THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT NO. 829 OF 2023

SECURITY GROUP UGANDA LIMITED :::::::::::::::::: PLAINTIFF

VERSUS

FINASI-ISHU CONSTRUCTION SPV – LTD (SMC) :::::::::::::: 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 High Court Civil Suit No. 829 of 2023 seeking recovery of UGX 74,582,400/= (Uganda Shillings Seventy-Four Million Five Hundred Eighty-Two Thousand Four Hundred Only) being an outstanding sum for guarding services provided to the Defendant, an interest surcharge of 10% per annum on the above sum from the date of default until payment in full and costs of the suit.

Background

The facts constituting the Plaintiff's claim are that on 1st December, 2021, the Plaintiff and Defendant executed a Guarding Services Contract, for provision of guarding services by the Plaintiff to the Defendant at its premises at the construction site for the International Specialized Hospital of Uganda (ISHU) at Lubowa for two (2) years at an agreed cost of UGX 74,582,400/=. The Plaintiff claims that the Defendant, in total breach of

the terms of the Contract, failed to remit payments for the said services despite numerous demands hence this suit. The Defendant was granted leave to appear and defend wherein it filed its Written Statement of Defence and Counterclaim contending that the Plaintiff breached the terms of the Contract.

On 22nd February, 2024, when this matter came up for mention, the Defendant raised a preliminary objection under **Sections 5, 9** and **71 of the Arbitration and Conciliation Act, Cap. 4** opposing the suit on grounds that the dispute between the Plaintiff and the Defendant is the subject of an arbitration agreement and should be referred and resolved through arbitration.

Representation

The Plaintiff was represented by M/s Engoru, Mutebi Advocates, while the Defendant was represented by M/s Signum Advocates.

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

Issues for determination

Pursuant to **Order 15 Rule 3 of the Civil Procedure Rules** as amended, this Court framed the issues to read as follows:

1. Whether the suit should be dismissed for violation of the arbitration clause in the parties' Agreement?
2. What remedies are available to the parties?

Submissions of the Parties

Issue No. 1: Whether the suit should be dismissed for violation of the arbitration clause in the parties' Agreement?

Defendant's submissions

In his submissions, Counsel for the Defendant contended that clause 16 of the Guarding Services Agreement is an arbitration agreement within the definition of **Section 2 (1) of the Arbitration and Conciliation Act** and it requires that disputes regarding the Agreement be dealt with under the Arbitration and Conciliation Act.

Counsel for the Defendant also contended that **Section 9 of the Arbitration and Conciliation Act** provides that, the Court shall not intervene in matters governed by the Act except for the limited purpose provided for in the Act. While referring the Court to the case of ***Yan Jian Uganda Company Ltd Vs Siwa Builders and Engineers Misc. Application No.1147 of 2014***, Counsel for the Defendant submitted that the Courts have repeatedly upheld the parties' clear intention to have their matters determined through arbitration as indicated in their Contracts.

Counsel for the Defendant referred to **Section 5 (1) of the Arbitration and Conciliation Act** and submitted that it employs a mandatory language obliging the Court to refer a matter for arbitration upon an application by a party. Counsel submitted that **Section 5 (1) (a) and (b) of the Arbitration and Conciliation Act** provide grounds for refusal of a reference to arbitration including if the agreement is null and void, inoperative or incapable of being performed or if there is no dispute between the parties regarding the matters agreed to be referred to

arbitration. Counsel submitted that neither of the above grounds applies to the present case.

To that aspect, Counsel for the Defendant referred to the case of ***Power and City Contractors Vs LTL Project (PVT) Ltd Misc. Application No.0062 of 2011***, in which the Court held that since none of the parties to the suit had pleaded that arbitration in the dispute was 'incapable of being performed', it was mandatory to refer such a matter to arbitration unless valid exceptions existed. Counsel submitted that the Court vide the above case further held that by incorporating an arbitration clause in their Contract, both parties thereto for all intents and purposes recognized arbitration as an effective means of solving any disputes that could arise.

