THE REPUBLIC OF UGANDA

IN THE HIGH COUR OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLEANEOUS APPLICATION NO. 201 OF 2020

(ARISING FROM CIVIL SUIT NO. 988 OF 2019)

VANTAGE MEZZANINE FUND II PARTNERSHIP :::::::::::::::::: APPLICANT

VERSUS

1. SIMBA PROPERTIES INVESTMENT CO. LTD}

2. SIMBA TELECOM LTD} :: RESPONDENTS

BEFORE: HON. MR. JUSTICE BONIFACE WAMALA

RULING

Introduction

This application was brought by Chamber Summons under Section 5(1) of the Arbitration and Conciliation Act, Cap 4 and Rule 13 of the Arbitration Rules, seeking orders that:

1. The dispute between the Applicant/Defendant and Respondent/Plaintiff in Civil Suit No. 988 of 2019 is the subject of a valid, binding and enforceable arbitration agreement/clause between the parties within the premises of the Arbitration and Conciliation Act, Cap 4 of the Laws of Uganda and should be referred and resolved through arbitration.
2. The arbitration clause should be enforced by stay and/or dismissal of the suit and referral of all legal proceedings in and arising out of HCCS No. 988 of 2019 and HCMA No. 1106; and referral of all matters in dispute between the parties to arbitration.
3. All Orders and reliefs obtained in HCMA No. 1106 of 2019 and subsequently extended by this court be vacated and/or set aside.
4. Costs of this application, High Court Civil Suit No. 988 of 2019 and of HCMA No. 1106 of 2019 be awarded to the Applicant.

The grounds of the application are set out both in the Chamber Summons and in an affidavit in support of the application deponed to by **Moses Muziki**, an Advocate working with the law firm representing the Applicant.

Briefly, the Respondents filed Civil Suit No. 988 of 2019 in this Court. The Applicants responded to the plaint and in their written statement of defense (WSD) indicated that they will contest the propriety of the proceedings and contest the jurisdiction of this Honorable Court. The Applicant states that the subject matter of this suit is a dispute arising from and relating to the contractual terms of the Mezzanine Term Facility Agreement (hereinafter to be called the **"Mezzanine Agreement"** or the **"MTFA"**) dated 11th December 2014 signed between the Applicant and the 1st Respondent. The said agreement in Clause 43 thereof contains a valid, binding and enforceable arbitration agreement within the confines of Section 5 of the Arbitration and Conciliation Act, Cap 4 of the Laws of Uganda (hereinafter to be referred to as the **"ACA"**).

The Applicant states that the dispute as set out in the plaint filed by the Respondent is captured under the terms of the said arbitration clause. The parties willfully, conscientiously, expressly and with the advice of Counsel excluded this Court from intervening to resolve any such dispute as within the ambit of the arbitration clause and opted to arbitrate any such dispute. It was therefore averred for the Applicant that within both the premises of the agreement and the governing laws to which the parties submitted their interests, this Honorable Court is therefore not clothed with jurisdiction to hear and finally determine the dispute raised in HCCS No. 988 of 2019 or any application arising therefrom.

The Applicant contended that HCCS No. 988 of 2019 and all applications arising therefrom constitute an abuse of court process, willfully done by the Respondents and the same ought to be dismissed with costs. Further, that

all the interlocutory reliefs obtained by the parties since the time of filing HCCS 988 of 2019 were obtained improperly, outside the premises of the law and ought to be vacated by this Honorable Court. It is therefore in the interest of justice and of upholding and vindicating the laws of Uganda that this application be allowed.

The application was opposed by the Respondents vide **an affidavit in reply** deposed by **Charles Nsubuga**, an advocate with the law firm representing the Respondents. Briefly, the grounds of opposition of the application are that the arbitration agreement entailed in Clause 43 was procured by undue influence, is devoid of certainty and consensus ad idem as to amount to a contract; and is therefore inoperative and/or incapable of being performed.

