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**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**[COMMERCIAL DIVISION]**

**MISCELLANEOUS APPLICATION NO. 2484 OF 2023**

**[ARISING FROM ARBITRAL CAUSE 0072 OF 2023]**

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**[ARISING FROM ICC ARBITRATION CASE NO. 26757]**

<b>1. VANTAGE MEZZANINE FUND II PARTNERSHIP</b>	<b>]</b>	
<b>2. VANTAGE MEZZANINE FUND II PROPRIETARY LIMITED</b>	<b>]</b>	<b>APPLICANTS</b>
	<b>]</b>	

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**VERSUS**

<b>1. COMMISSIONER LAND REGISTRATION</b>	<b>]</b>	
<b>2. SIMBA PROPERTIES INVESTMENT CO. LTD</b>	<b>]</b>	
<b>3. SIMBA TELECOM LTD</b>	<b>]</b>	
<b>4. ELGON TERRACE HOTEL LTD</b>	<b>]</b>	<b>RESPONDENTS</b>
<b>5. LINDA PROPERTIES LTD</b>	<b>]</b>	
<b>6. PATRICK BITATURE</b>	<b>]</b>	
<b>7. CAROL BITATURE</b>	<b>]</b>	
<b>8. UGANDA REGISTRATION SERVICES BUREAU</b>	<b>]</b>	

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**Before: Hon Justice Ocaya Thomas O.R**

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**RULING**

**Introduction**

This matter was placed before me the parties having appeared before the Asst. Registrar of this court and having filed their respective written submissions. The

5 Asst. Registrar found that she was not clothed with jurisdiction to entertain the matter referred it to me for determination.

I have proceeded to determine this matter based solely on the pleadings and written submissions that were filed by the parties.

10 The Applicants brought this application under the provisions of Section 6 of the Arbitration and Conciliation Act ["ACA"] and Rule 6 of the Arbitration Rules ["AR"]. The application seeks the following reliefs:

(a) The Court issues an Interim measure of protection restraining:

15 (i) the 1st Respondent from taking any actions or conducting any proceedings in respect of the Certificates of Title that the 2nd to 7th Respondents mortgaged to the Applicants, that would affect the Applicants' rights and the merits of the Final Arbitral Award and its Addendum pending court's determination of the Application for recognition and enforcement of the arbitral award.

20 (ii) the 8th Respondent from taking any actions, registering any documents, making any alterations to the Register or effecting any changes in the ownership, governance and management of the 2nd to 5th Respondents that relate to or may in any way impede the Applicants' rights set out in the Final Arbitral Award and its Addendum pending court's determination of the Application for recognition and enforcement of the  
25 Arbitral Award.

(b) For the purposes of this Application, the Court recognizes that the Arbitration Tribunal in its Final Arbitral Award that the International Chamber of Commerce issued on August 30th 2023, ruled on all matters of fact relating to  
30 the Applicants' security interests, and this court treats those findings as conclusive.

(c) Court grants the Applicants the costs of this Application.

The application was presented by way of Chamber summons, supported by an affidavit deposed by Moses Muziki, an advocate practicing in the firm M/s Kirunda &  
35 Co. Advocates, the Applicants' retained counsel conducting this matter.



## 5 **Background**

The parties have a fairly checkered history of litigation. For the purposes of this application, I will summarise it, relying on the averments in each party's pleadings and evidence.

### Applicants' Case

10 According to the Applicants, by a Mezzanine Term Facility Agreement dated December 11, 2014 between the Applicants and 2nd Respondent, the Applicants advanced to the 2<sup>nd</sup> Respondent a United States Dollars Ten Million (USD 10,000,000) mezzanine facility. The 3<sup>rd</sup> to 5<sup>th</sup> Respondents provided corporate guarantees and the 6<sup>th</sup> Respondent provided a personal guarantee to the said loan facility. The 2<sup>nd</sup> to 15 7<sup>th</sup> Respondents further secured the facility with, amongst several other securities, legal and equitable mortgages over various pieces of land including land comprised in Freehold Register 331 Folio 31, Plot 32, Elizabeth Avenue Kololo, LRV 3908 Folio 13, Plot 32, Elizabeth Avenue, Kololo, LRV 3435 Folio 12, LRV 3895 Folio 4, Plot 3, Water Lane, Naguru, LRV 3891 Folio 18, Plot 1, Water Lane, Naguru and LRV 4525 20 Folio 18, Plot 11 Summit View Close, Kampala in favour of the 1st Applicant. The 2<sup>nd</sup> to 5<sup>th</sup> Respondents also provided Share Pledges and executed various documents in respect of the shares in their respective companies. The 6<sup>th</sup> and 7<sup>th</sup> Respondents executed the various documents in respect of these Share Pledges.

The Applicants assert that following the 2<sup>nd</sup> to 7<sup>th</sup> Respondents' default of the 25 Mezzanine Term Facility Agreement, a dispute arose between the parties. On June 16, 2021, this Honourable Court found that there was a valid, binding and enforceable arbitration agreement between the parties. This Court referred the dispute to arbitration vide Miscellaneous Application No. 201 of 2020: Vantage Mezzanine Fund II Partnership v. Simba Properties Investment Co. Ltd & Anor.