Counsel for the Defendant also referred to the case of ***Ambitious Construction Company Limited Vs Uganda National Cultural Centre Misc. Application No.441 of 2020***, in which the Court opined that a party seeking reference of a matter to arbitration is required to show that:

a) there is a binding and enforceable arbitration agreement between the parties,

b) an arbitrable dispute exists between the parties before the Court,

c) the application is made after a defence has been filed in the matter before Court and

d) both parties have been given a hearing.

In conclusion, Counsel for the Defendant submitted that the Plaintiff's claim contained in High Court Civil Suit No.829 of 2023, being disputed by the Defendant, amounts to a dispute that is arbitrable and therefore the Court is obliged to enforce the agreement of the parties. Counsel for the Defendant lastly referred the Court to the case of ***Lamac General***

Services (U) Limited t/a African Boma & Others Vs Pegasus Technologies Limited Misc. Application No.1285 of 2021. Counsel prayed that the dispute between the Plaintiff and Defendant which is the subject of High Court Civil Suit No. 829 of 2023 be referred to arbitration to which the parties have by agreement bound themselves and that costs of the application and the suit be awarded in accordance with Section 27 of the Civil Procedure Act.

Plaintiff's submissions

In reply, Counsel for the Plaintiff submitted that this Court has jurisdiction to entertain this matter as the arbitration agreement is null and void on account of inconsistency with another clause in the Guarding Services Contract. Counsel buttressed the above submission with the case of ***Lakeside Dairy Limited Vs International Centre for Arbitration and Mediation Kampala and Anor Misc. Cause No.021 of 2021***, in which **Hon. Justice Stephen Mubiru** defined the essential elements of an arbitration clause as follows:

> *"There are four essential elements of an arbitration clause;(i) produces mandatory consequences for the parties; (ii) excludes the intervention of Courts in the settlement of the disputes, at least before the issuance of the award; (iii) gives powers to the arbitrators to resolve the disputes likely to arise between the parties; and (iv) permits the putting in place of a procedure leading under the best conditions of efficiency and rapidity to the rendering of an award that is susceptible of judicial enforcement."*

Counsel for the Plaintiff submitted that in the same case, **Hon. Justice Stephen Mubiru** defined pathological arbitration clauses and their effect as follows:

> *"An arbitration clause is pathological when it deviates from any one of the above four elements, i.e. the agreement is drafted in a way that raises questions concerning its own interpretation… How defective the clause is depends on the extent of the deviation from those elements. Pathological arbitration clauses are ones with apparent defects liable to disrupt the smooth progress of arbitration… The clause must be so defective such that it cannot be enforced as an arbitration clause at all. In such situations, the arbitration agreement is null and void or cannot be applied and the Courts regain jurisdiction to settle the dispute. Common examples of pathological clauses include ones… where the clause is inherently inconsistent or convoluted, where it is irreconcilably inconsistent with other clauses, and so on."*

Referring the Court to clauses 14 and 16 of the said Contract, Counsel for the Plaintiff argued that the two clauses are inherently and irreconcilably inconsistent with each other as clause 14 provides for the institution of any proceedings, which includes the fundamental breach of the Service Contract, such as the present proceedings.

The Plaintiff's Counsel further argued that as per **Article 139 (1) of the Constitution of the Republic of Uganda, 1995** and **Section 14 (1) of the Judicature Act, Cap.13**, this Court is vested with unlimited jurisdiction in all matters. Counsel disagreed with the submission of

Counsel for the Defendant that this Court cannot intervene in a dispute that is subject to arbitration following **Section 5 of the Arbitration and Conciliation Act**.

Counsel for the Plaintiff contended that much as this Court is empowered to refer the matter for arbitration, this is a proper case to decline a referral to arbitration. Counsel for the Plaintiff further, referred to the case of ***Lakeside Dairy Limited Vs International Centre for Arbitration and Mediation Kampala and Anor (supra)***, and reiterated that clause 16 is a pathological clause since it is inconsistent with clause 14, hence it is null and void.

Counsel for the Plaintiff rebutted the authority of ***Power and City Contractors Ltd Vs LTL Project (PVT) Ltd (supra)***, cited by the Defendant's Counsel and argued that it is inapplicable in this current case as the facts are distinguishable. Counsel contended that it did not have two conflicting dispute resolution forums and none of the exceptions applicable to a plea for referral of a dispute to arbitration were pleaded. In his conclusion, Counsel for the Plaintiff prayed for the dismissal of the preliminary objection.

