recapitalised as stated in Amos Nzeyi's affidavit, leading to an addition of 7 billion which had the effect of diluting the Applicant's shares. The rights issue had been intended to capitalise the bank due to the Bank of Uganda threats, but since the bank was capitalised under the court order, the rights issue was abandoned. The capitalisation order was not appealed and therefore, the contents of paragraph 7 of Dr Shonubi's affidavit, to the effect that the capitalisation was illegal are improper. According to Annexure B of Dr Shonubi's affidavit, Emirates did not allow the allotment and therefore, their shareholding has been reduced to 23% after the capitalisation order.

Even if the injunction against the 1stand 2nd Respondents not transfer 23.3% of the shares held by them was issued, they hold a lot more shares than that and therefore, the injunction would refer only to the shares which the Applicants paid for. This is however not the case because the affidavit of Matthew Rukikaire shows the shares that the Applicant is entitled to. The 76% shares which were to be purchased by the Applicant included shares held by the 1st, 2nd Respondents and Hon. Amama Mbabazi who is not a party to the suit, but the Applicant has not calculated the proportion of shares held by Hon. Amama or the 1st and 2nd Respondent**.** It is seen in Annexure R1 of Matthew Rukikaire' affidavit that the 1st Applicant represented itself as a core investor with sufficient funds to purchase the 1st, 2nd Respondent and Hon. Amama Mbabazi's shares amounting to 76% of the Company's shareholding, and was supposed to pay a sum of over USD 12m. The purchases should have been finalised by 31/12/2010 but due to the 1st Applicant's inability to pay, the Memorandum of Understanding was varied as seen in Annexure R2 and R3 of the same affidavit. Annexure A to affidavit in support of the application is a variation of the memorandum to include the 2nd Applicant and the application was made to purchase 49% of the shares because the 1st Applicant had to purchase the balance of the 76%. The Respondents tried to accommodate the Applicants as much as possible so that this agreement could be concluded but the Applicant failed due to lack of money.

The Respondents terminated the agreement marked **Annexure A** because of breach of the same, and therefore, the applicable agreement between the parties is that annexed to the affidavits of Matthew Rukikaire. Annexure A to the affidavit of Dr Shonubi of 9th July 2012 is a letter from Bank of Uganda stating that the bank was under recapitalised and there were threats of its closure. The Applicants undertook not only to buy shares but also to capitalise the bank. They

however failed to capitalise the bank and therefore, they are breach of the agreement to capitalise the bank. They have not proved in their affidavits that they have performed their part or are ready and willing to perform their part. The affidavit of Rukikaire in paragraph 25 shows the Applicant's breach. The authority of **Hanifa Bangirana Kawooya v AG & NCHE (Constitutional Court MA No.46 of 2010)** provides that an Applicant must come with clean hands [Page 5-6]. Also **Shaple & ORS v Times Newspapers ltd & ORS [1975] WLR 482 at 502.**

There is an alternative to what the Applicants have asked for, and money can atone for any damages, therefore, no irreparable loss has been proved.

The rules for temporally injunctions provide that the Applicant should provide security for performance of his obligation in case the Respondents wins, and counsel for the Applicants did not state that the Applicants have given any undertaking or willingness to deposit security as required in the case of **American Cyanamid [1975] All ER Page** 506 at 509**.**

The application should be dismissed with costs.

Applicant's Submissions in rejoinder

In rejoinder, counsel for the Applicant submitted that;

The affidavits of Dr Shonubi in paragraph 1 show the basis upon which he deposes the affidavits The Advocates Act allows an advocate to depose an affidavit as long as he is knowledgeable of the facts. Also the case **Kaingana –v- Dabo bou [1986] HCB 39** states this position of law.

Paragraph 17 of Rukikaire's affidavit, Annexure R1, and Annexure A to the affidavit in support show that there was a variation agreement which captures the previous agreements in recital A and therefore any previous agreement was overtaken by Annexure A, which is now the agreement in force. Furthermore, the agreement brings on board the 2nd Applicant. The agreement was for sale of 76% of shares and out of the USD 9m that was to be paid, the Applicants have paid USD 6.53 USD, representing 48.7% out of the 76% of the issued and paid up shares, and that is why the Applicant prayed for 48.7%. Furthermore, the provisions of the Financial Institutions Act and Bank of Uganda approval restrict the Applicant to a shareholding of not more than 49% shares.

There was mediation by Bank of Uganda, which has not been disputed by the Respondent and this is why there was delay by the Applicant in referring the matter to arbitration. The Applicant has not breached the agreement to refer the matter to arbitration because it has commenced arbitration under the ICC rules, but Article 30 of the Rules provides for payment of costs and there are other procedures under the Rules which must be complied with before notification of the arbitral proceedings can be served on the Respondent. In any event, S.6 of the Arbitration and Conciliation Act allows an application of this nature to be made before arbitration. There is

also no time limit to arbitration under the law and the court in giving its order to refer the matter to arbitration did not set a time frame. Furthermore, the agreement between the parties did not set a time frame for arbitration and therefore the Applicant can still refer the matter to arbitration.

With regard to the rights issue under paragraph 4 of the affidavit of Amos Nzeyi of 6th July, the order of Hon. Justice Kiryabwire does not affect private shares, held by the 1st or 2nd Respondent but it is useful in as far as regards the 3rd Respondent selling allotted shares held by the company to 3rd parties, and it does not affect the Applicant's 2nd prayer in this application. The rights issue has also not been over taken by events because there is a notice issued after the recapitalisation in respect of the rights issue and therefore, it is still on going.