30 The Applicants assert that on December 16, 2021, the Applicants and the 2<sup>nd</sup> to 7<sup>th</sup> Respondents proceeded to arbitration vide ICC Case No. 26757 under the auspices and administration of the International Chamber of Commerce in London.

The Applicants further averred that on July 31, 2023, the sole arbitrator constituting the arbitral tribunal that the International Chamber of Commerce appointed 35 rendered an arbitral award in Arbitration Case No. 2675. On August 9<sup>th</sup>, 2023, the 2<sup>nd</sup> to 7<sup>th</sup> Respondents applied to the Arbitral Tribunal to correct the Final Award. On October 4<sup>th</sup>, 2023, the Arbitral Tribunal issued its Addendum to the Final Arbitral

5 Award. The Addendum does not in any way change any evidentiary or factual findings in the Award.

It is the Applicants' contention that they have since filed Arbitration Cause No. 72 of 2023 ["the main suit"] seeking, inter alia, an order for this Court to recognize as binding and enforceable and enforce the Arbitral Award and its Addendum against  
10 the 2nd to 7th Respondents.

The Applicants contend that in its Arbitral Award, the Tribunal found in favor of the Applicants' security interests both with regard to the mortgages and share pledges. The Applicants contended that for the purposes of these proceedings, the law deems those findings as binding and conclusive.

15 It was the Applicants' case that on October 13th, 2023, the 1st Respondent summoned the 1st Applicant to be examined concerning the various properties which the 2nd to 7th Respondents mortgaged to the Applicants to secure the Mezzanine Facility. The 1st Respondent asked the 1st Applicant to appear and produce copies of the certificates of title and mortgage instruments in respect of the properties on October  
20 27, 2023.

It is further the Applicants case that they have learnt that the 2nd to 7th Respondents have been taking various actions and filed with the 8th Respondent documents that alter the Company Records of the 2nd to 5th Respondents. Specifically, the 2nd to 7th Respondents altered the shareholding and constitution of the Boards of Directors of  
25 the 4th and 5th Respondents respectively. The Applicants attached board resolution which they said evidences this.

The Applicants averred that they have reasonable suspicion that the 2nd to 7th Respondents moved the 1st Respondent to take action against the Applicants' interests, and that in any event, the Respondents are likely to interfere with the  
30 Applicants' rights and interests in respect of the various security interests relating to the loan facility. Accordingly, they contend that it is imperative that the Court restrains the 1st and 8th Respondents from taking any actions or registering any documents that relate to or may in any way impede the Applicants' rights set out in the Final Arbitral Award.

35 The Applicants also accuse the 1st Respondent of clear bias. They allege that the 1st Respondent received a complaint 2nd, 6th and 7th Respondent praying for the cancellation of certificates of title in the names of the 2nd, 6th and 7th Respondents

5 having been issued unlawfully, wrongly or illegally but the 1<sup>st</sup> Respondent has refused to provide a copy of the complaint to the Applicants in spite of a written request to do so.

1<sup>st</sup> Respondent's Case

10 The 1<sup>st</sup> Respondent opposed this application and raised the following preliminary objections:

- (a) This application arises from the main suit to which the 1<sup>st</sup> Respondent is not a party.
- (b) The 1<sup>st</sup> Applicant has no capacity to commence and continue this application as it was adjudged as lacking such capacity vide Misc. Cause 205/2021
- 15 (c) The 2<sup>nd</sup> Applicant has no locus standi to bring the instant application as it is neither a party to the proceedings before the Commissioner Land Registration nor has any legal or equitable interest in the properties subject to this application.
- (d) The application is incompetent, misconceived and not maintainable in law
- 20 (e) The application is premature, unmeritorious because it is speculative and the matters raised by the Applicants are based on fears that are yet to come into existence

The 1<sup>st</sup> Respondent contends that it has a statutory duty of keeping the sanctity of the land register. It received a complaint from the 2<sup>nd</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondent praying for the cancellation of certificates of title in the names of the 2<sup>nd</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents having been issued unlawfully, wrongly or illegally. In the complaint, it is alleged that the mortgage entries entered in favour of the 1<sup>st</sup> Applicant were entered in error as the 1<sup>st</sup> Applicant as a partnership has no capacity to hold property in its names but rather in the names of individual partners. The 1<sup>st</sup> Respondent asserts that the 2<sup>nd</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondent also alleged that the mortgage entries in favour of the 1<sup>st</sup> Applicant were not lawfully entered as the 1<sup>st</sup> Applicant was adjudged as lacking capacity/legal presence to be registered as a mortgagee vide HCMC 205/2021.

35 The 1<sup>st</sup> Respondent asserts that it examined the complaint and deemed it fit to summon the complainants under Section 165 of the Land Act. The 1<sup>st</sup> Respondent contends that there has been no decision taken that is likely to alter the status quo between the parties to this application and accordingly, this application is speculative and/or premature.

5 The 1<sup>st</sup> Respondent asserts that restraining it from exercising its statutory responsibilities is speculative as it stops and muzzles the exercise of rights. The 1<sup>st</sup> Respondent avers that this court should act cautiously in cases intended to restrain or stop statutory bodies from exercising their rights/discharging their legal duties, such as the present application.

