

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT DIVISION)

HCT - 00 - CC - CS - 0131 - 2011

JINJA PRODUCE AND MILLERS ASSOCIATION LTD

AND FOUR OTHERS APPLICANT

VERSUS

UMEME (U) LIMITED RESPONDENT

BEFORE HONOURABLE MR. JUSTICE HENRY PETER ADONYO

RULING ON PRELIMINARY OBJECTION

BACKGROUND

The plaintiffs sued UMEME (U) ltd for damages for breach of contract, refund of security deposit illegally obtained from each of the plaintiffs, compensation for destroyed maize, lost of income for each plaintiff for five (5) months, when electricity was disconnected, compensation for rent for five (5) months and determination of a memorandum of understanding between the themselves and the defendant.

It is stated that the plaintiffs did enter into an agreement with the defendant for the supply of electricity to the plaintiffs grinding mills situated at Jinja Industrial Area. That the plaintiffs did utilize electricity supplied and duly paid all their electricity bills. That, however, sometime in September 2009, some employees of the defendant in their ordinary course of duty called the plaintiffs for a meeting where in the plaintiffs were directed to abide by some conditions. Details are contained in the Amended plaint. That following the meeting the defendant through irregular methods disconnected electricity to the plaintiffs in order to compel the plaintiffs to comply with new conditions introduced in the aforementioned meeting. That the plaintiffs were forced to form companies by the defendant with the attendant legal fees and new security deposits contrary to the individual agreements signed between the plaintiffs and the defendant. The plaintiffs were therefore aggrieved and hence this suit.

This matter was therefore set for hearing. When it was set for hearing counsel for the defendants raised preliminary objection thus.

PRELIMINARY OBJECTION

Mr. Noah Mwesigwa, counsel for the defendant, raised this preliminary objection. He pointed out that this preliminary objection

was arising from paragraph 6 of the Written Statement of Defence and that it is raised on a point of law on the competency of the suit which he submitted was improperly instituted, premature and bad in law.

Paragraph 5(v) ii of the amended plaint is stated to provide the basis of the determination of disputes arising between the parties as per memorandum of understanding. That paragraphs 6, 9, 11, 12, 13, 14, 15, 16 and 17 similarly provided for mechanism of settling issues arising in implementing disputes between the parties.

It was the submission of counsel for the defendant that the plaintiffs had signed Memoranda of Understandings (MOUs) with the defendant and that those MOUs provided for, first and foremost for arbitration under the Uganda Arbitration and Conciliation Act. That it was important that the suit be referred to arbitration in accordance with the contract freely acceded to by the parties who were bound as free agents to follow what they agreed under such contract.

Counsel further went on to state what the provision of the Arbitration and Conciliation Act provided and the steps to be taken when a dispute arose. That indeed there is a dispute between the parties as seen from the amended plaint and the written statement of defence and hence the provision of the law ought to be followed by the parties. This would then require that these proceedings be stayed till the parties had followed what they had freely agreed to in the case of a dispute arising from their contract.

To reinforce this position, the decision of this court in the case of DANIEL DELESTRI AND OTHERS V KIPS TELECOMS (U) LTD. HCCCS NO. 207 OF 2013 was brought in. That my learned brother Justice Christopher Madrama held that it was mandatory for the provisions of the Arbitration and Conciliation Act to be followed and that particularly section 5 of the said Act was couched in such wording that did not grant any discretionary powers as it used the word "shall"

That once it has been brought to the attention of court and the court was satisfied that there was an arbitration clause in an agreement, then it was the duty of court to refer such matter for arbitration and stay any proceedings before it.

It was the contention of the counsel for the defendant that this was the situation in the instant case since in all the MOUs signed by the plaintiffs and the defendant, there was an arbitration clause and these were part and parcel of the documents filed by the plaintiffs in their own trial bundle. Therefore, it was submitted that this being so, the instant suit be stayed and the dispute between the parties referred for arbitration which in any case was the parties first choice of forum for resolving any dispute between themselves when they entered into the mentioned MOUs.

In response to the preliminary Objection, Mr. Omongole counsel for the plaintiffs delved into the background of this matter. He gave the background of it by stating that it previously had been raised and refereed by the arbitrator to the then trial judge and the same was overruled. That even thereafter, proposals for settlement out of court were made to the defendant who never responded and in the end mediation failed.

That this matter was even handled by the Electricity Regulatory Authority (ERA) as a complaint but the defendant never positively responded as could be seen from various communications to that effect including a letter from ERA dated 21st January 2011 inviting the defendant for arbitration which the defendant did not object to but only offered a lengthy response in a letter dated 10th March 2011 a copy of which unfortunately was not given to the plaintiffs. That ERA continued to invite the defendant for arbitration but the defendant never appeared before it and even ignored the proceedings completely by stopping further communication leaving ERA with no alternative but to advise the plaintiffs to proceed with court action.

That due to the failure by the defendant to appear before ERA, the Chairperson of ERA, referred the matter to this Honourable Court for settlement. The contention of the plaintiff was that the defendant was merely interested in forum shopping but not in the solving of the dispute between it and the plaintiffs as evidenced by various documents attached to the amended plaint and to the trial bundles in this respect. It was the plaintiffs contention that they would be aggrieved if this Honourable Court were to refer again this matter for arbitration after a period of three years yet during the said time their businesses have suffered as a result of the defendant delaying the conclusion of this matter. The plaintiff conceded that the defendant's action of failing to participate in arbitration was covered by the law and even that the defendant did not object to ERA as the arbitrator. That, under section 11 of the Arbitration and Conciliation Act; the defendants; were stopped from denying any decision of the arbitrator. Further that section 25(c) of the said Act provided that a defaulting party must show cause why it did not do so. That it was for this reason that the defendant could not wake up after three

(3) years later to request again for the matter to be referred to arbitration yet they had been given the opportunity before but ignored.

