

**THE REPUBLIC OF UGANDA,  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(COMMERCIAL DIVISION)  
CIVIL SUIT NO 77 OF 2012**

**WANZALA ENTERPRISES LTD}.....PLAINTIFF**

**VERSUS**

**BARCLAYS BANK OF UGANDA LTD}.....DEFENDANT**

**BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA**

**JUDGMENT**

This judgment arises from the prayers to court by the Defendant’s Counsel for judgment on the award of the referees under Order 47 rule 16 of the Civil Procedure Rules following the final award of the arbitrator to whom certain questions had been referred for trial.

When the suit was mentioned Counsel Joy Faida represented the Defendant but the Plaintiff’s Counsel was absent and no official of the Plaintiff appeared. The Defendant’s Counsel submitted that the Civil Procedure Rules allows an award under Order 47 rule 16 of the Civil Procedure Rules. She submitted that no notice of intention to set aside the award of the referees has been received within the prescribed time and the court ought to pronounce itself in accordance with the arbitration award with costs to be awarded to the Defendant.

I have carefully considered the submissions and would start with the cited rules of the Civil Procedure Rules. Rule 16 of Order 47 provides as follows:

16. Judgment to be according to award.

(1) Where the court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration in manner aforesaid, and no application has been made to set aside the award, or the court has refused the application, the court shall, after the time for making the application has expired, proceed to pronounce judgment according to the award.

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from the decree except insofar as the decree is in excess of, or not in accordance with, the award.”

Order 47 of the Civil Procedure Rules provides the procedure for arbitration by order of court. Such an arbitration proceeding is conducted where the court refers certain matters to be tried by arbitrators or referees such as in this case where a reference was made for reconciliation of accounts under section 27 of the Judicature Act Cap 13 laws of Uganda. In ordinary circumstances arbitration results into an award and according to Order 47 rule 10 of the Civil Procedure Rules. Rule 10 provides as follows:

"Where an award in the suit has been made, the persons who made it shall sign it and cause to be filed in court together with any depositions and documents which have been taken and proved before them; and notice of the filing shall be given to the parties."

What is required is for the award to be filed in court as prescribed above and notice of the filing to be given to the parties. The subsequent rules deal with the role of the court to give an opinion on a case stated by the arbitrators (rule 11), power to modify or correct an award (rule 12); to make orders as to costs of the arbitration (rule 13); the remission of an award or matter referred to arbitration for reconsideration by the arbitrators (rule 14) and finally rule 15 deals with grounds for setting aside an award. In that context therefore rule 16 deals with cases where the court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration. It also deals with situations where no application has been made to set aside the award (i.e. under Order 47 rule 15) or where the court has refused the application to set aside the award. It provides that the court shall after the time for making the application has expired; proceed to pronounce judgment according to the award.

The reference in this case was made under section 27 of the Judicature Act Cap 13 laws of Uganda. Section 27 of the Judicature Act provides that where in any cause or matter, other than in the criminal proceeding, all the parties interested who are not under disability consent, and among other things the question in dispute consists wholly or partly of accounts, the High Court may, at any time, order the whole cause or matter or any question of fact arising in it to be tried before a special referee or arbitrator agreed to by the parties or before an official referee or an officer of the High Court. Furthermore, section 28 of the Judicature Act provides that in all cases of reference to a referee or arbitrator, the referee or arbitrator shall be deemed to be an officer of the High Court and subject to the rules of court and shall have such powers and conduct the reference in such manner as the court may direct.

Where a matter has been referred to arbitrators/referees as prescribed, the court shall not except as directed by the rules and to the extent provided for under Order 47 deal with the matter in the suit. Order 47 rule 3 (2) of the Civil Procedure Rules provides as follows:

"Where a matter is referred to arbitration, the court shall not, except in the manner and to the extent provided in this order, deal with the matter in the suit."