The deponent further averred that the Applicant's transaction with the Respondents amounted to financial institutions business and/or venture capital business for which the Applicants required a licence to legally conclude the same. The Respondents thus have a legitimate claim and the filed suit raises questions of law that warrant investigation and a decision of this Court. The deponent averred that this Court is well clothed with jurisdiction to hear HCCS No. 988/2019 wherein it can grant a declaration that the purported Arbitration Agreement is inoperative and/or incapable of being performed.

The Respondents filed **an additional affidavit** in reply sworn by the same deponent in which he stated, inter alia, that the application for reference of HCCS No. 988 of 2019 to arbitration is non-suited, incompetent and bad in law for the reasons stated in the said affidavit. The Respondents prayed that the Court finds that this application has no merit and ought to be struck out.

The Applicant filed **an affidavit in rejoinder** and **a supplementary affidavit in rejoinder** both made by the same deponent for the Applicant. I

have considered the averments in the said affidavits in as far as they are relevant to the determination of the questions that are before me.

Representation and Hearing

At the hearing, the Applicant was represented by Mr. Kirunda Robert while the Respondents were represented by Mr. Muwema Fred and Ms. Kagoya Allen. It was agreed that the hearing proceeds by way of written submissions which were duly filed. I have considered the submissions in the course of resolution of the issue before the Court. I am grateful for the authorities supplied by Counsel which I have found useful.

Issue for determination by the Court

One issue is up for determination by this Court, namely, **whether the matters raised in HCCS No. 988 of 2019 ought to be referred to arbitration within the confines of the Arbitration and Conciliation Act**.

Submissions for the Applicant

It was submitted by Counsel for the Applicant that for an application of this nature, three grounds must be proved namely that;

(i) There is a suit filed between the parties and that a defense has been filed (existence of a dispute between the parties);
(ii) There is a binding and enforceable arbitration agreement; and
(iii) The court has no jurisdiction to hear the suit.

Counsel submitted that where the above grounds are proved, the suit shall be dismissed by the court.

On **existence of a dispute between the parties**, Counsel submitted that Section 5(1)(a) of the Arbitration and Conciliation Act requires that there is a suit before the court and that a defense has been filed. One of the parties to such a suit may then apply to have the suit referred to arbitration unless there is in fact no dispute between the parties, or there is no binding and

enforceable arbitration agreement between the parties. Counsel relied on the case of ***British American Tobacco vs Lira Tobacco Stores, HCMA No. 924 of 2013*** where the court held that "what is material under section 5 of the Arbitration Act is whether there is an arbitration agreement between the parties. An arbitration agreement is defined under section 2(1) of the Arbitration and Conciliation Act and the question for consideration is whether the matter before the judge or magistrate is subject to an arbitration agreement".

Counsel laid out the facts upon which the Applicant's assertion is based to the effect that there is a dispute between the parties.

On **existence of a binding and enforceable arbitration agreement**, Counsel relied on the statement of the law in ***British American Tobacco vs Lira Tobacco Stores (supra)*** to the effect that "the dispute between the parties can be about the validity of the contract itself and the arbitration clause would be sufficient to submit the dispute to the arbitral tribunal agreed upon".

Counsel for the Applicant stated that in order to determine this ground, the court ought to be guided by three considerations, namely;

(i) The wording and scope of the arbitration clause;
(ii) Section 16 of the Arbitration Act Cap 4; and
(iii) Any evidence in support of the validity of the arbitration clause.

Counsel relied on the averments in paragraphs 3, 4, 5, 6, and 19 of the affidavit in support of the application to argue that all the above elements are borne out in the application before the Court. Counsel went on that once parties have executed agreements, they are bound by them and evidence of the terms of the agreement should be obtained from the agreement itself and not from extrinsic evidence. Counsel referred the Court to the decision in ***Golf View Inn (U) Ltd V Barclays Bank (U) Ltd, HCCS No. 358 of 2009*** in

support of that submission. Counsel submitted that under paragraph 17 of the MTFA, the Respondents warranted the validity of the entire agreement, its supporting documents and their enforceability under Ugandan law. They do not dispute this clause of the agreement. The same Respondents cannot then contest Clause 43.1 of the same agreement. The Respondents also took benefit of the funds advanced under the agreement. They must not be allowed, therefore, to approbate and reprobate the same agreement.

