THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL SUIT No. 604 OF 2014

ECO FRIENDLY FARMING LTD :::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

UGANDA INVESTMENT AUTHORITY :::::::::::::::::::::::::: DEFENDANT

BEFORE: HON MR. JUSTICE B. KAINAMURA

RULING

When this matter came up for hearing for the first time before me, attempts at mediation having failed, Mr. Enos Tumusiime for the defendant raised a P O which in his opinion would dispose of the matter. Mr. Tumusiime submitted that the parties have been before court on the same matter under HCCS No. 387 of 2009 and court as per annexure M to the plaint ruled that the suit was premature and dismissed it with costs. Counsel stated that the reason for the dismissal was that the dispute was between a foreign investor and the Investment Authority and as such it should be settled in accordance with Section 28(1) and (2) of the Investment Code Act (Cap 92) which provides that such dispute should be referred to arbitration. Mr. Tumusiime further submitted that such arbitration should have been in accordance with the rules of procedure of the International Centre for Settlement of Investment Disputes which was flouted. Mr. Tumusiime prayed that the suit be dismissed with costs.

In response, Mr. G. Wilson Counsel for the plaintiff submitted that whereas it is true that settlement of disputes is provided for under Section 28 of the Investment Code Act, the Act does not override the inherent jurisdiction of the High Court provided for in the Constitution. He cited the case of ***Commissioner General URA Vs Meera Investments Ltd SCCA No.22 of 2007*** where the Supreme Court held that an Act of Parliament cannot oust the original jurisdiction of the

High Court except by an amendment of the Constitution. Mr. Wilson further submitted that Section 28 (2) of the Investment Code Act uses the word "**May"** which has been decided upon (see ***Uganda (DPP) Vs Col (Rtd) Kiiza Besigye Constitutional Reg. No.20 of 2005***) to the effect that its use in a statute implies a permissive, optional or discretionally act and is not mandatory. Mr. Wilson further pointed out that as indicated in paragraph 8 of the plaint, the plaintiff's attempts to initiate arbitration were frustrated by the defendant. It was Mr. Wilson's further argument that subjecting the dispute to arbitration in New York, Washington or London would not be cost effective considering that the subject matter is not more than two million dollars. In conclusion Mr. Wilson argued that Section 28 of the Investment Code Act allows any party aggrieved by failure to agree on the mode or forum for arbitration to apply to the High Court for redress. It was his prayer that the P O lacks merit and should be dismissed with costs.

In rejoinder to the plaintiff's reply, Mr. Tumusiime submitted that Article 139 (1) of the Constitution which confers unlimited original jurisdiction in all matters to the High Court qualifies the inherent powers of the High Court to be exercised not only in accordance to the Constitution but also with others laws. Mr. Tumusiime further argued that Section 7 of the CPA bars Court from trying any suit in which the matter was directly and substantially in issue in the former suit. Counsel pointed out that HCCS No. 387 of 2009 (***Eco Friendly Farming Ltd Vs UIA)*** is between the same parties, and is based on the same cause of action and seeks the same relief as the present case. Based on the above, Mr. Tumusiime submitted that the present case (HCCS No. 604 of 2014) is barred by *res judicata* and should be struck out with costs. On the plaintiff's reliance on Section 28 (4) of the ICA, Mr. Tumusiime submitted that this is not a case where the parties to a dispute do not agree on the mode or forum of arbitration but is a case where the plaintiff failed to follow the rules of procedure of arbitration and as such the plaintiff cannot seek protection of Section 28 (4) ICA. Mr. Tumusiime reiterated his earlier prayers that the P O be upheld and the suit struck out with costs.

I have considered the arguments of both Counsel. To my mind the P O pauses two issues for determination. One is whether the present suit is *res judicata* and the second is if it is not, whether or not Section 28 imposes a mandatory obligation on the parties to a dispute provided for under Section 28 (1) of ICA to subject the dispute to arbitration first.

Section 7 CPA provides for the doctrine of *res judicata* with the intent of pursuing conclusiveness of judgements as to the *points* decided in a suit between parties and the subsequent suit between the same parties. The section provides in part:-

> *"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties....."*

Based on the history of the dispute first set out above, can one say that HCCS 604 of 2014 is *res judicata* on account of the decision in HCCS No. 387 of 2009? The parties were the same and so is the cause of action.

