THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS CIVIL APPLICATION No. 0254 OF 2021

(Arising from Civil Suit No. 1059 of 2020)

BAYAN KAMPALA DIAGNOSTIC CENTRE LTD …… APPLICANT

VERSUS

1. MUKESH KUMAR }
2. VANI KUMAR } …… RESPONDENTS
3. SURRENDA SINGH }

Before: Hon Justice Stephen Mubiru.

RULING

a. Background.

The 1st respondent is a director and shareholder in the applicant company. He was appointed as the Managing Director and Secretary of the company. The applicant undertakes medical tests for migrant workers and the licence is managed by the Gulf council. The medical examination is done in UMI Towers in Kampala. It is the applicant's case that the other directors reside outside Uganda and while the 1st respondent was managing the company he took advantage of the absence of the other directors to undertake actions that were detrimental to the company which included bringing in other shareholders; a one Vani Kumar who happens to be the 1st respondent's daughter and another Surrenda Singh who has since left the company. To try and legalise his acts, he filed forged documents that indicated that Vani was a director and that his shares had been raised but also that some shares had been transferred to Kumar. He also filed a resolution purportedly passed by the board raising the maximum amount he could withdraw from the account of the applicant from US $ 5000 to US $ 10,000. In the process of managing the company the 1st respondent failed in his fiduciary duties to the company that caused financial loss to the applicant company. The claim thus is for the 1st respondent to be permanently barred from managing the affairs of the applicant company. The GCC suspended the licence of the applicant on communication of the 1st respondent that he had restructured the company, causing it further loss.

The 3rd respondent's defence is that he was a member of the applicant company and was allotted 12% shares. A return of allotment was filed with URSB. Without his knowledge or consent they were withdrawn. He requires a return of his shares. The 2nd respondent as daughter of the 1st respondent received 10% shares from the portion held by her father. The 1st respondent gave her 10% of his sharer as a gift *inter vivos*. The 1st respondent originated the idea to establish the applicant, called upon the other five shareholders as per the MEMATS. Each allotted to themselves 12% of the shares respectively. The share capital of the company was shs. 75,000,000/= When it was paid the money was not enough to establish a diagnostic centre which required expensive and modern machinery. It was agreed that the shareholders by way of shareholder loans or contribute money to the purchase of the machines and obtain the requisite licenses. Only sham Mura, Riyaz Ahemena and Kadich Ashood were able to make a contribution. The money was not enough an the 1st respondent spent US $ 88,000 of personal money to establish the company and it became a growing business concern.

As operations began and income started flowing in more machines were purchased and the applicant became a competitive company. There was a conflict regarding whether to reinvest the revenue or to declare dividends. The company had challenges of decision making between the shareholders and the Covid19 which led to temporary closure. Prior to that Shanu Mura and Dr. Hassa Ali came to Uganda and for the investment the 1st respondent had made, the agreed on allotting him more shares, hence the change in the share structure. All that was captured in a minute book held by the applicant. As conflicts went on the 1st respondent sought the indulgence of the Civil Division Court. While the case was pending the applicant brought the same conflict before this Division. It became hard to convene annual general meetings and the employees took advantage to exchange more damaging lies against the 1st respondent. The employees have taken over management of the applicant.

The defence is that the 3rd respondent is a subscriber and signed the MEMAT, the 2nd respondent received shares from the 1st respondent. The 1st respondent concedes there was a wrongful transfer to the 2nd respondent. It was within his mandate as Managing Director as Shareholder as well as company Secretary to raise the withdrawal sums. There was a memorandum of understanding

which states in event of conflict among the shareholders the licence would be suspended for 6 months. He denies filing forged documents as alleged.

b. The application.

This application is made pursuant to Order 46 rule 1 of *The Civil procedure rules*

c. Submissions of counsel for the applicants.

Counsel for the applicant, Ms. Kabakumba Labwoni, submitted that the court has jurisdiction to hear the matter. Section 5 of *The Arbitration and Conciliation Act*, requires referral to arbitration. In this case the clause is incapable of being performed. Some of the respondents are not patties to the arbitration clause. It is not binding on them. Then the relationship between the shareholders has irretrievably broken down. They do not see eye to eye and the 1st respondent is not willing to resolve the matter. In *British American Tobacco v Lira Tobacco Stores, HCSS No. 924 of 2013* it was held that grant of an application under section 5 of The Arbitration and Conciliation Act is limited to determining the enforceability of the clause. The issue before court is not covered by the clause; it does not cover fraud and forgeries since these are criminal matters that were not envisaged. The arbitration clause is incapable of being enforced. The court has unlimited jurisdiction and should preside instead of arbitration.