10 2<sup>nd</sup> to 5<sup>th</sup> Respondent' Case

The 2<sup>nd</sup> to 5<sup>th</sup> Respondents opposed this application. They indicated that they intended to raise three preliminary objections namely

(a) This application and the main suit are premature and incurably defective

15 (b) The Applicants have not followed the mandatory procedure as required by the AR and therefore this application ought to be dismissed with costs.

The Applicant contended that the main suit has not been validated, fixed and served as required by the ARs and no certificate of service has been filed on the court record. Even if the main suit is served, the 2<sup>nd</sup> to 5<sup>th</sup> Respondents have ninety days to file a response to the main suit. The 2<sup>nd</sup> to 5<sup>th</sup> Respondents contended that no application  
20 for enforcement of an award can be made until after the expiry of 90 days from the serving of the same and where no objection has been made.

The 2<sup>nd</sup> to 5<sup>th</sup> Respondents further contend that ICC Tribunal did not have jurisdiction to hear and determine the dispute and the 2<sup>nd</sup> to 5<sup>th</sup> Respondents have filed an application before the High Court of England to set aside the arbitral award vide CL-  
25 2023-000510. The 2<sup>nd</sup> to 5<sup>th</sup> Respondents therefore contended that the Applicants are precluded from making this application when the above-mentioned claim before the English court is pending.

The 2<sup>nd</sup> to 5<sup>th</sup> Respondents contended that arbitration has since terminated and therefore the Applicants could not obtain interim protection measures. Further, the  
30 2<sup>nd</sup> to 5<sup>th</sup> Respondent contends that

(a) This application intends to curtail proceedings brought under Section 91 of the Land Act and is therefore an abuse of court process.

35 (b) The 1<sup>st</sup> and 2<sup>nd</sup> Applicants have no capacity to bring this application as the 1<sup>st</sup> Applicant was declared nonexistent and incapable of commencing or continuing court proceedings in Misc. Cause 205 of 2021 and that the 2<sup>nd</sup> Applicant has no locus standi as it has never been a party to the arbitration agreement yielding the arbitral proceedings and award.

5 6<sup>th</sup> to 8<sup>th</sup> Respondent's Case

The 6<sup>th</sup> to 8<sup>th</sup> Respondents did not file affidavits in reply. They, except the 7<sup>th</sup> Respondent, however made submissions in support of their respective cases.

Representation

10 The Applicants were represented by M/s Kirunda & Co Advocates. The 1<sup>st</sup> Respondent and 8<sup>th</sup> Respondent were represented by Counsel from their in-house legal teams. The 2<sup>nd</sup> to 6<sup>th</sup> Respondents were represented by M/s Moogi Brian & Co. Advocates.

Evidence and Submissions

15 The Applicants led evidence by way of an affidavit in support of the notice of motion and affidavits in rejoinder all deponed by Moses Muziki, an advocate practicing in the firm M/s Kirunda & Co. Advocates, the Applicants' retained counsel in conduct of this matter. The 1<sup>st</sup> Respondent led evidence by way of an affidavit in reply deponed by Kafureeka Victor Jagaine a Senior Registrar in the office of the 1<sup>st</sup> Respondent. The 2<sup>nd</sup> to 5<sup>th</sup> Respondents led evidence by way of an affidavit in reply deponed by Laurel Ababuza Baguma, the Legal Manager of the 2<sup>nd</sup> to 5<sup>th</sup> Respondents.

20 All parties made submissions in support of their respective cases. Whereas those submissions were addressed to the registrar, as earlier stated the file was transferred from her chambers and placed before me. I have therefore, considered these submissions notwithstanding the reference to the registrar and factored the parties' respective arguments in arriving at my decision.

25 Decision

The 2<sup>nd</sup> to 7<sup>th</sup> Respondents made several preliminary objections in their submissions. These are as follows:

- (a) This Application is barred by law and is incapable of being commenced, entertained or maintained
- 30 (b) Both Applicants have no capacity or locus to file this application
- (c) The Application arises from an incompetent, premature and incompetently defective Arbitration Cause No. 72 of 2023

The 2<sup>nd</sup> Respondent raised the following preliminary objections:



- 5 (a) This application arises from the main suit to which the 1<sup>st</sup> Respondent is not a party.
- (b) The 1<sup>st</sup> Applicant has no capacity to commence and continue this application as it was adjudged as lacking such capacity vide Misc. Cause 205/2021
- 10 (c) The 2<sup>nd</sup> Applicant has no locus standi to bring the instant application as it is neither a party to the proceedings before the commissioner land registration nor has any legal or equitable interest in the properties subject to this application.
- (d) The application is incompetent, misconceived and not maintainable in law
- 15 (e) The application is premature, unmeritorious because it is speculative and the matters raised by the Applicants are based on fears that are yet to come into existence

A preliminary objection raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It is thus based on a commonly accepted set of facts as pleaded by both parties. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. Preliminary objections relate to points of law, raised at the outset of a case by the defence without going into the merits of the case. In any preliminary objection therefore, there is no room for ascertainment of facts through affidavit oral evidence. See **Yaya Farajallah v Obur Ronald & Ors HCCA 81/2016**

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25 Matters that require evidence cannot be entertained as preliminary objections but must instead be resolved in the main suit. See **Lweza Clays & Another vs Tropical Bank & Another, SCCA 31 of 2018, Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd [1969] EA 696, Ssekabira Herbert v Ssuna Mulema & Anor HCMA 186/2022**

