THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION NO. 1033 OF 2023
ARISING FROM CONSOLIDATED CIVIL SUIT NO. 0878 OF 2022 AND CIVIL SUIT NO. 1012 OF 2022

ROCKTRUST CONTRACTORS (U) LIMITED :::::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

DFCU BANK LIMITED :: RESPONDENT

(Before: Hon. Lady Justice Patricia Mutesi)

RULING

Background

This application is brought by Notice of Motion under **Sections 5** and **6** of the **Arbitration and Conciliation Act Cap 4, Section 33** of the **Judicature Act Cap 13, Section 98** of the **Civil Procedure Act Cap 71** and **Order 47 rule1, Order 13 rule 6** and **Order 52 rules 1** and **3** of the **Civil Procedure Rules S.I. 71-1**. The application seeks orders that:

1. Consolidated Civil Suits Nos. 0878 of 2022 and 1012 of 2022 be stayed, and the disputes arising therefrom be referred to an arbitrator.
2. Pending the arbitration, an interim measure of protection in the form of a temporary injunction doth issue restraining the respondent, her servants, agents and/or persons claiming under her from enforcing and/or exercising any purported right under the various deeds executed between the parties in pursuance to the contract financing arrangement which is the subject of the consolidated suits.
3. The respondent pays interest at commercial rate on all sums due and payable to the applicant and on the applicant's accounts which are affected by the interim order vide High Court Miscellaneous Cause No. 0043 of 2023 from

the 19th day of May 2023 until the said order is lifted and/or determination of the arbitration, whichever event shall occur first.

4. The interests in (c) above be payable by the respondent in any event.
5. In the alternative, and without prejudice to the foregoing, a judgment on admission be entered against the respondent, and the respondent's counterclaim in Civil Suit No. 0878 of 2022 together with her Civil Suit No. 1012 of 2022 be struck out with costs.
6. The applicant may have any other relief as Court may find appropriate.
7. The costs of this application be provided for.

The grounds upon which the application is based are contained in the affidavit of Ssembatya Francis, the applicant's director. Briefly, the grounds are that:

1. The applicant instituted the Civil Suit No. 0878 of 2022 challenging the respondent's recovery actions in respect of the relational contract and the various contract financing facilities between them, which were all subject to a Deed of Assignment of the applicant's contractual proceeds from Uganda National Roads Authority ("UNRA") and the Rural Electrification Agency ("REA").
2. In response, the respondent filed a counterclaim, and later Civil Suit No. 1012 of 2022, seeking inter alia to enforce the said deed of assignment.
3. The said deed of assignment contains an arbitration clause.
4. The disputes in both Civil Suits Nos. 0878 of 2022 and 1012 of 2022 arise and/or are connected with the said deed of assignment.
5. The respondent has already applied to this Honourable Court and obtained an ex parte interim order freezing payments due to the applicant and the applicant's accounts, even before the determination of the consolidated suits, and it is in the interest of commercial justice that interest be paid to the applicant on all sums and accounts affected by this interim order.
6. There is an imminent threat that the respondent will enforce the deed of assignment before the conclusion of arbitration to the detriment and irreparable loss of the applicant.
7. Contrary to her allegations of default in Civil Suits Nos. 0878 of 2022 and 1012 of 2022, the respondent has through pleadings and documents filed in

this Honourable Court vide Misc. Cause No. 0043 of 2023 made several unequivocal admissions which dispose and/or are capable of substantially disposing of her purported counterclaim and Civil Suit No. 1012 of 2022.

8. It is in the interest of justice that the application is granted.

The application is supported the evidence in the said affidavit of Ssembatya Francis. Mr. Ssembatya explained the genesis of the parties' relationship. He averred that the applicant has two long-term contracts with UNRA and REA ("the head contracts"). In 2019, the applicant approached the respondent for further financing on the two contracts. Through a facility letter dated 18th March 2019 and its subsequent variations of 31st May 2019, 31st July 2019 and 6th January 2020, and through several meetings, engagements and correspondences, the Respondent agreed to issue full term performance guarantees, on the applicant's behalf, to UNRA and REA. Subject to provision of financing by the respondent, the said facilities were to be secured by the proceeds of the head contracts and a deed of assignment to that effect was executed by the parties. That the respondent later unilaterally withdrew from athe relationship and declared the applicant to be in default before embarking on efforts to foreclose on the applicant's other assets which had also been used to secure the facilities.

