THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLEANEOUS APPLICATION NO. 441 OF 2020

(ARISING FROM CIVIL SUIT NO. 914 OF 2019)

AMBITIOUS CONSTRUCTION COMPANY LTD :::::::::::::::::: APPLICANT

VERSUS

UGANDA NATIONAL CULTURAL CENTRE :::::::::::::::::: RESPONDENT

BEFORE: HON. JUSTICE BONIFACE WAMALA

RULING

Introduction

[1] This application was brought by Notice of Motion under Section 5 of the Arbitration and Conciliation Act, Cap 4, Order 47 rule 1 and Order 52 rules 1 and 3 of the Civil Procedure Rules seeking orders that:

a) High Court Civil Suit No. 914 of 2019 be stayed and the dispute be referred to an Arbitrator.
b) The Court be pleased to appoint an Arbitrator to resolve the dispute.
c) Costs of this application be provided for.

[2] The grounds of the application are set out both in the Notice of Motion and in an affidavit in support of the application deponed to by **Prashant Ramji**, a Director in the Applicant Company. Briefly, the parties signed a contract on 7th August 2017 for the renovation of the National Theatre premises which contract contained a dispute resolution clause that required reference of the matters to an Adjudicator agreed to by the parties, failure of which the matter would be referred to arbitration for final determination of the dispute. The deponent stated that upon a dispute arising over performance of the contract, the Applicant wrote to the Respondent for

purpose of the parties agreeing on an Adjudicator and initiating an adjudication proceeding but the same was ignored by the Respondent. The Applicant wrote to the Uganda Institute of Professional Engineers (UIPE) to provide an Adjudicator whom the Institute provided in the name of Engineer Hans Mwesigwa. The appointment was communicated to the Respondent but the latter still ignored. The deponent attached correspondences to that effect. The Applicant therefore brought the suit to Court for purpose of the Court referring the matter to arbitration and to appoint an Arbitrator. He concluded that it is just and equitable that the application be allowed.

[3] The application was opposed by the Respondent vide an affidavit in reply deposed by **Francis Peter Ojede**, the Executive Director of the Respondent. Briefly, the deponent stated that the dispute subject of HCCS No. 914 of 2019 relates to breach of a contract that contains arbitration clauses. Accordingly, the Applicant wrongfully filed the suit with full knowledge that an arbitration clause existed in the agreement requiring the parties to submit the dispute to arbitration. The deponent further stated that he has been advised by the Respondent's advocates that the Court cannot stay the suit which it has no jurisdiction to handle and the correct course of action is to dismiss the suit with costs as the same was filed in total abuse of the court process. The deponent also stated that he had been further advised by their advocates that once a dispute is referred to arbitration, the suit consequently abates and can only be re-instituted in court in accordance with the Arbitration and Conciliation Act and Rules. The deponent concluded that this application is misconceived since the suit from which it arises is wrongfully before the Court. He prayed for dismissal of the application with costs.

Representation and Hearing

[4] At the hearing, the Applicant was represented by Mr. Aubrey Lukongwa appearing on brief for Mr. David Kaggwa while the Respondent was represented by Mr. Muwonge Kassim. 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 determination of this matter and I will refer to them where appropriate in the decision.

Court Determination

[5] The relevant provisions of the law applicable to the present matter are Sections 5 and 9 of the Arbitration and Conciliation Act, Cap 4 of the Laws of Uganda (hereinafter to be referred to as the **"ACA"**). **Section 5 of the ACA** provides as follows: –

> ***"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."*

[6] **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."*

[7] In line with the above provisions of the law, a party seeking reference of a matter to arbitration is required to show that there is a binding and enforceable arbitration agreement between the parties; that an arbitrable

dispute exists between the parties before the court; that the application is made after a defence has been filed in the matter before the court; and both parties have been given a hearing.

[8] On the case before me, there is no dispute as to whether the agreement between the parties contained an arbitration clause. There is no claim by either party that the arbitration agreement is null and void, inoperative or incapable of being performed. Consequently, there is no dispute over the existence of an arbitrable dispute between the parties. It is also clear that this application was brought after the Defendant in the suit (the Respondent herein) had filed a defence. Similarly, it is also not in doubt that both parties have been heard on the application for reference of the matter to arbitration. Ideally, the parties appear agreed and there ought not to have been a dispute over reference of this matter to arbitration. To my mind, the only dispute that exists is as to why the Applicant (the very Plaintiff in the suit) had to bring the suit in court.

[9] It appears on record that the Applicant filed HCCS No. 914 of 2019 (the suit) not because they were unaware of the existence of the arbitration agreement or because they had ignored it, but because of the alleged conduct by the Respondent of ignoring the prior efforts taken to resolve the dispute in accordance with the contract. It was averred for the Applicant that according to the contract, the forum of first instance in case a dispute arose was reference to an Adjudicator in accordance to General Conditions of Contract (GCC) 24 and 25 in the contract. The Adjudicator was supposed to be appointed upon the agreement of both parties. It is stated that when a dispute arose, the Applicant wrote to the Respondent for purpose of the parties agreeing on an Adjudicator and initiating an adjudication proceeding but the same was ignored by the Respondent.

[10] The Applicant further showed in evidence that it wrote to the Uganda Institute of Professional Engineers (UIPE) to provide an Adjudicator whom

the Institute provided in the name of Engineer Hans Mwesigwa. The appointment was communicated to the Respondent but the latter still ignored. The deponent attached to the affidavit in support of the application correspondences to that effect. The Applicant therefore opted to bring the suit to Court for purpose of the Court referring the matter to arbitration and to appoint an Arbitrator.