30 It is trite law that a preliminary point of law can be raised any time before judgment. See **Charles Sserunjogi v Tony Nkuubi HCOS 7/2019.**

In determining a preliminary point of law, the court must consider the pleadings and assume the contents therein to be correct. See **Mukisa Biscuit Manufacturing Co v West End Distributors [1969] EA 696, N. A. S. Airport Services v Attorney General [1959] EA 53, Rev George Lubega & Anor v Luwero Town Council & Anor HCCS 193/2009, Yutta Luda Musoke v Greenland Bank HCCS 506/2001.**

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Accordingly, I have found it important to first dispose of the preliminary objections before I proceed to determine the merits of the application, if at all. I note that the 2<sup>nd</sup>



5 to 5<sup>th</sup> Respondent listed a different set of objections in their affidavit in reply as compared to the submissions of the 2<sup>nd</sup> to 7<sup>th</sup> Respondents, although many of the objections are similar, albeit worded differently. This left the meaning that the 2<sup>nd</sup> to 7<sup>th</sup> Respondents had abandoned/modified the list of objections in the affidavit in favour of/into the list presented in their submissions.

10 It is the role of a party to present their case, whether in respect of evidence, pleadings or submissions clearly and coherently. It is not enough for a party to throw incoherent averments/submissions or unsubstantiated allegations or unsupported submissions at the court, hoping that the court will fill in the gaps, speculate or use its powers to separate the hay from the chaff. See **Night Nagujja v Namuwonge Agnes & Ors HCMA 1878/2021, Oscar Ssemawere v African Express Airways HCMA 259/2023, Kisam Enterprises v Attorney General HCMA 742/2023, Byaruhanga Mahmood v Top Finance Bank HCMA 250/2023, Centenary Bank v Federation Of Association Of Uganda Exporters Limited & Ors HCMA 474/2023.**

20 This Application is barred by law and is incapable of being commenced, entertained or maintained

Under this head, Counsel for the 2<sup>nd</sup> to 7<sup>th</sup> Respondents submitted that the Interim Protection Order [“IPO”] under **Section 6** of the ACA is not available to an applicant in respect of arbitral proceedings where an award has already been rendered.

**Section 6** of the ACA provides thus:

25 “6. Interim measures by the court

(1) A party to an arbitration agreement may apply to the court, before or during arbitral proceedings, for an interim measure of protection, and the court may grant that measure.

30 (2) Where a party applies to the court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.”

**Section 32** of ACA provides thus:

35 “(1) The arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under subsection (2).



5 (2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings where—

(a) the claimant withdraws his or her claim, unless the respondent objects to the order and the arbitral tribunal recognises a legitimate interest on his or her part in obtaining a final settlement of the dispute;

10 (b) the parties agree on the termination of the arbitral proceedings; or

(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary.

(3) Notwithstanding subsection (2)(c), the arbitral tribunal may terminate the arbitral proceedings where there has been an unconscionable delay, on the application of either party or of its own motion.

(4) Subject to sections 33 and 34, the mandate of the arbitral tribunal shall terminate upon the termination of the arbitral proceedings.”

In **Great Lakes Company Limited v Xsabo Power Limited HCMA 1041/2023** this court ruled thus

20 “Proceedings therefore may not be considered determined until the time allowed for applying for the correction of a final award and rendering additional awards under article 27 of the LCIA Arbitration Rules has elapsed, which is a period of 56 days of receipt of a request to make an additional award as to any claim, counterclaim or cross-claim presented in the arbitration but not decided in any  
25 award, which application must be presented within 28 days of receipt of the final award. This potentially creates a window of up to nearly three months after the date of delivery of a final award, before ongoing proceedings may be considered finally determined. I therefore find that the expression “until the final determination of the London Court of International Arbitration LCIA Consolidated Arbitration No. 204602” implies that the interim measures are to remain in force  
30 until the time for making an application under article 27 of the LCIA Arbitration Rules has expired, or that application having been made, it has been refused.

It is the applicant’s intention to have the order extended beyond that period, until the final disposal of their pending appeal against the orders of enforcement of the  
35 two partial awards, otherwise, it is contended, the appeal would be rendered nugatory. That would in effect turn the interim measure into a post award

5 protective measure. Awards are final and binding on the parties to the dispute. They are subject to the limited post-award remedies provided for in the LCIA Arbitration Rules and in the laws of the seat of the arbitration.

10 Interim protective measures are decisions that are made prior to a final award, where the relief granted is usually, but not necessarily, designed to protect a party during the pendency of the proceedings, and which are potentially subject to alteration or elimination in the final award. Therefore, they may be modified or revoked as soon as the circumstances justifying them have changed or ceased to exist. Although section 6 of *The Arbitration and Conciliation Act* is elastic enough to allow the grant of interim measures to protect the subject matter of arbitration  
15 “before,” “during,” and even “after” the award is passed but before it is enforced, post-award interim relief.”

See Also **AC Yafeng Construction Company Ltd v The Registered Trustees Of Living World Assembly Church & Anor HCMA 319 and 320 of 2021.**

20 A review of the arbitration agreement reveals that the seat of arbitration is the United Kingdom. It follows that the law of the seat is the relevant law in determination when arbitral proceedings commence.

