

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION

MISCELLANEOUS CAUSE NO.65 OF 2012

EMMANUEL MUGABO.....APPLICANT

VERSUS

- 1. SAAVA STEPHENE KIKONYOGO & JOSEPH KIGALA (administrators of the estate of the late Kasalina Nkizi Nalinya)**
- 2. THE COMMISSIONER LAND REGISTRATION.....RESPONDENTS**

BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE

RULING

When this application was called for hearing, Counsel Felix Kintu for the 1st respondent raised two points of law (PO). The first was that the application is against the estate of the late Kasalina Nkizi Nalinya, yet annexure C to the applicant's supporting affidavit and the orders sought (vesting order), show the land is registered in the names of individuals rather than the estate. He submitted that under section 59 of the Registration of Titles Act the application is rendered ineffective. He prayed court to dismiss it. The second was that under sections 5(9) and 40 of the Arbitration and Conciliation Act, once the parties agree to a mode of dispute resolution in an agreement, such parties should strictly act in pursuance of that clause.

I will first deal with the second PO. Counsel for the respondents on this point referred to annexure A to the applicant's supporting affidavit, a memo of the agreement where the parties specifically agreed to refer the matter for arbitration. He submitted that the essence of section 5 of the Arbitration and Conciliation Act requires a Judge to stay proceedings and refer the matter to arbitration in such circumstances. He submitted that the dispute arises out of a memo of agreement containing a clause that requires parties to refer it to arbitration. He contended that section 9 of the same Act bars this court from interfering in matters governed by the Arbitration and Conciliation Act, and that section 40 provides that where there is an arbitration clause court is not to entertain the matter but refer it to arbitration. He cited **NSSF V Alcon International Ltd CA No. 2/2008** and **Power & City Contractors Ltd V LTL Project Ltd HCT – 09 – CV – MA – 0062 – 2011** to support his position. He availed copies of the said authorities to court.

Counsel Gakyaro opposed both objections. On arbitration, he submitted that the Arbitration and Conciliation Act does not supercede the supreme law of the land. He also submitted without

prejudice and in the alternative that the applicant on several occasions approached the respondent to facilitate the process of having the applicant obtain his legal interest but the applicant has always not been willing to comply with the terms of the memo of 9th June 2011. He prayed court to overrule the PO under sections 33 of the Judicature Act and 98 of the Civil Procedure Act.

Section 40 of the Arbitration and Conciliation Act provides as follows:-

“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.”

Section 5 of the same Act provides that:-

“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 unless he or she 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.”***

It was held in **NSSF V Alcon International Ltd CA No. 2/2008** that courts will always refer a dispute to arbitration when there is an arbitration clause in a contract. Also see **Power & City Contractors Ltd V LTL Project Ltd HCT – 09 – CV – MA – 0062 – 2011**, Musota J.

In the instant case the memorandum of agreement between the applicant and the 1st respondent is annexed as **A1** to the applicant’s supporting affidavit. Clause 2 of the said agreement provides that any dispute arising from the memorandum of agreement shall be referred to an independent arbitrator agreeable to both parties whose decision shall be final. This agreement has not been denied or challenged by the applicant who in fact annexed it to his supporting affidavit. The Court of Appeal in the cited case of **NSSF V Alcon International Ltd**, quoting *David St. John Sutton: Russel On Arbitration, 22nd edition, Sweet & Maxwell, paragraphs 2 -119, page 80* stated that an arbitral clause in a contract has an enduring and special effect. 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 a solid reason for doing so. Courts will always refer a dispute to arbitration where there is an arbitration clause.

I am not persuaded by the submissions of learned Counsel for the applicant that the Arbitration and Conciliation Act does not supercede the supreme law of the land, or by his prayer to overrule

the PO under sections 33 of the Judicature Act and 98 of the Civil Procedure Act. First, I was not able to appreciate the relevance of his submissions about the supremacy of the Constitution over the Arbitration and Conciliation Act to the instant situation. Secondly, the law as set out in the Arbitration and Conciliation Act is clear and unambiguous. Section 33 of the Judicature Act empowers court in exercise of its jurisdiction to grant absolutely or on such terms and conditions as it thinks fit all such remedies legal or equitable as any of the parties is entitled to so that as far as possible all matters in controversy between the parties are completely and finally determined and all multiplicity of proceedings avoided. Section 98 of the Civil Procedure Act saves the inherent powers of court to make such orders as may be necessary for the ends of justice or to prevent abuse of process of court. In my opinion, contrary to the applicant's Counsel's submissions, I find that sustaining the PO rather than overruling it, by referring the matter to arbitration as per the agreement of the parties, will dispose of all matters to this dispute to achieve the ends of justice. It will also avoid multiplicity of proceedings, including abuse of court process, as required under the said sections 33 of the Judicature Act and 98 of the Civil Procedure Act.

In the premises and on basis of the above authorities, I uphold the second point of law raised by the respondent's Counsel. I find that this is a case where it is mandatory to refer this dispute to arbitration. I am obliged under sections 5 and 40 of the Arbitration and Conciliation Act to stay proceedings in this application and refer this dispute to arbitration as per the agreement between the parties. Costs will be in the cause.

In the circumstances, it will not be necessary to address the other point of law raised by the respondent's Counsel, as it would tantamount to handling the application when the same has been stayed and the dispute referred for arbitration.

Dated at Kampala this 13th day of December 2012.

Percy Night Tuhaise

JUDGE.