

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[COMMERCIAL DIVISION]
MISCELLANEOUS APPLICATION NO. 2314 OF 2023
[ARISING FROM MISCELLANEOUS APPLICATION NO. 621 OF 2023]
[ARISING FROM CIVIL SUIT NO. 842 OF 2023]

SMILE COMMUNICATIONS UGANDA LIMITED | APPLICANT

VERSUS

ATC UGANDA LIMITED	1	RESPONDENT
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Before: Hon. Justice Ocaya Thomas O.R

RULING

Background

On 6th November 2012, Eaton Towers and Smile Communications executed a co-location license and services agreement. On 10th October 2013, ATC Uganda Limited and Smile Telecommunications executed a Master Tower Space Use Agreement later amended by a first side letter. The Applicant charges that Clause 21.7 of the co-location agreement and Clause 34 of the Master Tower Space Use Agreement respectively set out the forum for dispute resolution amongst the parties. Following the Respondent's acquisition of Eaton Towers and a dispute that arose between the parties in 2020, the parties agreed to amend both agreements to consolidate and restate the dispute resolution provisions and as a result, in Clause 2.1 of the deed of amendment, the parties agreed to settle any dispute arising out of /in connection with the agreements in accordance with the Arbitration and Conciliation Act ["ACA"] by a single arbitrator appointed in accordance with the Act. (These three agreements considered together are referred to as "the agreements")

5 When the Applicant commenced the main suit, the Respondent filed HCMA 621/2023
[“the head application”] seeking the following reliefs:

(a) This Honourable Court does not have jurisdiction to handle HCCS 842/2022 as
the Plaintiff’s claim arises from agreements which are subject to an arbitration
agreement between the parties.

10 (b) The suit is an abuse of court process as the dispute is sub judice and the suit is
a form of forum shopping.

(c) The Respondent does not have a cause of action against the Applicant.

(d) HCCS 842/2022 should be dismissed/or referred to arbitration.

(e) The costs of this application should be provided for.

15 I heard and determined the head application. In summary, I held that:

1. The arbitration clause between the parties is incapable of being performed
owing to the doubtfulness of the parties’ ability to agree to the appointment of
an arbitrator and the non-existence of the institution empowered to do so
failing an agreement between the parties.

2. The interests of justice demand arbitration be undertaken in line with the
intention of the parties. Therefore, the court orders that the parties agree to
appoint an arbitrator within thirty days of this ruling, and failing an agreement,
either party may apply to an appointing authority under the ACA (without the
exclusion of any such appointing authority which is not duly constituted to
appoint an arbitrator) to appoint an arbitrator. Such arbitration shall be final.

3. In the event that the decision in (a) and (b) above is set aside, this court
would overrule the objections and refer the consideration of the questions
raised to trial.

4. The main suit is stayed and dismissed with each party bearing their costs both
in the head application and main suit.

The Applicant now brings this application for leave to appeal the decision of this court
to the Court of Appeal.



5 Applicant's Case

The Applicant indicates that it is aggrieved by the ruling of this court in the head application and wishes to appeal the same. The Applicant contends that its proposed appeal has high chances of success, that the Applicant will suffer substantial injustice if leave to appeal is not granted, that this application has been made without
10 unreasonable delay and that it is fair, reasonable and in the interests of justice that this application be allowed.

In its affidavit in support, the Applicant identifies eleven (11) proposed grounds of appeal. In summary, the Applicant criticizes the trial judge for

- 15 (a) Failing to properly evaluate the evidence on record thereby arriving at the wrong conclusion (ground 1)
- (b) Rendering orders that contradicted his findings (grounds 2,5-8)
- (c) Errors of law regarding the interpretation and application of section 5 of the ACA (grounds 3-4)
- 20 (d) Trivializing the fundamental importance of an appointing authority and the nature of the parties' relationship (Ground 9-10)
- (e) Unreasonably imposing a time limit of thirty (30) days in which to commence dispute resolution contrary to statutory timelines

25 Accordingly, the Applicant prayed for leave to appeal.

Respondent's Case

The Respondent opposed this Application. The Respondent contends that:

- 30 (a) The Applicant's application is frivolous, vexatious, is an abuse of court process, is without merit and ought to be dismissed.
- (b) An Applicant seeking leave to appeal must show that there are arguable grounds of appeal that merit serious judicial consideration but the Applicant's grounds are neither arguable nor do they merit serious judicial consideration.
- 35 (c) The 1st ground of appeal is general in nature and doesn't state the evidence that the trial judge failed to evaluate or the wrong conclusion reached.



5 (d) The second ground of appeal doesn't state the orders that the learned trial judge rendered that contradicted his findings.

(e) The third ground of appeal is not arguable as the trial judge did not oust the jurisdiction of the court but merely recognized a legal principle that courts will as much as possible enable the performance of defective arbitration clauses
10 despite defective or trivial errors in the clause.

