THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL DIVISION
MISC. APPLICATION NO. 1285 OF 2021
(Arising from Civil Suit No. 453 of 2020)

1. LAMAC GENERAL SERVICES (U) LIMITED]
t/a AFRICAN BOMA]
2. NUWAGABA LAUBEN]
3. UMAR MASANGO]..... APPLICANTS

VERSUS

PEGASUS TECHNOLOGIES LIMITED ..... RESPONDENT

BEFORE: HON. JUSTICE JEANNE RWAKAKOOKO

RULING

Introduction

This application was brought under Sections 5 & 71 of the Arbitration and Conciliation Act, Cap 4, Section 98 of the Civil Procedure Act, Cap 71, and Order 52 of the Civil Procedure Rules, SI 71-1 for orders that:

1. Civil Suit No. 453 of 2020 be stayed and the dispute be referred for arbitration.
2. Costs for the application be provided for.

Background

The Respondent filed Civil Suit No. 453 of 2020 (hereafter referred to as the main suit) for breach of contract. The contract in question is a Licence, Support, Maintenance and Service Level Agreement between the 1st Applicant and the Respondent dated 6th July, 2017. Both parties agree that there is a disputed arising from alleged breach of the terms.

The Applicants contend that the contract has a clause binding the party to refer any dispute arising from the contract to arbitration. The Respondent in its affidavit in reply contends that his main suit is rightly before this court. This according to the Respondent is because the 2nd and 3rd Applicants are not party to the contract. Additionally, that the 1st Applicant has not tendered an affidavit in support thereby rendering the application materially defective. Also that the Respondent's claim against the 2nd and 3rd Applicants is for fraud, unjust

enrichment, refund of money, general damages, interest and costs which are not contingent on the contract. Lastly, that the arbitration clause in the contract is pathological and incapable of being enforced.

Representation

At the hearing on 30th March, 2022 the Applicants were represented by Mukama Sanyu Jamil and Isiko Timothy Jonathan. Horace Nuwasasira appeared for the Respondent.

Parties were directed to file written submissions per court's set schedule, which they did with the exception of the written submissions in rejoinder. These were filed out of the scheduled time and will not be considered.

Issues for Determination

1. Whether the application is defective.
2. Whether Civil Suit No. 453 of 2020 should be stayed and the dispute referred to arbitration.
3. What remedies are available to the parties?

Resolution

Issue One: Whether the application is defective.

The Respondent's Managing Director Ronald Azairwe swore an affidavit in reply wherein he raised preliminary points that should be dealt with first. He swears in paragraphs 4, 4.1, and 4.2 that:

> "4. THAT in response to contents of the aforementioned Misc. Application No. 1285 of 2021 and the supporting affidavit, I have been advised by my lawyers Signum Advocates, whose advice I verily believe to be true, that the Application is incompetent, misconceived, frivolous and devoid of merit because: -
>
> 4.1. the 2nd and 3rd [Applicants] are not parties to the agreement dated 06 July 2017 that they seek to rely on and therefore have no locus or capacity to lodge such an Application.
>
> 4.2. the 1st Applicant has not tendered an affidavit in support of the Application which renders the Application materially defective."

First is the argument that the 2nd & 3rd Applicants are not party to the contract in question and thus cannot bring this application. This objection fails because the Applicants bring this application as Defendants sued by the Respondent in

the main suit. Section 5 of the Arbitration and Conciliation Act allows for a defendant upon filing a defense to bring an application for stay of legal proceedings before the high court and referral of the dispute to arbitration in the instances spelt out. The Applicants have, as is seen on the main suit file, filed a defense and pleadings in the main suit are closed. This right is open to all defendants to a suit subject to arbitration.

The Respondent sued the 2nd and 3rd Applicants in their capacity as directors of the 1st Applicant company. See paragraphs 3 & 4 of the plaint in the main suit. The Respondent jointly sued them with the 1st Applicant for breach of contract, fraud, unjust enrichment. It is therefore permissible in law as parties to the main suit to lodge this application for stay of the main suit and referral of the dispute to arbitration. After all, they were introduced to the dispute as a whole by the Respondent who sued them. The Respondent cannot now claim they lack locus standi to bring this application. Section 5 of the Arbitration and Conciliation Act places one pre-requisite for locus and that is that the applicant(s) ought to be a defendant(s) who has/have filed a defense in the main suit. All three Applicants have met this pre-requisite. The objection in paragraph 4.1. of the affidavit in reply fails.

The Respondent claims that the 1st Applicant has not tendered in an affidavit in support of the application and it is therefore defective. Nuwagaba Lauben swore the affidavit in support of the application. Under paragraph 1 of the affidavit in support, Nuwagaba Lauben swears the affidavit on his behalf as an adult male of sound mind. It is not sworn on behalf of the other applicants. He clarified in paragraph 5 of his affidavit in rejoinder to the affidavit in reply:

> "THAT in specific reply to paragraph 4.1. of the Affidavit in Reply, since I am a Director and Shareholder of the 1st Applicant in which capacity I was also sued and having executed the agreement on behalf of the 1st Applicant which gives rise to the dispute, I have the capacity to swear the Affidavit in support of the instant application."

