

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MUKONO
MISCELLANEOUS APPLICATION NO. 053 OF 2023

(ARISING OUT OF MISC. APPLICATION NO. 013 OF 2023)

(ARISING OUT OF ARBITRATION CAUSE NO. 003 OF 2023)

EYRE MALIK AGAR ::: APPLICANT

VERSUS

1. GEN. PAULINO MORU JIJIYO

2. MOSES ABYEYI MARIAL MAGOL

3. ANTHONY AHIMBISIBWE

**T/A M/S ANTHONY AHIMBISIBWE ADVOCATES AND
SOLICITORS**

4. BANK OF AFRICA UGANDA LIMITED::::::::::::::::::::: RESPONDENTS

BEFORE: HONOURABLE JUSTICE DAVID MATOVU

RULING

Introduction

1. Eyre Malik Agar (hereinafter referred to as the “Applicant”) filed Miscellaneous Application No. 053 of 2023 in the High Court of Uganda at Mukono against Gen. Paulino Moru Jijiyo, Moses Abyeyi Marial Magol, Anthony Ahimbisibwe T/A Ahimbisibwe Advocates & Solicitors and Bank of Africa

Uganda Limited (hereinafter referred to as the “Respondents”) seeking the following orders: -

- i) Setting aside the Arbitral Award in Arbitration Cause No. 3 of 2023,
- ii) Setting aside the Garnishee Order Absolute granted on 20th March, 2023 in Miscellaneous Application No 13 of 2023
- iii) Reversal of execution of the Garnishee order issued vide Miscellaneous Application No 13 of 2023
- iv) An order against 3rd Respondent not to pursue execution of the Garnishee order issued in Miscellaneous Application No 13 of 2023
- v) An order to transfer US\$ 592, 222. 2 (Five hundred ninety-two thousand two hundred twenty-two point two US Dollars) held on 3rd Respondent’s Account Number 07173840010 with 4th Respondent back to the Applicant’s Account Number 2201976066 with KCB bank.
- vi) Costs of this application.

Background facts

2. On 25th January, 2023 the 1st and 2nd Respondents filed Arbitration Cause No. 003 of 2023 in the High Court of Uganda at Mukono. This was a final arbitral award dated 11th July, 2019 involving the 1st and 2nd Respondents as claimants on the one part and the Applicant together with a one Yasir Said Arman as Respondents on the other, for purposes of enforcement of the arbitral award.
3. The arbitral award was in respect of a claim for non-payment for goods valued at Ug. Shs 2, 150, 000,000/= (Two billion one hundred fifty million shillings) supplied by the 1st and 2nd Respondents to the Applicant and Yasir Said Arman.
4. The arbitrator awarded a sum of US\$ 592, 222, 2 (Five hundred ninety-two thousand two hundred twenty-two and two US Dollars) to the 1st and 2nd Respondents and also awarded himself US\$ 1,000/= (One thousand US Dollars) as fees for conducting the arbitration.
5. On 27th January, 2023 the 3rd Respondent appeared as Counsel for the 1st and 2nd Respondents before the Deputy Registrar of this Court who issued a Garnishee nisi attaching

the Applicant's Account No. 2201976066 with KCB Bank to satisfy the arbitral award dated 11th July, 2019 of US\$ 592, 222.2 (Five hundred ninety-two thousand two hundred twenty-two point two US Dollars) which is the equivalent of Ug. Shs. 2, 150, 000,000/= (Two billion one hundred fifty million shillings).

6. Court also ordered the Garnishee to appear before it on 6th February, 2023 at 10:00 am to show cause why it should not pay the sums described hereinabove being the arbitral award to the Judgment creditors.
7. Surprisingly, no further action was taken until the 27th February, 2023 when the Applicant through his attorney Engineer Raymond Matsiko engaged the services of M/s Tumwebaze, Atugonza, Kobusingye Advocates who filed Miscellaneous Application No. 32 of 2023 seeking to set aside the Arbitral Award in Arbitration Cause No. 003 of 2023 on grounds that the Applicant and Yasir Said Arman were not aware of any transactions between them and the 1st and 2nd Respondents and they were not even served with any

documents relating to the arbitration proceedings or even the arbitral award.

8. Whereas Miscellaneous Application No. 32 of 2023 had been fixed for hearing on 5th April, 2023 at 10:30 am before Lady Justice Christine Kaahwa, the law firm of M/s Tumwebaze, Atugonza, Kobusingye Advocates which filed Miscellaneous Application No. 32 of 2023 filed a notice of withdrawal of this Application and on 15th March, 2023 claiming that they needed more evidence to support their application and on 17th March, 2023, the learned trial Judge formally withdrew Miscellaneous Application No. 32 of 2023 with no orders as to costs.
9. On the 20th March, 2023 the Deputy Registrar of this Court in the presence of the 3rd Respondent as Counsel for the Judgment creditors now 1st and 2nd Respondents and a one **Mr. Mugobera Charles Mbusa** who was holding brief for the Judgment debtors in Miscellaneous Application No. 13 of 2023 issued a Garnishee absolute for the attachment of US\$ 592, 222.2 (Five hundred ninety-two thousand two hundred twenty-two point two US Dollars) held on KCB Bank

Account Number 2201976066 in the names of Eyre Malik Agar and the same was to be paid to the 3rd Respondent's Account 07173840010 with the 4th Respondent.