With regard to the dilution of shares, the figures stated by counsel for the Respondent are entirely wrong because the purchase price for the shares was USD 9m and the Applicant paid USD 6m which amounts to 48.7% shares. In addition to this, the Applicants capitalised the bank with a sum of USD 3m, therefore, taking into account that amount, it cannot be said that the shares were diluted. Furthermore, in paragraph 7 of the affidavit in rejoinder, it is stated that the alleged allotment and dilution was invalid, irregular, illegal and improper because the 7m was never meant to be converted into equity but was purely for capitalisation of the bank as required by bank of Uganda and this adds to the dispute between the parties. Furthermore, there was never a meeting held to allot the 7 billion shares, and the Applicants did not participate in the process.

The Applicant has complied with the terms of the agreement and paragraph 4 of the affidavit of Dr Shonubi of 9th July and Annexure B of the affidavit in support, reflect that it is the Respondent with a problem because from one of the letters written by Bank of Uganda, it is stated that the Respondent has ownership and management wrangles, and therefore, it is the Respondents who breached the terms of the agreement by failing to provide what they were supposed to. It is the Respondents who did not have clean hands in this entire transaction from commencement to date. Furthermore, the Bank of Uganda reports marked Annexure F of affidavit in support show the problem with the Respondent vis-à-vis the Applicant's investment. The Applicant did not fail to pay, but could not continue making payments when the condition precedents/terms of agreement had not been met, and there was substantial breach of the agreement by the Respondents.

The question of termination of the agreement is one on the merits of the suit. It is a matter of evidence and calls for interpretation of contract. The court is not required to do this at this stage, but it is a matter for the arbitral tribunal to decide upon.

With regard to counsel for the Respondent's submission for provision of security as a condition precedent to this application, several authorities restrict the court to providing the interim relief, but do not provide for the requirement of security.

Ruling:

I have duly considered the Applicants pleadings, the Respondents pleadings, the affidavit evidence filed in support and opposition and the oral submissions of learned counsels. I have additionally considered the authorities submitted in support of the arguments.

This application is primarily made under sections 5 and 6 of the Arbitration and Conciliation Act and rule 13 of the Arbitration Rules. The specific remedy that the Applicant seeks is provided for under section 6 of the Arbitration and Conciliation Act cap 4 laws of Uganda which provides as follows:

> "***Interim measures by the court.***
>
> ***(1) A party to an arbitration agreement may apply to the court, before or during arbitral proceedings, for an interim measure of protection, and the court may grant that measure.***
>
> ***(2) Where a party applies to the court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application."***

The provision under section 6 (1) quoted above allows a party to apply for an interim measure of protection before or during arbitration proceedings. It further gives the court discretionary power whether to grant that measure or not. Both parties relied on authorities giving the principles which guide courts in the exercise of discretionary powers to grant temporary injunctions. Section 6 subsection 1 of the Arbitration and Conciliation Act uses the phrase "interim measure of protection". The phrase "interim measure of protection" is wider than the word "injunction". This is because the term "interim measure of protection" is also qualified by section 6 subsection 2 of the Arbitration and Conciliation Act envisages an application for an injunction or other interim orders/measures of protection other than injunctions sought by any of the parties to an arbitration clause and which may be granted by the court.

Interim measures of protection may include remedies such as provision of security for costs. An interim measure of protection includes an application for an interim injunction. The Applicants seek a temporary injunction restraining the Respondents, their servants, agents or otherwise from enforcing, effecting or otherwise implementing the entire rights issue of 13 January 2012 in respect of the Applicant and Applicants shares totalling to 48.702519% and which affects the Applicants by the third Respondent specifically and the same be suspended until the hearing and determination of the arbitration. The application for a temporary injunction is against the third Respondent with regard to the entire rights issue of 13th of January 2012.

The Applicants allege that the shares they hold are likely to be diluted. The second interim measure of protection by way of a temporary injunction is against the Respondents to restrain them from issuing, re-issuing, allotting, transferring, selling, disposing or otherwise dealing with

shares allotted to them or acquired by the Applicant and or in dispute until the determination of the arbitration.

The genesis of this application is that the Applicants filed High Court civil suit number 73 of 2012 which suit was stayed pending arbitration proceedings to be commenced under clause 18.2 of the first agreement between the parties dated 1st of June 2008. That agreement was between Amos Nzeyi, Hon. Amama Mbabazi referred to in the agreement as "the Vendors" on the one part and International Investment House Company LLC on the other part referred to in the agreement as "the Purchaser" and National Bank of Commerce Uganda Limited empowered by a resolution of its directors and referred to as the "bank" being a third party. The citations show that the bank is a public limited liability company incorporated in the Republic of Uganda with an authorised share capital of **5 billion Uganda shillings** divided into **160,000 Class A. ordinary shares** of **10,000 shillings each, Class B ordinary shares** of **Uganda shillings 10,000** each. The paid-up share capital of the third-party was **Uganda shillings 4,631,030,000/=** divided into **157,119 Class A ordinary shares** and **305,984 Class B ordinary shares**.

The citations in the agreement show that the Vendors were jointly the registered legal owners of 86.32% of the issued and paid-up share capital of the bank/third-party. The Vendors were willing to sell to the Purchaser and the Purchaser was willing to buy from the Vendors 76% of the issued and paid-up share capital of the bank owned by the Vendors. The bank only agreed to join the agreement for the purpose of giving it full and effective force and for doing such acts, matters and things as are required of it by the agreement. Subject to the terms and stipulations in the agreement the Vendors were supposed to sell and deliver to the Purchaser sold shares free from all claims or encumbrances and with all attached or accrued rights as at the completion date of the purchase price specified in clause 3 of the agreement.