Analysis and Determination

Having considered the above preliminary objection, the submissions and authorities by both Counsel, I find as hereunder;

Section 2 (1) (c) of the Arbitration and Conciliation Act defines an arbitration agreement 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.

Section 3 (1) of the Arbitration and Conciliation Act provides that the agreement may be in the form of an arbitration clause in a Contract. In the case of ***Heyam and Another Vs Darwins Ltd [1942] 1 All ER 337*** *at page* ***342***, **Viscount Simon L.C** defined an arbitration clause as 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 light of the circumstances in which it was made.

It is therefore trite that an arbitration agreement may cover not only "disputes" but also "disagreements" and "differences of opinions." 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).***

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

In the case of ***Omugabe Mbabazi Sam Vs Tumwesigye Dan High Court Civil Misc. Application No. 10 of 2023***; **Hon. Justice Vincent Wagona** held that;

> *"Section 5 of the same Act provides that when a matter is presented to Court and there is a valid and enforceable arbitral clause in the transaction documents between the parties, then Court is required to stay proceedings and refer the parties for arbitration."*

In the instant case, and for proper appreciation, I shall reproduce both clauses of the Contract in issue;

Clause 14

> **"*JURISDICTION***
>
> *This Agreement is made in the Republic of Uganda and is subject to the laws of Uganda and either party hereto shall be entitled to institute any proceedings in any Court of competent jurisdiction within Uganda."*

Clause 16

> **"*ARBITRATION***
>
> *Notwithstanding the provision relating to enforcement of rights under this Agreement, if any dispute or difference shall arise between the parties hereto touching any clause, matter or thing whatsoever herein contained or the operation or construction thereof and of the duties or liabilities of either party under this Agreement shall be dealt with in accordance with and subject to the provisions of the Arbitration and Conciliation Act in Uganda as for the time being in force."*

In my view, from the above, it is evident that there is an arbitration clause in the Contract and a clause for institution of proceedings in Courts. It would therefore appear that the parties did not in clear terms agree on the dispute resolution mechanism and instead had two clauses on dispute resolution.

The arbitration clause is explicit in its wording as having arbitration as a mode of dispute resolution. However, the Plaintiff disputes the above clause contending that it is null and void as it is inconsistent with clause 14. The Plaintiff contends that as provided for under **Article 139 (1) of the Constitution of the Republic of Uganda, 1995** and **Section 14 (1) of the Judicature Act**, this Court has unlimited jurisdiction to handle this matter.

Much as I agree with Counsel for the Plaintiff's submission that this Court has unlimited jurisdiction in all matters provided for under **Article 139(1) of the Constitution of the Republic of Uganda** and **Section 14 (1) of the Judicature Act**, it is trite that this jurisdiction has to conform with other written laws and procedures. Therefore, it is a cardinal principle of law that jurisdiction is a creature of statute and the same has been emphasized by Court in the case of ***Baku Raphael Obudra & Anor Vs Attorney General S.C.C.A No.1 of 2005***, wherein it was held that:

> *"It is trite that the Courts are established directly by the Constitution or indirectly under it, and that their respective jurisdictions are accordingly derived from the Constitution or other law made under the authority of the Constitution."*

The Supreme Court further held in the case of ***Uganda Revenue Authority Vs Rabbo Enterprises (U) Ltd & Anor S.C.C.A No.12 of 2004 [2017] UGSC 20***, that the High Court exercises its unlimited jurisdiction subject to other provisions of the Constitution.