10. On 22nd March, 2023 the Applicants through M/s Tumwebaze, Atugonza, Kobusingye Advocates again filed Miscellaneous Applications No. 112 and 113 of 2023 seeking stay to the execution of the Garnishee orders and Interim stay of the Garnishee orders pending the disposal of Miscellaneous Application No. 32 of 2023 which application they had withdrawn earlier on 17th March,2023.
11. On the same date 22nd March, 2023 the Respondents also filed Miscellaneous Application No. 048 of 2023 seeking to commit the Managing Director of KCB to Civil Prison for defying the Garnishee absolute order.
12. On 23rd March,2023 all files relating to Arbitration Cause No 3 of 2023 were reallocated to Hon. Justice David Matovu (Head of Circuit) for further management and by this time Miscellaneous Application No. 32 of 2023 had been withdrawn and also the order for a Garnishee absolute had been complied with and therefore on 23rd March,2023

Miscellaneous Applications No. 112, 113 and 48 of 2023 were all dismissed with no orders to costs as they had been overtaken by events.

13. On 27th March, 2023 the Applicant through M/s Yiga Advocates filed Miscellaneous Applications No. 53 and 54 of 2023 seeking to set aside the arbitral award in Arbitration Cause No. 3 of 2023 and an Interim Order for the 3rd Respondent not to withdraw or effect any transaction on the monies on his account received vide the Garnishee absolute issued in Miscellaneous Application No. 013 of 2023.
14. On 28th March, 2023 Miscellaneous Application No. 54 of 2023 was heard inter parties and Court issued an order against the 3rd and 4th Respondents not to withdraw US\$ 592, 222.2 (Five hundred ninety two thousand two hundred twenty two point two US Dollars) transferred from the Applicant's Bank Account Number 22019760666 held with KCB Bank to the 3rd Respondent's Account Number 07173840010 held with 4th Respondent Equatorial branch until hearing and determination of Miscellaneous Application No. 053 of 2023

and which order was to be in place for a period not exceeding 30 (thirty) days from the 28th March, 2023.

15. On 11th April, 2023 hearing of Miscellaneous Application No. 53 of 2023 commenced with the cross examination of Eyre Malik Agar (Applicant), Moses Abyeyi Marial Magol (2nd Respondent) and Peter Chuol Gatluak (arbitrator) in respect to the contents of their respective affidavit evidence on record and it was agreed that the written preliminary objections by Counsel for the 1st-3rd Respondents would be resolved in the final ruling but counsel Robert Rutaro later on the 13th April, 2023 withdrew his preliminary objections and even retrieved his written submissions from the record.

16. On 13th April, 2023 counsel Yiga Shafir cross-examined Egau Alfred on the contents of his affidavit of service and since the 1st and 2nd Respondents had just engaged counsel Gabriel Byamugisha to represent them court granted the newly engaged advocate time to peruse the court record and also issued timelines within which counsel were to file written submissions and reserved the ruling for the 25th April, 2023.

Legal representation

17. Mr. Yiga Shafir represented the Applicant while Mr. Robert Rutaro represented the 1st, 2nd and 3rd Respondents until the 13th April, 2023, when the 1st and 2nd Respondents engaged Counsel Gabriel Byamugisha to represent them for purposes of filing written submissions on their behalf.

Evidence of the Applicant

18. According to the affidavit of Raymond Matsiko the Attorney of the Applicant deponed on 27th March, 2023 he contended that a garnishee order had been issued by the Deputy Registrar of this Court and pursuant to this order US\$ 592, 222. 2 (Five hundred ninety-two thousand two hundred twenty-two point two US Dollars) was transferred from the Applicant's Account with KCB Bank Number 2201976066 and this money is currently on the Account of the 3rd Respondent Bank Account Number 07173840010 with the 4th Respondent Equatorial Branch.

19. That the Applicant does not know the 1st and 2nd Respondents and has never transacted any business with them and that he was not aware of any arbitral proceedings or

arbitral award as indicated in Arbitration Cause No. 03 of 2023.

