THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HIGH COURT MISCELLANEOUS APPLICATION NO 616 OF 2014

(ARISING FROM CIVIL SUIT NO 90 OF 2010)

SOBETRA (U) LTD}.....APPLICANT

VS

WEST NILE ELECTRIFICATION COMPANY LIMITED}.....RESPONDENT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

The Applicant Company filed this application under the provisions of article 126 (2) (e) of the 1995 Constitution of the Republic of Uganda, section 33 of the Judicature Act and section 98 of the Civil Procedure Act for setting aside the order vacating an order for stay of proceedings in HCCS 90 of 2010 pending arbitration and the resultant dismissal order of HCCS 90 of 2010 on 9 April 2014 and for reinstatement of the suit. The Applicant also prays for an order for costs of the application to be provided for.

At the hearing of the application the Applicant was represented by Kaggwa Michael holding brief for Kenneth Kajeke of Messieurs Kajeke, Maguru and Company Advocates while the Respondent was represented by Ebert Byenkya of Messieurs Byenkya Kihika and Company Advocates.

Before the application could be argued on the merits the Respondent's Counsel objected to the application and submitted that it was incompetent and ought to be dismissed. He submitted that article 126 of the Constitution is not an enabling law for filing an application. Secondly the Applicant moved under the inherent powers of the court to set aside an order vacating a previous order of stay of

proceedings and also to set aside the dismissal made under Order 17 rule 6 of the Civil Procedure Rules. Under Order 17 rule 6 of the CPR court is empowered to dismiss the suit for want of prosecution. He contended that the order was made because for four years no step had been taken with a view to proceeding with the suit. The only remedy prescribed by the rules is provided for under Order 17 rule 6 (2) of the Civil Procedure Rules which provides that where a suit has been dismissed under the rule, the Plaintiff may subject to the law of limitation bring a fresh suit. The remedy of the Applicant is to file a fresh suit and in the circumstances the court is functus officio.

Secondly the Respondents Counsel contended that the Applicant claims to have commenced arbitration proceedings in the earlier proceedings culminating in the stay of proceedings pending arbitration. Consequently the applicable law is the Arbitration and Conciliation Act cap 4 Laws of Uganda. The said Act provides that where there is an application the jurisdiction of the court is restricted under section 9 thereof which provides that:

> "Except as provided in this Act, no court shall intervene in matters governed by this Act."

One of the instances where a court may intervene is where it may order stay of proceedings in cases where the parties have an arbitration clause. The court is barred from reinstating a suit for purposes of staying it and sending it for arbitration. The parties should remain in the arbitration proceedings. Counsel relied on the case of **Nicholas Roussos versus Virani and another Civil Appeal Number 19 of 1993** decided by the Supreme Court of Uganda. In that case it was decided that judgments are set aside if they are entered under Order 9 of the Civil Procedure Rules. Secondly it is only a Defendant who can apply to set aside a judgment passed ex parte under that Order. In this case the remedy of the Applicant is to file a fresh suit under Order 17 rule 6 (2) of the Civil Procedure Rules.

In reply the Applicant's Counsel opposed the objection and submitted that the issue was whether the court has powers to entertain the application under any

law. Counsel submitted that the court has powers to entertain the application in the form in which it was brought. It is not true that the only remedy of the Applicant is to file a fresh suit which is subject to the law of limitation. He relied on the case of **Rawal vs. The Mombasa Hardware Ltd [1968] EA 392** in which Order 16 rule 6 of the Kenyan Civil Procedure Rules, which is in *pari materia* with the Ugandan Order 17 rule 6 of the Civil Procedure Rules, was considered by the Court of Appeal. It was decided by the Law JA that in the special circumstances of that case the remedy provided by Order 16 rule 6 of bringing a fresh suit was not intended to be exhaustive and that the inherent jurisdiction vested in the court by the Civil Procedure Act was not excluded. The Court of Appeal held that the court has jurisdiction to entertain an application to reinstate a suit that has been dismissed under Order 16 rule 6 (in pari materia with Order 17 rule 6 of the Ugandan Civil Procedure Rules).

