THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT SOROTI

HCT-09-CV-MA-0062-2011
(Arising from Civil Suit No. 29/2011)

POWER AND CITY CONTRACTORS LTD…….APPLICANT
VERSUS
LTL PROJECT (PVT) LTD……..RESPONDENT

BEFORE: THE HON. MR. JUSTICE STEPHEN MUSOTA

RULING

This ruling arises out of a preliminary objection raised at the trial of Misc. Application 62 of 2011, Power and City Contractors vs LTL Projects (VPT) Ltd.

The applicant is represented by M/s Nyote & Co. Advocates whilst the respondent is represented by M/s Kasirye Byaruhanga & Co. Advocates.

The background to this application is that the applicant sued the respondent vide High Court Civil Suit 29 of 2011 for breach of contract. It sought to recover sums due as a result thereof. The applicant thereafter filed an application for a temporary injunction vides Misc. Application No.62/2011.

When the application for a temporary injunction came up for hearing on 15 February 2012 before my predecessor, learned counsel for the applicant sought for an adjournment on grounds that he had only received the brief and was not ready to

proceed. While objecting to the adjournment learned counsel for the respondent raised an objection to court's continued entertainment of civil suit 29 of 2011 and Misc. Application No.62 of 2011 on grounds that the parties had by agreement undertaken to refer disputes arising out of their contractual relationship to Arbitration and that as such court is enjoined by law to refer the matter to Arbitration in accordance with the parties agreement. Learned counsel for the respondents submitted orally and the one for the applicants replied in writing.

According to **Mr. David innocent Nyote**, learned counsel for the applicant, this court has jurisdiction to handle this suit because;

1. The contract was made in Uganda at Kampala on 25th May 2010.
2. The performance of the contract is being done in Uganda.
3. The works which are the subject of the said agreement are being carried out at Kaberamaido in Uganda.
4. If the consortium Agreement is construed as purporting to oust the jurisdiction of the High Court of Uganda then it is illegal and therefore null and void.

Learned counsel referred to the case of ***Thompson v. Charnock (1977) 8 Term Rep. 139*** cited in ***Cheshire, Fifoot & Firmston's LAW OF CONTRACT 11th Edn at PP 376 and 139*** where it was held that parties by contract cannot "oust the ordinary courts from their jurisdiction." That such contract would be contrary to public/policy and is *protanto* void. That even if foreign law was chosen as the law applicable it does not affect the jurisdiction of Uganda Courts

as was held in the Kenyan Case of ***Tononoka Steels Ltd v. The Eastern and Southern Africa Trade and Development Bank [2000] 2 EA 532***.

5. That the defendant does not have the locus to raise the objection on ground of jurisdiction now. That the procedure of raising such objection is laid down in O.9 r. 3 (1) CPR. That the defendant ought to have given court notice of intention to defend proceedings and then within the time limited for service of a defence applied for dismissal of the suit. That such time has since elapsed and by filing a defence the opportunity is lost.

6. Regarding arbitration, learned counsel for the applicant submitted that the respondent's objection is unsustainable. That clause 8 of the consortium which refers disputes to arbitration is not mandatory. That it is optional and any party thereto may or may not choose to go for arbitration. That even if the clause for arbitration was mandatory, the objecting party can only apply for stay of proceedings so that the court refers the dispute to arbitration because court retains residual authority to handle peripheral matters and see to it that any disputes or differences were dealt with in the manner agreed.

Mr. Nyote further submitted that by filing a defence before making an application for stay of proceedings, and referring the matter to arbitration, the right to do so is always lost.

In reply, **Mr. Murangira** learned counsel for the respondent denied challenging the jurisdiction of this court. That where a court is seized with a matter which is the subject of Arbitration, it is mandatory to refer the matter to arbitration unless the case falls under the stated exceptions. That since the applicant has not pleaded

any exception the matter be referred for arbitration. Learned counsel referred to sections 5,9, and 40 of the Arbitration and Conciliation Act Cp.4 of the Laws of Uganda. He relied on the authorities of (1) ***SCCA No.02 of 2008 N.S.S.F & Anor. Vs. Alcon International Ltd*** and ***SCCA 18 of 2002 and Fulgensius Mungereza v. Price WaterHouse Coopers***.

Further that the respondent raised the issue of referral to Arbitration at the earliest opportunity in his pleadings in C.S.29/2011 and Misc. Application 62 of 2011.

Mr. Murangira further submitted that the authorities cited by the applicant have no bearing on this case. That it is the law in Uganda that a matter of law may be brought to the court's attention at any time during the proceedings as was held in ***Makula International Ltd v. His Eminence Cardinal Nsubuga and Anor. 1982 HCB P.11***.