In that aspect, **Section 9 of the Arbitration and Conciliation Act,** limits the extent of the Court's intervention in matters of arbitration stipulating that except as provided in the Act, no Court shall intervene in matters governed by this Act. The unlimited original jurisdiction of the Court cannot override this provision. (See: ***Babcon Uganda Ltd Vs Mbale Resort Hotel Ltd, C. A. Civil Appeal No. 87 of 2011*****).**

The above Section has been resounded in several decisions by this Court including the case of ***Lakeside Dairy Limited Vs International Centre for Arbitration and Mediation Kampala and Midland Emporium Limited*** **(supra)** in which **Hon. Justice Stephen Mubiru** stated that;

> "*By stating that "except as provided in this Act, no Court shall intervene in matters governed by this Act," Section 9 of the Arbitration and Conciliation Act seeks to restrict the Court's role in arbitration. The section, clearly in mandatory terms, restricts the jurisdiction of the Court to only such matters as provided for by the Act. The provision epitomises the recognition of the policy of parties' autonomy which underlies the concept of arbitration. (emphasis mine). Consequently, there are only three categories of measures under the Act which involve Courts in arbitration namely; (i) such measure as involves purely procedural steps and which the arbitral tribunal cannot order and/or cannot enforce, e.g. issuing witness summons to a third party or stay of legal proceedings*

commenced in breach of the arbitration agreement; (ii) measures meant to maintain the status quo like granting of interim injunctions or orders for preservation of the subject matter of the arbitration (interim measure of protection); and (iii) such measures as give the award the intended effect by providing means of enforcement of the award or challenging the same (See: ***Coppee – Lavalin SA/NV Vs Ken-Ren Chemicals and Fertilizers Ltd [1994] 2 All ER 465****).”*

Section 5 (1) of the Arbitration and Conciliation Act requires a Court before which proceedings are being brought in a matter which is the subject of an arbitration agreement, if a party so applies after the filing of a statement of defence and both parties having been given a hearing, to refer the matter back to arbitration unless the Court finds; - (a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or (b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

The term “inoperative” covers situations where the arbitration agreement has become inapplicable to the parties or their dispute and “incapable of being performed” relates to situations where the arbitration cannot effectively be set in motion.

The term “inoperative” was considered in the case of ***Broken Hill City Council Vs Unique Urban Built Pty Ltd [2018] NSWSC 825*****,** where it was defined as “having no field of operation or to be without effect.” It covers those cases where the arbitration agreement has ceased to have effect. The ceasing of effect to the arbitration agreement may occur for a variety of reasons, including; - where the parties have implicitly or

explicitly revoked the agreement to arbitrate; where the same dispute between the same parties has already been decided in arbitration or Court proceedings (principles of *res judicata*); where the award has been set aside or there is a stalemate in the voting of the arbitrators; or the award has not been rendered within the prescribed time limit; where a settlement was reached before the commencement of arbitration, and so on.

The phrase "incapable of being performed" was considered in 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*** where it was said to relate to the capability or incapability of parties to perform an arbitration agreement; the expression would suggest "something more than mere difficulty or inconvenience or delay in performing the arbitration." 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 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 of being fulfilled or performed, due to unforeseen contingencies.

The grounds for holding that a Contract has been frustrated apply to an arbitration clause. (See: ***Yan Jian Uganda Company Ltd Vs Siwa Builders and Engineers (supra).***

The circumstances of the case before me are that both parties do not dispute the existence of the arbitration clause but the Plaintiff's plight is that the arbitration clause is null and void for being inherently and irreconcilably inconsistent with clause 14 of the Contract.

In support of his argument, Counsel for the Plaintiff relied on **Hon. Justice Stephen Mubiru's** decision in the case of ***Lakeside Dairy Limited Vs International Centre for Arbitration and Mediation Kampala and Midland Emporium Limited (supra).*** His Lordship Stephen Mubiru gave an example of a clause which is irreconcilably inconsistent with other clauses and added that the defectiveness of a clause is dependable on the extent of deviation from the above elements.

His Lordship Stephen Mubiru went on to explain that such a clause must be so defective that it cannot be enforced as an arbitration clause at all and that in such situations, the arbitration agreement is null and void or cannot be applied and the Courts regain jurisdiction to settle the dispute.

His Lordship Stephen Mubiru in the aforementioned case further held that not all defects render an arbitration clause devoid of any effect. He clarified that a pathological arbitration clause may or may not be upheld depending on the nature and extent of its pathology and that some of the imperfections may be resolved through the tool of interpretation and that Courts will seek to give effect to the parties' intention to refer disputes to arbitration except in cases of hopeless confusion. In addition, that Courts

will strive to uphold the clause and prefer a viable interpretation over one that impugns the clause.

