

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**(COMMERCIAL DIVISION)**  
**CIVIL SUIT NO. 0432 OF 2022**

**TUMO TECHNICAL SERVICES LIMITED ::::::::::::::: PLAINTIFF**

**VERSUS**

**CHINA RAILWAY 18<sup>TH</sup> BUREAU**  
**(GROUP) CO. LIMITED ::::::::::::::: DEFENDANT**

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

**RULING ON PRELIMINARY OBJECTION**

Introduction

This Ruling is in respect of a preliminary objection raised by Counsel for the Defendant resulting from the institution of Civil Suit No. 0432 of 2022 by the Plaintiff, seeking recovery of UGX 81,200,400 (Uganda Shillings Eighty-One Million Two Hundred Thousand Four Hundred Only) being the retention sum, general damages, interest thereon and costs of the suit. Counsel for the Defendant raised a preliminary objection to the effect that the suit should be dismissed on the basis of an arbitration clause that is contained in the Agreement between the parties that forms the subject matter of the suit.

Representation

The Plaintiff was represented by M/S Twesigye, Asimwe Solicitors & Advocates while the Defendant was represented by M/S Yiga Advocates.



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

5

Preliminary objection for determination

Whether the suit should be dismissed for violation of the arbitration clause in the parties' Agreement?

10 Submissions

Defendant's submissions

In his submissions, Counsel for the Defendant contended that it is the principle of law that where parties have an agreement to proceed with their disputes by way of arbitration, the Court should bind them to this procedure.

Counsel argued that the suit before this Court is based on the Agreement between the parties executed on 9<sup>th</sup> August 2016, with a clause where the parties agreed that disputes arising in connection with the interpretation, construction, or implementation of the Contract, shall be referred to arbitration under the provisions of the Arbitration and Conciliation Act, Cap. 4 Laws of Uganda.

25 He submitted that the parties are bound by their agreement to have the matter proceed by way of arbitration and that the Plaintiff was aware of the clause but decided to institute this suit knowing that it is a wrong forum.

*phine*



Counsel quoted the case of **Vehicle and Equipment Leasing (U) Ltd Vs I Engineering Uganda Limited Misc. Application No. 1067 of 2021** in which the Court stated at page 5 that;

5            “It is my understanding that the provisions of an arbitration clause  
in the agreement is binding on the parties thereto. The arbitration  
clause takes precedence in dispute resolution by the parties,  
unless the Court finds that the arbitration agreement is null and  
void, inoperative or incapable of being performed which is not the  
10            case here”.

Plaintiff's submissions

In reply, Counsel for the Plaintiff submitted that whereas it is true that  
the parties had an arbitration clause in their Agreement, it has become  
15            incapable of being performed.

He stated that the parties have failed to appoint an arbitrator and that  
following the said failure, on 26<sup>th</sup> October 2021, the Plaintiff filed an  
application at the Centre for Arbitration and Dispute Resolution  
20            (hereinafter referred to as “CADER”) for the appointment of a neutral  
arbitrator as evidenced by attachment “A” to the submissions and that  
on 27<sup>th</sup> October 2021, CADER issued directions on how to proceed with  
the said application as evidenced by attachment “B” and the same were  
served on the Defendant’s Counsel but no action was taken.

25            He added that, when they moved CADER to exercise its powers and  
appoint an arbitrator, it declined because of a Court decision in  
**International Development Consultants Limited Vs Jimmy Muyanja,  
CADER & Rajesh Dewani Misc. Cause No.133 of 2018 (decided in**

*Shine*

2019), which challenged the powers of the Executive Director to appoint arbitrators.

5 Counsel further stated that CADER advised that it could only act, upon the consent of both parties and that a correspondence (attached as "C") dated 28<sup>th</sup> March 2022 with a signed consent form was sent to the Defendant's Counsel for consent and execution on their part but the same was ignored. Counsel further stated that for a period of six months, no action was taken by the Defendant and his Counsel to set the  
10 arbitration in motion and that due to the above failure on the part of the parties to agree on the arbitrator, the Plaintiff filed this case.