The Purchaser was supposed to pay to the Vendors a deposit of **US$870,000** by bank transfer initiated by the Purchaser. One half of the deposit had been paid and the other half was to be paid promptly after the signing of the agreement secondly the Purchaser was supposed to pay to the Vendors on the completion date any remaining purchase price of the sale of shares by bank transfer to the bank account of the Vendor's before the end of June 2008. The Purchaser was supposed to complete payment of the remaining purchase price in the sum of **US$8,575,714** before the end of June 2008. The total purchase price under the agreement is therefore **US$ 9,445,714.** The date of transfer of the payment by the Purchaser would constitute the completion date. The Vendors was supposed to deliver to J.B. Byamugisha advocates duly completed transfer forms of the sale of shares in favour of the Purchaser duly executed by the Vendor's accompanied by the respective share certificates acceptable to J.B. Byamugisha advocates who would then proceed to register the transfers after the completion date. Thereafter the Vendors were supposed to inform the next general meeting about the sale and purchase of shares the subject matter of the agreement.

The terms of the agreement of 1 June 2008 were not fulfilled. In a memorandum of understanding revising the terms of sale and purchase of the shares in National Bank of Commerce (U) limited dated 27th of June, 2009 Amos Nzeyi and Hon. Amama Mbabazi represented by Amos Nzeyi authorized by a Power of Attorney. In the variation of the agreement of the 1st of June, 2008 it is noted that the remaining amount of the purchase price was due on the completion date envisaged before the end of June 2008 and subject to conditions precedent. The sum of **U.S. $ 2,935,000** had been paid by the Purchaser while the remaining amount was pending. The payment was re scheduled by the Purchaser paying the **U.S. $ 600,000** upon the signing of the memorandum of understanding and a balance of the purchase price to be paid before the 30th of June, 2010. For the amount paid a share certificate was to be issued prior to the envisaged annual general meeting and on completion of paragraph 6 representing 24% of the banks share capital. In the variation of the agreement it was agreed that the annual general meeting of the bank would be postponed from the 26th of May 2009 to 13 August 2009. This was to allow the Purchaser to make the relevant payments. The Purchasers agreed to inject **US$3 million** as capital into the bank out of which **US$500,000** would be paid in the first week of July and **US$500,000** in the first week of August and the balance of **US$2 million** would be paid before 31 December 2009. This payment was part of the commitment laid out in the previous sale and purchase agreement in paragraph 6.1.2. The variation agreement was signed by Ahmed D. Al Marar chairman of the Purchaser. Both parties agreed to employ Mr Mohammed Wahra as the new Chief Executive Officer of the bank as soon as possible. In another variation agreement dated 12th of March 2010 between National Bank of Commerce (U) Limited and Amos Nzeyi and Hon. Amama Mbabazi and International Investments House Company LLC the parties note that whereas the share purchase agreement dated 1st of June 2008 was modified by a memorandum of understanding 27th of June 2009 the Vendors were informed by International Investment House Company LLC that they may not be in a position to fully honour their commitments in accordance with the agreements as modified and the local shareholders/Vendors accepted that position, it was agreed that the Purchaser shall purchase 76% of the shares of National Bank of Commerce and pay the balance of the purchase price as follows: **US$2,679,286** within a period of 14 days from the execution of the agreement and **US$3,231,499** before 31 December 2010. This would bring the total amount paid as the purchase price to **US$9,450,714**. The obligation of the Purchaser to inject **US$50 million** into the bank as capital was reduced to **US$12,500,000** out of which it was acknowledged that the Purchaser had paid **US$2 million** leaving a balance of **US$9,500,000** which was to be paid as follows: a sum of **US$7 million** was to be paid before the 31st of May 2010. Thereafter **US$2,500,000** was to be paid before 31 December 2011. It was further agreed that upon the payment of **US$2,679,286** for the shares and the injection of a further **US$7 million** into the bank by the Purchaser the local shareholders/Vendors shall issue the Purchaser with share certificates amounting to 76% of the shares of the bank/third Respondent. If the Purchaser had not completed full payment for all the shares, the local shareholders/Vendors shall place a caveat with the bank forbidding the transfer of or dealing with **26%** of the said shares being the percentage not paid for by 31st of May 2010 by the Purchaser. The **26%** shares shall automatically revert to their local shareholders/Vendors

if the Purchaser shall not pay for them on or before 31 December 2010. It was further provided that if the Purchaser did not fulfil any of the obligations specifically contained in the variation agreement to be observed and performed by it, the variation agreement shall become null and void upon any such failure and the parties shall be bound and governed fully as provided for in the agreement of 1st of June 2008 and the subsequent memorandum of understanding varying the same.

On 4 March 2011 the Vendors and International Investment House referred to as the "Arranger" and Emirates Africa Link for Strategic Alliance referred to as the "Buyer" and National Bank of Commerce (U) Ltd executed yet another comprehensive agreement. In the citations it is noted that the "Arranger" was desirous of assigning, transferring and or varying all its rights and interests in the existing agreements to the Buyer in the terms of the agreement. It also showed that the seller's and the company were in agreement with the desire of the "Arranger". Consequently the parties agreed to vary the terms and conditions of the existing agreements which included the agreement of 1 June 2008 as amended by the memorandum of understanding dated 27th of June 2009 and a variation agreement dated 4th of March 2011. Under the agreement International Investment House LLC assigned to the Buyer and the buyer assumed all the entitlements, interest and rights accruing and due to the Arranger in respect of the rights, duties and obligations under the existing agreements and as varied. The parties agreed that the agreement of 4th March 2011 superseded any previous agreement between the parties in the case of any conflict between the provisions of the agreement of 4th of March 2011 and the existing agreements referred to in the agreement. The parties however also provided that in the event the Buyer and the Arranger were to default in the performance of the obligations, conditions and duties stipulated under clause 4 of the agreement, the Seller's shall treat the agreement as terminated. In case of such termination the parties were to be bound by the previous existing agreements and the agreement of 4th March 2011 would stand terminated.