Counsel further submitted that there was simply no evidence before the Court to support the claim by the Respondents that the said agreement was procured through duress. The facts and circumstances surrounding the conclusion of the agreement fortify the position that the Respondents had presence of mind and ample legal assistance to ensure that the agreement was properly executed. Counsel submitted that even if any such evidence existed, under section 16 of the Act, the jurisdiction to determine such questions rests with the arbitral tribunal. Counsel therefore invited the Court to find that there is in fact a valid, binding and enforceable arbitration agreement between the parties before the Court.

On **the ground of lack of jurisdiction**, Counsel submitted that Section 9 of the Arbitration Act prohibits the intervention of any court in a matter that is the subject of an arbitration agreement beyond the scope allowed under the Act. Counsel submitted that although the High Court enjoys unlimited jurisdiction in all matters, it only does so subject to written provisions of the law. Counsel referred the Court to three decisions on the subject, namely, ***Babcon Uganda Ltd V Mbale Resort Hotel Ltd, Court of Appeal Civil Appeal No. 87 of 2011, British American Tobacco vs Lira Tobacco Stores (supra)*** and ***Power and City Contractors Ltd v LTL Project (PVT) Ltd, HCMA No. 0062 of 2011***.

Counsel concluded that, as such, within the premises of the agreement and the governing laws to which the parties submitted their interests, this Court

is not clothed with the jurisdiction to hear and finally determine the dispute raised under HCCS 988 of 2019 or any application thereunder. Counsel further stated that upon the Court finding as such, the Court would have no choice but to refer the matter for arbitration; in which case, the pending suit would lapse together with all the proceedings thereunder. Counsel prayed that the suit be dismissed, any orders or reliefs secured under the suit be vacated and costs of this application be awarded to the Applicant.

Submissions for the Respondents

In reply, Counsel for the Respondents conceded to the existence of a dispute between the parties in HCCS 988 of 2019 and contended that what is in dispute is whether there is a binding and enforceable arbitration agreement for reference to arbitration and whether this Court is seized with jurisdiction to hear the suit.

Counsel submitted that the Applicant's Counsel had used the holding in ***British American Tobacco Vs Ltd Tobacco Stores (supra)*** out of context because, in the view of Counsel for the Respondents, the import of the said decision is that the court must investigate the validity of the arbitration agreement before reference to arbitration can be made. Counsel emphasized that reference to arbitration is not automatic and the call by the Applicant for dismissal of the suit is unfounded.

Counsel also dispelled the notion that it is only the arbitral tribunal which has jurisdiction to inquire into the validity of an arbitration agreement under section 16 of the Act. Counsel argued that in their view, the arbitral tribunal exercises jurisdiction under section 16 of the ACA after arbitration has commenced. This is different from the exercise by the court of pre-arbitration jurisdiction under section 5 of the Act; which is exercised independently by a trial court and is not subordinate to section 16 thereof. Counsel further argued that the essence of section 5 of ACA is to accord jurisdiction to a court to hear both parties on whether, among others, the

arbitration agreement is valid. This jurisdiction is in addition to the wider unlimited jurisdiction enjoyed by the High Court to hear all civil matters.

Citing Section 5 of ACA, the Respondents' Counsel further stated that under the provision, the right of parties to be heard by court on whether the arbitration agreement is valid or not is mandatory because the word "shall" precedes the words "both parties having been given a hearing," meaning that the hearing is not optional. Counsel argued that, unlike in the case of ***British American Tobacco Ltd Vs Tobacco Stores (supra)*** which was been relied on by the Applicant's Counsel, in this case, the Respondents are asking the Court to investigate the legality and validity of both the Mezzanine agreement and the arbitration agreement thereunder. This therefore requires hearing of the parties on the merits of the case before the contentious issue of illegality is determined. That is the proper exercise of discretion that would yield to the law under Section 5 of ACA.

Counsel for the Respondents further submitted that in exercise of its jurisdiction as per the foregoing paragraph, the court also has to look at the provisions of the Contracts Act 2010 which is the law governing the legality or validity of contracts in Uganda. Counsel submitted that the Respondents' contention was that the arbitration agreement is void and unenforceable for reasons that the Applicant lacked the legal capacity to contract and secondly, even if the Applicant had the capacity, the arbitration agreement was procured by duress and undue influence.