As far as arbitration proceedings are concerned, the Applicant's Counsel submitted that the Arbitration and Conciliation Act does not stop the court from entertaining the application. The purpose of the application is to bring the case back to the status it was before 2014 when the suit had been stayed. The Applicant is not seeking to go against the Arbitration and Conciliation Act. Furthermore the Applicant's Counsel raised some issues on the merits such as whether the Plaintiff had been served on the day the case was dismissed. Secondly the application was not brought under Order 9 of the Civil Procedure Rules and the Applicant deliberately avoided proceeding under that Order. The Plaintiff is seeking to reinstate a suit which had been dismissed and the rules applicable are not under Order 9 of the Civil Procedure Rules. In the premises the Applicants Counsel prayed that the court overrules the Respondent's objection to the application.

In rejoinder the Respondent's Counsel submitted that he had not considered the case of **Rawal versus The Mombasa Hardware** Ltd (supra). However in the Ugandan jurisdiction it is a well laid out rule that one cannot invoke the inherent powers of court where there is a specific remedy provided for in the rules. Secondly inherent powers are invoked to avoid injustice or abuse of the process

of court. This suit should not been reinstated just for purposes of having it stayed again pending arbitration. The Applicant has no intention of trying the suit and the real purpose of the application is meant to deal with the costs which were ordered upon dismissal of this suit. The Applicant was trying to avoid costs ordered by the court and it has not made a case of prejudice or injustice therefore the court ought to dismiss the application with costs.

Ruling

I have duly considered the Applicant's application in light of the preliminary objection on the competence of the application or on the purpose.

As far as the provisions of Order 9 of the Civil Procedure Rules are concerned, both parties are in agreement that it is not applicable and there is no need to address the submissions on that point. The real bone of contention in this matter is whether Order 17 rule 6 of the Civil Procedure Rules is the only applicable rule where a suit has been dismissed under the provisions of Order 17 rule 6 (1) of the Civil Procedure Rules. The real issue is whether upon dismissal of the suit under the above rule, the court becomes *functus officio*. This is based on the premises that under Order 17 rule 6 (2) it is provided that a suit dismissed under Order 17 rule 6 (1) of the Civil Procedure Rules can be instituted afresh subject to the law of limitation.

There is no controversy about the fact that the Plaintiff's suit had been dismissed under Order 17 rule 6 (1) of the Civil Procedure Rules which empowers the court, if no application is made or step taken for a period of two years by either party with a view to proceeding with the suit, to order the suit to be dismissed. Consequently under Order 17 rule 6 (2) where a suit has been dismissed, the Plaintiff may subject to the law of limitation file a fresh suit. From this premise it is submitted on behalf of the Respondent that the court has exhausted its jurisdiction or had no further jurisdiction in the matter. It is upon the Applicant/Plaintiff subject to the law of limitation to file a fresh suit if he or she wishes to have the claim prosecuted.

In support of the Applicant's contention that the court has residual or inherent powers to reinstate this suit alternative to the Plaintiff having to file a fresh suit, I have considered the case of **Rawal versus The Mombasa Hardware Ltd [1968] EA 392** decided by the East African Court of Appeal sitting at Mombasa. In that case the Appellant sued the Respondent in 1962. No step was taken in the suit for over three years and the court on its own motion and without notice to the parties dismissed the suit under the Kenyan Order 16 rule 6 of the Civil Procedure (Revised) Rules 1948. The Appellant applied to have the order of dismissal set aside and the suit reinstated under the inherent powers of the court provided for by the equivalent of section 98 of the Civil Procedure Act (section 97 of the Kenyan Civil Procedure Act). The High Court dismissed the application on the ground that under section 97 of the Kenyan Civil Procedure Act, inherent jurisdiction had been excluded by Order 16 rule 6. The Appellant appealed to the East African Court of Appeal. Law JA held that the inherent jurisdiction of the High Court was not excluded in the special circumstances of the case. Furthermore the Defendant was not been deprived of any defence that he originally enjoyed or that he originally pleaded. It is being deprived of what may be called and after acquired defence which accrued to him solely through the action taken by the court of its own motion of which he was not even aware. The court allowed the appeal and remitted the application back for hearing on the merits.