Under this new arrangement the "Buyer" was to complete the purchase of the sales shares free of any encumbrances. The purchase of the shares was **US$9,445,714**. It was paid as follows: **US$4,505,000** was paid to the Sellers prior to the execution of the agreement. It was written that this represented 36.25% of the sale shares. Thereafter **US$1,903,571.19** shall be paid to the Sellers on or before the expiry of 30 business days from the date of execution of the agreement provided certain preconditions and obligations specified in schedule 3 to the agreement were satisfied by the Sellers and the company. The balance of the purchase price representing 25% of the sale of shares shall be paid to the Sellers on or before 30 June 2011 or as otherwise expressly agreed upon between the parties. It was further agreed that upon the payment of the instalment the Purchaser would obtain a shareholding of 51% of the shares. Upon the instalment being effected the 51% shareholding was to be transferred to the buyer with the approval of Bank of Uganda. The buyer undertook to make a capital investment into the company of **US$12,500,000** and it was noted that the sum of **US$3 million** had already been paid as a deposit by the Arranger into the company at the time of the execution of the agreement. The Arranger had made

various payments to third parties on behalf of the company including rent, furniture purchase, consulting services and which were to be recognised as comprising part of the capital investment. In remaining amount of **US$9,500,000** was to be paid on or before the 30th day of June 2012. The capital investment was not supposed to dilute or reduce the value of any shareholding at the date of completion. The sellers and buyers agreed that until completion they would ensure that they work together including voting together with the buyers to ensure that a strategic plan of the company would be implemented as envisaged by the players. The Sellers were to ensure that the interests of the buyers were preserved and reflected in any resolutions of the board of directors. Completion meant the buyer delivering the instalments to the Sellers and the Sellers jointly and severally handing over duly executed transfer forms representing 51% of the sale shares.

It was specified in schedule 1 of the agreement that the shareholding before acquisition was that Amos Nzeyi held 30% shareholding. Dr Ruhakana Rugunda held 16.32% shares while honourable Amama Mbabazi held 40% shares. Thereafter the shareholding after acquisition was to be as follows: Emirates Africa Link for Strategic Alliance LLC would hold 36.25%. Abu Dhabi Investment Group Ltd would hold 4.985%. Aberdeen Capital Ltd would hold 4.977% and lastly Riyadh Investment House Ltd would hold 4.788%.

In a letter dated 9th of July 2011 the National Bank of Commerce under the hand of Amos Nzeyi wrote a letter addressed to Mr Ahmed Darwish Dagher Al Marar of International Investment House LLC of Abu Dhabi UAR indicating that the bank of Uganda approved 49% of the shares of National Bank of Commerce (U) Ltd to Emirates African Link for Strategic Alliance LLC and approval of Mr Ahmed Darwish Dagher Al Marar and Mr Hanz Herman Lotter as non-executive directors to the board of National Bank of Commerce (U) Ltd. There was a further conditional approval of the appointment of Mr Moawia Ahmed El Amin to the position of Chief Executive Officer of the National Bank of Commerce (U) Ltd.

Last but not least on the 27th day of July 2011 the parties executed yet another Variation and Accommodation Agreement. It was noted that the Sellers and the company had completed the respective actions required of them and that the agreement dated 4th of March 2011 and the Arranger and Buyer had not completed the actions required of them under the agreement and had requested for extension of time which the Sellers and the company had agreed to on certain conditions.

The Arranger and the Buyer were to pay the Sellers **US$1,703,517.19** and the clause 4.3.2 of the agreement for the acquisition of shares in the company in two instalments. The first instalment was **US$800,000** to be paid immediately upon the signing of the agreement. The balance of a sum of **US$903,517.19** was to be paid on or before 2 August 2011. Furthermore the Arranger and the Buyer were to pay the company a sum of **US$2,500,000** to capitalise the company in terms of clause 5.5 of the agreement dated 30th of September 2011. It was further agreed between the parties what was required to maintain the company's core capital above the Uganda

Central Banks regulatory limits. The balance of capital of **US$7 million** was to be paid on or before 30 June 2012. A sum of **US$3,037,143** outstanding for the purchase of the shares in the company since 30 June 2011 was to be paid by the Arranger or the Buyer to the Sellers in two equal instalments the first of which shall be paid on or before 12 September 2011. The second instalment was to be paid on or before 30 September 2011. In case of failure to pay as agreed, the Arranger shall retain only those shares already paid for at the time of such failure. The Arranger and the buyer declared and agreed that they would forfeit those shares not paid for and the same shall remain with the Sellers to sell to any third party to associate with the company for its full capitalisation and more capable management. In case the Arranger or the Buyer pays the sum of **US$1,703,517.19** they would appoint the Chief Executive officer of the company. It was further agreed that the number of non-executive directors would be reduced to 5 and the five were named in the agreement.

Whereas the remedy of a temporary injunction is an equitable remedy, it has a statutory foundation under section 6 of the Arbitration and Conciliation Act. The main objective of a temporary injunction is to maintain the status quo. The other objective which is corollary to the maintenance of the status quo is to ensure that the Applicants proceeding before an arbitral tribunal for whatever remedy it is seeking therein is not rendered nugatory. In this case the Applicants dispute was referred by the Court to arbitration under clause 18.2 of the agreement dated 1st of June 2008. The question of whether the main quest of the Applicant would be rendered nugatory part and parcel of dealing with the maintenance of the status quo. In the endeavour the court establishes whether the Applicants would be left without a remedy if the order for an interim measure of protection is not issued.