I disagree with the above paragraph of the affidavit in rejoinder. The import of this averment is that the 2nd Applicant claims to have sworn an affidavit on behalf of the 1st Applicant company, and the 3rd Applicant. He has however not provided any document proving this. The law is that a person swearing an affidavit on behalf of others must have a document granting him or her such authority. See **Bishop Patrick Baligasiima –v- Kiiza Daniel & 16 Others, Misc. Application No. 1495 of 2016.** In the case of a company like the 1st Applicant, the law expected the 2nd Applicant to present a company resolution authorizing him to swear an affidavit on its behalf. The fact that the 2nd Applicant is a

shareholder and director of the company is not authorization enough. A resolution is still required.

The consequence of this non-compliance with the law is that, the 2nd Applicant's affidavit will be read and regarded only as evidence in support of his case, and not the other Applicants' case. I do not find that the application is completely defective and should be dismissed on this point. After all, it is supported by an affidavit by one of the Applicants. In **Yona Kanyomozi –v- Motor Mart (U) Ltd, Supreme Court Civil Application No. 8 of 1989**, Justice Mulenga, JSC (RIP) seated as a single judge had to consider an application for reinstatement of an appeal. The affidavit in support of the application contained material falsehoods, which had been rebutted by the Respondent. However, Justice Mulenga found that although the affidavit in support was filled with material falsehoods, it did not render the credibility the rest of the averments doubtful.

In this application, the averments made in the 2nd Applicant's affidavit in support remain credible save for the misrepresentation that the affidavit in support and in rejoinder is also made on behalf of the 1st Applicant company. Therefore, the application remains supported and not dismissed.

The preliminary objections fail. Issue one is answered in the negative.

Issue Two: Whether Civil Suit No. 453 of 2020 should be stayed and the dispute referred to arbitration.

Section 5 of the Arbitration and Conciliation Act provides:

> 5. 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.

It is the Applicants' case that the dispute in Civil Suit No. 453 of 2020 is one that is subject to arbitration under clause 14.4 of the contract. The Respondent on the other hand claims that the arbitration clause is "pathological and incapable of being performed." This is because it does not indicate the seat of arbitration thereby creating uncertainty; the Executive Director of CADER referred to is a public official who only has administrative powers and has no powers to appoint an arbitrator; and lastly because enforcing clause 14.4 would facilitate breach of the rules of natural justice because the Executive Director of CADER would act without authority.

To properly appreciate clause 14.4, I shall reproduce all of Clause 14 of the Licence, Support, Maintenance and Service Level Agreement for Mobile Payments Aggregation Services marked Annexure A to the Affidavit in Reply. It provides:

> *"14. RESOLUTION OF DISPUTES*
>
> *14.1 Any dispute or disagreement arising between the Parties in relation to this Agreement shall, upon the request of one Party to the other, be referred to a senior manager of each Party who shall meet within Fourteen (14) days of such notice in good faith in order to determine whether the matter referred to them is capable of resolution and, if so, to resolve the matter between them.*
>
> *14.2 If such senior managers shall fail to reach agreement within a reasonable time and in any even within seven (7) days of first meeting, any such dispute shall be referred to a senior executive nominated by the chief executive officer (or equivalent) of each of the Parties who shall meet in good faith within fourteen (14) days of such dispute or disagreement being so referred in order to determine whether the matter referred to them is capable of resolution and, if so, to resolve such matters.*
>
> *14.3 This clause and any discussion of senior personnel which takes place hereunder shall not prejudice any right or remedy which any Party may ultimately have should the matter fail to be resolved by such discussions.*
>
> *14.4 If any such dispute or disagreement cannot be settled in accordance with the foregoing provisions of this Article, the dispute shall be referred on election of either Party (the "Notice of Arbitration) to arbitration by a single arbitrator to be appointed by agreement between the parties or in default of such agreement within 14 days of service of Notice of Arbitration upon the application of either party, by the Executive Director of the Centre for Arbitration and Dispute Resolution (CADER).*
>
> *14.5 Such arbitration shall be conducted in Kampala in accordance with the provisions of the Arbitration and Reconciliation Act, Cap 4 Laws of Uganda 2000 or its successor legislation.*

14.6 To the extent permissible by law, the determination of the arbitrator shall be final, conclusive and binding upon the parties hereto.

14.7 Pending final settlement or determination of a dispute, the parties shall continue to perform their subsisting obligations hereunder.

14.8 Nothing in this Agreement shall prevent or delay a party seeking urgent injunctive or interlocutory relief in a court having jurisdiction."

Neither party submitted on the dispute resolution steps laid out in clauses 14.1-14.3 above. However, what is in dispute is clause 14.4.

