THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL DIVISION]

M.A No. 1054 of 2019

BYARUHANGA BARIGYE ENOCH::::::::::::::::::::::::::::::::::APPLICANT

VERSUS

MULTIPLE INDUSTRIES LTD::::::::::::::::::::::::::::::::::::RESPONDENT

BEFORE: HON. JUSTICE DUNCAN GASWAGA

RULING

[1] This is an application brought under section 98 CPA, Section 33 of the Judicature act, Order 9 rule 3 (1) (g), (2) and (3), Order 7 rule 11 (a) and (d) and rule 19 CPR for orders that; the subject matter to wit; the debt bailout agreement is a one off transaction and not a commercial transaction thus he is not amenable to the jurisdiction of this court but is rather borne out of employment and or a matter connected to or related to employment relationship that existed between the applicant and the respondent hence rightly within the jurisdiction of the industrial court in accordance with Sections 2,5 and 7 of the Labor Disputes and Settlement Act of 2006 and Section 71, 77 and 93 of the Employment Act 2006 whose jurisdiction the plaintiff or respondent has duly submitted to; that at all material times the plaintiff/respondent and its advocates Tumusiime Kabega and Co.

Advoates was well aware of the pending labor dispute claim reference No. 244 of 2018 between the applicant and the respondent where in the subject matter inter alia of the respondent's suit , are partially or substantially in issue and pending determination before Industrial Court Kampala but wittingly filed the main suit No. 817 of 2019 over the same matters in gross abuse of court process henceforth ought to be struck out and or dismissed with costs to the applicant; the main suit No. 817 of 2019 was filed prematurely and in bad faith in a wrong court as it does not disclose a cause of action since no statutory demand was issued to the defendant or applicant contrary to section 19 of the Mortgage Act 2009 and the suit was filed in gross contravention of clause 13 of the debt bailout agreement which in absence of unfair dismissal requires all disputes to be referred to arbitration thus should be rejected and or struck out under order 7 rule 11 (a) and (d) CPR as amended; that in the alternative the main suit No. 817 of 2019 filed in High Court commercial division is statutorily barred under section 6 of the CPA and Section 5 of the Arbitration and Conciliation Act as there is a pending suit labor dispute claim No. 244 of 2018 Industrial Court in which the impugned subject matter is partly or substantially in issue and pending in a court of competent jurisdiction or for being in the wrong forum and should be struck out for that reason and for want of jurisdiction and that the costs of this application be provided for.

[2] This application was supported by the affidavit of **Byaruhanga Barigye Enoch** the applicant and the grounds are briefly that; the applicant was employed by the respondent as human resource and and administration manager on 19th February 2012 until his services

were verbally and unlawfully terminated on 31st August 2018. The applicant, in March 2018 faced with financial challenges and high cost of living approached the respondent for salary increment which was allowed and the respondent's salary was raised to Ugx 3,000,000/=. In April 2018 following an advert in the newspapers to foreclose his property that he had given as collateral to Centenary Bank, the applicant approached the respondent for a cash bail out facility. On 30th April 2018 the respondent considered and granted the applicant the cash bailout facility. Subject to the debt bailout agreement dated 30th April 2018 the respondent subsequently released a refundable cash facility of **Ugx 52,617,300/=** in three separate installments to wit; **Ugx 15,000,000/= on 30th April 2018**, **Ugx 15,000,000/= on 30th May 2018** and **Ugx 22,617,300/= on the 3rd of July 2018** being higher than that originally envisaged in their debt bailout agreement which was due to accumulated interest and penalty. Upon completion of payment as per the bank schedule, the applicant requested for release of mortgage and sought another mortgage or structured salary loan and this the respondent's managing director was aware of.