The principles for grant of a temporary injunction are summarized in the digest of the case of **Kiyimba Kaggwa vs. Katende [1985] HCB** at page 43. Firstly the Applicant must show a prima facie case with a probability of success. The second principle is that injunctions will normally not be granted unless the Applicant might otherwise suffer irreparable injury which may not be adequately compensated for by an award of damages. The third principle is only applied where the court is in doubt on the first two principles and decides the case on the balance of convenience. In the case of **American Cyanamid Co. Ltd v Ethicon [1975] 1** ALL E.R. 504 Lord Diplock held that the all the Plaintiff needs to show by his action is that there are serious questions to be tried and that the action is not frivolous or vexatious. It was sufficient for the Applicant to show that there is an arguable case which merits judicial consideration. This is because of the inconclusive and contested nature of affidavit evidence and the procedural requirement to wait for the final resolution of question of facts when the main suit is finally resolved. The rationale is that by the time of final outcome of the suit, evidence would have been tested by the rigorous process of cross-examination and vetting in the main trial.

As far as the first test is concerned, there is no doubt in my mind that the Applicant has raised some arguable points which amount to a valid dispute in terms of clause 18.2 which prescribes that in the dispute whatsoever and howsoever arising out of the agreement including the

termination thereof or the validity or not of its provisions shall be referred to arbitration in accordance with the rules of the International Chamber of Commerce. The vendors are entitled to appoint one arbitrator and the purchaser is acting jointly with a third arbitrator shall also appoint another arbitrator and the chairman being the third arbitrator shall be appointed by the arbitrators so appointed by the parties.

The basic dispute that arises in the controversy between the parties is the entitlement of the Applicants to shares so far purchased from the Respondents. The question is whether the Applicants are entitled to 48.702519% of the issued and paid-up share capital of the third Respondent. The assertion that the Applicants are entitled to 48.702519% is denied by the Respondents. Paragraph 3 of the affidavit of Mathew Rukikaire merely asserts that it is false to assert that the applicants acquired 76% of the issued and paid-up capital of the third respondent. Secondly in paragraph 15 of the affidavit he asserts that it is false to claim that the applicants have acquired 48.702519% of the issued and paid-up share capital of the third respondent. He however does not give the proportion of the issued and paid-up share capital acquired by the applicants so far. The proportion of shares which form the foundation of the Applicant's application is further contested on the ground that one of the Sellers of the shares is not a party to the application namely Hon. Amama Mbabazi. It is declared in the agreement of the parties signed in March 2011 that Amama Mbabazi was a holder of 40% shares prior to acquisition. How much of the 40% shares were acquired by the Applicants is not disclosed. In any case the Applicants seem to have no grievance against honourable Amama Mbabazi who is not a party to the application. The second point of contention is the contractual obligation of the Applicants to and whether it entitled them to purchase 76% of the shares in the third Respondent. This controversy is complicated by the Applicants own agreement that they would be willing to take what they have so far purchased.

I am persuaded by the principles deduced from the **America Cynamid** case (supra) that where a dispute has been referred to adjudication, the court should avoid making pronouncements which would affect the merits of the adjudication itself. This is further supported by the fact that the High Court enjoys appellate jurisdiction from an arbitral award under the Arbitration and Conciliation Act Cap 4 2000 revised edition of the laws of Uganda. The scope of the provision for interim measures pending arbitration was discussed in the case of **Adhunik Steel Ltd versus Orissa Manganese and Minerals** a decision of the Supreme Court of India in Civil Appeal Number 6569 of 2005. The court agreed that the jurisdiction of the court is to grant interim remedies only and handover powers to the arbitral tribunal who would exercise those powers until they complete their task whereupon the court would lend its coercive powers to the enforcement of the award. In my judgement the powers of the court will not only be exercised in the enforcement of the award but also in the exercise of any appellate or supervisory jurisdiction under the Arbitration and Conciliation Act. The court should therefore allow the full force of the contractual provision to resolve any dispute through arbitration to be effectual by refraining from finally determining matters in controversy before an arbitral tribunal which is yet to be appointed

so that the dispute is as far as possible determined through arbitration. Section 34 of the Arbitration and Conciliation Act (supra) allows the High Court to set aside an arbitral award on grounds stipulated in that section. The contract of the parties is governed by the laws of Uganda. I am also persuaded by the remarks of Lord Diplock in the American Cyanamid case (supra) that the final resolution of questions of fact should be left to the adjudicator.

In the circumstances of the Applicants, the final question of how much shareholding they have so far purchased in the third Respondent should in the main remain a triable issue. The question would further require assessment by an expert/s. It cannot be finally determined by the court at this stage. The Applicants assert that they have so far paid for over 48% of the issued and paid-up share capital. Even though the question cannot be finally determined by this honourable court, the court cannot escape the responsibility of establishing whether there is a Prima facie case or an arguable case on the basis of the shareholding which can be determined on the basis of the documentation submitted in evidence.

In the agreement dated 27th of June 2009 the parties clearly indicate that the Purchasers had an obligation to pay for about 26 per cent of the remaining shares out of the 76% agreed upon. They also agreed that if the 26% was not paid for within the period specified, it will revert to the local shareholders/Vendors. This amounts to a probable acknowledgement that the applicants percentage is close to 50% of the issued and paid-up share capital hitherto owned by the Vendors. Additionally there is acknowledgement in the various agreements that the Purchasers/Applicants had made certain payments towards the purchase of the shares. It is a deduction of fact from available evidence that the total purchase price agreed upon for 76% of the shares was **U.S. $9,445,714.** On the face of the record the Applicants have so far paid **U.S. $6,053,027.20** which represents about 48% of the sale price agreed for the purchase of 76% shares in the third Respondent and as represented by the Vendors. The amounts paid and acknowledged represents just slightly under 2/3 of the purchase price for the 76% issued and paid up share capital held by the Vendors. The estimation of about 48% is the Prima facie shareholding which forms the basis of the Applicant's application for an interim measure of protection. The subtle wording of the agreement dated 1st June 2008 paragraph C reads as follows:

> "The Vendors are willing to sell to the Purchaser and the Purchaser is willing to buy from The Vendor's 76% of the issued and paid-up share capital of the Bank owned by the vendors."