To counter this argument the Respondent's Counsel submitted that in Uganda where a specific rule has been provided for, the inherent powers of the court cannot be invoked by an Applicant to move the court for a specified remedy under the general powers of the court.

The decision of the East African Court of Appeal has been further refined in the case of **Adonia v Mutekanga [1970] 1 EA 429** by the East African Court of Appeal sitting in Kampala where the case of **Rawal vs. The Mombasa Hardware Ltd** (supra) was put into context by Spry VP at page 432 when he held:

> "On the other hand, there is no rule of law, as Mr. Kazzora implied, that inherent powers cannot be invoked where another remedy is available. The position, as I understand it, is that the courts will not normally exercise

their inherent powers where a specific remedy is available and will rarely if ever do so where a specific remedy existed but, for some reason, such as limitation, is no longer available. The matter is, however, not one of jurisdiction. The *High Court is a court of unlimited jurisdiction, except so far as it is limited by statute, and the fact that a specific procedure is provided by rule cannot operate to restrict the court's jurisdiction*, Rawal v. Mombasa Hardware Ltd [1968] E.A. 392." (Emphasis added).

The decision in **Rawal v. Mombasa Hardware Ltd** (supra) has not to my knowledge been overturned and is still good law. In special or rare circumstances the High Court may invoke its inherent jurisdiction to set aside a dismissal ordered under Order 17 rule 6 (1) of the Civil Procedure Rules. Whatever the special circumstances for reinstatement of a suit are should be considered by the presiding judge. Consequently the question is whether in this case there are special circumstances that would warrant the reinstatement of this suit. The question is also a matter of law.

This suit is peculiar in that the Plaintiff's application in Miscellaneous Application Number 149 of 2010 being an application for a temporary injunction had had been dismissed. In the ruling dismissing the suit under order 17 rules 6, I observed that the last paragraph of the ruling on the temporary injunction application stayed the proceedings under the provisions of section 5 of the Arbitration and Conciliation Act, pending arbitration of the dispute as court was informed. I further noted in my ruling that the Plaintiff's Counsel had informed the presiding judge Honourable Lady Justice Stella Arach that the matter was pending arbitration. I observed that a suit should not be kept pending for a period of four years on the ground that it is before the arbitrator without concrete evidence and without any adherence to the timelines for arbitration. Under section 31 of the Arbitration and Conciliation Act arbitrators are required to make the award within two months after entering on the reference or after having been called on to act by notice in writing from a party to the submission. Because the court stayed proceedings it cannot be held that upon reference of the dispute for arbitration the suit abated.

Under section 25 of the Arbitration and Conciliation Act a person who commences arbitration proceedings is not prejudiced by the default of the Respondent if he/she or it refuses to appear in the proceedings because the arbitral tribunal has powers to proceed ex parte and make the award where the Respondent does not appear or dismiss the claim upon failure of the claimant to attend the proceedings where sufficient notice has been given.

In this application the Applicant is seeking to reinstate the suit when the dispute is alleged to be before arbitrators or pending arbitration or on the ground that the arbitral proceedings had been frustrated by the Respondent. Arbitral proceedings cannot be frustrated by a Respondent because the Plaintiff/Claimant in the arbitral proceedings can proceed ex parte upon giving sufficient notice under the Act on the Respondent. Perusal of the Arbitration and Conciliation Act makes it clear that once the matter has been referred under a contractual clause to submit to arbitration a dispute within the contemplation of the parties for arbitration, it can only result in an award either dismissing the claim or an award of some kind. In case there is failure by the parties to agree to or appoint an arbitrator, there are special provisions dealing with appointment of arbitrator's under section 11. An appointment may be made upon application to the appointing authority by the appointing authority. The appointing authority means an institution, body or person appointed by the Minister to perform the functions of appointing arbitrators and conciliators. There is therefore no room for any suit referred to arbitration to bounce back to court except in the manner provided for by the Arbitration and Conciliation Act. The intervention by the court comes under provisions for setting aside an award under section 34 of the Arbitration and Conciliation Act. Interim measures of protection, applications for recognition and enforcement of the award under section 35 and 36 of the Arbitration and Conciliation Act. Other applications deal with seeking the assistance of the court in taking evidence under section 27 of the Arbitration and Conciliation Act. Applications to the High Court are strictly made under The Arbitration Rules prescribed in the first schedule to the Act.