Mention was had on Rule 6 of the International Arbitration Rules which provides for arbitral matters to proceed even if one party did not accede and that because the defendant did not raise anything, this matter was referred to this Honourable court for settlement. The case of UGANDA TELECOM V HITECH TELECOM was cited as an authority to this effect where the parties had entered into a contract and in the said contract included an arbitration clause and HITECH failed to submit to it and an arbitration order was made against it in its absence, HITECH rejected the decision but that the High Court of Australia rejected the argument of HITECH that it never participated in the arbitration process on the basis of the clear provision of the Rules. So that that being case, it was submitted that this situation was at fours with the instant matter as the instant defendant never attended the arbitration proceedings before ERA and the matter was resolved by referring it to this court for settlement.

However, counsel for the plaintiff while objecting to the PO submitted in the alternative that while the plaintiffs were not against the referral of the matter again for arbitration since several other avenues had been utilized to try to resolve this matter, he opined that that the PO was only brought to further delay the hearing of the suit matter. However he hinted that in the event this honourable Court was inclined to order for Arbitration, a time limit should be set so that this matter was sorted out as soon as possible.

In rejoinder, counsel for the defendant informed court that indeed the matter went for mediation but then it was discovered that there were certain legal issues which could not be resolved by a mediator such that all the parties agreed that the court handle those legal issues which when raised was for striking out the suit, the court declined to do so but ordered the plaintiffs to amend the plaint.

The plaintiff followed the guidance of the court and an amended plaint was filed in 2012.

RESOLUTION OF THE PRELIMINARY OBJECTION

I have had a look at pleadings and the trial bundle in this suit. I have found that there are MOUs entered into by the parties in this suit which require that the first point of settlement of any dispute arising between these very parties before me was arbitration. This situation has been brought to my attention then in compliance with **section 5 of Arbitration and Conciliation Act** which provides;

" A judge or magistrate before whom proceedings are being brought in a matter which is the subject of an arbitration agreement shall, if a party so applies after the filing of a statement of defence and both parties have been given a hearing , refer the matter back to arbitration unless he or she finds the arbitration agreement null and void, inoperative or incapable of being performed; or that there is not in fact a dispute between the parties with regard to the matters agreed to be referred to arbitration."

The pleadings in the instant matter including the trial bundles show that the parties made clear reference to arbitration from the contract which they signed Looking at those MOUs, I have not found any issue in them which would render them null and void or inoperative. They indeed fulfill those prior conditions which were enumerated by Honourable Justice Tsekooko, as he then was, in the case of **Shell Uganda Ltd V Agip (U) Ltd, Civil Appeal No 49 of 1995**, where he laid out conditions for the exercise of discretion to stay proceedings pending arbitration must obtain. Those conditions included that there was a valid agreement to have the dispute settled by arbitration, that proceedings in court having commenced, proceedings having been commenced by a party to the agreement against another party to the agreement, the proceedings being in respect of the dispute so agreed to be referred, that the application was made after appearance by the party to the proceedings, that the application was made after appearance by that party, and before he has delivered in the pleadings or taken in the other steps in the proceedings and that the party applying for stay was ready and willing to do all things necessary to the proper conduct of the arbitration.

The instant case has all the above cited conditions. Furthermore, **Section 40 of the Arbitration and Conciliation Act** provides that:

"When seized of an action in a matter in respect of which parties have made an arbitration agreement referred to in section 39, the court shall, at the request of one of the parties, refer the parties to arbitration, and unless it finds that the agreement is null and void, inoperative or incapable of being performed."

This is a clear provision of the law which needs no further delving into. While I do take note that delays have occurred for over three (3) years and substantial costs have been incurred I seem to think that the proper direction of this matter would ease the pain of costs and resolve amicably matters in dispute between the parties.

The fairer thing to do here would be to ensure that the arbitration process is given a time limit to prevent and cut further the losses by the aggrieved parties.

For the above reasons, I would find this a fit and proper case wherein an order stay these proceedings would be in the interest of the justice of the case and for the good relationship between the two parties. In the premises therefore I would allow the preliminary objection with conditions that the defendant must effectively participate in the arbitration process at all times and that the process should take no more than sixty days from the date of this order.

ORDERS

I would therefore stay these proceedings and order that this matter be referred to arbitration as provided for in the MOUs of the parties to this suit. Taking that this matter has unnecessarily delayed I would order that the Arbitration process be commenced

and concluded within sixty days. It should be brought to the attention of the arbitrator in this matter that the provisions of the law relating to arbitration and conciliation be strictly followed especially those relating to attendance and making of a decision on the issues between the parties.

I make no order as to costs at this stage but to direct that it abides the consequences of the arbitration and or orders of this court.

I do so order accordingly.

Henry Peter Adonyo

Judge

11th February 2014

Court: It is ordered that this matter doth come before this honourable court for mention and further directions sixty days from the date of this order.

I do so order accordingly.

Henry Peter Adonyo

Judge

11th February 2014