20. That he had tried to search for a copy of the arbitral award from the High Court in Mukono and at the Commercial Division of High Court (CADER) and ICAMEK but all was in vain.
21. That he contacted M/s Yiga Advocates who advised him that Arbitration Cause No. 03 of 2023 was a fraudulent scheme and no arbitration proceedings ever took place and no summons were served upon the Applicant who was in Khartoum Sudan at the time of the alleged arbitration proceedings.
22. That the execution of this arbitral award was done in error as Court could not execute an arbitral award procured fraudulently.
23. That he had filed the instant application to recover money deposited on the 3rd Respondent's Account with the 4th Respondent.
24. He also filed an affidavit in rejoinder to that of the 3rd Respondent and contended that he holds an engineering

degree from Kyambogo University awarded to him on 16th December, 2016.

25. That he was granted a power of Attorney to represent Gen. Eyre Malik Agar Ngayoufa who is the same person as Eyre Malik Agar the Applicant in this case.
26. That contrary to what he stated in his affidavit in support Yasir Said Arman is actually known to the Applicant.
27. That the Applicant was not a party to the purported arbitration proceedings at all.
28. That the Applicant was not a party to any agreement that gave rise to these proceedings.
29. That it surprising to note that as early as 2nd October, 2008 when the purported agreement was made the 1st and 2nd Respondents were in position to predict that Peter Chuol Gatluak would be an arbitrator to proceedings to take place in Uganda in 2018.
30. That there was no proof that the said Peter Chuol Gatluak accepted the role of arbitrator in this matter on the letter of 14th August, 2018 whose receipt he acknowledged on the said letter.

31. That the arbitration proceedings or arbitral award by Peter Chuol Gatluak was not registered with either CADER or ICAMEK.
32. According to the affidavit in rejoinder by Eyre Malik Agar (Applicant) to the affidavit of the 2nd Respondent he confirmed that the names Eyre Malik Agar and Eyre Malik Agar Ngayoufa refer to him.
33. That in February, 2023 he received a phone call from KCB Bank about a Garnishee nisi on his account to pay an arbitration award where upon he instructed Raymond Matsiko to halt this process.
34. That Raymond Matsiko engaged M/s Tumwebaze, Atugonza, Kobusingye Advocates but later on learnt that these lawyers who filed an application to halt the process had withdrawn the application without his permission.
35. That he was later informed by KCB Bank that a Garnishee absolute was issued on 20th March, 2023 and as a result US\$ 454,976 (Four hundred fifty-four thousand nine hundred seventy-six US dollars) was transferred from his account to another account in Bank of Africa (U) Ltd.

36. That he has since instructed another law firm of Yiga Advocates to halt this process.
37. That he does not know the 1st and 2nd Respondents.
38. That he also does not know Peter Chuol Gatluak
39. That he was not served with any summons by Fatuma Night as alleged as he has never been a resident of Bukerere Mukono and at the time he was allegedly served with summons he was in Khartoum Sudan.
40. That he has never entered into any agreement with the 1st and 2nd Respondents and the signature on the agreement dated 2nd October, 2008 purported to be his was a forgery and he attached his diplomatic passport No D031300 for comparison of signatures on his passport with those on the agreement dated 2nd October,2008.
41. That on 2nd October, 2008 he was not in Mukono as alleged in the contract agreement and at this time he was a National Minister of Trade in Khartoum Sudan.
42. While on oath and under cross examination by Counsel Robert Rutaro the Applicant confirmed that the names Eyre

Malik Agar Ngayoufa and Eyre Malik Agar are his and they refer to the same person.

43. He presented Court his diplomatic passport No. D031300 issued by the Republic of Sudan on 14th April, 2021 in the names of Eyre Malik Agar Ngayoufa born on the 23rd March, 1950.
44. He explained that he opened up his account with KCB bank while he was a guest of the Ugandan Government and a rebel in South Sudan.
45. That he received a call from his bankers between 10th - 15th February, 2023 and this is when he instructed Raymond Matsiko to engage lawyers on his behalf.
46. He contended that matters relating to the garnishee proceedings were very important to him but being a member of the Senior Council of Sudan he is governed by protocol and was very busy hence the delay to come to Uganda.
47. He confirmed to be Sudanese citizen who deponed his affidavit in Khartoum before a lawyer called Awatiff Abdu Alrahman ibn Aouf.

48. While under examination by Court he stated that he first visited Uganda in 1970 and thereafter had been a regular guest of Chief of Defence Forces of the UPDF who used to arrange for his accommodation but he did not rent any house while staying in Uganda.
49. While in Uganda his telephone contact was **+256772224454** given to him by his host the Chief of Defence forces.

Evidence of the 1st and 2nd Respondents

50. According to the affidavit in reply by Moses Abyeyi Marial Magol filed on 31st March, 2023 he contended that he together with the 1st Respondent they supplied goods to the Applicant worth Ug. Shs. 1, 285,000,000/= (One Billion two hundred eighty-five million) as indicated in the agreement dated 2nd October, 2008.
51. That according to the said agreement Gen. Peter Chuol Gatluak was to be their arbitrator in case of any dispute.
52. That when the Applicant failed to comply with the terms of the agreement they reported the matter to the arbitrator.