It follows that the court is forbidden from dealing with the matter in the suit. Order 47 rule 16 therefore introduces some kind of misnomer because a judgment is an adjudication arising from a controversy clearly spelt out. What is envisaged is that the court may pronounce judgment based on the reference and it would depend on the issue referred to in the reference. What was the subject matter of the arbitration? With reference to the matter before the court, a reference was made by order of court and with the consent of parties on 1<sup>st</sup> July, 2014 for the determination of certain questions namely:

“ ...

- a. How much money was disbursed under the facilities inclusive of costs under the relevant loan facilities?
- b. Terms of repayment
- c. How much was repaid by the Plaintiff over the period?
- d. Whether any of the parties owes the other any money for the relevant period?
- e. Costs will be shared between the parties and are payable on a 50% and 50% basis by each party.

It had been agreed that the controversy between the parties mainly concerned a question of accounts. The suit of the Plaintiff against the Defendant as disclosed in paragraph 3 of the plaint is for declaration that the Defendant mismanaged the Plaintiff's account/loan account by making numerous mistakes on the same leading to loss. Secondly, it is for a declaration that the Plaintiff overpaid the Defendant for a loan and overdraft facility extended to it by the latter. Thirdly, it is for an order for recovery of Uganda shillings 188,528,065/= being the sum that the Plaintiff overpaid the Defendant. It is also for consequential orders of interest at the rate of 30% per annum; general damages; interest and costs of the suit.

The crux of the reconciliation was to establish whether the Defendant owes money to the Plaintiff.

The final reconciliation of accounts between the Plaintiff and the Defendant was filed by a covering letter dated 20<sup>th</sup> September, 2016 by Messieurs Mungereza & Kariisa Certified Public Accountants. It was filed in court on 21<sup>st</sup> September, 2016. The conclusion of the reconciliation can be found in item 8.0 at page 11 where it is written that the Plaintiff owes Barclays Bank Uganda shillings 50,376,225/=.

Section 27 of the Judicature Act, envisages reference of a matter in dispute in the suit. Matters in dispute in the suit arise from the pleadings in terms of Order 15 rule 1 of the Civil Procedure Decision of Hon. Mr. Justice Christopher Madrama Izama \*^\*~ \*&\*\$\$# xtra+ maximum735securityx 2017 style

Rules. It provides that issues arise when a material proposition of law or fact is affirmed by one party and denied by the other. Material propositions are those propositions of law or fact, which a Plaintiff must allege in order to show a right to sue or a Defendant must allege in order to constitute a defence. Lastly Order 15 rule 1 (3) of the Civil Procedure Rules provides as follows:

"Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue."

The court may frame issues from allegations made on oath by the parties, allegations made in the pleadings or in answers to interrogatories delivered in the suit and from the contents of documents produced by either party under Order 15 rule 3 of the Civil Procedure Rules. One strong conclusion that can be made from the above rules is that issues arise from the pleadings. This is supported by Order 21 of the CPR and particularly rule 5 thereof which provides that in instances in which issues have been framed, the court shall state its finding or decision, with the reasons for the finding or decision, upon each separate issue, unless the findings upon any one or more of the issues is sufficient for the decision of the suit. Order 6 rule 1 of the CPR requires every pleading to contain a brief statement of the material facts on which the party pleading relies for a claim or defence as the case may be. It follows that a suit or a claim must be disclosed by the pleadings in terms of the material facts which support the claim or the defence.

The written statement of defence of the Defendant does not contain any counterclaim. The question of reconciliation of accounts between the parties only leads to a conclusion as to whether the suit of the Plaintiff has any merit. With reference to the plaint, the Plaintiff claims for certain declarations in paragraph 3 of the plaint. However, it is alleged for instance in paragraph 3 (i) that the Defendant mismanaged the Plaintiff's account/loan account by making numerous mistakes on the same leading to loss. Secondly, the Plaintiff claims a declaration that it overpaid the Defendant for a loan and overdraft facility extended to it by the latter. Thirdly, it is for an order for recovery of Uganda shillings 188,528,065/= being the sum that the Plaintiff overpaid the Defendant.