**Section 58** of the UK Arbitration Act provides for an arbitration award being final and binding on the parties except if the parties agree otherwise. **Section 32(1)** of the UNCITRAL Model Law provides that arbitral proceedings are terminated by a final  
25 award. It is not in dispute between the parties that a final award has been rendered. It follows that, in my view, arbitral proceedings have concluded. I note that the English act does not have the equivalent of our Section 32 of the ACA, which provides for when arbitral proceedings are deemed to have ended. Under the UK Act, Section 43 of their act is more broad reaching than our Section 6, which appears to confine  
30 interim reliefs to the pendency of arbitration proceedings.

I cannot agree with the submissions of Counsel for the Applicant that since ICC rules do not explicitly say when arbitration proceedings end, the same is still on going until an award is registered. This is because a party may register an award in virtually all the jurisdictions of the world. It would then mean that arbitral proceedings remain  
35 on going until the award is registered in all the countries of the world. In my view, that would be the wrong approach. It follows that the arbitral proceedings terminate when a final award is given, save in circumstances where the same is appealable.

5 I also cannot, with the greatest respect, agree with the decision in **Xsabo Power**  
(above) in as far as it says Section 6 applies even after an arbitral award has been  
rendered but is not registered. In my view, the provisions of the section are clear; the  
reliefs under that section are only available when the proceedings are ongoing, after  
which the law of the seat takes over.

10 Does this then mean the Applicant's application is incompetent on the basis of the  
objection under this head? In my view no. Why? Where a party alleges that actions  
are being undertaken that affect the ability to enforce the arbitral award, the  
applicant can seek reliefs, inter alia, before this court by invoking this court's inherent  
powers to render reliefs in the interest of justice. See **Section 98 of the Civil**  
15 **Procedure Act.**

In **Ayissa Namiro v Uganda Marines Products Limited & Anor HCMC 78/2015**,  
the court held thus:

“Under Section 33(supra), the High Court is vested with very wide general  
powers to grant remedies. It provides as follows;

20 “The High Court shall, in the exercise of the jurisdiction vested in it by the  
Constitution, this Act or any written law, grant absolutely or on such terms and  
conditions as it thinks just, all such remedies as any of the parties to a cause or  
matter is entitled to in respect of any legal or equitable claim properly brought  
before it, so that as far as possible all matters in controversy between the  
25 parties may be completely and finally determined and all multiplicities of legal  
proceedings concerning any of those matters avoided.”

Under Section 98 CPA, the inherent power of court is saved in the following terms;

30 “Nothing in this Act shall be deemed to limit or otherwise affect the inherent  
power of the court to make such orders as may be necessary for the ends of  
justice or to prevent abuse of the process of the court.”

“These provisions vest the High Court with wide discretionary and inherent powers  
respectively to grant absolutely or on such terms and conditions as it thinks just, all  
such remedies as any of the parties to a cause or matter is entitled to in respect of any  
legal or equitable claim properly brought before it.”



5 See also **Kagumaho Musana v Rama and 3 Others HCMA 933 of 2019** and **Tullow Uganda Limited & Anor v Jackson Wabyona & Ors HCMA 443/2017**, **Green Meadow Limited v Patrice Namisono HCMA 1368/2022**.

In my view, this court is empowered to entertain this application even in light of the fact that Section 6 of the ACA is not applicable as this court has broad powers to grant  
10 reliefs in the interests of justice. Moreover, the position of the law is that a party proceeding under the wrong law is not fatal as long as jurisdiction exists. See **Gids Consults Limited & Anor v Naren Mehta HCMA 864/2022**, **Saggu v Roadmaster Cycles Ltd 2002 1 EA 258**, **Cwezi Properties v UDB HCMA 1315 of 2022**

Whereas Section 6 of the ACA is not applicable, this court has jurisdiction to hear and  
15 determine this application under the provisions of Section 98 of the CPA and Section 33 of the Judicature Act.

Both Applicants have no capacity or locus to file this application

The 1st Applicant has no capacity to commence and continue this application as it was adjudged as lacking such capacity vide Misc. Cause 205/2021

20 The 2nd Applicant has no locus standi to bring the instant application as it is neither a party to the proceedings before the commissioner land registration nor has any legal or equitable interest in the properties subject to this application.

I will deal with these three objections at once, as they are very similar.

The 1<sup>st</sup> to 7<sup>th</sup> Respondents contended that the 1<sup>st</sup> Applicant does not have capacity to  
25 commence this application in light of the decision of this court in HMC 205/2021 and that the 2<sup>nd</sup> Applicant is not a party to the arbitration agreement and therefore cannot commence or continue this application.

In my view, determining the above objections would be determining, at least in part, the main cause. Accordingly, these objections are best reserved for determination in  
30 the decision of this court in the main suit.

The Application arises from an incompetent, premature and incompetently defective Arbitration Cause No. 72 of 2023

This objection deals with the question of whether the requisite procedures have been undertaken by the Applicants in presenting the main suit. For instance, the 2<sup>nd</sup> to 7<sup>th</sup>  
35 Respondents contend that an authenticated copy of the award has not been filed. In

5 my view, the purpose of this application is to seek interim reliefs pending the disposal of the main suit. Determining this objection would be delving into the merits of the main suit which are best reserved for the judgment that will dispose of the same.