Finally I agree with the Respondent's Counsel that the Applicant's application to reinstate a suit which has been dismissed under the provisions of Order 17 rule 6 of the Civil Procedure Rules would serve no useful purpose since the extent of court intervention is limited by the provisions of section 9 of the Arbitration and Conciliation Act which provides that:

> "Except as provided in this Act, no court shall intervene in matters governed by this Act."

In other words I agree that the Applicant will suffer no prejudice since the Arbitration and Conciliation Act permits the Applicant to file relevant applications in the High Court in the manner provided for under the Arbitration and Conciliation Act where necessary arising from the arbitral proceedings. The jurisdiction of the court is restricted to matters prescribed under those applications prescribed by the Act. The matter is pending arbitration and I share my doubts about whether there are arbitration proceedings following the enabling provisions of the Arbitration and Conciliation Act which permits a claimant to proceed ex parte since May 2010. Where arbitral proceedings have been commenced, the Applicant does not lose the supervisory control of the High Court under the Act. Most importantly section 71 (2) of the Arbitration and Conciliation Act provides that:

> "Until the rules committee makes rules of court to replace them, the rules specified in the First Schedule to this Act shall apply to arbitration in Uganda."

The Applicant has conceded twice that the matter is pending arbitration. For the avoidance of doubt the Applicant avers in paragraphs 3 and 4 of the Notice of Motion as follows:

> "3. The Applicant commenced arbitration proceedings in May 2010 which is pending and the Respondent has to date not filed an answer thereto.

4. The Applicant has made several efforts to settle the matter through arbitration, mediation but the Respondent has frustrated it by refusing to agree to the proposed arbitrator (s) and mediator (s) since 2010."

If the Applicant wants a matter to be handled by the High Court, it can only proceed under the provisions of The Arbitration Rules in the First Schedule prescribed by section 71 and for any of the matters specified in the Arbitration and Conciliation Act. An application to reinstate the suit serves no useful purpose since the suit in the High Court which had previously been pending arbitration had the stay order vacated to prevent an abuse of the process of court where no proceedings were taking place as represented to Hon. Lady Justice Stella Arach. Subsequently upon lifting the stay order the suit has abated through the reference to arbitration and the dismissal order.

The only kind of suit that does not abate pending arbitration is one commenced under the provisions of Order 47 of the Civil Procedure Rules where parties agree before the court to have any matter pending in court referred for arbitration both under the provisions of Order 47 of the Civil Procedure Rules and section 27 of the Judicature Act. In such cases there is no prior agreement in terms of the Arbitration and Conciliation Act by the parties to submit the contemplated dispute to arbitration.

Section 5 of the Arbitration and Conciliation Act deals with applications for reference to arbitration whenever there is an arbitration clause providing for the submission of the dispute to arbitration and its provisions are mandatory. A matter referred for arbitration under section 5 of the Arbitration and Conciliation Act by the court can only come back through the filing of a fresh application enabled by the Arbitration and Conciliation Act and The Arbitration Rules.

In the premises the Applicant cannot be prejudiced by the dismissal of the suit since the matter was referred for arbitration. As for costs of that dismissal it is the Applicant who filed the suit in the High Court with full knowledge that there is an agreement between the parties to submit the dispute to arbitration. Secondly it is the applicant who sought the reference to arbitration. Because the provisions of

Section 5 of the Arbitration and Conciliation Act providing for reference to arbitration where there is an agreement to arbitrate is mandatory, costs occasioned by filing the suit in the High Court ought to be met by the Plaintiff. In the premises the application to reinstate the suit lacks merit on a point of law and according to the dictates of justice and the application is dismissed with no order as to costs.

Ruling delivered in open court on the 5th of September 2014

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Kaggwa Michael holding brief of Kenneth Kajeke Counsel for the Applicant

Ebert Byenkya Counsel for the Respondent

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

5/09/2014