Counsel submitted that the Respondents' contention for lack of capacity on the part of the Applicant was premised on the claim that the Applicant was a partnership that had not been registered as such in Uganda under the Partnership Act 2010. The next basis was that the Applicant had conducted lending business in Uganda without a license which was in contravention of the Financial Institutions Act 2004. Lastly that the Applicant conducted

venture capital business without a license. Counsel made extensive arguments on these contentions which I have taken into consideration.

Counsel finally contended that the dispute in respect of the illegality of the MTFA was not an arbitrable dispute as it involves interpretation and enforcement of public law rights which are distinct from private arbitral rights. Counsel submitted that the determination of these public rights was a matter of public policy which enjoins the courts to interpret the sovereign laws in issue; which matters cannot be left in the hands of a private arbitrator who is not obligated under a public duty. Counsel relied on the decision in ***Airports Company South Africa Limited Vs ISO Leisure OR Tembo (Pty) Ltd & Another (4), SA 642***.

Counsel invited the Court to find that the application to refer the suit to arbitration is unmerited and should be dismissed with costs. Counsel also contested the prayer to vacate the orders issued under HCCS 988 of 2019 as it was wrongly sought from the Court.

Submissions in rejoinder were filed on behalf of the Applicant which I will not summarize here but I have taken into consideration in the course of reaching a determination of this matter.

Court Determination

The relevant and focal provisions applicable to the present matter are Sections 5, 9 and 16 of the Arbitration and Conciliation Act, Cap 4 of the Laws of Uganda (hereinafter to be referred to as the **"ACA"**). I will here below set out the said provisions.

Section 5 of the ACA provides –

> ***"Stay of legal proceedings.***
>
> *(1) 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 having been given a hearing, refer the matter back to the arbitration unless he or she 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.

(2) Notwithstanding that an application has been brought under subsection (1) and the matter is pending before the court, arbitral proceedings may be commenced or continued and an arbitral award may be made."

Section 9 of the ACA provides –

"Extent of court intervention.

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

Section 16 (1) of the ACA provides –

"Competence of arbitral tribunal to rule on its jurisdiction.

(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose—

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not itself invalidate the arbitration clause."

The above provisions set out the principles that are necessary for determination of this matter. To secure a reference of a matter such as this to an arbitral tribunal, the Applicant has to prove that:

(i) A dispute exists between the parties before the Court;

(ii) There is a binding and enforceable arbitration agreement;

(iii) The court has no jurisdiction to hear the suit between the parties.

The Respondents conceded to the fact of existence of a dispute between the Applicant and themselves. What the Respondents contest is the existence of an arbitrable dispute; which aspect falls under the second element, namely, whether there is a valid, binding and enforceable arbitration agreement or clause.

Under *Section 2 (1) (c) of ACA*, an "arbitration agreement" is defined as *"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"*.

On the matter now before the Court, a contract was executed between the Applicant and the Respondents herein, which has been referred to as the Mezzanine Term Facility Agreement (**MTFA**). The said agreement contains an arbitration clause under Paragraph 43.1 thereof. The question to be determined, therefore, is whether the arbitration clause contained in the said contract is valid, binding and enforceable as between the parties.

The impugned arbitration clause under Clause 43.1 (a) of the MTFA is in the following terms:

"Arbitration

(a) Any dispute, claim, difference or controversy between the parties arising out of, relating to or having any connection with this agreement including any dispute as to its existence, validity, interpretation or performance, breach or termination or the consequence of its nullity and any dispute relating to any non-contractual obligations arising out of or in connection with it (for the purpose of this clause a Dispute), shall be referred to and finally resolved by arbitration under the International Chamber of Commerce (ICC) Rules (for the purpose of this Clause, the Rules)."

