**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT FORT PORTAL**

**CIVIL SUIT NO. 0048 OF 3021**

**DR. KAGORO KAIJAMURUBI :::::::::::::::::::::::::::::::::::: PLAINTIFF**

**VERSUS**

**JEREMY JOHN GRAHAM :::::::::::::::::::::::::::::::::::::::: DEFENDANT**

**BEFORE: HON. JUSTICE VINCENT WAGONA**

**RULING**

The plaintiff brought this suit against the defendant for breach of the lease agreement for land comprised in LRV 658, Folio 4, Block 33, Plot 4, Land at Kabarizi, Mwenge in Kyenjojo District registered in the names of Graham John Ramsay seeking recovery of possession and or re-entry, rent arrears, interest thereon, damages and costs of the suit.

It was contended by the plaintiff that by a lease agreement dated 28th August 1967, Switzer Kaijamurubi (Lessor) who was the biological father and predecessor in title of the plaintiff leased the suit land to the late John Ramsay Graham, a biological father to the defendant for a term of 99 years out of his freehold FRV 17/23, Mwenge, Block 33, Plot 5 land at Kabirizi. That the defendant and the predecessors in title defaulted on payment of rent for a period of 31 years and despite reminders from the plaintiff to have the same paid, they have kept a deaf ear. The plaintiff thus sought an order for entry or repossession of the suit land, recovery of rent arrears, interest, general damages and costs of the suit.

When the case was scheduled for mention on 21st February 2023, learned counsel for the defendant intimated to court that he had a preliminary point of law to raise regarding the competence of the matter before court on ground that parties had included an arbitral clause in the lease agreement they executed. Court gave parties a schedule to file submissions which they complied with.

**Representation:**

**Mr. James Byamukama of M/s Byamukama, Kaboneka & Co. Advocates** appeared for the plaintiff while **Mr. Baluti Emmanuel of M/s Baluti& Co. Advocates** appeared for the defendant. Both parties filed written submissions which I have considered.

**Issues:**

1. **Whether Civil Suit No. 048 of 2021 is competent before this court.**
2. **Remedies available.**

**Submissions for the Defendant:**

Mr. Emmanuel for the defendant submitted that in the lease agreement executed between the parties, they included an arbitral clause which is binding and which in effect ousts the jurisdiction of this court. That the plaintiff's suit is premised on alleged breach of the lease agreement which is the basis of the plaintiff's claim and the same is attached as annexure B to the plaint. That at page 4 of the lease agreement, it provides for the applicable Dispute Resolution Mechanism between the parties being arbitration as opposed to litigation. It was pointed out that the said arbitration clause out rightly ousts the jurisdiction of the court to handle the case at hand.

Learned Counsel submitted that Section 9 of the Arbitration and Conciliation Act ousts the jurisdiction of courts in disputes governed by Arbitration. He invited court to ***Civil Appeal No. 87 of 2011, Babcon Uganda Limited Vs. Mbale Resort Hotel Limited and HCMA No. 671 of 2022, Simba Properties Investment Co. Limited & Anor Vs. Robert Kirunda*** and others which support the position in section 9 of the Act.

That in reply to the written statement of defense, the plaintiff submitted that the defendant refused or ignored a reference to arbitration which was not true and it is confirmation that the plaintiff is aware of the arbitral clause. It was contended that the plaintiff's remedy is found in Section 11(4) and (5) of the Arbitration and Conciliation Act where the plaintiff should have applied to the appointing authority for compulsory appointments of an arbitrator. Learned counsel thus made a prayer pursuant to the point of law at hand for court to find that it has no jurisdiction and to reject the plaint and consequently dismiss the suit under Order 9 rule 11(d) of the Civil Procedure Rules.

**Submissions for the Plaintiff:**

In response Mr. Byamukama for the plaintiff contended that under clause 2 of the lease agreement, it was provided that the landlord reserves the right of re-entry in the event the Tenant defaults on payment of rent for 6 months. That under clause 6, it was agreed that any dispute in the construction of the agreement shall be referred to arbitration by two arbitrators each appointed by either party in accordance with the Arbitration and Conciliation Act.

That the defendant had defaulted on rent for 31 years and despite the several demands and commitment to pay, he failed to do so. That in 2015, the plaintiff's former lawyer, M/s KRK advocates invoked the arbitration clause and appointed an arbitrator and communicated the same to the defendant's former lawyers M/s Kasirye Byaruhanga & Co. Advocates and the letter was ignored. It was pointed out that when the defendant ignored the process of arbitration initiated, the plaintiff filed this suit seeking re-entry in accordance with clause 2 of the lease agreement.

Mr. Byamukama contended that whereas Section 9 of the Act restricts the role of ordinary courts in arbitration matters, that there are exceptions and these include; (a) stay of proceedings under section 5 of the Act, (b) Interim relief quo under Section 6, power to set aside an arbitral award and restricted right of appeal under Section 38. Ithat the applicable exception to the case at hand is under section 5 of the Act which empowers court to stay proceedings involving a matter that is subject to a valid, operable and performable arbitration agreement and to refer such a matter for arbitration.