By reconciling the accounts of the parties in the arbitration/reference and coming to the conclusion that it is the Plaintiff who owes the Defendant, the Plaintiff's suit has no merit because it proceeded from the premises that the Defendant owed the Plaintiff. The other allegations and declarations sought are supposed to give the facts giving rise to the claim for loss. Where there is no loss and it is the Plaintiff who owes money to the Defendant the consequential claims for the loss, general damages and interest cannot be sustained. The determination of the arbitrators/referees is that the Plaintiff owes the Defendant Uganda shillings 50,376,225/= after examining the accounts of the parties. The material proposition which is an over arching proposition was that the Defendant was liable to the Plaintiff for monetary loss occasioned to the Plaintiff. All the other averments and claims rest on that proposition. The

Defendant denied the proposition in the written statement of defence but did not file a counterclaim against the Plaintiff.

The finding of the auditors has not been challenged. The point of law for consideration is whether the Arbitration and Conciliation Act applies to the arbitral proceedings. In this case there was no written agreement between the parties to submit the dispute for arbitration. Section 2 of the Arbitration and Conciliation Act defines the term "arbitration" to mean any arbitration whether or not administered by a domestic or international institution where there is an arbitration agreement. It further defines "arbitration agreement" to mean an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

Section 27 of the Judicature Act provides for reference of any particular matter by the court with the consent of the parties. The parties must have legal capacity to consent. Therefore an arbitration agreement does not have to be a contractual matter and any agreement to refer any matter to arbitration even if from a proceeding in the court, amounts to an arbitration agreement under the definition cited above. It follows that the Arbitration and Conciliation Act applies to a reference to arbitration by the court under section 27 of the Judicature Act as well as Order 47 of the Civil Procedure Rules. Section 34 of the Arbitration and Conciliation Act provides that recourse to the court against an arbitral award may be made only by an application for setting aside the award under that section.

Last but not least section 34 (3) of the Arbitration and Conciliation Act provides that an application for setting aside the arbitral award may not be made after one month has elapsed from the date on which the party making the application has received the arbitral award. The arbitral award is dated September 2016 and particularly was filed on court record on 21<sup>st</sup> September, 2011.

Under section 28 of the Judicature Act, a referee or arbitrator to whom the matter has been referred under section 27 of the Judicature Act, is an officer of the court and bound by the rules of the court.

Neither of the parties has applied to set aside the arbitral award. In the written statement of defence of the Defendant, there is no counterclaim and the arbitral tribunal could not award any money in favour of the Defendant. It only found that the Plaintiff was liable to the Defendant as far as the loan transaction is concerned and they determined the amount. In the circumstances, the only possible judgment of the court following the arbitral award is to dismiss the Plaintiff's suit because the Plaintiff cannot prove any loss occasioned to it by the Defendant. On the contrary, it is the Plaintiff who owes the Defendant. Notwithstanding that the Defendant does not have a counterclaim against the Plaintiff, there is a contractual relationship between the parties and the Defendant has the mechanism of how to recover money from the Plaintiff and therefore

no order shall be made on the aspect of the amount outstanding as against the Plaintiff. In the premises the Plaintiff's suit lacks merit and is accordingly dismissed.

As far as costs are concerned, the costs of the arbitral proceedings shall be borne by each side on a 50/50 basis. The rest of the suit in terms of the claim for damages, and interest is dismissed with costs.

Judgment delivered in open court on 18<sup>th</sup> May, 2017

**Christopher Madrama Izama**

**Judge**

Judgment delivered in the presence of:

Joy Faida Counsel for the Defendant

Plaintiff is absent

Charles Okuni: Court Clerk

Julian T. Nabaasa: Research Officer Legal

**Christopher Madrama Izama**

**Judge**

**18<sup>th</sup> May, 2017**