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**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**[CIVIL DIVISION]**

**CIVIL SUIT NO. 400 OF 2019**

**BUSENVI ENTERPRISE LTD.....PLAINTIFF**

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**VERSUS**

**MAKINDYE SSABAGABO MUNICIPAL COUNCIL.....DEFENDANT**

**BEFORE: HON. JUSTICE ESTA NAMBAYO**

**RULING**

**Introduction**

15 The Plaintiff, Busenvi Enterprise Ltd, sued the Defendant for specific performance, declaration for breach of contract, special damages amounting to 685,992,329 (six hundred eighty -five million, nine hundred ninety-two thousand and three hundred twenty-nine shillings only), being monies for the outstanding balance on the contract price, accrued penalty and interest charges on the outstanding loan, quantum of losses  
20 incurred, general damages, aggravated damages, interest and costs of the suit.

**Background**

The brief background to this case is that on the 24<sup>th</sup> of July, 2017 the plaintiff entered into a contract with the defendant for upgrading St. Noah Road in Bunamwaya in Kampala from murrum to bitumen standard at a price of 1,089,317,897/-. It is the  
25 plaintiff's claim that in the course of implementation of the contract, the defendant defaulted on its payments to the plaintiff and as such, the plaintiff has suffered loss

and damages. When the matter came up for hearing, Counsel for the defendant raised a preliminary objection on grounds that this suit should have been referred for arbitration as provided in the contract terms.

### 30 **Representation**

Learned Counsel Duncan Kagimu appeared for the Plaintiff while Learned Counsel Nelson Nerima was for the Defendant. Submissions were made viva voce.

Two issues that arose out of the submissions are;

1. Whether this suit should have been referred for arbitration
- 35 2. Whether court can refer this matter for arbitration upon a preliminary objection

### **Submissions for the Defendant**

Counsel for the defendant submitted that the contract, upon which this suit was filed in court has provisions for arbitration and as such, Counsel should have referred the matter for arbitration. He relied on clause 25 of the General Conditions of the Contract on page 10, paragraph 25 and explained that the paragraph provides for 2 steps of dispute resolution; by adjudication and by arbitration. Counsel also relied on S.5 of the Arbitration and Conciliation Act which requires courts to refer matters such as this one to arbitration when agreed on by the parties in the contract; and S. 9 of the Arbitration and Conciliation Act which provides that courts shall not interfere in matters governed by arbitration. He referred this court to the cases of ***Vantage Mezzanine Fund II Partnership -v- Simba Properties Investments Co. Ltd & Anor, MA No. 201 of 2022 and Power and City Contractors Ltd –v-LTL Project (PVT) LTD, MA No. 62 of 2011*** and prayed that this court be pleased to refer the matter for arbitration and dismiss this case from court.

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### **Submissions for the Plaintiff**

In reply, Counsel for the Plaintiff submitted that the defendant should have filed a formal application. That there is need to give opportunity to the Plaintiff to show that the matter is properly before this court and to enable court to determine on merit as to why this case should be referred for arbitration or not. Counsel explained that court has to decide whether the agreement is null and void, incapable of being performed and whether there is a dispute requiring referral to arbitration. That this is the rationale behind the requirement that a party should apply formally for referral to arbitration. Counsel further submitted that arbitration is a form of ADR. That in this case, parties have been for mediation from which they obtained partial consent and a payment schedule. That this matter has been in court for more than 2 years without Counsel raising any issues with the procedure. That Counsel is only waking up now to raise an objection as an afterthought so as to waste court's time. Counsel relied on the case of *Yan Jian Uganda Company Ltd –v- Siwa Builders & Engineers, MA No. 1147 of 2014* for the right procedure for applying to court to refer the matter for arbitration and prayed that the objection be overruled so that the matter is heard and determined on its merits.

### **Submissions for the Defendant in re-joinder.**

In rejoinder, Counsel for the defendant submitted that the plaintiff did not plead that the arbitration clause is void and inoperative and that this being a point of law there is no need to file a formal application. That the Arbitration agreement has been brought to the attention of court and that the court must apply Sections 5 & 9 of the Arbitration and conciliation Act.

## Analysis

**Section 5 of the Arbitration and Conciliation Act provides 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,**  
80 **refer the matter back to the 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**  
85 **matters agreed to be referred to arbitration.**

**S.9 of the ACA, provides for the extent of court's intervention and it states that except as provided in this Act, no court shall intervene in matters governed by this Act.**

My understanding of the above provisions of the law is that where a matter has been  
90 filed before court and the Defendant after filing a defence believes that the case should be referred for arbitration, he/she must apply to court and show that there is a binding and enforceable arbitration agreement which is operative and capable of being performed and that the dispute between the parties in court is in regard to the matters that the parties agreed to be referred for arbitration. Where the above have  
95 been proved the court must refer the matter for arbitration under S. 9 of the ACA.

In regard to the procedure of applying to court, Counsel for the Defendant submitted that the application may be by way of an objection on a point of law and that it is not a requirement that the Applicant files a formal application.

100 All the cases that Counsel for the parties relied on show that application for referral to arbitration was made formally and not by way of a preliminary objection.

***In Yaya –v- Obur and Ors, Civil Appeal No.81 of 2018, Mubiru, J, noted that;***

105 *“Court has discretion to dispose of the preliminary objection immediately or defer its ruling until after hearing the whole case. Such a deferment may be made where it is necessary to hear some or the entire evidence to enable the Court to decide whether the objection raised is dispositive of the suit or not”.*

***In Mukisa Biscuit Manufacturing Co. Ltd -v- West End Distributors Ltd [1969] E.A 697,*** it was held that;

110 *“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”*

I have already laid out what the Defendant must prove in the application that the matter should be referred for arbitration. It is my view that in order to make a determination on whether or not the matter should be referred for arbitration, it would  
115 require that the court considers the evidence adduced by the parties and apply the relevant provisions of the Arbitration Act. Court cannot determine as a matter of law that the matter should be referred to arbitration without the said evidence. This would mean therefore that there must be a formal application detailing the relevant areas of the agreement providing for referral to arbitration, which court must examine before  
120 coming to a conclusion that the matter should be referred for arbitration.

## **Decision**

The objection is hereby overruled with orders that: -

1. The matter proceeds for hearing.
2. Costs of the objection stay in the cause.
- 125 3. Counsel for the Defendant may file a formal application for determination by this court if he holds the view that this matter should be referred for arbitration.

I so order.

Dated signed and delivered at Kampala on this 1<sup>st</sup> day of July, 2022.

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**Esta Nambayo**

**JUDGE**

**1<sup>st</sup>/7/2022**