The representation in the agreement is that the 76% of the issued and paid-up share capital was the proportion of the issued and paid-up share capital in the Respondent Bank. It was also represented that the issued and paid-up share capital in the third respondent was 4,631,020,000/= out of an authorised share capital of Uganda shillings 5,000,000,000/=.

Turning to the prayers sought the first interim measure of protection by way of a temporary injunction is to prevent the Respondents or their servants, agents or representatives from enforcing, effecting or otherwise implementing the entire rights issue of 13th of January 2012. The question of the rights issue is central to the quest of the Applicants to refer the dispute to arbitration. This is because the foundation of the grievance is the quest to control the third Respondent Company. The Applicants presumably need to control the third Respondent Company through majority shareholding because they want to set up an Islamic Bank. They are unable to influence the policy in the third Respondent unless they own more than 50% of the issued and paid-up share capital in the third Respondent. The quest to set up an Islamic bank seems to be at the heart of the controversy because the Applicants assert that they wanted to set up their own bank but at the request of the Respondents they were persuaded that they could set up an Islamic bank through ownership of shares in the Respondent bank. It is also evident that at the heart of the controversy is the quest of the Applicants to have a management which would ensure the fulfilment of their desires to set up an Islamic bank for profit.

It was argued very strongly for the Respondents that the rights issue has been overtaken by events. This is based on the interpretation of the orders of honourable Justice Kiryabwire in miscellaneous application number 150 of 2012 between honourable **Justice Professor Kanyeihamba and others against the first Respondent and others HCMA NO 150 of 2012**. The Applicants are not parties to that application. Notwithstanding an order was issued allowing the third Respondent bank to recapitalise in order to meet the bank of Uganda statutory requirements by Friday 25th of May 2012. Secondly there was to be the appointment of a new board of directors and senior management team immediately after recapitalisation. It is alleged by the first Respondent that the recapitalisation of the third Respondent bank was successfully carried out in accordance with the orders of Hon. Justice Kiryabwire referred to above. It is further alleged that **Uganda shillings 7 billion** was raised and shares allotted in respect thereof out of the general un allotted shares/rights issue.

Was the rights issue which is the subject matter of the remedy sought in prayer No 1 in the chamber summons overtaken by events? A rights issue deals with the raising of capital. The only difference being that it is offered to existing shareholders in proportion to their current shareholding.

According to **Gower's Principles of Modern Company Law Fourth Edition Stevens and Sons 1979 at page 343 – 344:**

> "The company may make an offer, not with the public at large, but to the existing members who are given rights to acquire shares of the new issue in proportion to their existing holdings.

…The normal practice is to offer the shares upon rather more favourable terms than would be adopted on a direct issue to the public, so that the rights are almost certain to be taken up either by the members or by those to whom they sell."

The grievance of the Applicants is that they are being offered diluted shares in that what was being offered represents about 25% and not 48% which would be in proportion to what they had already paid for or their alleged current shareholding.

I cannot deal conclusively with the question of proportion of shares the applicants are entitled to which they have purchased. It is alleged that the rights issue took place and **Uganda shillings 7 billion** was raised and shares allotted in respect thereof. This was allegedly done pursuant to a court order. It was also done under the directive of the Bank of Uganda which is the regulatory authority. The role of the Bank of Uganda/Central Bank is in relation to the third Respondent company as a licensed bank. The role of the Bank of Uganda is not in dispute. By a letter dated 9th of July 2011 annexure R5 to the affidavit of Matthew Rukikaire the Central Bank approved sale of 49% shares of National Bank of Commerce to Emirates Africa Link for Strategic Alliance LLC. The affidavit of Dr Alan Shonubi dated 9th of July 2012 annexure "A" thereof is a letter from the Deputy Governor Bank of Uganda dated 11th of May 2012 and addressed to right honourable Amama Mbabazi, Hon. Rukahana Rugunda, Mr Amos Nzeyi and Emirates Africa Link for Strategic Alliance LLC on the subject of remedial actions to be implemented by National Bank of Commerce Ltd. The letter stipulates among other things that all shareholder disputes must be resolved and all the necessary legal procedures for transferring/or allotting shares to their respective owners in accordance with the law were to be complied with within 30 days. Secondly as soon as the shareholders disputes are resolved and the shareholding records are regularised, the shareholders should inject sufficient new capital through issuance of new paid-up shares, either to existing shareholders or any new shareholders as approved by the Bank of Uganda to raise core capital to the statutory minimum of **Uganda shillings 10,000,000,000**. Secondly within 10 working days from Monday 14th of May 2012 the shareholders were to raise 7 billion in the form of a subordinated loan to ensure that the banks deposit can be adequately protected in the interim period before the bank is fully recapitalised through the issuance of new paid-up shares. There is no evidence to show that a subordinated loan of about **Uganda shillings seven billion/=** was raised in accordance with the directives of the Bank of Uganda. There was some controversy about approval of 49% shares to the 2nd Applicant and not to both Applicants. This controversy is resolved by reference to the agreement referred to above which assigns the first Applicant's rights to the second Applicant.

The Bank of Uganda has regulatory powers over financial institutions such as the third Respondent. This is prescribed by the Bank of Uganda Act Cap 51 2000 revised edition of the laws of Uganda. Section 4 (2) (j) of the Bank of Uganda Act provides that the Central Bank shall supervise, regulate, control and discipline all financial institutions. Under section 38 the Bank of Uganda may impose a minimum cash reserve balance to be maintained in the form of deposits by a financial institution. Failure to maintain the minimum cash reserve balance

prescribed by the Bank of Uganda makes the financial institution liable to pay a fine under section 38. The third Respondent is a financial institution falling under the supervisory control of the Bank of Uganda.