[3] However, **on 31st August 2018** the managing director summarily dismissed the applicant and no certificate of service was issued to him. The applicant remained un discharged but without receiving monthly salary. The applicant subsequently filed a labor complaint for unfair dismissal before the labor officer at Makindye claiming general damages, special damages and an order that **Ugx 52,617,300/=** and interest, if any, under the debt bailout agreement dated 30th April 2018 be paid by the plaintiff. The labor officer

subsequently referred the matter to the industrial court upon failure to resolve the complaint and considering the legal issues involved which was registered by the court as labour dispute reference No. 244 of 2018. That the respondent responded to the claim on 12th November 2018 and duly submitted to the jurisdiction of the court. The pretrial matters and all pleadings were completed and the said matter was fixed for hearing on the 10th of June 2020. That the payment of the loan facility advanced to the applicant by the respondent was frustrated by the respondent yet the same was the basis for negotiating a salary loan in order to refund the respondent's monies within four months.

[4] That the respondent has at all times in the labour court been represented by M/s Tumusiime Kabega & Co. Advocates who were aware of the pending matter before the Industrial Court but chose to ignore the same instead and filed **Civil Suit No. 817 of 2019** whose subject matter is similar to that of the claim in the Industrial Court. That the plaintiff filed the plaint prematurely which does not also disclose a cause of action since there was no compliance with clause 5.1 and 13 of the debt bailout agreement. In addition **Civil Suit No.817 of 2019** is statute barred as the same was filed in disregard of section 6 CPA and Section 5 Arbitration and Conciliation Act chapter 4. That labour dispute claim No. 244 of 2018 between the applicant and respondent has a high likelihood of success and will dispose of all matters between the parties to a logical finality and that the respondent being aware of industrial claim No. 244 of 2018 brought Civil Suit No. 817 of 2019 in bad faith and with calculated

motive to subject the applicant to unnecessary costs and frustrate his quest to justice

[5] This application raises 3 issues for determination to wit;

1. ***Whether the High Court commercial division has jurisdiction to enforce the refundable cash facility or debt bailout agreement dated 30th April 2018 between the applicant and the respondent in the circumstances***
2. ***Whether the respondent is liable for abuse of court process***
3. ***Whether that means suit number 817 of 2019 between the respondent and applicant lacks a course of action and ought to be referred to arbitration first***
4. ***What remedies are available to the parties***

[6] The applicant raised a preliminary objection. I find it apposite to first determine the preliminary objection before proceeding to the merits of this application

Preliminary Objections

[7] It was submitted for the applicant that the affidavit in reply to the instant application of Karamagi William is incurably defective and offends the law of affidavit evidence particularly Section 6 of the Oath Act in so far as the jurat is not dated which raises serious doubts as to whether the commissioner for oath ever met the deponent and as to when that happened. The applicant therefore prayed that court finds the affidavit of Karamagi William fatally defective and the same

be struck out, the application be treated as unchallenged and determined on the basis of the grounds raised by the applicant.

[8] In response thereof it was submitted for the respondent that the affidavit evidence of Karamagi William is in conformity with all laws governing affidavit evidence and it was prayed that the preliminary objection should be overruled. In rejoinder the respondent prayed that the court be pleased to examine the copy of affidavit on court record because the applicant's copy does not have a date.

[9] I have carefully examined the documents on court record and I find that the affidavit in reply of William Karamagi does not in any way contravene the law as stated by the respondents as the same is fully dated. In the circumstances therefore, this preliminary objection is overruled.

[10] The respondents also raised a preliminary objection to this application as stated under paragraph two of the affidavit in reply that this application is made out of time as per Order 9 rule 3 of the CPR. That the applicant made this application under the said order whereas the application was not made within the time limited for service of a defense as articulated by the law in the circumstances the respondent prayed that this application be dismissed

[11] In reply thereof, it was submitted by the applicant that questions of jurisdiction can be raised at any time during the pendency of the suit. That in any case the applicant filed the defence on time and put the respondent on notice that it intended to dispute the jurisdiction of this court.

[12] I have diligently perused the pleadings on record. As stated in Order 9 rule 3, there are particular timelines that ought to be followed for

one to file an application of this nature. The same ought to be filed within the times prescribed for filing a defence and the other party needs to be put on notice of the same. However, apart from the respondent raising this objection, there is no cogent evidence presented that indicates the particular timelines violated by the applicant. In the premises therefore, and in the interest of justice I hereby overrule this preliminary objection for lack of merit. The application shall then be heard on its merits.