The ruling in HCCS No. 387 of 2009 was to the effect:-

> *"I think the law is clear as to what to do. I think the investment licence says the same thing. I find this suit premature and dismiss it with costs."*

Clearly HCCS No 387 of 2009 was determined on a preliminary objection. In the case of ***Isaac Bab Busulwa Vs Ibrahim Kakinde, HCCS No. 1494 of 1977*** Court held;

> *"A dismissal of a suit on a preliminary point not based on the merits of the case does not bar a subsequent suit on the same facts and issues and between the same parties"*

The above decision followed an earlier decision in ***Keharchand Vs Jan Mohammed (1919-21) EACA 65*** where it was held:-

> *"Where a suit has been dismissed on a preliminary objection the plaintiff has not had an opportunity of being heard on the merits and is therefore not res judicata"*

It is clear, based on the decisions above, that the dismissal of HCCS No. 387 of 2009 without going into the merits of the issues raised there in was no decision on the issues raised in the suit and accordingly HCCS No. 604 of 2014 is not *res judicata*.

The second issue for determination is the import of Section 28 ICA on resolution of disputes between a foreign investor and UIA. As we have seen, when HCCS No. 387 of 2009 was called, the presiding Judge ruled that the suit was premature since the plaintiff had not first proceeded under Section 28 of ICA. From the court record, in particular paragraphs 7 and 8 of the plaint in the case now under review – HCCS 604 of 2014, the plaintiff averred that after HCCS No. 387 of 2009 was dismissed on the ground that the plaintiff had not first proceeded under Section 28 of ICA, the plaintiff sought to initiate arbitration but was frustrated by the defendant. On its part the defendant, from the submission of Mr. Tumusime its Counsel, still maintains that Section 28 of ICA was not followed to the letter and that the suit be struck out with costs.

Section 28 (2) provides:-

*"A dispute between a foreign investor and the authority or the Government in respect of a licensed business enterprise which is not settled through negotiations "**May"** be submitted to arbitration in accordance with the following methods as may be mutually agreed by the parties:-*

(a) In accordance with the rules of procedure for arbitration of the International Center for the Settlement of Investment Disputes.

(b) Within the framework of any bilateral or multilateral agreement on investment protection to which the Government and the country of which the investor is a national are parties or

*(c) In accordance with any other international machinery for the settlement of investment disputes **(emphasis added)***

As first noted in this ruling, Counsel for the plaintiff contended that the use of the word "***May***" is discretionary and the plaintiff was not obliged to undergo ICSID arbitration mandated by Section 28 (2) (a) of ICA. Counsel relied on the case of ***Uganda (DPP) Vs Col (Rtd) Dr. Kiiza Besigye*** (supra) where the Constitutional Court held:-

> *"We observe that the word "**May"** is not defined in the Constitution but is exhaustively explained in **BLACKS LAW DICTIONARY 6th Edn** where it is stated to imply permissive, optional or discretional and not mandatory. The word **"May"** is the opposite of **"shall"** which is generally imperative or mandatory".*

Counsel for the plaintiff further argued that the provisions of ICA do not override the inherent jurisdiction of the High Court provided for in the Constitution. He cited the case of ***Commissioner*** or ***General URA Vs Meera Investments Ltd*** (supra) where the Supreme Court held:-

> "*The constitutionality of the original and unlimited jurisdiction of the High Court was emphatically pronounced by the Court of Appeal in **M/s Raba Enterprises (u) Ltd and M/s Elgon Hardware Ltd Vs Commissioner General Uganda Revenue Authority CA No. 51 of 200**3 where the lead judgment (Okello J A as he was then) declared that:-*

> *"An Act of parliament cannot oust the original jurisdiction of the High Court except by an amendment of the Constitution"*

Emphasizing this principle later in the judgment the Learned Justice of Appeal observed:-

> *"The conferment of the appellate jurisdiction on the High Court by Section 27 of the Tax Appeals Tribunal has no effect on the original jurisdiction of the High Court conferred by Article 13 (1) of the constitution. That means that a party who is aggrieved by the decision of the tax authorities on tax matter may choose either to apply to the Tax Appeal Tribunal for review or file a suit in the High Court to redness the dispute. The choice is his/hers. Once he/she goes direct to the High Court that court cannot chase him/her away on the ground that it lacks original jurisdiction in the matter"*

In my opinion, the two decision embody the true expose' of the interpretation and application of Section 28 of ICA.

However that said, I should not be understood that I stand in appeal over the decision of this court in HCCS No. 387 of 2009.

I am also not in agreement with the submission in rejoinder by Mr. Tumusime that the instant suit is an abuse of court process. In his ruling Kiryabwire J (as he then was) held that HCCS No. 387 of 2009 was premature. Counsel for the plaintiff argued, rightly in my view, that the plaintiff sought to initiate arbitration but the initiative was unsuccessful since the defendant insisted on arbitration through ICSID which as seen above is not mandatory.

In my view that amounted to a failure to agree on the made or forum for arbitration and squarely places the matter within the ambit of Section 28 (4) ICA hence this case.

In the result and for reasons stated above, this P O fails and is overruled. Costs will be in the cause.

B. Kainamura
Judge

04.09.2015