The bank of Uganda has given time limits within which the third Respondent is to comply with its directives. There is an apparent potential conflict between the orders sought by the Applicants and the directives of the Bank of Uganda which are to be complied with within a shorter time frame than any anticipated arbitration. I have duly considered the fact that there are two lines of action and obligation required of the Applicants in the various agreements. The first line of action/obligation is the purchase of shares. The second contractual action/obligation is the capitalisation of the third Respondent bank. Initially in the agreement dated 1st of June, 2008, recapitalisation obligations of the Applicants were a post purchase position or contractual obligation. Recapitalisation was supposed to be embarked upon after completion of the purchase price representing 76% in the third Respondent and bought from the Vendors/Respondents. As it were, the Applicants have not purchased 76 per cent of the contractual shares. However, subsequent agreements came up with variation that the Applicants may take the shares they have so far purchased. The obligations of the Vendors were initially to hand over transfers after completion of the purchase price. These obligations were subsequently amended by the agreement that 26% shares not purchased revert back to the Respondents if the Purchasers fail to pay for them. In real terms, it is proper to assume that the Applicants would own at least 50 per cent shares in the third Respondent. In addition there is evidence that the Bank of Uganda has approved 49% shares ownership to the second Applicant. Reading the directives of the Bank of Uganda in context, the Applicants are entitled to at least 49% of the shareholding of the third Respondent bank. The rights issue should have obliged the applicants to pay at least 49% of the new allotment. This would be without prejudice to the obligation to pay for percentage of shares approved by the Bank of Uganda.

Inasmuch as the Bank of Uganda has issued directives to the third Respondent Company which directives affect the shareholding in terms of the need for recapitalisation, Bank of Uganda is not a party to this application and has not made any representations in court in its regulatory capacity. I agree with the Applicant's counsel that the directive of the Bank of Uganda on the capitalisation was to proceed after the question of ownership of shares had been solved. However the question of ownership could not be resolved and moreover the arbitration proceedings have not taken off. Negotiations between the parties broke down. Because the bank of Uganda is a regulatory authority, the court will place due weight to their directives notwithstanding the pendency of any arbitration proceedings. I have also duly considered the submission on behalf of the Respondents that the Applicants have not come to court with clean hands because of their failure to complete the purchase of 76% shares and also recapitalise the third Respondent. These submissions do not advance a position taking away the entitlement of the Applicants to the shares they have so far purchased. The dispute only relates to how much of the shareholding of the third Respondent the shares purchased by the Applicants represent at the time of filing of the

application. Alleged breach of shares is in relation to shares not purchased and recapitalisation. The purchased shares represent property rights and are to be reflected in the participation proportionately in the affairs of the third Respondent and specifically in the rights issue. Additionally the second applicant would be entitled purchase up to 49% approved by the Bank of Uganda in the context of the directives to raise capital even by way of a rights issue. Last but not least the order of the court in miscellaneous application number 150 of 2012 was made complementary to the directives of the Bank of Uganda.

I have carefully reviewed the evidence on record. The grievance of the Applicants additionally is that they cannot enforce their rights under the acquired shares. This is presumably based on the requirement of the sellers/Respondents to issue to the Purchasers duly transferred share certificates. Would this affect the right of the Purchasers to vote or participate in the meetings of the third Respondent bank? The various agreements also have permitted the Applicants officials to participate in the management of the third Respondent. The second controversy relates to the proportion of their shareholding in the overall shareholding of the company. This involves testing the representations of the Respondents as far the proportion of their shareholding is against the overall shareholding in the company. Additionally, there is an alleged recapitalisation by the raising of **Uganda shillings 7,000,000,000**/- through issuance of new shares. Lastly the Applicants alleged that their shares would be diluted. The rights issue would dilute the percentage of holding of the shareholders if it does not reflect the proper proportions so far purchased at the time of the rights issue and may also affect the contractual obligations of the parties. At this point in time the court cannot assume that the obligations of the parties have been avoided as that is a matter to be determined in the arbitration proceedings in terms of clause 18.2 of the agreement to submit disputes to arbitration. As to whether the arbitration proceedings have commenced as averred by Dr Alan Shonubi or whether there has been a delay in resolving the dispute through arbitration does not take away the fact that the dispute was referred to arbitration and there is no evidence that arbitration has failed. The parties agreed in court to an interim injunction pending negotiations which failed and I agree with the Applicants Counsel that any delays in arbitration proceeding can be attributed to negotiations. The ICC rules of arbitration article 4 require the Secretariat to notify the claimant and the respondent of the receipt of the request and the date of such receipt. It is the respondents submission that there has been no notice of commencement of arbitration proceedings by a request to submit to arbitration. It is true that there has been a delay in the commencement of arbitration proceedings. However, I cannot find that the applicants are not entitled to arbitration due to the delay since section 6 of the Arbitration and Conciliation Act permits the court to grant an interim measure of protection before commencement of arbitration proceedings. I cannot also find that the Applicants violated the court order to refer the dispute to arbitration.

However the delay to commence or proceed with arbitration has only compounded the complex shareholding problems and controversies in the third Respondent and the rights of the parties. This is because it is alleged that the rights issue was enforced and capital raised. There is a

further intention by the Respondents clearly expressed in the affidavit of Mathew Rukikaire to sell some shares to another bank.

Taking all the factors into consideration, namely the role of the bank of Uganda, the alleged recapitalisation of the third Respondent bank, the fact that other parties not before the court would be affected, the sentimental value of failure or potential failure to set up an Islamic Bank as weighed against other persons who may be affected by such an injunction, the court is in doubt and cannot decide whether the Applicants would suffer irreparable loss which cannot be adequately atoned for by way of an award of damages. The court will decide the application on the balance of convenience.

