

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
IN THE MATTER OF A REFERENCE TO ARBITRATION
UNDER THE ARBITRATION AND CONCILIATION ACT CAP 4
AND
IN THE MATTER OF AN APPLICATION FOR AN INTERIM
MEASURE OF PROTECTION
MISC. APPLICATION NO. 2154 OF 2023

MAROLA TECHNOLOGY-SMC LTDAPPLICANT
(COMMONWEALTH TECHNOLOGIES LTD)

VERSUS

UGANDA INVESTMENT AUTHORITYRESPONDENT

BEFORE: HON. LADY JUSTICE PATIENCE T.E. RUBAGUMYA

RULING

Introduction

This application was brought by Notice of Motion under Section 6 of the Arbitration and Conciliation Act Cap 4, Section 98 of the Civil Procedure Act Cap 71, Section 33 of the Judicature Act Cap 13, Rule 13 of the Arbitration Rules and Order 52 Rules 1 and 3 of the Civil Procedure Rules SI 71-1, seeking for:

1. An interim measure of protection doth issue against the Respondent or its agents restraining and/or stopping it from implementing and/or enforcing the board decision granting the lease comprised in land at Namanve LRV 4571 Folio 2 Plot 3205

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Block 234 to any other person pending the disposal of the arbitration commenced by the Applicant.

2. Alternatively, but entirely without prejudice, an interim measure of protection doth issue against the Respondent and or its agents from evicting the Applicant and/or interfering with the Applicant's possession, occupying, constructing, titling, further formalising any land allocation and carrying out any activities on the land at Namanve LRV 4571 Folio 2 Plot 3205 Block 234, until the disposal of the arbitration process commenced by the Applicant.
3. The costs of the application abide the main application.

The grounds of the application are detailed in the affidavit in support by **Ms. Esther Semakula**, the Company Secretary of the Applicant, but briefly are that;

1. On the 29th day of June 2022, the Applicant and Respondent entered into a commercial lease agreement for the allocation of land comprised at Namanve LRV 4571 FOLIO 2 Plot 3205 Block 234, for a period of 12 years.
2. On the 27th day of June 2023, the Applicant applied for a renewal and/or extension of the lease from the Respondent which application was rejected.
3. A dispute has arisen in relation to the determination of the Applicant's rights which dispute should be resolved by way of arbitration pursuant to the Investment Code Act, 2019.

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4. The Applicant has initiated arbitration proceedings to resolve the dispute between the parties but in the meantime the Respondent is threatening to evict the Applicant.
5. It is just and equitable in the circumstances of this case that the orders sought be granted.

In its affidavit in reply, the Respondent through **Mr. Robert Mukiza** its Director General, opposed the application briefly stating inter alia that;

1. The Applicant and the Respondent entered into a lease agreement over the suit land by agreement dated 18th March 2016 for an initial period of 5 years. The lease expired on 17th March 2021 and the parties entered into a lease renewal agreement dated 29th June 2022 for a lease period of one year which expired on 28th June 2023.
2. The Applicant applied for extension of the lease on 27th June 2023, one day before the lease expired on 28th June 2023 and upon expiry and before renewal of the same, the land reverted to the Respondent.
3. The Applicant filed Misc. Application No.881 of 2023 arising from Misc. Cause No.142 of 2023 seeking for a temporary injunction. The Applicant also filed Misc. Application No.883 of 2023 arising from Misc. Cause No.142 of 2023 seeking for an interim order.
4. On 21st August 2023, the judicial review application came up for hearing before Hon. Justice Dr. Douglas Singiza and that the ruling was scheduled for 19th January 2024.

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5. On 18th September 2023, the Respondent rejected the Applicant's attempts to commence arbitration proceedings under the Investment Code Act, 2019 on ground that the Applicant had already chosen to have the dispute adjudicated by Court.