This application arises from the main suit to which the 1st Respondent is not a party

10 This objection was raised by the 1<sup>st</sup> Respondent who contended that they were not parties to the main suit and therefore, their joinder in this application was bad in law.

It is trite law that a party may join another party whose presence is necessary for the comprehensive determination of a matter of contention. This is especially true where a party joined would be the one against whom the order sought would be enforced. See **Sarah Nabukenya & Ors v Sulaiman Mukasa & Sons HCMA 193 and 231 of 2022, Departed Asians Property Custodian Board v. Jaffer Brothers Ltd [1999] I.E.A 55, Order 1 Rule 10(2) CPR**

Although these precedents are decided in respect of joinder in substantive suits, the same position follows in miscellaneous applications which, effectively, are proceedings of their own.

20 In the instant case, the main suit is for registration of an arbitral award. That action does not require the joinder of the 1<sup>st</sup> Respondent. However, the present action aims at stopping any dealing/determination in respect of the Applicants' securities, and was commenced, inter alia, in light of proceedings before the 1<sup>st</sup> Respondent commenced by the 2<sup>nd</sup>, 5<sup>th</sup> and 7<sup>th</sup> Respondents. It follows that the joinder of the 1<sup>st</sup> Respondent, and even the 8<sup>th</sup> Respondents in the main suit was not necessary, but is necessary in the present application as, if the reliefs sought are granted, the same would require a positive action or a deterrence from a certain course of action. Accordingly, the 1<sup>st</sup> Respondent is a necessary party, owing to the nature of the reliefs sought, but also owing to the need to give it a hearing before a decision affecting it can be rendered.

The application is incompetent, misconceived and not maintainable in law

35 The 1<sup>st</sup> Respondent raised this objection in its affidavit in reply but did not substantiate the same. The 1<sup>st</sup> Respondent did not even submit on the same in its submissions. As was held in **Night Nagujja v Namuwonge Agnes & Ors HCMA 1878/2021**, it is not enough for a party to throw unsubstantiated allegations at the court, hoping that the court will fill in the gaps, speculate or use its powers to separate the hay from the chaff. It is trite law that courts base their decisions on evidence and

5 not assumptions, abstractions or innuendos. See also **Oscar Ssemawere v African Express Airways HCMA 259/2023**

The application is premature, unmeritorious because it is speculative and the matters raised by the Applicants are based on fears that are yet to come into existence

10 Under this head, the 1<sup>st</sup> Respondent essentially submitted that the examination process for which the summons were issued is only a mechanism of collection of information and that no decision has been undertaken by it.

15 It is not disputed that the the 2<sup>nd</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondent praying for the cancellation of certificates of title in the names of the 2<sup>nd</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents having been issued unlawfully, wrongly or illegally. In the complaint, it is alleged that the mortgage entries entered in favour of the 1<sup>st</sup> Applicant were entered in error as the 1<sup>st</sup> Applicant as a partnership has no capacity to hold property in its names but rather in the names of individual partners. The 1<sup>st</sup> Respondent asserts that the 2<sup>nd</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondent also alleged that the mortgage entries in favour of the 1<sup>st</sup> Applicant were not lawfully entered as the 1<sup>st</sup> Applicant was adjudged as lacking capacity/legal  
20 presence to be registered as a mortgagee vide HCMC 205/2021.

25 It is also not disputed that the 4<sup>th</sup> Respondent filed a board resolution allotting 99400 shares in the to the 2<sup>nd</sup> and 6<sup>th</sup> Respondents. It is also not disputed that the 5<sup>th</sup> Respondent filed a board resolution allotting 4900 shares to the 2<sup>nd</sup> Respondent and the 3<sup>rd</sup> Respondent. These resolutions are dated 14<sup>th</sup> August 2023 and 6<sup>th</sup> September 2023 respectively.

On the one part, the 1<sup>st</sup> Respondent contends that the examination currently pending before it is merely an information gathering exercise while the 8<sup>th</sup> Respondent contends that the above stated board resolutions were registered by it as required by law.

30 In my view, the contentions of the 1<sup>st</sup> Respondent are without merit. Section 91 of the Land Act provides as below:

“91. Special powers of Commissioner

(1) Subject to the Registration of Titles Act, the Commissioner shall, without referring a matter to a court or a District Land Tribunal, have power to take such steps as are  
35 necessary to give effect to this Act, whether by endorsement or alteration or cancellation of certificates of title, the issue of fresh certificates of title or otherwise.

5 (2) The Commissioner shall, where a certificate of title or instrument—

(a) is issued in error;

(b) contains a wrong description of land or boundaries;

(c) contains an entry or endorsement made in error;

(d) contains an illegal endorsement;

10 (e) is illegally or wrongfully obtained; or

(f) is illegally or wrongfully retained;

give not less than twenty one day's notice, of the intention to take the appropriate action, in the prescribed form to any party likely to be affected by any decision made under this section.

15 (2a) The Commissioner shall conduct a hearing, giving the interested party under subsection (2) an opportunity to be heard in accordance with the rules of natural justice, but subject to that duty, shall not be bound to comply with the rules of evidence applicable in a court of law.