At this stage of the proceedings, the court cannot issue an injunction against the Respondents to stop the entire rights issue of 13 January 2012 because the status quo has been complicated by further events which took place after 13th of January 2012. This includes the order of the court referred to above in miscellaneous application number 150 of 2012 allowing the company to recapitalise to meet the bank of Uganda statutory requirements by 25th of May 2012. Secondly the bank of Uganda which is the regulatory authority has directed the third Respondent to recapitalise within a specified time or risk closure. The rights issue is an attempt by the third Respondent bank to raise capital to fulfil the statutory minimum requirements. Furthermore, it is alleged that the rights issue has already taken place and the Respondents were issued shares together with the other persons. It is also alleged that they recapitalisation was completed implying that other members have purchased the shares. In other words the other party's not before the court would be affected by any injunction with regard to any allotted but unpaid for shares. The status quo could have changed. Last but not least, in case the Applicants are aggrieved by the actions of the Respondents in the rights issue, a case which is directly the subject matter of controversy in the intended arbitration between the parties, the Applicants may seek other remedies such as a refund of the monies or any other remedy authorised by the law. For the court to issue an injunction to restrain the third Respondent bank from raising capital either through a rights issue to existing holders or to members of the public would interfere with the statutory role of the bank of Uganda already expressed in various directives to the parties.

The applicants indicate that they are willing to pay for the remaining 27.29% shares agreed in previous agreements. The rights issue would have been favourable to the Applicants if they had paid or are willing to pay the balance on the allotted shares and were given the right to pay for or refuse to take up the rights issue shares. In the circumstances prayer number one for a temporary injunction to restrain the Respondents, their servants, agents or otherwise from enforcing, effecting or otherwise implementing the entire rights issue of 30 January 2012 in respect of the Applicant and the Applicants shares totalling to 48.702519% and which affects the Applicants by the third Respondent specifically until the hearing and determination of the arbitration can only be granted conditionally had there been a Bank of Uganda approval of the unpaid balance of the represented 27.29% shareholding and upon undertaking to pay by the Applicants. In the absence of the above prayer No. 1 is declined without prejudice to the applicant rights to try and establish

its right to a correct proportion of the issued and paid up shares and the rights issue as well. The first order is declined with the question of costs to be determined after any further proceedings if pursued before the arbitrators and by the arbitrators.

As far as the second prayer is concerned, the Applicants seek for an order restraining the Respondents from issuing, allotting, transferring, selling, disposing or otherwise dealing with the shares held by them and already acquired by the Applicant or in dispute until the determination of the arbitration.

Without much ado, the Applicants are entitled to any shares which they have lawfully purchased. There is no controversy that the Applicants purchased some shares. The controversy is in the exact proportion of shares so far purchased. There are some difficulties which are latent in this latter prayer. The Applicants allege that the rights issue has offered them diluted shares representing 25% of the issued and paid-up shareholding in the third Respondent bank. In as much as the exact proportion of shares remains to be determined, I have already found that the Applicants would be entitled to up to 49% of shares approved by the bank of Uganda. What is critical in this percentage is that it is out of the already paid up share capital owned by the vendors/respondents. The actual shareholding already purchased is a question of mathematics and can be easily ascertained by establishing the percentage already purchased out of the purchase price for 76% shares as before the rights issue. However, it is not indicated from which Respondent and to what proportion the total numbers of shares purchased by the Applicants are obtained. Additionally one of the Vendors Hon. Amama Mbabazi is not a party to of this application. It is hard to assess in real terms the effect of the order sought. Notwithstanding, it is a proper assumption to make that the Respondents know the amount of shares purchased from each of them. The parties from both sides have not disclosed what proportion of shares each of the Respondents contributed to the shares so far purchased by the Applicants. Whatever that proportion, there would be no prejudice to the Respondents to be restrained from dealing in shares they have already sold. Additionally obligations to capitalise the third respondent is an obligation in the relation to the third respondent. Two a large extent this application deals with the purchase of shares from individual shareholders out of their paid-up shares. Under the obligation to purchase shares owned by individual shareholders, the obligation of the third respondent was to give consent to the sale of shares which it did by resolution. Secondly, the obligation of the third respondent company is to make the sale effectual by executing the necessary actions required of it. The sale of the shares remains a matter between individuals and the purchasers of the shares. On the Other hand the issue of recapitalisation should be dealt with on its own merits. The alleged breach of contract if any of the Applicants cannot in equity blot out their rights to the shares purchased or a correct proportion of the rights issue in accordance with their shareholding rights. The injunction cannot interfere with the rights of the respondents to pursue recapitalisation of the Bank.

In the premises a temporary injunction issues restraining the Respondents, their agents, and servants or otherwise from dealing in the shares so far purchased by the Applicants.

Notwithstanding the temporary injunction, the parties shall ascertain and agree on the number of shares so far purchased from the Vendor's prior to the rights issue complained about failure for which the assessment shall be referred to auditors agreed upon without prejudice to the reference of the dispute to arbitration. Any shares so ascertained shall entitle the Applicants to a transfer from the appropriate Vendors of any of the shares so affected. Issues arising out of any perceived dilution of shares and any entitlement to a claimed percentage of shareholding would be handled in the arbitration itself.

The Applicants are entitled to half the taxed costs of the application.

Ruling delivered in open court the 5th of October, 2012

Christopher Madrama

JUDGE

Ruling delivered in the presence of:

Apio Jamina holding brief for Noah Mwesigwa for the Applicants

Dr. Byamugisha for the respondent

Charles Okuni: Court Clerk

Christopher Madrama

JUDGE

5th October 2012