[11] The Respondent did not controvert the evidence and sequence of facts by the Applicant as set out above. The said evidence is therefore deemed true and correct. That being the case, the only question that requires the court's consideration is whether bringing the suit was the best mechanism available to the Applicant to seek reference of the dispute to arbitration. It appears to me that the Applicant proceeded under the assumption that since the Respondent had snubbed the attempts to agree upon an Adjudicator, it was useless to get back to them over appointment of an arbitrator. Given that the Respondent offered no response over the communication regarding the appointment of an Adjudicator and gave no reasons for their non-cooperation, I am prepared to give a benefit of doubt to the Applicant over their assumption that it was unnecessary to get back to the same Respondent over appointment of an Arbitrator. The Applicant was therefore entitled to resort to other options available under the law.

[12] Section 11 of the ACA provides for appointment of arbitrator(s). Under sub-section (4) thereof, where parties fail to agree on appointment of an arbitrator, a party interested in the appointment may apply to the Appointing Authority. Under S. 2(1)(a) of ACA, "appointing authority" means an institution, body or person appointed by the Minister to perform the functions of appointing arbitrators and conciliators. The Centre for Arbitration and Dispute Resolution (CADER) was put in place as such "Appointing Authority" within the meaning of the Arbitration and Conciliation Act (ACA). However, in ***International Development Consultants Ltd -V- Jimmy Muyanja and others Misc. 133 of 2018***

(**Ssekaana J.**), it was held that the power vested in CADER was exercisable by the Governing Council of CADER and not by the Executive Director as the practice had been at the time. The dilemma was that as of March 2019 when the decision was passed, the Governing Council was not in place. There is no evidence that by the 7th November 2019 when the suit was filed, the Governing Council was in place. In absence of an appointing authority within the meaning of the ACA, the Plaintiff was right to seek the court's intervention for purpose of appointment of an arbitrator. The suit by the Plaintiff/Applicant was therefore properly brought before the court. This application is, as well, properly before the court.

[13] The other point raised by Counsel for the Respondent concerned whether, after reference of the matter to arbitration, the suit should be stayed (as prayed for by the Applicant) or dismissed with costs (as prayed for by the Respondent). Relying on the decisions in ***Yan Jian Uganda Company Ltd vs Siwa Builders and Engineers, HC MA No. 1147 of 2014*** and ***Sobetra (U) Ltd vs West Nile Electrification Company Ltd, HC MA No. 10 of 2010***, Counsel for the Respondent appeared to argue that once a matter is referred or referable to arbitration, it is not permissible to stay the suit from which the matter arises. In my view, Learned Counsel for the Respondent misconstrued the findings of the Learned Judge in the two above cited decisions. What the Learned Judge found was that in light of the facts and circumstances in those cases, it was unnecessary to stay the suits. The Learned Judge did not say it was not permissible under the law. Clearly, the Learned Judge was cognisant and indeed quoted the express provision of Section 5 of ACA whose head note reads "*Stay of legal proceedings*".

[14] It follows, therefore, that the power to stay proceedings in such circumstances is provided for under the governing Act. The argument by the Respondent's Counsel that the court has no jurisdiction to stay such a proceeding is, therefore, misguided. The fact that a matter involving an

arbitrable dispute has been brought before the court does not deprive the court of jurisdiction. That, in my considered view, is the very essence of the provision under Section 5 of ACA. Provided the exceptions within that provision do not apply, the court is duty bound to refer the matter to arbitration. The matter before me falls in that category.

[15] In line with the decisions in ***Yan Jian Uganda Company Ltd vs Siwa Builders and Engineers (supra)*** and ***Sobetra (U) Ltd vs West Nile Electrification Company Ltd (supra)***, I will proceed to consider whether in the present circumstances there is need to stay the suit. I am in agreement with the Learned Judge that after referring the dispute to arbitration, a stay of the suit serves no useful purpose since it is not envisaged that the parties would come back to court other than in a manner provided for in the ACA in instances such as setting aside the award, enforcing the award, applications for interim measures, among others. In all such instances, there will be no need for the stayed suit. To that extent, I am in agreement that once I have entered an order referring the matter to arbitration, it is unnecessary to stay the suit. The suit will therefore be terminated for having served its purpose.

[16] Regarding the costs of the suit, it was argued by Counsel for the Respondent that the application was misconceived and an abuse of the court process and it ought to be dismissed with costs. As I have indicated herein above, the Applicant was justified in bringing this suit. It cannot therefore be penalized to costs. Given that the dispute between the parties is yet to be determined on the merits, I accordingly order that the costs shall abide the order of arbitration as to costs.

[17] It was prayed by the Applicant that upon the Court referring the matter to arbitration, the Court should proceed to appoint an Arbitrator. The parties however did not make any proposals as to persons suitable to undertake the task. In the circumstances I will appoint the Firm of Praxis

Conflict Centre who shall assign a suitable Arbitrator of the dispute between the parties.

[18] In the result, therefore, this application is allowed with the following orders:

a) The dispute between the parties herein is referred to arbitration.

b) High Court Civil Suit No. 914 of 2019 is closed as it has served its purpose.

c) The Court hereby appoints the Firm of Praxis Conflict Centre who shall assign a suitable Arbitrator of the dispute between the parties.

d) The costs of this application and of the suit shall abide the order of arbitration as to costs.

It is so ordered.

Dated, signed and delivered by email this 26th day of September, 2022.

Boniface Wamala

JUDGE