THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

MISCELLANEOUS APPLICATION NO. 280 OF 2000

(Arising out of Civil Suit No. 72 OF 2000)

CYPRIAN INYANGAT:::::::::::::::::::::::::::::::: APPLICANT/DEFENDANT

VERSUS

ANDREW BOB OLIGO::::::::::::::::::::::::::::::::RESPONDENT/PLAINTIFF

BEFORE: THE HON. LADY JUSTICE C.K. BYAMUGISHA

RULING

The applicant/defendant filed this motion under the provisions of section 17 of the Arbitration Act, section 61 of the Civil Procedure Act and Orders 43 rules 5 and 48
rule 1 of the Civil Procedure Rules seeking the following orders: -

1. Civil Suit No. 72/2000 be stayed and the matter in dispute be referred to arbitration.

2. The parties hereto be directed Co appoint an arbitrator in a time prescribed by court.

3. Costs of the application be provided for.

The basic of the application as set out in the motion is that by a Partnership Deed created on the 26th day of April 1984 between the applicant and respondent, the two partners made a submission to refer any dispute arising out of the partnership to arbitration. It is also contended by the applicant that the respondent has breached the terms of the Partnership Deed by filing civil suit No. 72/2000 before referring the matter to arbitration. It is further contended that the applicant has at all times been ready to resolve any disputes arising out of the partnership business with the respondent either between themselves alone or at the instance of third parties.

The above contentions were supported by the affidavit of the applicant one Cyprian Inyangant but were opposed by the affidavit of Andrew Bob Oligo the respondent/plaintiff

who stated in paragraph six thereof that he verily believes what his lawyers told him that since a written statement of defence was filed in the matter by the applicant/defendant, it is now too late for the suit to be stayed for a referral to arbitration.

When the matter came before me both counsel made submissions to support their case. From the submissions made and the supporting affidavits and documents the following matters are not being seriously contested. On the 26th April, 1984, a partnership under the name and style of Invo Consult Uganda was created by the parties to these proceedings. On or about the 6th August, 1995 the partnership ended. However, it seems the defendant continued to do business under the firm names and has since received payments for work done before the partnership ended. It was provided under clause 19 of the Partnership Deed that:-

> "any dispute, question in connection with partnership or this deed shall in the first instance be decided upon by the partners and in the event of failure to settle the dispute the same shall be referred to the Arbitration under the provisions of the Arbitration Act Cap 55 or any statutory modification or reenactment thereof for the firms being in force".

A dispute has risen not between partners but about the partnership deed since the partners separated in 1995 or thereabouts.

However the contention in this matter is whether the parties have complied with the provisions of the Arbitration Act and the clause I have referred to above. Section 2 of the Arbitration Act, defines "submission" to mean a written agreement to submit present or future differences to arbitration whether an arbitration is named therein or not. The Partnership Deed which the parties are relying on fits the definition I have referred to although no arbitrator was appointed. Section 3 of the same Act provides that

> "a submission unless a different intention is expressed therein, shall be irrevocable, except by leave of the court".

The partnership deed and clause 19 in particular is clear in itself, it does not express a different intention in my view other than to refer any dispute to arbitration. The provisions of the Act seem to be mandatory in that a submission or an agreement to refer a dispute to arbitration is irrevocable except with the leave of court. The plaintiff did not seek the leave of this court to revoke the submission and yet he is seeking court's intervention in the dispute. It would seem that the revocation of the arbitration clause is a necessary step before any action is filed. To quote Halsbury Vol. 15 page 215

> "a person is bound by the recitals in a deed to which he is a party whenever they refer to specific facts which are certain, precise, and unambiguous".

The plaintiff is alleging that the defendant has committed certain breaches in the partnership deed and yet he is silent about the breach he has committed by filing the suit without referring the alleged breaches to arbitration and without seeking leave of this court to revoke the arbitration clause. There are also no reasons to show why the matter was not referred to arbitration.

This brings me to the instant application. Section 17 which is the subject of contention provides that:

> "where any party to a submission to which this part applies or any person claiming under him commences any legal proceedings against any other party to the submission or any person claiming under him in respect of any matter to such legal proceeding may at any time after appearance and before filing a written statement of defence, or taking any other steps in the proceedings apply to the court to stay proceedings and the court if satisfied that there is no sufficient reason why the matter should not be referred in accordance with submission and that the applicant was at the time when the proceedings were commenced and still remains and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings".

The advocates who appeared before me did not cite any authority in which the provisions of the section have been judiciary considered. However, in the case of Muluki Vs Oriental Fire and General Insurance [1973) E.A 162 the defunct court of Appeal for East Africa had occasion to consider similar provisions of the Kenya Arbitration Act. The brief facts of the case were that the appellant sued the respondent under an agreement which contained an arbitration clause. The respondent filed an application for the stay of the suit. Before the application was heard the respondent filed a defence joining issue with the plaint on the merits. The Judge made the order for stay and the appellant appealed. In allowing the appeal the court considered the import and effect of the operative words in the section which are "apply to that court". According to the leading judgement of Lutta J.A (as he then was) the words involve not only the filing of the motion and the giving of notice to the other party but the oral hearing in court as well. The court went on to state that it is only when all these matters take place that an application is made.

In the matter now before court, there is no dispute that the defendant filed his defence on 24/02/2000 before making an application for stay of the proceedings. This according to counsel for the plaintiff/respondent disentitles him to the orders he is seeking. According to counsel the applicant has filed a defence and has also taken another step in the proceedings by filing Miscellaneous Application
No.281/2000.
Counsel referred to Halsbury's Vol. 2 page 24 where the learned author sets out the conditions to be fulfilled in an application of this nature. One of the conditions is that the arbitration agreement must be in writing must be valid and subsisting. Counsel for the applicant on his part submitted that the amendments introduced by statutory instrument No. 26/98 - The Civil Procedure (Amendment) Rules 1998 abolished the entry of appearance and therefore the defendant had to take the steps laid down in the new rules.

The question which has arisen in this matter is whether the applicant has fulfilled the legal requirements set out in the section? Whereas I agree that the amendments brought about by statutory instrument No. 26/98 amendment order 9 in that instead of entering appearance, the defendant is required to file a defence, the same instrument introduced Order 51 B which gives power to a defendant who wishes to dispute the jurisdiction of the court by reason of

any irregularity or on any other ground to give notice of intention to defend the proceedings and to apply to court within the time limited for service of a defence for orders which are specified. In my view the introduction of this provision was meant to take care of situations like the one at hand. Be that as it may, the matter now before court involves a partnership deed which is no longer subsisting, the partners having parted ways in 1995. Therefore there are no terms to enforce or to refer to arbitration. I take it that before the separation, the partners must have taken stock of what they had and shared out whatever was available at the time. For that reason alone, the orders being sought cannot be granted and the application is dismissed with costs.

March 9, 2002 C.K. Byamugisha
JUDGE

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