Through Civil Suit No. 0878 of 2022, the Applicant sued the Respondent to stop these recovery efforts. In response, the respondent filed a counter-claim and later Civil Suit No. 1012 of 2022, for declarations that the applicant was in default of its loan obligations. Both suits were later consolidated by the Court. Mr. Ssembatya insists that since the Deed of Assignment contains an arbitration clause, and the consolidated Civil Suits No. 0878 of 2022 and 1012 of 2022 disclose an arbitral dispute, this matter ought to be referred to arbitration.

Mr. Ssembatya further averred that through Misc. Cause No. 0043 of 2023, the respondent sought and obtained an interim order from this Court freezing payments due to the applicant from UNRA arising out call-off orders that she explicitly declined to finance. By reason of the said order, the applicant has been deprived of use and benefit from monies due and payable to it by UNRA and those on her said account frozen by the respondent. It is in the interest of commercial

justice that interest at the prevailing lending rate be paid to the applicant on all sums and accounts affected by the said interim order. Mr. Ssembatya also asserted that the respondent's pleadings in Misc. Cause No. 0043 of 2023 contain several admissions which entitle the applicant to a judgment on admission.

The respondent strongly opposed the application through an affidavit in reply sworn by Phinellah Nakisibo Sebunya, its Special Assets Manager. Ms. Nakisibo confirmed that the respondent advanced various loan facilities to the applicant. These facilities were secured by fixed and floating debentures over the applicant's present and future moveable and immoveable assets, personal guarantees of Ssembatya Francis and Luyima Hood Musoke, legal mortgages and further charges over Bulemezi Block 178 Plot 25 at Kojo and Kyadondo Block 206 Plot 1478 at Mpererwe, assignment of contract proceeds from UNRA and REA and cash cover.

She stated that the applicant defaulted on repayment of the facilities and that it remains indebted to the respondent in the sums of UGX 12,367,378,986. In breach of the Deed of Assignment, the applicant diverted the contract proceeds to other banks. She explained that the Deed of Assignment secures obligations and liabilities under the Facility Agreement dated 6th January 2020 only, and that the Deed has no connection with the lease facilities under which there are outstanding amounts of UGX 3,072,307,984. She further stated that the applicant's Civil Suit No. 0878 of 2022 is also founded on the Facility Agreements and Vehicle Lease Agreements which do not contain any arbitration agreements but instead specifically confer jurisdiction on the courts.

Finally, Ms. Nakisibo informed Court that the respondent has already commenced arbitration proceedings, that the appointing authority has appointed His Lordship Emeritus Hon. Justice David Kutosi Wangututsi as arbitrator and that arbitration is already at scheduling stage. She denied all the alleged admissions.

The applicant filed an affidavit in rejoinder also sworn by Ssembatya Francis. Therein, he averred that the respondent's affidavit in reply also contains admissions that the alleged assignment was premised on the respondent's obligation to finance the head contracts, that the applicant disputes the alleged indebtedness and that the applicant is entitled to refinance the head contracts

through other banks. He clarified that His Lordship Emeritus Hon. David Kutosi Wangututsi has since recused himself from the arbitration and that the matter has now been referred to another arbitrator. He confirmed that arbitration is still at pleadings stage and that the applicant intends to amend its pleadings to include a counter-claim before the new arbitrator. He concluded by saying that this Court is not vested with jurisdiction to hear the case which is subject to arbitration.

Issues arising

1. Whether the consolidated Civil Suits Nos. 0878 of 2022 and 1012 of 2022 should be referred to arbitration.
2. Whether this Court should issue interim measures of protection pending the determination of the arbitration.
3. Whether the applicant is entitled to interest on its frozen receivables and accounts.
4. Whether the applicant is entitled to a judgment on admission.

Representation and hearing

At the hearing, the applicant was represented by Mr. Abbas Kawaase of M/S Fides Legal Advocates while the respondent was represented by Mr. William Kasozi and Mr. Emmanuel Wasswa of M/S AF Mpanga Advocates. I have carefully reviewed the materials on record, the submissions of the parties and the laws and authorities cited.

Determination

Issue 1: Whether the consolidated Civil Suits Nos. 0878 of 2022 and 1012 of 2022 should be referred to arbitration.

When the parties appeared in Court for the hearing of this application, it became apparent to me that they have already commenced arbitration pursuant to the Deed of Assignment. The respondent adduced a letter from the President of the Uganda Law Society ("ULS"), the appointing authority in the arbitration clause of the Deed of Assignment, dated 6th June 2023 appointing His Lordship Emeritus Hon. Justice David Kutosi Wangututsi as the arbitrator in the dispute.