Furthermore, Counsel referred to **Section 5 (1) of the Arbitration and Conciliation Act, Cap. 4** which provides that:

15  
*"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  
20 arbitration unless he/ she finds-*

*(a) that the arbitration agreement is null and void, inoperative, or incapable of being performed; or*

25 *(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration".*

In reference to the meaning of the phrase, "incapable of being performed", Counsel relied on **Hon. Justice Stephen Mubiru's** Ruling in  
30 **Converge Systems Limited Vs Post Bank Limited Misc. Application No.839 of 2023 (Arising from Civil Suit No.323 of 2021)** wherein His

*phine*



Lordship quoted the cases of **Lucky Goldstar International (HK) Ltd Vs NG Moo Kee Engineering Ltd [1993] HKCFI 14 and Bulkbuild Pty Ltd Vs Fortuna Well Pty Ltd & Ors [2019] QSC 173** and held that:

5            “There has to be some obstacle which cannot be overcome even if  
the parties are ready, able and willing to perform the agreement. It  
applies to cases in which; - the arbitration cannot be effectively set  
in motion; the clause is too vague or perhaps other terms in the  
contract contradict the parties’ intention to arbitrate; an arbitrator  
10 specifically named in the arbitration agreement refuses to act or if  
an appointing authority refuses to appoint; the parties had chosen a  
specific arbitrator in the agreement, who was, at the time of the  
dispute, deceased or unavailable, and so on. These are situations in  
which the arbitration agreement is frustrated or becomes incapable  
15 of being fulfilled or performed, due to unforeseen contingencies. The  
grounds for holding a contract has been frustrated to apply to an  
arbitration clause. (**see Yan Jian Uganda Company Ltd Vs Siwa  
Builders and Engineers, H.C Misc. Application No.1147 of  
2014**)”.

20 Counsel went on to submit that an arbitration agreement may be found  
to be inoperative or incapable of being performed where the parties have,  
by virtue of having identified a non-existent appointer, not agreed on an  
appointment procedure at all; or where the parties agreed to a procedure  
25 which requires them to agree, but one has failed to act, or both have  
failed to act as required. Referring to the instant case, Counsel submitted  
that it is clear that the arbitration agreement has become incapable of  
being performed due to the fact that the parties failed to appoint an

*phine*

arbitrator and even the appointing authority CADER, refused/or declined to appoint an arbitrator due to a Court decision.

In his conclusion, Counsel submitted that the Plaintiff could not sit without a remedy but to invoke this Court's inherent powers and its unlimited jurisdiction to entertain the case.

Defendant's submissions in rejoinder

In rejoinder, the Defendant's Counsel disputed the contention by the Plaintiff's Counsel that the Defendant has frustrated the arbitration. He submitted that this suit is part of a dispute that has already been through arbitration vide **CAD/ARB/29/2018, Tumo Technical Services Ltd Vs China Railway 18<sup>th</sup> Bureau (Group) Co. Limited**. Counsel contended that the application that was served on the Defendant was on the same day of the hearing and that no further efforts were made to engage the Defendant.

Counsel submitted that the Plaintiff cannot refer to the unlimited jurisdiction of this Court yet arbitration jurisdiction is bestowed upon the institutions of arbitration and Court has avoided the same and strictly referred matters to arbitration.

He argued that though Counsel for the Plaintiff stated that CADER cannot appoint an arbitrator, there is no evidence to that fact and Section 11 of the Arbitration and Conciliation Act, Cap.4 provides for other options. Counsel submitted that the **Converge System Limited (supra)** case quoted by Counsel for the Plaintiff is exceptional and not applicable in this case.

phine



Analysis and Determination

Having analyzed the gist of the preliminary objection and the submissions by both Counsel thereto, I find as hereunder;

5 An arbitration clause was defined by Viscount Simon L.C in the case of **Heyam and Another Vs Darwins Ltd (1942) 1 All ER 337** to mean a written submission agreed to by the parties to the contract and, like other written submissions to arbitration, must be construed according to its language and in the light of the circumstances in which it was made.