Hon. Justice Stephen Mubiru further held that where the parties have evinced a clear intention to settle any dispute by arbitration, the Court should give effect to such intention, even if certain aspects of the Agreement may be ambiguous, inconsistent, incomplete or lacking in certain particulars.

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, (22nd 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 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."*

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;

*"... 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, 6th 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."*

In view of the above, and the fact that the Defendant has raised this preliminary objection at the early stage of the Court proceedings, it can be deduced that it is willing to set the arbitration in motion. There is no evidence of, an intention of both parties to abandon the right to arbitrate in the instant case. The Court must therefore as much as possible, enable the performance of the arbitration clause. Parties who sign a binding arbitration agreement are in principle held by its terms.

Having considered the above, my view is that the Contract in issue should be read and interpreted as a whole so as to determine the spirit and intention of the parties. A contract should be construed so as to give full meaning and effect to all of its provisions. The construction of clause 16 is specific and mandatory over clause 14 in respect of dispute resolution. Clause 14 on the other hand provides for institution of any proceedings in any Court of competent jurisdiction. The parties clearly vide clause 16 made reference to the applicability of the Arbitration and Conciliation Act

which provides for the appointment of the arbitrators and the related processes. In my view, clause 16 of the Contract cannot be said to be hopeless so as not to give it effect in the circumstances.

Furthermore, the instances in respect of which the Court can intervene and handle matters are clearly spelt out in the Arbitration and Conciliation Act as stated and in this case, the instances are not applicable.

I do not find clause 16 of the Contract to be incurably defective to render it inoperative or incapable of being performed. I have noted that the Plaintiff does not dispute the existence of the arbitration clause in their Contract or its ability to comply with the same.

Further, I have considered public policy and the purpose of arbitration as a dispute resolution mechanism as provided for by the Arbitration and Conciliation Act, which is intended to facilitate a quicker method of settling disputes compared to Court proceedings. Public policy relates to the most basic notions of morality and justice. It would be unjust to deny the parties an opportunity to explore arbitration which is a form of alternative dispute resolution, that is being promoted in society as a mechanism for faster resolution of disputes among other advantages. Further, the Plaintiff has not adduced evidence to show that arbitration is cost prohibitive, vis-a-vis the estimated projection of Court litigation costs.

In addition, arbitration agreements are purely matters of Contract, and the effect of **Section 5 (1) of the Arbitration and Conciliation Act** is to make contracting parties to live up to their agreement by disallowing any of them to refuse to perform their part of the contract when it becomes disadvantageous to them. In the instant case, the parties in my view must

have negotiated the arbitration clause and included the same for a good reason even in light of the fact that another general clause was included for proceedings in Court.

It would not be fair for Court to disregard the parties' intentions especially where there has been no waiver of arbitration. The mishap and poor drafting in this Contract before me is the fact that a general clause for institution of Court proceedings was included in the same Contract that also contained an arbitration agreement. Accordingly, I am inclined to invoke **Section 5 (1) of the Arbitration and Conciliation Act** which requires this Court before which proceedings have been brought in a matter which is the subject of an arbitration agreement, to refer the matter back to arbitration.

This Court shall therefore allow the preliminary objection to make the contracting parties live up to their agreement as stipulated in clause 16 of the Contract.

Arbitration cannot proceed along with litigation, save within the necessary statutory exceptions. A stay of the suit serves no purpose since the parties can only come back to Court in the manner provided for in the Arbitration and Conciliation Act. Accordingly, I hereby dismiss this suit with no orders as to costs to enable the parties undertake arbitration.

In the premises, I therefore order that;

1. The dispute between the parties herein is referred to arbitration in accordance with the provisions of the Arbitration and Conciliation Act, Cap. 4.

2. High Court Civil Suit No.829 of 2023 is hereby dismissed.

3. Each party shall meet its costs.

I so order.

Dated, signed and delivered electronically this **22nd** day of **March**, **2024.**

Patience T. E. Rubagumya

JUDGE

22/03/2024

8:30am