When the said arbitrator disclosed that he was a customer of the respondent, the applicant objected to his suitability. The ULS President then appointed His Lordship Hon. Chief Justice Emeritus Bart Magunda Katureebe to be the arbitrator on 6th October 2023. In the affidavit in rejoinder, the applicant clarified that the arbitration is still at the pleadings stage, and both parties seem content with the progress of the arbitration proceedings so far. In the premises, it is unnecessary for this Court to delve into the typical considerations in applications seeking referrals of disputes to arbitration. The respondent has not substantially opposed the arbitration. In fact, the present arbitration proceedings were initiated at the respondent's request to the ULS President.

It is also inconsequential, in my considered view, for the Court to formally refer the matter to arbitration at this point because the matter is already under arbitration. The Court can only sanction the arbitration to proceed to its logical conclusion.

The only contention between the parties remains on the scope of arbitration and the extent to which the dispute between them is covered by the arbitration agreement. The respondent argues that it is only the part of the dispute which relates to the breaches of the Deed of Assignment that can be settled in arbitration and that the remainder of the dispute relating to the alleged breaches of the Facility Agreements and the enforceability of the other forms of security for the facilities is not subject to the arbitration agreement. While conceding that the arbitration clause is only expressly set out in the Deed of Assignment, the applicant argues that the Deed of Assignment (including the arbitration clause set out therein) was implicitly incorporated into the other facility documents relating to the dispute by the facility letter of 6th January 2020.

I am convinced that the scope of the arbitration agreement is an issue which ought to be considered and settled by the arbitrator at first instance pursuant to the doctrine of *kompetenz-kompetenz* which is one of the pillars of party autonomy that lies at the heart of arbitration. In **TMA Architects & Anor v Prome Consultants Limited, High Court of Uganda (Commercial Division) Misc. Cause No. 0080 of 2021**, this Court expounded on this doctrine and held:

> ***"… Any jurisdictional arguments remain matters for the tribunal to decide in accordance with the principle of kompetenz-kompetenz. Whereas a plea that the arbitral tribunal does not have jurisdiction should be raised not later than the submission of the statement of defence, and although a party is not precluded from raising such a plea because he or she has appointed or participated in the appointment of an arbitrator, the principle of kompetenz-kompetenz provides that court should as far as possible avoid anticipating a decision that the tribunal is empowered to make. The determination of the question of the jurisdiction of a tribunal lies in its own domain, at least in the first instance, by virtue of the principle of kompetenz-kompetenz … According to that doctrine, an arbitral tribunal has jurisdiction to consider and decide any disputes regarding its own jurisdiction …"*** Emphasis mine.

I cite the above dictum with approval. A duly appointed arbitrator typically has the mandate to interpret the arbitration agreement and decide, at least at first instance, whether he or she has the authority to make a decision in respect of the entire dispute or only in respect of a part of the dispute. Accordingly, in the instant facts, the arbitrator has the power to construe the arbitration agreement in the Deed of Assignment and make a decision as to the scope of his mandate. I need not emphasise that **Section 9** of the **Arbitration and Conciliation Act Cap 4** prohibits any interventions by this Court in disputes that are subject to an arbitration agreement except as expressly authorized by that Act. Through **Section 34(2)(iv)**, the Act anticipates that this Court can only consider questions on the scope of an arbitration agreement while dealing with an application to set aside an award after the conclusion of arbitration. It is therefore clear to me that, at first instance, issues of the scope of an arbitration agreement ought to be considered and settled by the arbitrator himself or herself, and not by this Court.

Since there is a possibility that the arbitrator will decide that his mandate only extends to the alleged breaches of the Deed of Assignment and not to the entire dispute, there is a likelihood that there could be some residual issues to be heard and settled by this Court after the conclusion of the arbitration. For this reason, the Court cannot simply write off and abate the consolidated Civil Suits Nos. 878 of

2022 and 1012 of 2022. Rather proceedings in the consolidated suits shall be stayed pending the outcome of the arbitration.

Issue 2: Whether this Court should issue interim measures of protection pending the determination of the arbitration proceedings.

The applicant seeks the issuance of a temporary injunction, as an interim measure of protection, restraining the respondent, her servants, agents and/or persons claiming under her from enforcing and/or exercising any purported right under the various deeds executed between the parties in pursuance of the contract financing arrangement pending the conclusion of the arbitration. The proposed injunction, as I understand it, will restrain the respondent from having recourse to the other securities for the facilities, other than the Deed of Assignment, in order to recover the outstanding loan balance before the closure of arbitration.

Section 6(1) of the **Arbitration and Conciliation Act Cap 4** accords courts the discretion to issue interim measures preserving the status quo of a dispute before or during arbitration. In an application of this nature, the court will generally have regard to the nature and strength of the applicant's case, the existence of an imminent risk of irreparable loss and the course of action favoured on a balance of convenience. See: **AC Yafeng Construction Limited v The Registered Trustees of Living Word Assembly Church & Anor, High Court Miscellaneous Application No. 0001 of 2021**.