Finally, learned counsel submitted that this is not a case governed by the provisions of O.9 r. 3(1) CPR and therefore the proceedings in issue be stayed and referred to arbitration under the Arbitration Rule of Singapore International Arbitration centre as agreed.

In Uganda Arbitration is governed by the Arbitration and Conciliation Act 2000. It is provided under S.40 thereof that:

> "***When seized of an action in a matter in respect of which the parties made an arbitration agreement referred to in section 39, the court shall at the***

> ***request of one of the parties, refer the parties to arbitration, unless it finds that the agreement is null and void, inoperative or incapable of being performed.”***

None of the parties to this suit has pleaded that arbitration in this dispute is “incapable of being performed.” This phrase has a lot of bearing when court determines to refer a matter before it for arbitration. The law quoted above also presupposes that before this court can refer to a dispute to arbitration it must be;

> ***“seized of an action in a matter in respect of which the parties made an arbitration agreement referred to in S.39……..”***

Thereafter it becomes mandatory to refer such a matter to arbitration unless valid exceptions exist. This court therefore has jurisdiction to receive a suit even if the agreement binding the parties has an arbitration clause. This is what can enable it to refer the matter to arbitration.

Under S.5 of the Act, it is enacted that:

> ***“(1) 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 arbitration…….”***

Proceedings must be before a court before it considers referring it to arbitration. This presupposes that pleadings are complete before the issue of arbitration arise.

In the agreement between the parties hereto, under clause 8.3. the procedure for resolving disputes is laid down. In the event of any dispute arising out of or relating to the consortium agreement, clause 8.3.3 provides that:

> ***"If the dispute is not resolved during the senior management meeting, then either party may refer such dispute to Arbitration pursuant to Arbitration Rules of the Singapore International Arbitration Centre. If the dispute is referred to arbitration, the arbitrators decision shall be final and binding. Arbitration will be conducted in Singapore in English……..."***

In view of this clear provision, I agree with the submission by **Mr. Murangira** that the fact that the above clause was put in the consortium agreement in clear and unambiguous terms and the parties expressly agreed to submit disputes arising out of their contract to arbitration, for all intents and purposes arbitration was recognized as an effective and efficient means of solving all the disputes out of the binding contract. This clause is binding on the parties to the contract. It was held in ***National Social Security Fund and W.H. Ssentongo T/A Ssentongo & Partners v. Alcon International Ltd CA No. 02 of 2008*** that:

> ***"An arbitration clause in a contract has an enduring and special effect, that is, even if parties decide to***

> ***adopt a different dispute resolution mechanism for a particular dispute that arises under a contract, the arbitration continues in force and is not thereby totally repudiated unless there is solid reason for doing so. Courts will always refer a dispute to arbitration where there is an arbitration clause in a contract."***

According to ***Russel on Arbitration 22nd Edn Sweet & Maxwel paragraphs 1-119 Page 80***;

> ***"……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."***

Therefore by incorporating an arbitration clause in their contract both parties hereto for all intents and purposes recognized arbitration as an effective means of solving any disputes that could arise.

See also ***Flugensius Mungereza's*** case (supra).

In view of the above latest clear statement of the law I am unable to be persuaded by the argument by **Mr. Nyote** which is archaic and outdated and which does not match the dynamics of the present economic dispensation and the law as it is now. Our courts have stated the law as of now in clear terms which is at variance with the theories laid down in the 18th century. Reference of disputes to arbitration was not an optional clause but a binding clause.

By their pleadings in the Civil Suit, the respondents hereto sought to oust the jurisdiction of this court. This was not accurate. The defendant/respondent in their written statement of defence paragraph 2 thereof pleaded that:

> **"*The defendant shall raise a preliminary objection to the effect that the court has no jurisdiction to entertain this suit by virtue of an arbitration clause obtaining in the contract between the parties and from which the suit arises and shall pray that the suit be dismissed with costs*."**

Although the respondents pleaded as such, this ruling has endeavoured to show that the jurisdiction of this court must always be maintained. This objection was raised at the earliest opportunity and would have been handled during the scheduling conference. The same objection is raised in the affidavit in reply to this application in paragraph 13 thereof.

In any case, it is the law in this country that a point of law can be raised at any time in any civil proceedings and decided upon.

Finally I will uphold the submission by learned counsel for the respondent that O.9 r.3 CPR is not relevant in determining this objection. The Arbitration and Conciliation Act and the rules made thereunder are most appropriate.

For the reasons outlined in this ruling I will uphold the preliminary objection by learned counsel for the respondent. I will order a stay of proceedings in Civil Suit 29 of 2011 and Misc. Application 62 of 2011. The dispute between the parties hereto is referred to arbitration. Costs will be in the cause.

Stephen Musota

JUDGE

21.06.2012