10 It is trite that an arbitration agreement may cover not only "disputes" but also "disagreements" and "differences of opinion." The existence and the validity of an arbitration agreement should be determined primarily in light of the common intent of the parties, the requirement of good faith, and the belief that the person who signed the clause had the power to bind the company (see **Premium Nafta Products Ltd and others Vs Fili Shipping Company Ltd and others (2007) UKHL 40; Fiona Trust and Holding Corporation Vs Privalov (2008) 1 Lloyd's Rep 254, (2007) 4 All ER 951.**)

20 The construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. This type of presumption provides that a valid arbitration clause should generally be interpreted

phurè

expansively and, in cases of doubt, extended to encompass disputed claims.

In the instant case, clause 13 of the Subcontract Agreement between the parties provides that;

"Settlement of disputes

The parties shall firstly settle any disputes arising in connection with the interpretation, construction, or implementation of this contract amicably and in the event of failure to settle such dispute within 5 (five) working days, such dispute shall be referred to arbitration under the provisions of the Arbitration and Conciliation Act Cap.4 of the Laws of Uganda".

From the above, it is evident that the parties intended to arbitrate any disputes that would arise under the Agreement. The arbitration clause is explicit in its wording as to the resolution of any matter arising from the Agreement to arbitration as a mode of dispute resolution. The parties have also not disputed the clause or intention as expressed in their Agreement and submissions filed in respect of the preliminary objection raised.

**Section 5(1) of the Arbitration and Conciliation Act, Cap.4** empowers the Court to interfere with an arbitration clause in circumstances where the arbitration agreement is null and void, inoperative, or incapable of being performed, or where it is found that there is no dispute between the parties with regard to matters agreed to be referred to arbitration. While "inoperative" covers situations where the arbitration agreement has become inapplicable to the parties or their dispute, "incapable of

phine



being performed” relates to situations where the arbitration cannot effectively be set in motion.

5 The circumstances of the case before me are that both parties do not dispute the existence and validity of the arbitration clause. However, the Plaintiff’s plight is that the Defendant has made the clause incapable of being performed. Counsel for the Plaintiff highlighted the challenges in trying to proceed with the arbitration process. He stated that on 26<sup>th</sup> 10 October 2021, the Plaintiff filed an application at CADER for the appointment of a neutral arbitrator as evidenced by attachment “A” to the submissions, and that on 27<sup>th</sup> October 2021, CADER issued directions on how to proceed with the said application as evidenced by attachment “B” and the same were served on the Defendant’s Counsel but no action was taken.

15

I have also taken note of the demand notices dated 2<sup>nd</sup> November 2020 and 17<sup>th</sup> February 2021 served on and received by the Defendant on 2<sup>nd</sup> November 2020 and 24<sup>th</sup> February 2021, respectively.

20

The above documents and the stamps thereon confirm that they were all received by the Defendant’s Counsel, with no response, except for the application (“A”) that was received in protest for having been served on the day and time of hearing. The same was confirmed by Counsel for the Defendant in his submissions who stated that the Defendant wants the 25 arbitration but that the Plaintiff did not make a follow up, on the letters he served.

25

Given the above, it is evident that the Plaintiff tried to initiate ways to put the arbitration in motion without in my view, active cooperation of the 30 Defendant.



However, it cannot be said that the clause is inoperative because the only reason that hindered the progress of arbitration was the delay in signing the consent form for arbitration. Unlike the facts in the case of **Converge Systems Limited Vs Post Bank Limited Misc. Application No.839 of 2023 (Arising from Civil Suit No.323 of 2021)** where **His Lordship Stephen Mubiru** held that it appeared that the parties were unable to and would continue to be unable to effectively set the arbitration in motion as required by the agreement, in the instant case it cannot be said that the parties are unable to set the arbitration in motion.

I have considered the purpose of the arbitration process as provided for by the Arbitration and Conciliation Act, Cap.4 which is intended to facilitate a quicker method of settling disputes. Arbitration is also less costly compared to litigation.

It is notable that arbitration agreements are purely matters of contract, and the effect of section 5 (1) of the Arbitration and Conciliation Act, Cap.4 is to make contracting parties respect their agreement by disallowing any of them to refuse to perform their contract when it becomes disadvantageous to him or her.