Issue 1 Whether the High Court commercial division has jurisdiction to enforce the refundable cash facility or debt bailout agreement dated 30th April 2018 between the applicant and the respondent in the circumstances

[13] It was submitted for the applicant that the refundable cash facility / bail out agreement dated 30th April 2018 which forms the subject matter of the main suit No.817 of 2019 is a one off transaction and not a commercial transaction but rather a matter borne out of employment relationship between the applicant or defendant and the respondent or plaintiff. That this is a matter connected to employment relationship and properly within the jurisdiction of the industrial court under section 93(7) of the Employment Act and Sections 2, 5, 7 and 8 of the Labour Disputes (Arbitration and Settlement) Act 2006 as amended.

[14] That the subject matter is not a commercial transaction contemplated under paragraph 4 of the of the **Constitutional Commercial Court Practice Directions legal notice No. 5 of 1996** which designated this court as a specialized High Court commercial division. It is the

evidence of the applicant that the respondent is not in the business of money lending or a banker whatsoever but simply granted its employee, the applicant, a secured salary advance in its capacity as employer and in the circumstances of this case is properly joined issue in a prior suit or pending labor dispute No. 244 of 2018 Industrial Court. That the Industrial Court as established under Section 7(1) of the Labour Disputes Arbitration and Settlement Act 2006 as amended and Section 8 thereof lays down the functions of the Industrial Court. Section 2 of the same Act defines what constitutes a labor dispute.

[15] That in the recitals of the said bail out agreement it is provided thus *"whereas the borrower is currently employed by the company and has approached the company for possible reimbursable cash bail out to avoid debt escalation and the bank from realizing his collateral security "* the above recital sums up the intention of the parties and the capacities in which the agreement was executed and the same as being connected to employment hence any questions of unfair termination of employment during the subsistence of the said bail out agreement can rightly and were rightly joined in a Labor dispute reference No. 244 of 2018 before the industrial court as a court with competent jurisdiction. The respondent duly submitted to this jurisdiction.

[16] Counsel further relied on the case of **Engineer John Eric Mugyenyi Vs Uganda Electricity Generation Co. Ltd C.A.C.A No. 167 of 2018** where the court gave interpretation of the jurisdiction of the labor officer and industrial court that despite this court being clothed with original and unlimited jurisdiction in all matters civil and criminal

under Article 139(1) of the Constitution of the Republic of Uganda 1995 as amended regard must be put to the constitutional powers of the Chief Justice and the purpose for which this court was established as a specialized High Court commercial division under the constitutional commercial court practice directions legal notice number 5 of 1996. That any attempt to treat this court as a general High Court with original unlimited jurisdiction will create distortion as to why it is designated as a High Court commercial division and further cause confusion and multiplicity of suits, forum shopping as well as an absurdity as to whether one could as well file in this court criminal matters or family causes alleging breach of marriage contracts.

[17] The applicant concluded by praying that this court be persuaded to find that it does not have jurisdiction and to dismiss or strike out the plaint with costs to the applicant for the following reasons; that the bailout agreement dated 30th April 2018 which is the sole subject matter of the main suit No. 817 of 2019 is a one off transaction born out of employment relationship and as such not a commercial transaction; that even if this court was to invoke the original general unlimited jurisdiction of the High Court of Uganda the same is not possible because the subject matter of the bailout agreement dated 30th April 2018 and the issues in the main suit **No. 817 of 2019** are well canvassed in a prior suit labor dispute claim reference **No.244 of 2018** pending determination by a court with competent jurisdiction between the same parties in this case the industrial court; the said bail out agreement dated 30th April 2018 in clause 13 has an effective and operative arbitral clause that save for the inviolable jurisdiction of

the industrial court ought to be referred to arbitration first thus this court does not have original jurisdiction on the matter. See **Section 27(1) of the Employment Act 2006** and Section 9 of the **Labour Dispute Arbitration and Settlement Act 2006** as amended and that if all the issues raised in a prior suit pending before the industrial court and prayers of the applicant/ defendant herein were to be answered in the affirmative by the court the remedy of the respondent/plaintiff would be in appeal to Court of Appeal and last to file a fresh suit in any other court. See **Section 22 of the Labour Dispute Arbitration and Settlement Act 2006** as amended.