53. That on 14th August, 2018 he together with the 1st Respondent were summoned for a hearing and he was informed by the arbitrator that on this same day the Applicant and Yasir Said Arman had also been summoned for the same hearing but they did not turn up hence proceeding in their absence.
54. That during the hearing himself, Lt. Gen James Ajong Mowut and Paulino Moru Jijiyo testified before the arbitrator and it was on the basis of their evidence that the arbitral award was made on 11th July, 2019.
55. That it is this award that the 3rd Respondent who happens to be their lawyer executed.
56. While under cross examination by Counsel Yiga Shafir he stated that he was born in 1984 and studied up to Senior four in 2005 at John Paul Wau Secondary School in Southern Sudan and thereafter he joined the war.
57. That in 2006 he went to North Afro Nile border where he fought for eight (8) years.
58. That he first visited Uganda in 2022.

59. When asked by Court if he was ever in Mukono in 2018, he categorically stated that he was not in Mukono during those years as he first came to Uganda on the 1st April 2022.
60. He stated that knew the Applicant as he met him on 2nd October, 2008 in Saneer South Sudan.
61. He confirmed that they supplied the Applicant with all the 250,000 (Two hundred fifty thousand) pairs of gum boots but he paid nothing and their total claim is for US\$ 1.6 Million (One point six million US Dollars) but the arbitral award is US\$ 592, 222, 2 (Five hundred ninety-two thousand two hundred twenty-two and two US Dollars).
62. He clarified that all their transactions with the Applicant were in Saneer South Sudan and not in Mukono Uganda.

Evidence of Brigadier Peter Chuol Gatluak

63. According to the affidavit of Peter Chuol Gatluak filed in reply on 31st March, 2023 he contended that on 14th August 2018 he was approached by the 1st and 2nd Respondents to be their arbitrator in a case between them, the Applicant and Yasir Said Arman.

64. That after studying their complaint/claim he attempted to contact the Applicants with a view of serving them with the claim and also to get their side of the story.
65. That he engaged a lady by the names of Fatuma Night to serve the Applicants who were staying in Mukono and indeed service was effected upon both the Applicant and Yasir Said Arman.
66. That the Applicants did not turn up for the hearing and he heard the 1st, 2nd and one (1) other witness.
67. That he saw and examined a memorandum of understanding between the parties and was satisfied that indeed the 1st and 2nd Respondents had supplied items for which they were not paid and he accordingly made an award of Ug. Shs. 2,150,000,000/= (Two Billion one hundred fifty million shillings) in favour of the 1st and 2nd Respondents.
68. That he gave copy of his award to the 1st and 2nd Respondents.
69. While under cross examination by Mr. Yiga Counsel for the Applicant, this witness statement that he holds Masters in Business Administration (MBA) obtained from Cryadon

University in the USA and he also obtained a Bachelor's degree from the same University.

70. That he lived in the USA between 1994 - 2006 and thereafter started working in Juba Southern Sudan as a Deputy Director of Planning and budgeting and was later promoted to the position of Director of Planning and budgeting in June.
71. That he was approached by the 1st and 2nd Respondents to be their mediator in a dispute against the Applicant and Yasir Said Arman and this was provided for in Paragraph 7 of their contract agreement dated 2nd October, 2008.
72. That on 14th August, 2018 he received a letter from the 1st and 2nd Respondents requesting him to arbitrate their dispute and he cross checked with both sides.
73. That he did not read the Arbitration and Conciliation Act Cap 4 in full and he is not an accredited arbitrator in Uganda.
74. He stated that after receiving the letter dated 14th August, 2018 he had to ensure that there was transparency on both sides.

75. He stated that in August 2018 he was in Juba and he came to Mukono in January, 2023.
76. He confirmed that he knew Fatuma Night as a business lady he first met in Entebbe. He stated that he actually met Fatuma Night on 19th December, 2022 at a Hotel called Georgia.
77. When asked why his passport issued to him in 2018 had no entry and exit stamps from Uganda Immigration department for the period around 4th May, 2019 he answered that he had misplaced his passport around this time and was using a temporary travel document.
78. When asked about the role played by Fatuma Night in these arbitration proceedings he categorically answered that Fatuma Night should be in a better position to answer her role but according to him Fatuma Night was a volunteer in these proceedings.
79. He confirmed that he was in Uganda during the arbitration proceedings which were conducted at King Fahad Plaza Kampala Road and he served a copy of the arbitral award upon the Applicant's Attorney.