It was argued by Counsel for the Respondents that the arbitral tribunal exercises its jurisdiction in regard to inquiry into the existence or validity of an arbitration agreement under Section 16 of ACA only after arbitration has commenced. Counsel submitted that this jurisdiction is different from the pre-arbitration jurisdiction under Section 5 of ACA which is exercised independently by a trial court and is not subordinate to Section 16 of ACA. Counsel further submitted that the import of Section 5 ACA is to accord jurisdiction to a court to hear both parties on whether, among others, the arbitration agreement is valid. This jurisdiction is in addition to the wider unlimited jurisdiction enjoyed by the High Court to hear all civil matters under Section 14 of the Judicature Act and Article 139 of the Constitution.

The above argument by Counsel for the Respondents appears to suggest that the jurisdiction given to the court under Section 5 of ACA excludes the jurisdiction of the arbitral tribunal in matters subject of the Arbitration Act. Clearly, this submission by learned Counsel for the Respondents does not take into account the express provision under Section 9 ACA which delimits the extent to which the court can intervene in matter subject of the Arbitration Act (ACA). The provision clearly states that the court shall not intervene in matters governed by the ACA except as provided by the Act.

According to Section 5 ACA, when proceedings are brought before a judge or magistrate in a matter that is subject to an arbitration agreement, the judge or magistrate shall refer the matter back to arbitration unless the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed; or that there is no dispute to necessitate reference to arbitration. It is true that this presupposes that the court has to conduct a hearing to ascertain whether the arbitration agreement is void, inoperative, or incapable of being performed; and/or whether there is a dispute necessitating arbitration. For that hearing to take place, it is stated in the provision that one of the parties should have applied after the filing of

the defence in the matter that is before the judge or magistrate and both parties have to be given a hearing. The hearing referred to here under the provision is on the question as to whether or not the matter should be referred to arbitration and not a full trial of the dispute on the merits as the Respondents' Counsel appeared to suggest. The kind of hearing envisaged under Section 5 of ACA is the exact proceeding that we are dealing with in the present application.

The foregoing, therefore, means that upon the court conducting a hearing such as this, and it finds that the arbitration agreement is not null and void, is not inoperative or incapable of being performed; and that there is a dispute that necessitates arbitration, then the court shall refer the matter to arbitration.

I need to emphasize here, therefore, that the jurisdiction given to the court under Section 5 ACA is not exclusive over that given to the arbitral tribunal under Section 16 ACA. Where a matter is directly referred by one of the parties to arbitration and the question as to existence and validity of the arbitration agreement is raised either before or after commencement of arbitration proceedings, the arbitral tribunal has jurisdiction to hear and determine that objection within the provisions of Section 16 ACA.

The correct position of the law therefore appears to be, in my view, that in regard to determination of the question of existence and validity of an arbitration agreement, the court (under Section 5 ACA) and the arbitral tribunal (under section 16 ACA) have concurrent jurisdiction. The determining factor is as to which of the forum the objection has been presented. But in as far as the question of existence and validity of the arbitration agreement is concerned, that is where the court's jurisdiction stops. As was held by **Egonda-Ntende, JA** in ***Babcon Uganda Ltd V Mbale Resort Hotel Ltd, Court of Appeal Civil Appeal No. 87 of 2011***, the provision under Section 9 ACA is unambiguous in ousting the jurisdiction of

the court in matters governed by the ACA and the general provisions on the unlimited jurisdiction of the High Court cannot override the express provisions of the said statute. It should be emphasized that the constitutional provision under Article 139 of the Constitution is subject to other provisions of the Constitution. Where a statute expressly or by irresistible inference ousts the jurisdiction of the High Court, such ouster is lawful under the law. In ***Babcon Uganda Ltd V Mbale Resort Hotel Ltd (supra)***, the Court of Appeal held that Section 9 of the ACA satisfied the above standard and clearly ousted the jurisdiction of the court in matters governed by the ACA except to the extent stated therein.

It follows therefore that where the question as to the existence and validity of an arbitration agreement has been brought before the court, if the court upon investigation finds that the arbitration clause exists and is not invalid, the court must refer the matter to the arbitral tribunal to investigate any other matters concerning the contract between the parties. As was rightly submitted by Counsel for the Applicant, the position of the law is that an arbitration agreement is separate and independent of the contract in which it is embedded. This is clear from a reading of Section 16 (1) of ACA and from the decision by **Madrama J.** (as he then was) in the case of ***British American Tobacco vs Lira Tobacco Stores, HCMA No. 924 of 2013***.