Representation

The Applicant was represented by **M/s Moogi Brian & Co. Advocates** while the Respondent was represented by **M/s Kampala Associated Advocates**.

Both parties were directed to file written submissions which they did and the same were considered by Court.

Counsel for the Respondent raised the following preliminary objections:

- a) That the application offends the *lis pendens* rule and is barred by law.
- b) The application is an abuse of Court process.

Order 6 Rule 8 of the Civil Procedure Rules, is to the effect that a point of law that is pleaded when so raised is capable of disposing of the suit, may by consent of the parties or by order of the Court on the application of either party, be set down for hearing and disposed of at any time before the hearing.

In the case of ***Mukisa Biscuit Manufacturing Co Vs West End [1969] EA 696 at 701***, Justice Sir Charles Newbold stated that;

"A preliminary objection raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is extrinsic evidence of judicial direction."

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It is therefore trite that where there is a preliminary objection capable of disposing of the matter in issue, it is judicious to first determine the said objection before embarking on the merits of the case.

Guided by the above provision and the nature of the preliminary objections raised, I shall proceed with the determination of the preliminary objections as raised.

Consideration of the preliminary objections

Preliminary objection no. 1: Whether this application offends the *lis pendens* rule and is barred by law?

Respondent's submissions

Counsel for the Respondent submitted that filing of the instant application for an interim order in this Court while similar applications are before the High Court Civil Division between the same parties with the same subject matter, is a gross violation of the *lis pendens* rule rendering the instant application wholly untenable.

Relying on Section 6 of the Civil Procedure Act Cap 71 which provides for the *lis pendens* rule, Counsel quoted **Hon. Justice Christopher Madrama** in the case of ***Shumuk Springs Development Ltd & 3 Others Vs Bonney Mwebesa Katatumba & 6 Others HCT-00-CC-CS-0375-2009***, in which he held that;

"Section 6 of the Civil Procedure Act is mandatory in that it bars a Court from proceeding with the trial of any suit or proceeding where the matter in the suit is also directly and substantially in issue in a previously instituted suit or proceeding and between the same parties. First of all, the Court has to establish whether there is a previously instituted suit or proceeding

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between the same parties. Secondly the Court has to determine whether the matter in controversy in the second suit is also directly and substantially in issue in a previously instituted suit. Thirdly, this suit instituted prior in time must be before a court of competent jurisdiction. All in all, an examination of the current suit namely HCCS No.375 of 2009 and HCCS No.126 of 2009 clearly reveals that the matter in issue in the current suit is also directly and substantially in issue in a previously instituted suit namely HCC No.126 of 2009 between the same parties or between parties under whom they or any of them claim It is therefore my conclusion that the current suit cannot be tried as the Court is barred from proceeding with the trial of the suit under Section 6 of the Civil Procedure Rules”.

I shall now consider the conditions stipulated in Section 6 of the Civil Procedure Act;

(i) On whether the matter in issue in the present application is also directly and substantially in issue in a previously instituted suit or proceedings, Counsel for the Respondent submitted that before the Board of the Respondent had determined the application for extension of the lease, the Applicant filed a judicial review application vide Misc. Cause No.142 of 2023 at the High Court Civil Division. That the Applicant further filed Misc. Application No.881 of 2023 arising from Misc. Cause No.0142 of 2023 seeking for;

“A temporary injunction restraining and or stopping the Respondent and or their agents from evicting, occupying, constructing, titling, further formalising any land allocation and carrying out activities on the land in Namanve LRV 4571 Folio 2 Plot 3205 Block 234 until the disposal of the main application”.