20 (2b) Upon making a finding on the matter, the Commissioner shall communicate his or her decision in writing to the parties, giving the reasons for the decision made, and may call for the duplicate certificate of title or instrument for cancellation, or correction or delivery to the proper party.

(3) If a person holding a certificate of title or instrument referred to in subsection (2) fails or refuses to produce it to the Commissioner within a reasonable time, the  
25 Commissioner shall dispense with the production of it and amend the registry copy and where necessary issue a special certificate of title to the lawful owner.

(4) The Commissioner may—

(a) correct errors in the Register Book or in entries made in it;

(b) correct errors in duplicate certificates or instruments; and

30 (c) supply entries omitted under this Act.





- 5 (5) The Commissioner may make amendments consequent upon alterations in names or boundaries but in the correction of any such error or making of any such amendment shall not erase or render illegible the original words.
- (6) Upon the exercise of the powers conferred on the Commissioner under subsection (5), the Commissioner shall affix the date on which the correction or amendment was  
10 made or entry supplied and shall initial it.
- (7) Any error or any entry corrected or supplied under this section shall have the same validity and effect as if the error had not been made or entry not omitted.
- (8) In the exercise of any powers under this section, the Commissioner shall—
- 15 (a) give not less than twenty-one days' notice in the prescribed form to any party likely to be affected by any decision made under this section;
- (b) provide an opportunity to be heard to any such party to whom a notice under paragraph (a) has been given;
- (c) conduct any such hearing in accordance with the rules of natural justice but subject to that duty, shall not be bound to comply with the rules of evidence  
20 applicable in a court of law;
- (d) give reasons for any decision that he or she may make.
- (9) The Commissioner shall communicate his or her decision in writing to the parties and the committee.
- (10) Any party aggrieved by a decision or action of the Commissioner under this  
25 section may appeal to the District Land Tribunal within sixty days after the decision was communicated to that party.
- (11) Where the Commissioner has cancelled a certificate of title or an entry in the Register Book, a party in whose favour the cancellation is made shall not transfer the title until the expiry of the time within which an appeal may be lodged; and where an  
30 appeal is lodged against the cancellation, he or she shall not transfer the title until the determination of the appeal.
- (12) The party who lodges an appeal under this section shall take steps to ensure that the Commissioner and the other party are served with the notice of appeal.

5 (13) Where the person who appealed under this section fails to prosecute the appeal, the District Land Tribunal shall, on application by any other party to the appeal, strike out the appeal.”

10 It must be noted that, under **Section 91** of the Land Act, the 1<sup>st</sup> Respondent may cancel entries on the register of titles. These powers do not require recourse to court or any other forum, and may occur even when court proceedings are ongoing. A party may, notwithstanding that they have commenced or are defending a claim in another fora, such as in a court or tribunal, commence a complaint under **Section 91** of the Land Act and obtain the relief of cancellation of a title or entry thereon.

15 Accordingly, unlike what was represented by the 1<sup>st</sup> Respondent, the collection of information only facilitates the exercise of its powers under that provision. It follows therefore that, in respect of the proceedings before the 1<sup>st</sup> Respondent, the Applicants’ application is not premature as there is a real likelihood of mortgage or other entries entered in favour of the Applicants being cancelled in exercise of the 1<sup>st</sup> Respondents above stated powers.

20 In respect of the 8<sup>th</sup> Respondent, there is a real likelihood that the 2<sup>nd</sup> to 7<sup>th</sup> Respondents may take further steps that affect the Applicants’ claims, in light of the mezzanine financing agreements and the securities provided for therein, including shareholding, since the 5<sup>th</sup> and 6<sup>th</sup> Respondents have already taken steps before the 8<sup>th</sup> Respondents which, the Applicants contend contravenes the award and aims at frustrating its enforcement.

25 Accordingly, this objection is also without merit.

## **PART II: DECISION ON THE MERITS OF THE APPLICATION**

**Section 98** of the Civil Procedure Act provides thus

30 “Nothing in this Act shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

35 The Respondents made lengthy submissions as to whether the conditions for grant of an injunction are satisfied. In my view, the question to consider was whether the interests of justice necessitated the grant of the reliefs sought.



5 It is clear that:

- (a) The financing/credit agreements executed between the Applicants and the 2<sup>nd</sup> to 7<sup>th</sup> Respondents created securities in immovable property and shareholding.
- (b) Disputes arose out of those agreements for which an arbitral award has been rendered, although there is an application to set the same award aside.
- 10 (c) The Applicants have filed the main suit to register that award, and if registered, would seek to take advantage of those securities in accordance with the law and/or financing documents.
- (d) There are various actions/proceedings that have been taken or are taking place in respect of the very same securities, and which have the likelihood of
- 15 affecting the Applicants' interests therein.
- (e) If such actions/proceedings were allowed to remain/continue, the Applicants' main suit and the reliefs sought therein may be rendered moot/nugatory.