(f) The fourth ground of appeal is misconceived because the decision of the learned judge to overlook Section 5 of the ACA was in the first place based on Section 98 of the Civil Procedure Act and not judicial precedent as the Applicant alleges.

15 (g) The fifth ground of appeal is misconceived and based on a misinterpretation of the learned judge's orders. The learned judge at paragraph 30 on page 20 of his ruling recognized the acrimonious relationship between the parties and made orders for the appointment of an arbitrator in the event the parties failed to reach an agreement.

20 (h) The Respondent will be greatly prejudiced by granting leave to appeal as it will delay the resolution of disputes which arose in 2020.

Representation

The Applicant was represented by M/s TARA Advocates while the Respondent was
25 represented by M/s Katende, Ssempebwa & Co. Advocates.

Evidence and Submissions

The Applicant led evidence by way of an affidavit in support and affidavit in rejoinder deposited by M/s Oscar Kabata, the Applicant's Senior Manager Legal and Regulatory
30 Affairs. The Respondent led evidence by way of an affidavit in rejoinder deposited by Mark Turyamureeba.

Both parties made written submissions in support of their respective cases which I have considered in arriving at my decision below. I have however not felt the need to
35 reiterate them herein.

5 **Decision:**

PART I: PRELIMINARY MATTERS

Before I delve into the merits of the application, I note that the Respondent contended
10 the Applicant's application is frivolous, vexatious, is an abuse of court process, is
without merit and ought to be dismissed.

In **John Garuga Musinguzi & Anor v Dr. Chris Baryomunsi & Anor HCMC
817/2016**, court defined frivolous and vexatious claims thus:

15 "A frivolous claim or complaint is one that has no serious purpose or value. Often
a "frivolous" claim is one about a matter so trivial or one so meritless on its face
that investigations would be disproportionate in terms of time and cost. The
implication is that the claim has not been brought in good faith because it is
obvious that it has no reasonable prospect of success and/or it is not a reasonable
20 thing to spend time complaining about. A "vexatious" claim or complaint is one (or
a series of many) that is specifically being pursued to simply harass, annoy or
cause financial cost to their recipient."

In **King's College Budo Staff Savings Scheme Limited v Zaverio Samula & Ors
25 HCCS 26/2020**, the court defined abuse of court process thus:

"The term abuse of court process has the same meaning as abuse of judicial
process. The employment of judicial process is regarded as an abuse when a party
uses the judicial process to the irritation and annoyance of his opponent and the
efficient administration of justice. It is a term generally applied to a proceeding,
30 which is wanting in bona fides and is frivolous, vexatious or oppressive. The term
abuse of process has an element of malice in it. The concept of abuse of judicial
process is imprecise, it implies circumstances and situations of infinite variety and
conditions."

See also **Deox Tibeigana v Vijay Reddy HCMA 665/2019, Uganda Land
35 Commission and Another V James Mark Kamoga and Another, SCCA No. 8 of
2014, Meera Investments Limited v Nelson Lukozi HCMA 399/2022**

5 Whereas the Respondent made the above contentions, they took no effort to demonstrate how the application was frivolous, vexatious or an abuse of court process. An application cannot be said to be frivolous, vexatious or an abuse of court process merely because a party objects to it.

10 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 not assumptions, abstractions or innuendos. See Also **Centenary Bank v Federation Of Association**
15 **Of Uganda Exporters Limited & Ors HCCS 474/2016**, **Luswata Mary Veronica v Exim Bank HCMA 1118/2023**

Accordingly, these contentions were not made out for this court to be able to render a decision on the same. I will thus proceed to the merits of the application.

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PART II: DETERMINATION ON MERITS

The right of appeal is a creature of statute and must be given expressly by statute. See **Hamam Singh Bhogal T/a Hamam Singh & Co. v. Jadva Karsan (1953) 20 EACA 17**; **Baku Raphael v. Attorney General S.C Civil Appeal No. 1 of 2005 and Attorney**
25 **General v. Shah (No. 4) [1971] EA 50**).

Section 76 of The Civil Procedure Act and **Order 44** of the Civil Procedure Rules provide for a right of appeal from orders and/or decrees mentioned therein, made under rules from which an appeal is expressly allowed by rules. The order sought to
30 be appealed is not one of the listed orders, hence this application. Rule 2 of Order 44 states that an appeal under the Rules shall not lie from any other order except with leave of the court making the order or of the court to which an appeal would lie if leave were given.

35 **Order 44 Rule 1(2)** provides thus:



5 “An appeal under these Rules shall not lie from any other order except with leave
of the court making the order or of the court to which an appeal would lie if leave
were given.”