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Counsel argued that the Applicant further filed Misc. Application No.883 of 2023 arising from Misc. Cause No.142 of 2023 seeking for;

- a. An interim measure of protection against the Respondent or its agents and/or stopping it from implementing and/or enforcing the Board decision granting the lease comprised in land at Namanve LRV 4571 Folio 2 Plot 3205 Block 234 to any other person pending the disposal of the arbitration commenced by the Applicant.
- b. Alternatively, but entirely without prejudice, an interim measure of protection be issued against the Respondent and or their agents from evicting the Applicant and /or interfering with the Applicant's possession, occupying, constructing, titling, further formalizing any land allocation and carrying out any activities on the land at Namanve LRV 4571 Folio 2 Plot 3205 Block 234 until the disposal of the arbitration process commenced by the Applicant.

(ii) On whether the previously instituted suit or proceeding is between the same parties, Counsel for the Respondent contended that the applications at the High Court Civil Division and this current application are between the same parties.

(iii) Whether the suit or proceeding is pending in the same or any other Court having jurisdiction to grant the reliefs claimed;

Counsel for the Respondent contended that Misc. Cause No. 142 of 2023, Misc. Application No. 881 of 2023 and Misc. Application No. 883 of 2023 are pending before the Civil Division of the High Court whose jurisdiction is the same as that of the Commercial Division.

In reply to preliminary objection no.1, Counsel for the Applicant while relying on Section 6 of the Civil Procedure Act, submitted that the case

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before His Lordship Dr. Douglas Singiza relates to enforcement of a public right and seeks for remedies of certiorari and mandamus whereas the matter before this Court relates to enforcement of a private right.

Resolution of preliminary objection no. 1

The phrase "*lis pendens*" is defined by Black's Law Dictionary 11th Edition to mean "a pending suit".

Section 6 of the Civil Procedure Act provides that;

"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."

From the above provision and several precedents, in establishing whether this matter violates the doctrine of *lis pendens*, it has to be established that, the matter in issue in the present application is also directly and substantially in issue in a previously instituted suit or proceeding, secondly that the previously instituted suit or proceeding is between the same parties and lastly, the suit or proceeding is pending in the same or any other Court having jurisdiction to grant the reliefs sought. (*see Jadva Karsan Vs Harnam Singh Bhogal [1953] 20 EACA 74, on page 75 - 76 the Supreme Court of Kenya*).

It is undisputed evidence that the Applicant herein aggrieved by the decision of the Respondent not to renew its lease in respect of land at

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Namanve LRV 4571 Folio 2 Plot 3205 Block 234, instituted at High Court Civil Division Misc. Cause No.142 of 2023 for judicial review seeking orders among others; a permanent injunction restraining the Respondent from interfering with the Applicant's quiet possession of the subject land at Namanve.

Arising out of the same cause, the Applicant filed Misc. Application No.881 of 2023 and Misc. Application No.883 of 2023, seeking for a temporary injunction and an interim order respectively, against the Respondent not to deal in the suit land in any way until the final disposal of the main cause. ***(See annexure "AA" and "BB" attached to the affidavit in reply).***

For avoidance of doubt, Misc. Application No.883 of 2023 sought for;

"An interim order doth issue restraining the Respondent, its agents, servants or any person acting on its behalf from evicting the Applicant and or re-entering land at Namanve LRV 4571 Folio 2 Plot 3205 Block 234, until disposal of Misc. Application No.881 of 2023."

Considering the nature of the remedy sought for an interim order and temporary injunction in both applications in the High Court Civil Division, the Applicant is seeking the protection of Court against the Respondent from interfering with the suit land in any way until the determination of the dispute in issue. I therefore find the matter in issue in the instant application directly and substantially in issue in Misc. Application No.883 of 2023 and Misc. Application No. 881 of 2023.

As to whether the previously instituted suit or proceeding is between the same parties, this test is undisputed by the parties. All the applications filed by the Applicant are against the Respondent. ***(See annexures "O",***

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“AA” and “BB” attached to the affidavit in reply) and are in Courts having jurisdiction to grant the said reliefs sought.