As quoted by the **Court of Appeal** in the case of **National Social Security Fund Vs Alcon International Ltd CA No.2 of 2008, David St. John Sutton** in **Russell on Arbitration, (22<sup>nd</sup> Ed. Sweet & Maxwell) paragraph 2-119, page 80**, states that;

*“...a party may abandon its right to arbitrate for example by delay or inaction, or by commencing court proceedings in breach of an arbitration agreement. However, the courts are slow to find such*

*phue*



5 *repudiation or abandonment without very clear evidence of, an intention to abandon the right to arbitrate together with reliance by the other party to its detriment. Even if the right to arbitrate a particular dispute has been abandoned, that does not necessarily mean that the arbitration agreement itself has been abandoned”.*

10 In the case of **ATC Uganda Limited Vs Smile Communications Uganda Limited Misc. Application No.621 of 2023, Hon. Justice Thomas Ocaya O.R.**, though he found the parties unlikely to agree on arbitration and on that basis found the agreement incapable of being performed, he referred the parties to arbitration holding that;

15 *“... the basis of arbitration is the principle of party autonomy that recognizes the rights of the parties to design their arbitral dispute resolution process (see Department of Economics, Policy and Development of the City of Moscow Vs Bankers Trust Co [2004] EWCA Civ 314, North Shore Ventures Ltd Vs Anstead Holdings Inc (No.2) [2011] EWHC 910 (Ch), CGU International Insurance Plc Vs Astra Zeneca Insurance Co. Ltd [2007] 1 All ER (Comm) 501, Hunter and Redfern On International Arbitration, 6<sup>th</sup> Edition By Nigel Blackbay and Constatine Partasides, Paragraphs 3.97-3.110 and 6.07-6.10). Accordingly, as much as possible, parties are afforded a chance to design the process and character of the arbitration they will subject themselves to”.*

25 In view of the above, and the fact that the Defendant filed a Written Statement of Defence in this matter and raised this preliminary objection, it can be deduced that it is willing to set the arbitration in motion. There is no evidence of, an intention to abandon the right to

*phine*

arbitrate in the instant case. The Court must therefore as much as possible, enable the performance of the arbitration clause especially in such cases where the language and intention of the parties is drafted in clear terms. On the basis of the facts and the law, I am inclined to give  
5 the parties an opportunity to set the arbitration in motion since this dispute squarely arises from the Subcontract Agreement which contains a clear and concise arbitration clause.

I take cognizance of the current challenges in one of the arbitral  
10 institutions specifically CADER. However other arbitral institutions in the Country can be considered by the parties so as to set the arbitration in motion. In light of Section 98 of the Civil Procedure Act which gives the High Court inherent powers to take decisions as may be necessary for the ends of justice, in the instant case and given the facts, justice  
15 demands that arbitration be undertaken in accordance with the intention of the parties as expressed in clause 13 of the Subcontract Agreement. The intention of the parties as clearly stated in the arbitration clause should be given effect.

20 This Court will therefore allow the preliminary objection so as to make the contracting parties respect the terms of their Agreement. However, the Defendant should fully cooperate this time in the process of setting the arbitration in motion and participate by complying with all the requisite processes and providing the necessary consent to facilitate the  
25 arbitration process.

With due respect, since Counsel for the Defendant raised the preliminary objection about the arbitration clause, the Court does not expect the Defendant, to turn around and frustrate the arbitration process.

*pluvie*



Additionally, arbitration cannot proceed along with litigation, save within the necessary statutory exceptions. Accordingly, I hereby dismiss this suit to enable the parties undertake arbitration.

5

In the premises, I therefore order that:

1. The dispute between the parties is referred to arbitration. The parties should agree to appoint an arbitrator within 30 days from the date of this Ruling. In the event of failure, either party shall refer to an appointing authority under the Arbitration and Conciliation Act, Cap. 4 to appoint an arbitrator.
2. Civil Suit No.0432 of 2022 is hereby dismissed.
3. Each party shall meet its costs.

15

I so order.

20 Dated, signed, and delivered electronically this **24<sup>th</sup>** day of **November, 2023.**



Patience T. E. Rubagumya

25

**JUDGE**

24/11/2023

8.30am