Regarding the nature and strength of the applicant's case, it is sufficient, at this stage, for the Court to be satisfied that the applicant has a strong case to be presented to the arbitrator which is likely to succeed. It is also sufficient if an applicant proves that the dispute raises a serious question that merits consideration by the arbitrator.

After considering each party's case, I am satisfied that the dispute raises serious questions as to the alleged breaches of the Deed of Assignment which merit the arbitrator's consideration. For example, while the applicant accuses the respondent of arbitrarily refusing to disburse all the facilities as agreed, the respondent explains that it withdrew its funding because the applicant had already started defaulting on repayment of earlier disbursed facilities. These are critical

factual issues which are serious enough, and the arbitrator ought to be allowed to get to the root of the cause and effect of each party's actions and omissions in the transaction as a way of determining liability.

I am also satisfied that the applicant is likely to suffer irreparable injury if the status quo is not preserved pending the conclusion of arbitration. Since both parties have opted to go to arbitration, any recovery actions by the bank in the meantime, including the selling off of moveable and immoveable security, will permanently deprive the applicant of the said security and create 3rd party rights therein even before the arbitrator decides the merits of the dispute. It is trite law that an interim measure of protection is only available where compensatory damages would be inadequate and where an imminent damage would be irreparable. In **Kiyimba Kaggwa E.L.T. v Haji Abdu Nasser Katende [1985] HCB 43,** irreparable damage, injury or loss has been defined as 'loss that cannot be compensated with money'. If the applicant's moveable and immoveable property is sold off before the determination of the merits of the dispute by the arbitrator and 3rd party rights are created therein, the resultant injury for the applicant cannot be adequately compensated with money.

Finally, in cases of this nature, the Court must always ensure that it takes the course of action that results in a lower risk of injustice if the decision to grant the interim measures is incorrect. In this case, the facilities were secured by charges and mortgages over moveable and immoveable properties belonging to the applicant. Pending the conclusive determination of the substantive rights and duties of the parties in arbitration, the risk of injustice is higher if the respondent is not restrained from further recovery and the applicant's assets are sold off to 3rd parties before the conclusion of arbitration.

Issue 3: Whether the applicant is entitled to interest on its frozen receivables and accounts.

The applicant's case for interest is that the respondent obtained an ex parte order from this Court in Misc. Cause No. 0043 of 2023 freezing the applicant's bank account in the respondent and the applicant's proceeds from UNRA until the final determination of the said Cause. The applicant asserts that this has deprived it of

access to its money payable to it for services provided to, and consumed by, UNRA. The "contractual interest" that the applicant claims to be entitled to arose out of **Clause 43** of the applicant's contract with UNRA. This provision entitles the applicant to interest at the prevailing lending rate for delayed payments from UNRA. In my view, the applicant's claim for this interest against the respondent is, therefore, misconceived for 2 reasons.

First, the general rule on privity of contract precludes the charging of contractual obligations on persons who were not part of the contract (see **Digital Displays Limited v Tim Construction Company Ltd & 2 Ors, HCCS No. 21 of 2015**). Since the respondent was not privy to the applicant's contract with UNRA, it cannot be order to pay the "contractual interest" agreed therein. Second, payment of interest on any sum can only be ordered in this case after the determination of the substantive rights and entitlements of each party to this dispute in, or after, arbitration. When it has been determined how much the applicant is entitled to recover from the respondent, if any, then questions of the interest applicable to that sum can be considered.

For these reasons, this issue is answered in the negative.

Issue 4: Whether the applicant is entitled to a judgment in admission.

The applicant's claim for a judgment in admission is raised in the alternative in the event that this Court declines to refer the matter to arbitration. As I have found above, arbitration between the parties has already commenced and this development has been duly sanctioned by the Court to proceed. This issue is, therefore, now redundant.

Reliefs

Consequently, I make the following orders:

i. The ongoing arbitration proceedings between the parties are hereby sanctioned to proceed to their logical conclusion.

ii. Proceedings in consolidated Civil Suits No. 0878 of 2022 and 1012 of 2022 are hereby stayed pending the outcome of the arbitration.

iii. A temporary injunction is hereby issued restraining the respondent, her servants, agents and/or persons claiming under her from enforcing and/or exercising any purported right under the various deeds executed between the parties in pursuance to the contract financing arrangement which is the subject of the consolidated suits until the conclusion of the arbitration.

iv. The costs of this application shall abide by the outcome of the consolidated Civil Suits No. 0878 of 2022 and 1012 of 2022.

Patricia Mutesi

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Patricia Mutesi

JUDGE

(30/10/2023)