[18] In response thereof it was submitted for the respondent that this honorable court has jurisdiction to enforce the said refundable cash facility and this is not in any way an abuse of court process and that the bailout facility does not in any way form part of the former employment relationship between the parties. That it is a fact that the security for the bailout facility was not the applicant's salary but rather a certificate of title registered in the applicant's name and as such this mode of transaction is commercial in nature since it involved payment of sums to the bank to enable discharge of the mortgage on the applicant's title and therefore it is entirely distinct and independent from the employment of the applicant. That there is no injustice occasioned if the application is not granted since the applicant's success in the labor dispute reference No. 244-2018 will entitle him to remedies therein.

[19] In rejoinder thereof, the applicant reiterated its earlier submissions on all the issues and further stated that the bailout agreement was an integral part of the employment contract and thus any matters of law

or fact arising therefrom are determinable and within the jurisdiction of the Industrial Court.

[20] Guideline 4 of **The (Constitution Commercial Court)(Practice) Directions** is to the effect that;

> *4. Jurisdiction of the commercial court.*
> *(1) The business of the commercial court shall comprise all actions arising out of or connected with any relationship of a commercial or business nature, whether contractual or not, and include, but not be limited to—*
> *(a) the supply or exchange of goods and services;*
> *(b) banking, negotiable instruments, international credit and similar financial services;*
> *(c) insurance, reinsurance;*
> *(d) the operation of stock and foreign exchange markets;*
> *(e) the carriage of goods (by water, land and air); and*
> *(f) foreign judgments and commercial arbitration questions.*
> *(2) In the event of any doubt as to whether a matter is commercial or not, the registrar at the outset or the commercial judge during the course of the action will have power to resolve differences of opinion*

[21] It is prudent to note that the cause of action in **Civil Suit No. 817 of 2019** is breach of contract. The respondent asserts that the said suit was filed following the applicant's failure to fulfil his obligations under the bailout agreement. The applicant on the other hand insists that the commercial court has no jurisdiction to handle that particular suit. The bailout agreement between the applicant and the respondent company is one of a contractual nature. It was an agreement to advance a loan to the applicant so that he would be able to clear his outstanding loan with centenary bank such that the bank wouldn't

realize its security by selling of the applicant's properties. It is therefore my considered view that the dynamics of this transaction place it in the jurisdiction of the Commercial Court.

[22] However, I should also add that recovery of monies under a mortgage executed between the applicant and the respondent indeed has no bearing on the employment status or dismissal of the applicant. This is simply because, the recovery of the money wasn't premised on the applicant's salary but on the security advanced. Otherwise it would be imprudent for the respondent to dismiss the applicant from his employment well knowing that the re-payment of the loan was pegged on the salary received by the applicant from the respondent company. The security was supposed to be sold upon default by the applicant. See **George Okoya and Anor Vs Bank of Africa M.A No. 59 of 2018 arising from Labour Dispute No. 49 of 2018** where it was held that;

> *In our considered opinion where an employee has entered a mortgage with his/her employer, enforcement of the mortgage deed is purely a commercial transaction unless the mortgage arrangement has protective clauses in favour of the employee and as such whether the employee was unlawfully terminated has no or very little bearing on the recovery process under the mortgage deed.*

[23] In the circumstances therefore, I find that the commercial court indeed has jurisdiction to entertain Civil Suit No. 817 of 2019 which is for recovery of monies advanced by the respondent to the applicant in a purely separate matter not connected to his employment terms at all when it comes to repayment or default of the loan. Had the parties intended that the said loan arrangement be pegged on the applicant's

employment terms it was open to them to expressly state so in the loan document. This could not even be implied from the loan/mortgage arrangement. Clearly, the mortgage/loan document did not contain any protective clauses in favour of or available to the applicant. He cannot therefore benefit from this document as is and as he would have loved to. This is further compounded by the fact that the applicant presented a certificate of title as security for the loan clearly indicating that this was a separate and distinct transaction from his employment with the respondent.