80. While under re-examination by Mr. Robert Rutaro he confirmed having been to Uganda on several occasions and that he handled the arbitration proceedings personally.
81. He confirmed that he knew the Applicants.
82. He still insisted that Fatuma Night was volunteer who is in the best position to know whatever role she played in these arbitration proceedings.
83. He stated that when he failed to physically trace the Applicants he was left with no option but to handover the arbitration documents to their attorney and it was still their attorney who received the arbitral award on their behalf.
84. He categorically stated that he did not send Fatuma Night to serve any documents during these arbitration proceedings.
85. When court sought clarification from him as to whether Moses Abyeyi Marial Magol (2nd Respondent) appeared before him during the arbitration hearing on 4th May, 2019 in Uganda he answered in the affirmative.

Evidence of Egau Alfred

86. According to his affidavit of service filed on 12th April, 2023 he stated to be Process server of the High Court who received witness summons for service upon Fatuma Night a process server attached to Mengo Chief Magistrates Court.

87. That he went to Mengo Chief Magistrates Court for purposes of effecting service of the witness summons upon Fatuma Night and he was informed by Nyeko Mike that the said Fatuma Night was actually not a staff of the Judiciary but was a student on clerkship attached to Mengo Chief Magistrates Court.

88. That the said Fatuma Night had died in 2022 due to Covid 19

Evidence of the 3rd Respondent

89. According to the affidavit of Anthony Ahimbisibwe the 3rd Respondent filed on 31st March, 2023 he stated to be an Advocate of the High Court of Uganda and the Managing Partner of M/s Anthony Ahimbisibwe & Co. Advocates and Solicitors.

90. That he represented the 1st and 2nd Respondents during the execution proceedings filed vide Miscellaneous Application No. 13 of 2023 which gave rise to this application.
91. That this application is incompetent and an abuse of Court process meant to defeat Justice because all due process was followed in executing the arbitral award now in issue.
92. That M/s Tumwebaze, Atugonza, Kobusingye Advocates and legal Consultants filed Miscellaneous Application No. 32 of 2023 seeking to set aside the same orders sought now and they withdrew their application on 15th March, 2023 which withdrawal was endorsed by Court on 17th March, 2023.
93. That it was upon the withdrawal of Miscellaneous Application No. 32 of 2023 that a garnishee absolute was issued by Court on 20th March, 2023.
94. That after a garnishee absolute was issued M/s Tumwebaze, Atugonza, Kobusingye Advocates again filed Miscellaneous Application No 112 of 2023 for stay of execution and Miscellaneous Application No. 113 of 2023 for Interim stay of execution which applications were dismissed as being

overtaken by events and the same position ought to apply to the instant application.

95. That this matter is res judicata and a one Eng. Raymond Matsiko is an impostor as adjudged by the Deputy Registrar on 20th March, 2023 who did not have valid powers of Attorney from the Applicant.

96. That there is no Applicant in this case since Raymond Matsiko has no valid powers of Attorney.

97. That without prejudice to the foregoing contents of his affidavit in reply the Applicant had no evidence of fraud and corruption to set aside the arbitral award.

Legal arguments by Counsel for the Applicant

98. In his written submissions filed on 14th April, 2023 Counsel for the Applicant argued that the arbitral award at Mukono dated 11th July, 2019 purportedly made by General Peter Chuol Gatluak was fraudulent and marred with illegalities.

99. Counsel argued further that an arbitrator could only lawfully be appointed pursuant to the Arbitration and conciliation Act Cap 4 and this could only be done by the

Centre for Arbitration and Dispute Resolution (CADER) as provided in Section 68 (e) of this Act and since General Peter Chuol Gatluak was not lawfully appointed he was incompetent to handle the arbitration now in issue.

100. Counsel argued that the arbitration agreement dated 2nd October, 2008 was illegal as the Applicant and 2nd Respondent were not in Mukono or Uganda in 2008 thus breaching Section 10 (1) of the Contracts Act 2010.

101. Counsel argued that there was no service of arbitration proceedings as provided for in Section 18 of the Arbitration and Conciliation Act. He submitted that Fatuma Night was not known to the Applicant who was in Khartoum and the affidavit of service of Fatuma Night was full of inconsistencies and she was not a competent Court Process Server.

102. Counsel argued that there were actually no arbitral proceedings on 4th May, 2019 as the 2nd Respondent first came to Uganda on 1st April, 2022 and therefore could not have participated in arbitral proceedings of 4th May, 2019 at Colline hotel Mukono and yet the arbitrator claims to have handled the arbitration proceedings at King Fahad Plaza in Kampala.

103. Counsel submitted that since the Arbitration was the poisonous tree the garnishee proceedings were fruits of the poisonous tree and should therefore be set aside.

104. Counsel filed his submissions in rejoinder and argued that the supplementary affidavits were inadmissible and he relied on the case of **Surgipharm (U) Limited Versus Uganda Investment Authority and Graphics System (U) Limited** High Court Civil Division Miscellaneous Cause No 65 of 2021.