Though Counsel for the Applicant argues that Misc. Cause No.142 of 2023 relates to enforcement of a public right and seeks for remedies of certiorari and mandamus while the current application is seeking for enforcement of private right, the argument is not satisfactory in that any order made by this Court in this application will directly affect the matter at the High Court Civil Division. Furthermore, the remedies being sought in this instant application and in the two Misc. Applications in the High Court Civil Division are essentially the same.

The case of ***Krone Uganda Limited Vs Kerilee Investment Ltd M.A 306 of 2019*** cited by Counsel for the Applicant in the submissions in rejoinder is not relevant to the instant application. In the aforementioned case, Court held that an application to set aside a consent judgment was different from an application for stay of execution. I entirely agree with this Ruling. In the instant case the facts are different to the extent that, the two applications for interim and temporary injunction orders are seeking the same relief from this Court.

I would have been persuaded to some extent by the argument of Counsel for the Applicant that the remedies being sought are different if the Applicant had not filed Misc. Applications No. 881 of 2023 and No. 883 of 2023. The issue in determination in Misc. Cause 142 of 2023 dealing with the legality of the directive of the Director General of the Respondent would certainly be different from the orders being sought in the instant application.

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In the circumstances, the act of the Applicant filing this instant application and the two applications in the High Court Civil Division violates the *lis pendens* rule.

Preliminary objection no. 2: Whether the application is an abuse of Court process?

Respondent's submissions

Counsel submitted that Section 98 of the Civil Procedure Act and Section 33 of the Judicature Act enjoin this Court to curtail abuse of process.

He quoted among others the ***case of Attorney General Vs James Mark Kamoga & Anor, SCCA No.8 of 2004*** in which **Mulenga JSC (RIP)** concurred with the definition of abuse of Court process as per Black's Law Dictionary (6th Edition) and held that;

"Abuse of court process involves the use of the process for an improper purpose or a purpose for which the process was not established."

Lastly, he submitted that the Applicant has filed multiple suits in different Divisions. That Misc. Cause No.142 of 2023 in the High Court Civil Division seeking among others a permanent injunction restraining the Respondent from interfering with the Applicant's quiet possession of the suit land, Misc. Application No.881 of 2023 and Misc. Application No.883 of 2023 seeking for a temporary and interim injunction in respect of the suit land and the instant application, in which the Applicant is seeking an interim order pending the disposal of the arbitration commenced by the Applicant, are for the same remedies but in different Divisions of the High Court.

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Applicant's submissions

In reply, Counsel for the Applicant argued that any challenge to the propriety and competence of an application pertains whether a Court has jurisdiction to entertain this application.

He submitted that the powers of this Court to entertain this application stem from the Investment Code Act, 2019 under Section 25. That arbitration is one of the options a party can seek to resolve such a dispute.

To that extent the Applicant submitted that the application is properly before this Court. Counsel further relied on the case of ***Eco-Friendly Farming Ltd Vs Uganda Investment Authority Civil Suit No. 604 of 2014*** where Court held that arbitration is nevertheless the most preferred mode of dispute resolution mechanism under the law and concluded that there exists a valid arbitration agreement and that there are pending arbitration proceedings between the parties.

Resolution of preliminary objection no. 2

I have considered the submissions of both Counsel and the cases cited. I note that the argument of Counsel for the Applicant is largely that this instant application stems from the Investment Code Act, 2019 and the Lease Agreements.

Clause 10 of the Lease Agreement between the parties dated 29th June 2022 provided as follows;

“Dispute Resolution

The parties express the intention that all disputes in connection with this Lease Agreement and the execution hereunder shall be settled through amicable negotiations. In the event that no settlement can be

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reached through amicable negotiations, any dispute, controversy or claim arising out of or relating to this Agreement or the breach, termination or invalidity thereof shall be settled by any means authorised by law of the Republic of Uganda”.