The combined effect of the above provisions is to provide for an appeal as of right in
10 respect of some decisions and leave to appeal in respect of others. See **Lawrence
Musitwa Kyazze v Eunice Busing**

Leave to appeal will normally be granted where prima facie there are grounds of
appeal that merit serious consideration. See **Sango Bay Estates v Dresdner Bank &
15 Anor (1971) EA 17, Southern Union Insurance Brokers & Ors v Niko Insurance
Ltd HCMA 568/2022, G.M. Combined (U) Ltd v. A.K. Detergents (U) Ltd, SCCA
23/1994.**

In **Southern Union Insurance** (Supra), this court held that in determining an
20 application for leave to appeal, this court should (i) identify and assess the
“seriousness and significance” of the points sought to be raised on appeal. If the points
are neither serious nor significant, relief will usually be granted; (ii) the court must
consider the points relate to a significant misdirection on law or fact; and (iii) the
court must always have regard to all the circumstances of the case, including (a) the
25 need for litigation to be conducted efficiently and at proportionate cost; and (b) the
need to enforce compliance with rules, practice directions and orders. The relevant
factors would vary from case to case but might include the promptness of an
application for relief and other past or current delay.

30 If the question is one of principle and a novel one, ordinarily leave to appeal should be
granted. Substantial justice should not altogether be lost sight of in considering
finality of decisions, in cases where the Legislature and the Rules Committee have cast
the duty of deciding whether the litigation should be continued further, on the trial
court or alternatively the appellate Judge who considers an application for leave to
35 appeal. It would be obviously absurd to allow an appeal against a decision under a
provision designed to limit the right of appeal. However, if the question raised be one

5 in respect of which there is no authoritative decision that would be a guide to the parties, then the circumstances favour granting of leave.

An Applicant seeking leave to appeal must show either that his or her intended appeal has a reasonable chance of success or that he or she has arguable grounds of appeal
10 and has not been guilty of dilatory conduct. Leave to appeal will be given where: the court considers that the appeal would have prospect of success; or there is some compelling reason why the appeal should be heard, but where the order from which it is sought to appeal was made in exercise of a judicial discretion, a rather strong case will have to be made out. See **GM Combined v AK Detergents SCCA No. 23/1994**,
15 **Southern Union Insurance Brokers & Ors v Niko Insurance Ltd HCMA 568/2022 (Supra)**.

The court will only refuse leave if satisfied that the Applicant has no realistic prospects of succeeding on appeal. A real prospect of success means that the prospect for the
20 success must be realistic rather than fanciful see **Swain v. Hillman [2001] 1 All ER 91**, **Southern Union Insurance Brokers & Ors v Niko Insurance Ltd HCMA 568/2022**, **Musa Sbeity & Anor v Akello Joan HCMA 249/2019**,

I agree with counsel for the Respondent that the Applicant's first two grounds are
25 worded too generally. Grounds of appeal should precisely and specifically indicate the error/mistake in the decision appealed from to be presented for appellate consideration.

However, I note that the appellant seeks a determination on

30 (a) The powers of the court to order arbitration where the parties had agreed to an institutional arbitration but where the same institution is not operative so as to render the arbitration agreement incapable of being performed.

(b) The appropriateness/legality of court ordering the parties to arbitrate in
accordance with the ACA in circumstances mentioned in (a) above as opposed
35 to allowing recourse to litigation.

(c) The powers of court or propriety of ordering the parties to first agree on an arbitrator where there is animosity between the parties.

5 (d) The validity and/or reasonability of ordering the parties to commence proceedings in thirty (30) days.

In my view, the above grounds merit serious consideration by an appellate court. Further, considering the fact that arbitration is nascent development in Uganda, a
10 reconsideration of the above matters will have to provide additional clarity and promote Uganda as a safe seat of arbitration where arbitration rules are clear and settled.

In **Applications for admission as Amicii curiae by various UN bodies and Human
15 Rights Watch: In re certification application by various applicants and others v Anglo American SA (Ltd) [2022] ZAGPJHC 935**, a cause raising a novel point of law was held to be that “seeks to take the law where the law has not yet gone”. In my view, the above matters have not, as far as I am aware, been considered and determine several times in the appellate courts and, the Applicant having raised them, it should
20 be given an opportunity to consider them.

Accordingly, I find that this is a proper case for leave to appeal.

Conclusion

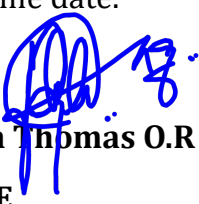
25 In summary, the Applicant is given leave to appeal the decision of this court in the head application to the Court of Appeal. Costs of this application shall abide the outcome of the appeal.

I so order.

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DATED this 2nd day of January 2024 and uploaded on ECCMIS on the same date.

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Ocaya Thomas O.R
JUDGE

2nd January 2024