Legal arguments by Counsel for the 1st and 2nd Respondents

105. Counsel for the 1st and 2nd Respondents argued that since the Applicant had filed a similar application which he later withdrew the instant application is an abuse of Court process.

106. Counsel argued that according to Section 34 (3) of the Arbitration and Conciliation Act an application of this nature cannot be allowed after one (1) month from the date of receipt of the arbitral award.

107. That this application is incompetent because the power of Attorney in favour of Raymond Matsiko was defective and he

could therefore not swear an affidavit in support of this application.

108. As to whether the arbitration award was that the law does not restrict the appointment of arbitrators to CADER and in the instant case the arbitrator was appointed in the agreement dated 2nd October, 2008.

109. Counsel argued that since Fatuma Night is dead, her affidavit of service is unchallenged and she was competent to serve Court process.

110. Counsel argued that the arbitral award was duly registered in accordance with Section 35 (1) of the Act and the garnishee is already granted and therefore Court should order for the transfer of the funds in issue to the 1st and 2nd Respondents.

Legal arguments by Counsel for the 3rd Respondent

111. In this submission filed on 17th April, 2023 Counsel for the 3rd Respondent adopted the grounds as set out in the Applicant's submission save for the amount of US\$ 592, 222. 2 (Five hundred ninety-two thousand two hundred twenty-two point two US Dollars) which according to him the amount

attached was US\$ 454,000/= (Four hundred fifty-four thousand US dollars).

112. Counsel took note of the proceeding of 11th April, 2023 especially the cross examination of the Applicant, the 2nd Respondent and the Arbitrator as having revealed several glaring issues which he trusted Court to deliver a verdict on.

113. Counsel argued that since the 3rd Respondent was a law firm they were only carrying out a professional duty of representing a client and therefore should not be linked to whatever facts were revealed by the witnesses on 11th April, 2023 while under cross examination.

114. Counsel submitted that there was no cause of action against the 3rd Respondent and suing the advocate in his pursuant capacity was over zealous and the suit against the 3rd Respondent should be dismissed with costs.

115. Counsel submitted that given the revelations during the proceedings of 11th April, 2023 after cross examination of the Applicant, the 2nd Respondent and the arbitrator they were ready to abide with the outcome of this case.

116. Counsel implored this Court that in the event it orders for the return of the money attached by the garnishee order then Court should cater for their instruction fees of between 8%-10% of the subject matter.

Decision of Court

117. Counsel for the 1st and 2nd Respondents sought to introduce two (2) supplementary affidavits vide his letter dated 18th April, 2023 and with all due respect to Counsel this application was heard on 11th April, 2023 in the presence of the Applicant and his Counsel and the 1st, 2nd and 3rd Respondents were also in Court duly represented by Counsel Robert Rutaro at the time.

It would be improper for this Court to admit the two (2) supplementary affidavits at this stage of the hearing, as this would not give other counsel in the matter an opportunity to be heard on these supplementary affidavits and court therefore rejects the two (2) supplementary affidavits. (See case of **Surgipharm (U) Limited Versus Uganda Investments Authority & Anor** (Supra).

118. Still on the contents of the letter dated 18th April, 2023 from M/s Byamugisha Gabriel & Co. Advocates about the deliberate misdirection of witnesses by Mr. Robert Rutaro. Court had the opportunity of seeing and hearing Moses Abyeyi Marial Magol (2nd Respondent) and also General Peter Chuol Gatluak on the 11th April, 2023 testifying while on oath and they answered all questions put to them by counsel confidently and court found that these witnesses told the whole truth while under cross-examination and re-examination and therefore it is improper for counsel Gabriel Byamugisha who was not in court on 11th April, 2023 to make such malicious allegations bordering on unethical conduct and incompetence on the part of counsel Robert Rutaro who in any case has no opportunity to defend himself at this stage.

119. Court is therefore not surprised that according to the submissions of Counsel for the 3rd Respondent an advocate who attended Court on 11th April, 2023 he found the evidence of the Applicant, the 2nd Respondent and General Peter Chuol Gatluak while under cross-examination and re-examination to

have revealed a lot about the arbitration proceedings and the resultant arbitral award both now in issue.

120. Upon court's perusal of the Notice of Motion and the accompanying affidavits to Miscellaneous Application No. 53 of 2023 and also upon perusal of the affidavits in reply and rejoinder and after carefully listening to the cross examination of the Applicant, the 2nd Respondent and Peter Chuol Gatluak this Court is satisfied that the alleged arbitration proceedings of 4th May, 2019 at Colline Hotel Mukono and subsequent arbitral award of 11th July, 2019 did not take place because of the following reasons: -

- i) The contract of supply of goods dated 2nd October, 2008 allegedly between the Paulino Moru Jijiyo and Moses Abyeyi Marial Magol on the one part and Eyre Malik Agar and Yasir Said Arman on the other relates to the supply of **250,000** (Two hundred fifty thousand) pairs of gum boots each at Ug. Shs. **20, 000/=** (Twenty thousand shillings) totaling to Ug. Shs. **500,000,000/=** (Five hundred million shillings).