Whether the respondent is liable for abuse of court process

[24] The respondent relied on section 6 CPA to state that one of the legal inputs here is to prohibit parties from filing different suits based on similar questions of law and facts between same parties in the same court or different courts with concurrent or similar jurisdiction over the same subject matter. That the courts are equally barred from hearing such matters concurrently. See **Tindyebwa Stephen Vs Alpha International Investments Ltd M.A No. 789 of 2005** where it was held that section 6 CPA is couched in mandatory terms. That such conduct amounts to abuse of court process. See the case of Uganda **Land Commission Vs James Mark Kamoga and Anor S.C.C.A No. of 2004.** That the respondent's lawyers have always been aware of the proceedings in the Industrial Court but still went ahead to file Civil Suit No. 817 of 2019. The applicant prayed that this court be persuaded by the above authorities to find that the respondent or plaintiff is culpable for abuse of court process.

[25] In reply thereof it was submitted for the respondent that the applicant's reference to section 6 CPA is misguided and not relevant

in this matter. The respondent reiterated its earlier submission that the two suits are distinct. That Civil Suit No. 817 of 2019 instituted by the respondent here in is premised on a breach of contract for non-payment of the bailout facility whose security was a certificate of title registered in the name of the applicant whereas labour dispute reference No. 244 of 2018 is premised on termination of employment all of which are two different causes of action that as such the respondent's institution of Civil Suit No.817 of 2019 is not in any way an abuse of court process and the applicant's allegation of the same are unfounded and only intended to delay court process in the matter.

[26] Section 6 CPA states thus;

> *"No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where that suit or proceeding is pending in the same or any other court having jurisdiction in Uganda to grant the relief claimed."*

[27] This in essence is the lis pendens rule. The Black's Law Dictionary (8th Ed) defines *"lis pendens", as a latin expression which simply refers to a "pending suit or action".* A number of considerations have to be looked at to consider whether the instant suit/application is barred by the "lis pendens" rule and these are;

(i) Whether the matter(s) in issue in the instant suit are directly and substantially in issue in a previously instituted suit,

(ii) *Whether the previously instituted suit is between the same parties*

(iii) *Whether the suit is pending before in the same or any other court having jurisdiction to grant the reliefs claimed* as stated in the case of **Springs International Hotel Vs. Hotel Diplomate Ltd and Anor Civil Suit No.227/2011**.

[28] In this particular application, it is apparent that labour dispute **No. 244 of 2018** involves the two parties now before court in this particular application. The labour dispute reference No. 244 of 2018 concerns unlawful termination of the applicant shortly after being granted a salary advance/cash bailout facility by the respondent. Upon the said dismissal, the applicant filed a claim with the labour officer at Makindye but the same was forwarded to the Industrial Court and is pending determination. In the said labour claim, the applicant prays that court orders the respondent to pay the bailout facility for having caused the applicant failure to mitigate loss due to unlawful dismissal. The respondent then filed **Civil Suit No. 817 of 2019** for breach of contract of the bailout agreement. It is important to note that though the applicant prays for the above mentioned prayers in the Industrial Court, the cash bail out facility is a distinct transaction from the employment relationship between the applicant and the respondent. I find no connection whatsoever between the cash bailout agreement and the dismissal of the applicant. I therefore find that the respondent is not liable for abuse of court process.