That being the case, contrary to the submission of Counsel for the Respondents, it does not follow that invalidity of the contract (be it for illegality or any other vitiating factor) would automatically invalidate an arbitration clause. As a matter of fact, the tenor of the law on the subject as analyzed above is to the effect that the validity of an arbitration clause is not dependent on the validity of the contract in which it is embedded; and that where an arbitration clause is valid, questions as to invalidity of the main contract would not impede reference to and consideration of a matter by an arbitral tribunal. Indeed, the recommended course of action is that once the court is satisfied on the existence of a valid arbitration cause, it is mandated

to refer the matter to the arbitral tribunal which has the jurisdiction to entertain and consider the questions regarding the validity of the main contract.

For avoidance of doubt, questions regarding the validity or not of the contract in issue are one of the issues that lie within the domain of the arbitral tribunal. Contrary to the submissions of the Respondents' Counsel, such questions cannot be the basis for divesting the arbitral tribunal of jurisdiction and instead investing in in the court. Such an argument would amount to construing the provisions of the ACA in reverse mode. Clearly under the law, the court's jurisdiction is lawfully ousted where the mater falls within the ambit of the arbitral tribunal under the ACA. Counsel for the Respondents appeared to suggest in their submissions that where the validity of the contract in which the arbitration clause is contained is questionable, jurisdiction would be assumed by the court to determine such a matter. The firm view of this Court is that this argument is totally against the weight of the law and principles governing arbitration as espoused under the provisions of the ACA.

In the circumstances therefore, the arguments by Counsel for the Respondents laying emphasis on the validity, or lack of it, of the MTFA are not competently before this court for determination. This is more so since they are not capable of impeaching the existence or validity of the arbitration agreement beyond the loose claim that the clause is embedded in an invalid contract; which claim, as already stated is not competently before this Court.

The only claim that was directed against the arbitration agreement was the allegation that the clause was entered into by the Respondents under circumstances amounting to duress or undue influence. Unfortunately, in their submissions, Counsel for the Respondents opted to abandon this claim. Nevertheless, since the claim appears in the pleadings and evidence

that are before this court in this application, I will make a consideration as to whether there is evidence before the court that is capable of impeaching the impugned arbitration clause.

It was stated in paragraph 4 of the affidavit in reply to the application that the Respondents' case is that the arbitration agreement entailed in Clause 43 of the MTFA was procured by undue influence, is devoid of certainty and consensus ad idem to amount to a contract and is therefore inoperative and/or incapable of being performed. In paragraph 5 of the affidavit in reply, it was stated that the purported arbitration agreement provides that the Applicant reserved the right to elect the seat or legal place of arbitration which clearly shows that there was no consensus ad idem at all with regard to the same.

It is clear from the above averments that the Respondents do not deny entering into the arbitration clause. The claim is that it was entered into through duress and undue influence. The particulars of duress and/or undue influence, as can be gleaned from the affidavit in reply, are however, feeble in my view. The parties agreed to three possible choices of seat or legal place of arbitration, namely Uganda, London or Mauritius. The Respondents are said to be Ugandan Nationals. The Applicant is said to be a South African entity. The jurisdiction of South Africa is not one of the three agreed places of arbitration. It was then agreed that the Applicant had to choose the place of arbitration out of the three agreed choices. This is the clause that is being attacked by the Respondents.

I must say I am unable, in the slightest, to see how this clause disadvantaged the Respondents. Having three choices of which the complainant's jurisdiction is included and the other party's jurisdiction not included was the fairest the Respondents could get even if, indeed, the Respondents were the weaker party. The Respondents do not say which jurisdiction would be more preferable to them if they had been allowed to

exercise their free will in a better way. I find this claim by the Respondents escapist and unserious. This is more so because this court is in position to take judicial notice of the fact that the persons behind the Respondents, particularly the third Plaintiff in the amended plaint, are some of the most polished and astute business personalities there are in Uganda. The Respondents were well and independently advised by senior and prominent legal professionals in Uganda. Faced with such facts, my view is that a feeble claim of duress and/or undue influence of the nature as this one amounts to an insult of own intelligence on the part of the Respondents and their advocates.