This same price appears in all subsequent documents like the letter dated 14th August 2018 from Gen. Paulino Moru Jijiyo and Moses Abyeyi Marial Magol addressed to General Peter Chuol Gatluak. Incidentally this letter was only signed by the 2nd Respondent implying that the 1st Respondent did not sanction the purported arbitration.

The same price also appears in the claim No. 001 of 2019 according to the evidence of witness No. 1 Lt Gen James Ajong Mawut and that of witness No. 2 Paulino Moru Jijiyo in the arbitration proceedings.

Subsequently, the same price appears in the final award made on 11th July, 2019.

If at all the 1st and 2nd Respondents had supplied the 250,000 (Two hundred fifty thousand) pairs of gum boots as they claim they should have realized in the course of the eleven (11) years that this matter took that the actual cost of these gum boots was Ug. Shs. **5, 000,000,000/= (Five billion shillings)** and not Ug. **Shs. 500,000,000/=** (Five hundred million

shillings) and they would not have forfeited their Ug. Shs **4, 500, 000,000/= (four billion five hundred million)**. This court believes the evidence of the Applicant that he had no business transactions with the 1st and 2nd Respondents.

Court finds that the correct price of 250,000 (Two hundred fifty thousand) pairs of gum boots as Ug. Shs. 20,000/= each should have been Ug. Shs. 5, 000,000,000/= (Five billion shillings) and therefore this wrong price in all documents was done by the same person whose mathematics was wanting and the figure of 500,000,000 (Five hundred Million) was intentional in order to fit within the targeted funds on the Applicant's account with KCB Bank.

- ii) Moses Abyeyi Marial Magol states in paragraph 5 of his affidavit in reply filed on 31st March, 2023 that he was summoned by the arbitrator to appear on 14th August, 2018 for hearing.

The same Moses Abyeyi Marial Magol told Court while under cross examination by Mr. Yiga Shafir that he first came to Uganda on **1st April, 2022**.

Court noted that the said Moses Abyeyi Marial Magol appeared as witness No. 3 in the arbitral proceedings of **4th May, 2019 at Colline Hotel Mukono** and not on **14th August 2018** as he states in his affidavit in reply

Court finds that Moses Abyeyi Marial Magol first came to Uganda on **1st April, 2022** and therefore he did not participate in the purported arbitration proceedings of **4th May, 2019 at Colline Hotel Mukono**. It is also difficult to prove that the 1st Respondent attended the arbitration proceedings since he did not depone any affidavit in reply to that effect. This alone proves that none of the witnesses mentioned in the Arbitration proceedings and subsequent award actually attended these proceedings and there were no such Arbitration

proceedings and as such no Arbitral award could arise therefrom.

iii) Court also finds that since **Gen. Paulino Moru Jijiyo** was not an arbitrator in this case as alleged in the affidavit of service of Fatuma Night and yet even Peter Chuol Gatluak who claims to have engaged Fatuma Night to serve process upon the Applicants denied instructing Fatuma Night to do anything while under cross examination there was actually no service of the claim upon the Applicant as alleged by Fatuma Night.

iv) According to paragraph 4 of the affidavit of Peter Chuol Gatluak (the Arbitrator) he engaged a lady by the names of Fatuma Night to serve the Applicants who were at the time staying in Mukono and indeed service of the claim papers was made.

However, while under cross examination by Mr. Yiga Shafir Peter Chuol Gatluak denied engaging the said Fatuma Night to do anything in this arbitration.

v) Court perused the affidavit of service deponed by the said Fatuma Night on 4th April, 2019 and attached to the affidavit of Peter Chuol Gatluak in reply to this application and the said Fatuma Night stated that she was contacted by the Arbitrator a one **General Paulino Moru Jijiyo** who gave her the contacts of the persons to be served. It is the finding of this court that no service at all was ever effected upon the Applicant and the Arbitration proceedings and subsequent award cannot stand.

121. Court found Peter Chuol Gatluak's explanation that he misplaced his passport in May, 2019 and was using a temporary travel document to be a lie as the exit and entry stamps in his passports clearly show that on 4th May 2019 he was not in Uganda and he could not therefore have conducted any arbitration hearing at Colline Hotel on this day as he claims.

122. Court finds that all documents in support of this alleged arbitration namely the contract to supply of goods dated 2nd October, 2008, the letter dated 14th August, 2018 to Gen.