Issue 3 whether that means suit number 817 of 2019 between the respondent and applicant lacks a cause of action and ought to be referred to arbitration first

[29] It was submitted for the applicant that Order 7 rule 11 (a) & (d) of the Civil Procedure rules is to the effect that a plaint shall be rejected if it

does not disclose a cause of action. See also **Uganda Aluminium Ltd Vs Restuta Twinomugisha C.A.C.A No.22 of 2000.** That as such the plaint in **Civil Suit No.817 of 2019** is brought in bad faith against the applicant as the facts do not disclose any substantial matter to be answered by the applicant as the same can be answered in a pending **Labor Dispute No. 244 of 2018** between the same parties and in which matters raised in the instant suit. That in the alternative, the respondent filed the main suit **No. 817 of 2019** prematurely and without a cause of action as it was under contractual duty to issue a statutory demand notice of 45 days in accordance with section 19 of the mortgage act and Clause 5.1 of the said bailout agreement. That such action leaves the respondent without a cause of action as the applicant cannot be said to have breached a contract for which a statutory demand was never issued. Similarly that the respondent lacks a cause of action to commence the main suit in this court as the court of first instance because the said bail out agreement contained an effective and enforceable **arbitral clause 13** and in absence of a labor dispute over the same the respondents would only have a cause of action to invoke arbitration proceedings and not file a first instance suit in this court. That the transaction, the subject of the bailout agreement, forms the subject matter of the main suit yet the same is being determined in the Industrial Court.

[30] In response thereof it was submitted for the respondent that **Civil Suit No.817 of 2019** has a cause of action which is based on breach of contract by the applicants and payment of the bailout agreement to the respondent as earlier submitted. See **Barclays Bank Uganda limited Vs Howard M. Bakojja Civil Suit No. 53 of 2011**. That the

applicant failed to pay up the facility in the bailout agreement without just cause and as a result the applicant was in breach of a contract thus a cause of action against the applicant. Regarding the applicant's prayer to refer the matter to arbitration, the respondents admitted that both parties had had several meetings and explored all means to settle the matter but failed

[31] From the pleadings of the respondent, it is apparent that the cause of action is breach of contract. Indeed it is true that the suit is properly before this court. However, it is important to note that **Clause 13** of the Bailout agreement between the applicant and respondent is to the effect that;

> "*All disputes, controversies or claims arising out of or in connection with or in relation to this agreement of its negotiation, performance, breach, existence or validity, whether contractual or in tort shall first be resolved amicably interparty within 10 days of service of claim on the other party; failure of which parties agree to submit to The Center for Arbitration and Dispute Resolution (CADER) located at Portal Avenue Crusader House 3rd Floor, P.O Box 25585 Kampala, Uganda for arbitration, under its rules as in force and effect on the date of this agreement.....the award of the arbitration shall be final and binding against the parties hereto.*"

[32] Though it has been submitted by the respondent that this was a one off commercial transaction and the same has no connection whatsoever to the employment relationship, and that the parties have explored all the avenues to settle the matter and these have failed, there has been no mention of whether there was a claim submitted to

CADER as agreed in the arbitration clause. It is prudent to note that where parties have agreed on a course of action, the same should be acted upon before the parties resort to the courts of law. However, where the same has not been successful, then the parties can refer to other avenues, such as courts of law for remedies.

What remedies are available to the parties

[33] It was submitted for the applicant that he had made out his case and the main suit **No. 817 of 2019** should be struck out or dismissed for want of jurisdiction. That in the alternative, the suit be referred to arbitration under Section 5 of the Arbitration and Conciliation Act or that the suit be stayed in accordance with Section 6 CPA, pending determination of the Labour claim. The applicant also prayed for the costs of the application.

[34] It was submitted for the respondent the applicant is not entitled to any relief claimed in this application and that the bailout agreement is a distinct contract from the applicant's employment and thus the applicant has particular obligations under the bailout agreement which he has failed to execute. That the institution of High Court civil Suit No. 817 of 2019 by the respondent is not in any way an abuse of court process and the argument that the said suit be stayed is misguided. That this court has jurisdiction conferred upon it by the law to hear and dispose of High Court civil suit number 817 of 2019 since the preliminary steps to mediate and settle the matter out of court failed.

[35] In the circumstances therefore, I find that this application lacks merit and shall be dismissed with costs.

I so order

Dated, signed and delivered at Kampala this 24th day of January, 2022.

Duncan Gaswaga

JUDGE