The justification for review is that under Order 46 rule 1 of *The Civil procedure rules* and *Buwule Mohammed Kasasa v. National Water and Sewerage Corporation, Misc. Apn. 2 of 2*016 about scope of review by Registrars of their own orders. The decision applied to be reviewed was issued by a Registrar who could not review his own decision. *F. X. Mubuuke v. UEB, HC Misc. Apn 98 of 2005*; the scope of review is mistake, discovery of new and important evidence, or any sufficient reason. This means legal and adequate reasons, as much as may be necessary to answer the purpose intended. The court issued an order for the auditing of the applicant's books poof account and this is supported by the affidavit is support para 65 but it could not be implemented because the bank asked to issue the bank details declined stating that they needed an order directed at them. The

banks are Bank of India Uganda, Diamond Trust Uganda NS Exim Bank. Diamond Trust is 0168017002 and 0168017001 from the company incorporation in 2019 to-date.

d. Submissions of counsel for the respondents.

Counsel for the respondents, Mr. Aimomugasho Francis, submitted that the application is a perpetuation of want of jurisdiction by the court. Section 5 (1) of *The Arbitration and Conciliation Act*. In Civil Suit No. 202 of 2016 it was followed. None of the exceptions apply. It is not null and void. The arbitral agreement covers the disputes now at hand. It covers "anything done to the company ….. arising hereunder or arising out of relations." The dispute is among members the 1st and 3rd respondents are a subscriber. The applicants are faulting the 1st respondent fir bringing in the 2nd respondent, his son, as a shareholder without consulting the company. What is faulted is the action of the 1st respondent which is covered by the arbitration clause in its second limb of the arbitration clause. The matter should be referred to arbitration and the effect of referral is that the pending suit lapses, with cists to the 1st respondent who filed a reply.

Regarding review, Order 46 rule 1 does not provide for the remedy being sought. It envisage aba aggrieved person. *Misc. Apn. 123 of 2000 Busoga Grower's Coop Union v. Nsamba and Sons Limited*, requires a legal grievance, wrongful deprivation or affect on title. In *Re Nakivubo Chemists [1979] HCB 12* sufficient cause means of a similar kind. The order of audit is sufficient. There is no pleading or evidence of the order being served. It binds all persons to whose attention it is directed. It will be sought for all other persons who are contacted by the auditors. There is no evidence that the order was served on the bank. They were only given a letter. In the plaint, prayer (c) among the final orders, an audit is sought. It would be sufficient if it had been served on the bank. There is one applicant company which ought to be audited. There is no need for review as the order is binding on all recipients. The deponent to the affidavit in support and rejoinder lacks locus standi to depone. The affidavit in rejoinder does not disclose the source of information but touches. *Munyagwa Edward and 6 others v. Lukonge Matovu, Misc. Apn. 1183 of 2019*. There is a power of attorney and this query is answered. The court should find there is no need of review since the order is specific enough and the matter ought to go to arbitration.

e. Submissions of counsel for the applicants in reply.

Counsel for the applicant argued in reply that if the order was specific and could be implemented we they would not be here. The order was served on Bank of India (see annexure "D") and on Diamond Trust bank and it was received by both. The banks and the accounts had not been indicated. It is general and cannot be implemented specifically. Much as the 3rd respondent is not a shareholder; see in annexure "F" to the plaint. The 1st respondent appointed the 2nd respondent who is a daughter for the 1st respondent. After appointment, the 2nd respondent was engaged in the alleged mismanagement. Article 81 of Table "A" allows the appointment of lawful attorney. Sufficient Cause under Order 46 rule 1 of *The Civil procedure Rules*, a court order can be reviewed for sufficient. A previously overlooked but excusable misfortune too is justification enough. Court overlooked the name of the bank and bank details. The rest of the individuals are cooperating. *Nsamba Estates* case refers to personal grievance which includes deprivation of something. The applicant will be denied a full audit of the account.

f. The decision.

The arbitration clause is clause 61 of the Articles of Association of the applicant and it states as follows;

> If and whenever any difference shall arise between the Company and any of the members or their respective representatives touching the construction of any of the articles herein contained or any act or thing made or done or to be made or done or omitted or in regard to the company arising hereunder or arising out of the relation existing between the parties by reason of these articles or of the Act, such difference shall forthwith be referred to two arbitrators, one to be appointed by each party in difference, or to an umpire to be chosen by the arbitrators before entering into consideration of the…

We live in a pro alternative dispute resolution age based on the understanding that dispute settlement by arbitral tribunals has the same value and standing as adjudication before domestic courts and therefore section 5 (1) of *The Arbitration and Conciliation Act* requires a court before which proceedings are being brought in a matter which is the subject of an arbitration agreement, if a party so applies after the filing of a statement of defence and both parties having been given a

hearing, to refer the matter back to the arbitration unless the court finds; - (a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or (b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

The term "inoperative" was considered in *Broken Hill City Council v. Unique Urban Built Pty Ltd [2018] NSWSC 825*, where it was defined as "having no field of operation or to be without effect." It covers those cases where the arbitration agreement has ceased to have effect. The ceasing of effect to the arbitration agreement may occur for a variety of reasons, including; - where the parties have implicitly or explicitly revoked the agreement to arbitrate; where the same dispute between the same parties has already been decided in arbitration or court proceedings (principles of *res judicata*); where the award has been set aside or there is a stalemate in the voting of the arbitrators; or the award has not been rendered within the prescribed time limit; where a settlement was reached before the commencement of arbitration, and so on.