Peter Chuol Gatluak, the proceedings of 4th May, 2019 in claim No. 1 of 2019 at Colline Hotel Mukono, the affidavit of service by Fatuma Night deponed on 4th April, 2019 and the final award dated at Mukono 11th July, 2019 were all fraudulent and were all designed to steal money from the Applicant's Account Number 2201976066 with KCB Bank.

123. Court took an initiative to serve Fatuma Night with witness summons to appear before court on 13th April, 2023 at 9:30 am.

124. However, according to the affidavit of service filed on 12th April, 2023 by Egau Alfred a Court Process server attached to Mukono Court the said Fatuma Night was not a staff of the Judiciary but a student on clerkship who has since passed on.

125. Court finds that the said Fatuma Night was not a process server of the High Court and was therefore not competent to effect Court process hence Eyre Malik Agar (Applicant) and Yasir Said Arman were not served with any claim or other documentation prior to the arbitral award.

126. Service of court process is generally governed by Order 5 CPR for the service of summons. In particular, it is a

requirement under Order 5 r.10 CPR, that service of summons shall be made to the defendant in person or his/her appointed agent.

127. **“Personal service”** denotes leaving a copy of the document served with a person upon whom the service is intended to be effected.

128. It is worth noting that for service to be deemed proper and effective, there must be proof of service by a serving officer or process server. In that regard, Order 5 r.16 CPR provides as follows;

“The serving officer shall, in all cases in which the summons has been served under rule 14 of this Order, make or annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which the summons was served, and the name and address of the person, if any, identifying the person served and witnessing the delivery or tender of the summons.”

129. In **MB Automobiles vs. Kampala Bus Service [1966] EA 400; Owani vs. Bukenya Salongo [1976] HCB 62**, court held

that failure to record the name and address of the person identifying the person to be served renders the affidavit of service incurably defective.

130. The process server in the impugned Arbitration proceedings did not prove that the alleged telephone contacts in her affidavit of service indeed were for the Applicants, even the source of these telephone contacts is doubtful given the serious contradictions in the evidence on record and the process server herself did not disclose that the Applicants were indeed identified to her by someone who knew them. This by all standards invalidates the affidavit of service and does not amount to effective service of the Arbitration proceedings.

131. Peter Chuol Gatluak informed this Court on oath that he wrote the final award at King Fahad Plaza on Kampala Road in Kampala and not at Mukono as it appears in the final award and this also goes to prove that no arbitration proceedings took place at Mukono on the 4th May, 2019 and the resultant arbitral award dated 11th July 2019 is a nullity and is hereby set aside.

132. This Court finds that this fraudulent arbitral award was only designed to defraud the Applicant of his money held on KCB bank Account Number 2201976066 and which sum of money is currently on the 3rd Respondent's Account Number 07173840010 with Bank of Africa Equatorial Branch in trust for the 1st and 2nd Respondents.
133. Court cannot condone such fraud where a baseless arbitral award is used to steal money from an unsuspecting Applicant's Account this is an illegality. See case of **Makula International Versus His Eminence Cardinal Nsubuga (1982) HCB 24.**
134. Otherwise, courts of law are going to be used as places where fraudulent arbitral awards are sanitized in order to defraud innocent parties and for this reason court cannot allow garnishee proceedings arising from a fraudulent arbitral award to stand.
135. I therefore allow Miscellaneous Application No. 053 of 2023 and hereby set aside all garnishee proceedings arising from Mukono High Court Miscellaneous Application No. 013 of

2023 and Mukono High Court Arbitration Cause No. 003 of 2023.

136. I hereby order the 3rd Respondent to transfer Us\$ 454,976 (United States Dollars Four hundred fifty-four thousand nine hundred seventy-six) he received from the Applicant's KCB bank Account Number 2201976066 by virtue of the garnishee order issued on 20th March, 2023 back to the Applicant's Account Number 2201976066 with KCB bank within **two (2)** days from the date of this ruling/ order failing which this money will attract interest at a Commercial rate from the date of this ruling/ order until the money is transferred back in full.

137. Court finds the prayer by counsel for the 3rd Respondent to be given instruction fees rather ridiculous as the 3rd Respondent ought to have exercised due diligence in executing the instructions he received from the 1st and 2nd Respondents by perusing all the relevant documentation that led to the fraudulent arbitral award and if counsel had done so this Miscellaneous Application would possibly not have arisen.

138. As court is not sure if indeed the 3rd Respondent participated or was aware of the fraudulent arbitration proceedings and subsequent arbitral award I will not condemn him to pay costs of this application but the 1st and 2nd Respondents are hereby ordered to pay the costs of this application to the Applicant because they knew the source of the fraudulent arbitration proceedings and the resultant arbitral award.

Dated this 25th day of April 2023.

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David Matovu
JUDGE