Let me conclude this point with the following statements from decided cases regarding the test to be applied by the court when determining existence or not of duress or coercion. **Obura J.** (as she then was) in the case of ***Golf View Inn (U) Ltd Vs Barclays Bank (U) Ltd, HCCS No. 358 of 2009 (Commercial Court),*** citing the decisions in ***Pao On & Others vs LauYiu & Another [1979] 3 ALL ER 65*** and ***Balton vs Armstrong [1976] AC 104*** had this to say:

> ***"... there is criteria that is relevant in considering whether a plaintiff acted voluntarily or not in signing an instrument or entering into a contract. ... in determining whether there was coercion of the will such that there was no consent, it is material whether the person alleged to have been coerced did or did not protest at the time, that at the time he did or did not have an alternative course open to him such as an adequate legal remedy, whether he was independently advised and finally whether after entering the contract, he took steps to avoid it."***

It is clear to me that none of the conditions envisaged in the above test exist in the instant case so as the Court to infer any duress, coercion or undue influence suffered by the Respondents before, at or during the conclusion of the arbitration agreement. I would also like to point out that the courts have

a duty to uphold and enforce legal bargains by parties and to avoid the appearance of rewriting terms of such contracts. In the words of **Lord Jessel MR** in ***Printing & Numerical Registering Co. v Sampson (1875) Lr Eq 462 at 467***;

> ***"If there is one thing more than another which public policy requires, it is that men of full age and competence and understanding shall have the utmost liberty in contracting and their contracts, when entered freely and voluntarily, shall be held enforceable by the courts of justice."***

It was further stated in ***Stockloser V Johnson (1954) 1 All ER 640*** that:

> ***"People who freely negotiate and conclude a contract should be held to their 'bargain', rather that the judges should not intervene by substituting each according to his individual sense of fairness, terms which are contrary to those which the parties have agreed upon for themselves."***

On the facts and circumstances of the present case, there is not the slightest evidence or possibility that when the parties herein entered into the arbitration agreement, the Respondents were subjected to any duress, coercion or undue influence. The arbitration agreement is therefore valid, operative, and capable of being enforced. The parties' agreement that any dispute between them is to be referred to arbitration has to be respected, upheld and enforced by the Court.

Having found as I have above, it is clear to me that this Court is not seized with the jurisdiction to investigate and determine the other matters raised by the Respondents in regard to the Mezzanine Agreement. This includes questions as to the Applicant's capacity to contract and the inclusion of parties that are alleged not to have been part of the arbitration agreement, among others. Under Section 5 of the ACA, upon such a finding, I am obliged to refer the matter to arbitration which I accordingly do. Upon doing

so, the proceedings in HCCS No. 988 of 2019 accordingly lapse together with any pending interlocutory proceedings thereunder and any orders that may have been issued thereunder. I am persuaded by the decision of Madrama J. (as he then was) in ***British American Tobacco vs Lira Tobacco Stores (supra)*** in the adoption of this approach. The said proceedings and any orders thereunder have to be terminated as they were entertained by the Court without the requisite jurisdiction. It is also my finding that the Respondents are liable to meet the costs of this application and of the terminated proceedings as I find no cause to the contrary.

Decision of the Court

Having found that the impugned arbitration agreement exists, is valid, operative and capable of being performed, and that there is an arbitrable dispute between the parties herein, it is ordered that this matter be and is accordingly referred to arbitration in accordance with Section 5 of the ACA. Accordingly, Civil Suit No. 988 of 2019 and all legal proceedings and orders thereunder are dismissed and/or vacated or set aside by the Court. Costs of this application, of HCCS No. 988 of 2019 and the proceedings thereunder are awarded to the Applicant against the Respondents.

It is so ordered.

Dated, signed and delivered by email this 16th day of June 2021.

Boniface Wamala
JUDGE