The general rule is that litigants are not to be shut out from access to justice to pursue cases which they are otherwise on the face of it entitled to pursue, unless such cases

20 cannot reasonably hope to succeed. Since court does not determine moot disputes, actions that render an action moot/nugatory limit access to justice. See **Simba Properties Investment Company Limited & Ors v Vantage Mezzanine Fund II Partnership & Ors HCMA 414/2022**

It must be recalled that all persons seeking to vindicate a right, be it contractual,

25 constitutional or otherwise are entitled to an effective remedy. The right to an effective remedy is the obligation to provide a judicial relief when a violation of a right is established. The remedy must be effective in practice as well as in law. It entails a double dimension: on the one hand, the procedural right to an effective access to a fair hearing, and on the other hand, the substantive right to an adequate redress. The

30 remedy must be sufficient to ensure observance of rights in issue, by guaranteeing real and effective judicial protection. See **Jawara v. The Gambia (2000) AHRLR 107, Behangana Domaro and another v. The Attorney General, Constitutional Petition No. 53 of 2010, Ochwa Olanya Charles v Attorney General HCCS 41/2012**

35 Accordingly, in matters of this nature, the court may make a variety of reliefs to preserve the application for registration or recognition of an arbitral award by granting reliefs preventing any act or omission that may impair the presentation, continuance or disposal of the application or, if successful, the enforcement of the



5 resultant award/decreed. The relief necessary is determined by the circumstances of the case and the interests of justice. See **China Citic Bank Corporation Limited v. Yan, 2016 BCSC 2332, Sunlodges Ltd. v. The United Republic of Tanzania, 2020 ONSC 8201**

10 Counsel for the 1<sup>st</sup> and 8<sup>th</sup> Respondents contended that it wouldn't be in the interests of justice for the court to issue an order halting them from exercising their statutory duty. Generally, courts are hesitant to halt the exercise of public functions. See **Uganda National Bureau of Standards vs Ren Publishers Ltd & Multiplex Limited HCMA No. 635 of 2019, R v Secretary of State for Transport ex.p Factortame Ltd [1990] 2 AC 85, Shell Petroleum Development Company of Nigeria Limited & Another v The Governor of Lagos State & Others 5 ALL NTC, ACP Bakaleke Siraj v Attorney General HCMA No. 551 of 2018, Kennaway v Thompson [1981] QB 88 at 93, Alcohol Association Of Uganda & Ors v The Attorney General & Anor HCMC 744/2019**

20 In my view, a distinction ought to be drawn between an application for an injunction affecting only parties to litigation and where an injunction affects the general public, such as seeking to suspend the operation of a law. In the former situation, an injunction wouldn't constrain exercise of statutory functions unbearably as the parties to that matter are joined and will argue out their rights in the main cause. This is different from the latter case where a balancing act needs to be achieved between private rights and public interest. If the contentions of counsel for the 1<sup>st</sup> and 8<sup>th</sup> Respondents were to be taken to their logical conclusion, no interim remedy would ever be obtained against a public body and the result would be that litigants would not be able to obtain effective remedies.

30 In my view, when there is a need to preserve the status quo so that enforcement is not impaired or rendered difficult or impossible, reliefs can be obtained even against third parties not privy to the arbitral agreement, award or the proceedings in the main cause for registration/enforcement if the interests of justice so require. See **Dainford Navigation Inc -v- PDVSA Petroleo S.A "MOSCOW STARS" [2017] EWHC 2150 (Comm)**

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35 I am therefore unable to agree with the contentions of counsel for the 1<sup>st</sup> and 8<sup>th</sup> Respondents to this end.

Accordingly, in the interests of justice, I find that the Applicants ought to obtain the reliefs sought in order to preserve their action in the main suit.

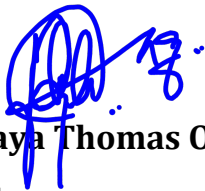
5 **Conclusion:**

In the premises, I make the following orders, in the interests of justice:

- 10 (a) An order issues preventing 1<sup>st</sup> Respondent from taking any actions or conducting any proceedings in respect of the Certificates of Title that the 2<sup>nd</sup> to 7<sup>th</sup> Respondents mortgaged to the Applicants, that would affect the Applicants' rights and the merits of the Final Arbitral Award and its Addendum pending court's determination of the Application for recognition and enforcement of the arbitral award. To this end, the proceedings currently pending before the 1<sup>st</sup> Respondent in respect of the complaint by the 2<sup>nd</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents is stayed pending the determination of the main suit.
- 15 (b) An order issues preventing the 8<sup>th</sup> Respondent from taking any actions, registering any documents, making any alterations to the Register or effecting any changes in the ownership, governance and management of the 2<sup>nd</sup> to 5<sup>th</sup> Respondents that relate to or may in any way impede the Applicants' rights set out in the Final Arbitral Award and its Addendum pending court's determination of the Application for recognition and enforcement of the Arbitral Award. To this end, an order issues suspending the registration and validity of the board resolutions dated 14<sup>th</sup> August 2023 and 6<sup>th</sup> September 2023 registered by the 8<sup>th</sup> Respondent on 12<sup>th</sup> September 2023 and returning 4<sup>th</sup> and 5<sup>th</sup> Respondents' respective shareholding to the position it was before the passing and/or registration of the said resolutions until disposal of the main suit.
- 20 (c) All parties bear their costs for this application.
- 25

I so order.

30 Delivered electronically this 17<sup>th</sup> day of November 2023 and uploaded on ECCMIS.



Ocaya Thomas O.R

35 **Judge**

**17<sup>th</sup> November, 2023**