The phrase "incapable of being performed" was considered in *Lucky-Goldstar International (HK) Ltd v. NG Moo Kee Engineering Ltd [1993] HKCFI 14* and *Bulkbuild Pty Ltd v. Fortuna Well Pty Ltd & Ors [2019] QSC 173* where it was said to relate to the capability or incapability of parties to perform an arbitration agreement; the expression would suggest "something more than mere difficulty or inconvenience or delay in performing the arbitration." There has to be "some obstacle which cannot be overcome even if the parties are ready, able and willing to perform the agreement. It applies to cases in which; - the arbitration cannot be effectively set in motion; the clause is too vague or perhaps other terms in the contract contradict the parties' intention to arbitrate; an arbitrator specifically named in the arbitration agreement refuses to act or if an appointing authority refuses to appoint; the parties had chosen a specific arbitrator in the agreement, who was, at the time of the dispute, deceased or unavailable, and so on. These are situations in which he arbitration agreement is frustrated or becomes incapable of being fulfilled or performed, due to unforeseen contingencies. The grounds for holding that a contract has been frustrated apply to an arbitration clause (see *Yan Jian Uganda Company Ltd v. Siwa Builders and Engineers, H.C. Misc. Application No. 1147 of 2014*)

It seems to me from the above definitions that the focus is on the administration of the arbitration itself rather than on the merits of what was to be referred to arbitration. While "inoperative" covers situations where the arbitration agreement has become inapplicable to the parties or their dispute, "incapable of being performed" relates to situations where the arbitration cannot effectively be set in motion. Therefore an arbitration agreement may be found to be inoperative or incapable of being performed where the parties have, by virtue of having identified a non-existent appointor, not agreed on an appointment procedure at all; or where the parties agreed a procedure which requires them to agree, but one has failed to act, or both have failed to act as required.

It is trite that an arbitration agreement may cover not only "disputes" but also "disagreements" and "differences of opinion." However, the question whether and which disputes are covered by an arbitration agreement must be determined by interpreting the agreement pursuant to the *in favorem* rule of construction (an arbitration agreement should be construed in good faith and in a way that upholds its validity). This type of presumption provides that a valid arbitration clause should generally be interpreted expansively and, in cases of doubt, extended to encompass disputed claims. The construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction (see *Fiona Trust & Holding Corp v. Privalov, [2007] UKHL 40*). This means that a liberal way of construing arbitration agreements has to be pursued even in those cases where in general contract law the ambiguity could not be resolved through the application of traditional means of interpretation.

The very fundament of the arbitration process is the consent of the parties to arbitrate and this is done by way of a clause in the agreement or a separate submission to arbitration. As a matter of principle, arbitration agreements bind only those who contract into them. The scope of an arbitration agreement is limited to the parties who entered into it and those claiming under or through them. Unless the non-signatory's intention to be bound by the arbitration agreement can be established, such non-signatory cannot be referred to arbitration (see *Reckitt Benckiser (India) Private Limited v. Reynders Label Printing India Private Limited and others, (2019) 7 SCC 62*).

However, an arbitration clause may be assigned, taken over, transferred or simply become binding as a third party involves itself deeply enough in the contractual relationship, including assignment, novation and statutory provisions or where there is a clear intention of the parties to bind both, the signatory as well as the non-signatory parties (see *Chloro Controls (I) Pvt. Ltd. v. Severn Trent Water Purification Inc. and others., (2013) 1 SCC 641*). For example in contracts of guarantee, the guarantor "acquires" the arbitration clause only if he or she assumes joint liability with the debtor.

Although courts generally favour arbitration, they will not compel the arbitration of claims that are outside the scope of the parties' agreement. Causes of action against different parties cannot be bifurcated in a single arbitration and an arbitration agreement will only bind the parties which have entered into the same. Where a suit is commenced regarding matters which lie outside the arbitration agreement and is also between some of the parties who are not parties to the arbitration agreement, there is no question that section 5 (1) (b) of *The Arbitration and Conciliation Act* will be invoked since such is not within the scope of "the matters agreed to be referred to arbitration." The phrase "the matters agreed" requires that the entire subject matter of the suit and the parties involved therein should be subject to arbitration agreement.

Order 46 rules 1 of *The Civil Procedure Rules*, empowers this court to review its own decisions where there is an error apparent on the face of the record. The error or omission must be self-evident and should not require an elaborate argument to be established. An error which has to be established by a long-drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record (see *Nyamogo & Nyamogo Advocates v. Kago [2001] 2 EA 173)*. A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the Court.

The application is accordingly allowed. The order is reviewed by directing the following bank to provide the auditor with information relating to the specified accounts, as follows;;

a) Bank of India Uganda,
b) Diamond Trust Uganda
c) Exim Bank

The costs of this application are to abide the result of the suit. The suit is hereby fixed for mention on the 3rd day of May, 2021 at 9.00 am. Serve counsel for the respondents.

Dated this 31st day of March, 2021

……..
Stephen Mubiru
Judge,
31st March, 2021.