The above clause on dispute resolution, does not specify arbitration as the mode of dispute resolution between the parties but rather it provides for a window of parties to decide on any mode authorised for dispute resolution under the laws of Uganda and indeed arbitration is one mode that is provided for in the laws of Uganda. However, it should be noted that the Lease Agreement did not specify arbitration as the mandatory mode of dispute resolution.

The expired lease agreements contained a similar dispute resolution clause as clause 10 reproduced hereinabove.

I shall now examine the provisions under the Investment Code Act, 2019 which Counsel for the Applicant relied on. Section 25(2) of the Investment Code Act, 2019 provides that;

*“A dispute between an investor and the Authority or the Government in respect of a registered business enterprise which is not settled through negotiations **may be submitted to arbitration** in accordance with the following methods as may be **mutually agreed** by the parties....”*
(emphasis mine).

In as much as Section 25(2) of the Investment Code Act, 2019 provides for arbitration, the law provides that the dispute “may” be submitted to arbitration and does not make it mandatory. Furthermore, subsection (2) of Section 25 provides that the method should be mutually agreed upon by the parties.

An arbitration agreement is defined under Section 2 (1)(c) of the Arbitration and Conciliation Act Cap 4 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 (emphasis mine).

In the instant case and as stated in paragraph 64 of the affidavit in reply, the Respondent rejected the Applicant's attempts to commence arbitration proceedings under the Investment Code Act, 2019 as evidenced by annexure "FF", the letter dated 18th September 2023.

While I agree with the Ruling in the case of **Eco-Friendly Farming Ltd (Supra)** cited by Counsel for the Applicant, that arbitration is the most preferred mode of dispute resolution, it is not the case at all times and the facts of each case must be examined. Parties have used other dispute resolution mechanisms depending on their preferences and circumstances.

The Respondent herein did not agree to the arbitration method and therefore it was improper and irregular for the Applicant to file this instant application by proceeding under the Arbitration and Conciliation Act Cap 4 when this arbitration method was not agreed to by the Respondent.

Accordingly, I respectfully disagree with Counsel for the Applicant that there is a valid arbitration agreement and pending arbitration proceedings because the proceedings are not in existence.

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In the case quoted by Counsel for the Respondent of ***Pan-Afric Impex (U) Ltd Vs Barclays Bank Plc and Absa Bank Ltd, MA No. 804/2007, Hon. Justice Egonda-Ntende*** held that;

“It is without question that a court can grant interim measures of protection under the foregoing provisions. There are conditions though for a person to take advantage of these provisions. Firstly, there must be an arbitration agreement between the parties. A party to such an agreement may then apply for such an interim measure before or commencement of arbitral proceedings. If the arbitral proceedings have commenced, the applicant would have to be a party to these proceedings, and a party to the agreement giving rise to the arbitration proceedings”.

In the instant case as already stated above, the Respondent rejected the arbitration mode and therefore, there are no arbitration proceedings between the parties.

The question that then comes to my mind is, whether the law makers envisaged a situation where the investor and Authority would fail to agree on the mode of arbitration?

Section 25(4) of the Investment Code Act, 2019 provides that,

“Where the parties to a dispute do not agree on the mode or forum for arbitration, the party aggrieved by compulsory acquisition or possession or the amount of compensation payable, or in respect of any other matter relating to the business enterprise, may apply to the High Court for the determination of any of the following....”

In the instant case, the Applicant already filed an application in the High Court Civil Division seeking protection in respect of the suit land pending

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determination of the judicial review application. The instant suit falls in the category of institution of multiple suits on the same subject matter which in my view is an abuse of Court process.

Conclusion

Section 33 of the Judicature Act and Section 98 of the Civil Procedure Act entrust this Court with power to curb abuse of Court process. This application contravenes the *lis pendens* rule and is an abuse of Court process as resolved hereinabove. Accordingly, I hereby dismiss this application with costs to the Respondent.

I so order.

Dated, signed and delivered this **23rd** day of **October, 2023**.


Patience T. E. Rubagumya
JUDGE