Counsel for the Respondent submitted that clause 14.4 above envisages the appointment of a single arbitrator by the parties, failing which, the Executive Director of CADER would appoint the arbitrator. I disagree with this interpretation, and the subsequent arguments arising out of it.

The plain and clear meaning of clause 14.4 is that upon failure to resolve a dispute under the mechanisms of clauses 14.1-14.3, the dispute would then be referred to arbitration. Arbitration would commence by either party issuing a notice of arbitration requiring the parties to agree to the appointment of a single arbitrator. Should the parties fail to agree on the appointment of a single arbitrator within 14 days from service of the notice of arbitration, then the Executive Director of CADER would be the single arbitrator of the dispute. It was the intention of the contracting parties that the outcome of arbitration stands as binding on both of them. There is nothing pathological about that clause.

Nonetheless, regardless of what the interpretation of clause 14.4 is, one thing is for sure that the first mode of appointing an arbitrator is through agreement of the parties. Counsel for the Respondent relied on **International Development Consultants Limited –v- Jimmy Muyanja & 2 Others, Misc. Cause No. 133 of 2018,** particularly Sekaana, J's ruling that:

> "The function of appointing arbitrators and conciliators is so important that it would be equated to appointing judicial officers which could not be delegated or vested in a sole individual – Executive Director. The action of the 1st Respondent appointing an arbitrator in CADER Misc. Appn. No. 67 of 2017 as if he was the Centre was ultra vires the Arbitrations and Conciliation Act and hence illegal."

The context of the above case is so different from the case at hand. I wish to point out that the above case was an application for judicial review of the 1st Respondent's (Executive Director, CADER) action of appointing himself as arbitrator in CADER Misc. Application 67 of 2017. The ruling in **International Development Consultants Limited –v- Jimmy Muyanja & 2 Others** above is also distinguishable from the case at hand with regard to the facts and rationale

of the holding. In that case, the arbitration clause in the relevant agreement provided for appointment of a single arbitrator agreed upon by the parties. They failed to agree on an arbitrator and therefore invoked Section 11(3) & (4) of the Arbitration and Conciliation Act and applied for appointment of an arbitrator by CADER. This is what resulted in the Executive Director appointing himself as arbitrator hence the judicial review application. Section 11(4) read together with Sections 11(3), and 2(1)(a) of the Arbitration and Conciliation Act mean that the appointment of the single arbitrator in that case was the preserve of the appointing authority, and not the Executive Director/1st Respondent as had been done. This is why Sekaana, J held at page 17 of the ruling held that: "A public body could only delegate powers if it was provided for in the legislation that created it. The 1st respondent in this matter alleging delegation must adduce evidence to show that the responsible person/authority had either expressly or impliedly delegated one or more of its functions."

In the application before this court, the 1st Applicant and Respondent as empowered by the principle of freedom of contract and Section 11(2) of the Arbitration and Conciliation Act agreed to appoint the Executive Director of CADER as the arbitrator in the event that they fail to agree on a single arbitrator. By the mentioned principles of law, enforcement clause 14.4, in so far as it provides for the CADER Executive Director to act as the single arbitrator upon failure to agree on one, would not lead the Executive Director to act ultra vires as was the case in **International Development Consultants Limited -v-Jimmy Muyanja & 2 Others.** It would simply be enforcement of the arbitration clause

The Respondent's arguments seek to rely on Section 5(1)(a) of the Arbitration and Conciliation Act above. The first Respondent argument that the seat of arbitration is not stated is addressed by clause 14.5 of the contract/agreement. The second argument that the Executive Director of CADER only possesses administrative powers and cannot appoint an arbitrator is misconceived. It is also premature because clause 14.4 only provides the Executive Director of CADER as the single arbitrator in the event that the parties fail to agree on a single arbitrator.

The facts as laid out in the pleadings show that the parties have not undertaken any of the steps laid out in clause 14 of the agreement. Once a dispute arose, the Respondent immediately sought recourse in the High Court, ignoring its obligation under clause 14 of the agreement. The court cannot endorse disregard of contractual obligations.

The duty of the court is to enforce contractual obligations as stated in the contract. In that vein, it would be absurd for this court to render clause 14.4 ineffective on basis of a premature assertion. Similarly, the Respondent's

argument that appointment of the CADER Executive Director would be contrary to the cardinal rules of natural justice is dismissed. It is equally premature. I therefore find that the arbitration clause is indeed operative and capable of being enforced.

Subsequently, as per Section 5 of the Arbitration and Conciliation Act I resolve to stay the proceedings in the main suit and refer this matter to arbitration per the agreement. Issue two is answered in the affirmative.

Issue Three: What remedies are available to the parties?

Conclusion

1. The proceedings in Civil Suit No. 453 of 2020 are hereby stayed.
2. The dispute in Civil Suit No. 453 of 2020 is hereby referred to arbitration.
3. Costs are awarded to the Applicants.

I so order.

Jeanne Rwakakooko
JUDGE
31/05/2022

Ruling delivered on this 2nd day of June, 2022.