It was submitted that the exception under Section 5 was applied in the case of ***Ambitious Construction Co. Ltd Vs. Uganda National Cultural Centre, Civil M.A No. 441 of 2020*** where justice Wamala stayed proceedings in the main suit and referred the case for arbitration and appointed an arbitrator to assist the parties. That the same position was stated in ***Simba Properties Investment Co. Ltd Vs. Robert Kirunda& 3 others, Commercial Court M. A No. 671 of 20220.***

It was submitted that the plaintiff in this case made attempts to have the case settled by way of arbitration and such efforts were frustrated by the defendant. That arbitration could not be possible if both parties were not available as was observed in ***SCCA No. 3 of 2014, Sinba& 4 others Va. Uganda Broadcasting Corporation.*** Counsel submitted that Section 9 of the Act only restricts court from interfering in arbitration but does not oust the jurisdiction of courts. That Section 9 should be read together with other provisions of the Act which create exceptions. That when the issues of arbitration arise during court proceedings, that the procedure is not to automatically dismiss the suit as submitted by counsel for the defendant but to stay proceedings and refer the matter for arbitration in accordance with section 5(1) of the Act. That the case cited by counsel for the defendant of ***Babcon (supra)*** dealt with section 34 of the Act that dealt with an appeal against an arbitral award and it is different from the facts before this court.

Counsel further submitted that the defendant in the written statement of defense admitted breaching the terms of the lease agreement by defaulting on payment of the rent in arrears. It was contended that there is no dispute between the parties which warrants the dispute being referred for arbitration. That secondly, the defendant frustrated the process of arbitration and thus rendered the lease agreement inoperative and un-performable and this he is estopped under Section 5 (1) from raising such issue which he frustrated. That although section 9 restricts courts intervention in matters where there is an arbitral clause, that section 5 (1) (a) and (b) gives this court jurisdiction to try the matter and grant the remedies sought by the parties.

Counsel invited court to a similar interpretation of Section 5(1) under the English Arbitration Act as observed in Halsbury's Laws of England, 4th edition Volume 1 paras 602, 630 and 631 where it observed by the learned authors thus: ***"If the claim has been expressly or impliedly admitted by the defendant or the defendant has no demonstrable defense thereto or the defendant has admitted liability but failed to pay, then there is in fact no dispute between the parties to refer to arbitration. In that case court should proceed to try the suit. If the arbitration agreement has been rendered void, or inoperative, incapable of being performed by frustration or breach of the contract by the defendant, again court should proceed to try the suit."***

That the same position was stated by justice Stephen Mubiru in ***Simba Investment Properties Co. Ltd & Anor Vs. Robert Kurunda & 3 others*** (supra) where he noted that: **"*where a party has admitted liability or compromised his stand, by some admission capable of altering the position of the parties in respect to the matter in dispute, the matter can no longer be referred for arbitration*".** That in the current suit the defendant admitted being a tenant and the fact that he breached the tenancy agreement by failing to pay the agreed rent and as such the case should not be referred for arbitration but should be heard by court on merits.

Counsel thus asked court to overrule the point of law for want of merit or in the alternative without prejudice to invoke section 5(1) of the Act to stay proceedings and refer the matter for arbitration with directions on when the same should be completed and the suitable arbitrators. That costs should abide the outcome of the arbitration.

**DECISION:**

**Issues One: Whether Civil Suit No. 048 of 2021 is competent before this court.**

The main issue is about the propriety of this suit in the light of the arbitral clause in the lease agreement between the plaintiff and the defendant. The center of the debate is whether or not the Arbitration and Conciliation Act (ACA) ousts the jurisdiction of courts.

Section 3 of the ACA provides for the form of an arbitration agreement and 5 provides that:

***1. Stay of legal proceedings;***

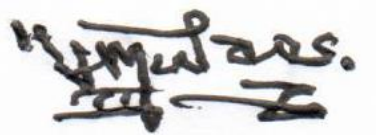
*(1) A judge or magistrate before whom proceedings are being brought in a matter which is the subject of an arbitration agreement shall, if a party so applies after the filing of a statement of defence and both parties having been given a hearing, refer the matter back to the arbitration unless he or 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 matters agreed to be referred to arbitration.*

*(2) Notwithstanding that an application has been brought under subsection (1) and the matter is pending before the court, arbitral proceedings may be commenced or continued and an arbitral award may be made.*





Section 9 of the ACA on the other hand limits the extent to which courts can intervene in matters governed by the Act and it provides that; ***"Except as provided in this Act, no court shall intervene in matters governed by this Act."*** The general position is that the ACA specifically Section 9 limits the jurisdiction of courts in matters subject to arbitration save as permitted by the Act.

In ***Babcon Uganda Limited Vs. Mbale Resort Hotel Ltd, Civil Appeal No. 87 of 2011,*** Justice Egonda Ntende in his lead judgment observed at page 7 that: '***Section 9 of the ACA satisfied the forgoing standard. It is clear in ousting the courts' general jurisdiction. It bars the courts from interfering beyond the limited or special jurisdiction permitted under the ACA***." Therefore, the jurisdiction that the ACA ousts is the general jurisdiction and not the specific jurisdiction.

It is apparent that where the Act creates special circumstances where courts can intervene, then such jurisdiction is not ousted by section 9 of the Act. The Section itself states that "*Except as in this Act……",* meaning that courts can only exercise jurisdiction over matters that are permitted under the Act. The basic example is in section 27 where it is provided that; "*The arbitral tribunal, or a party with approval of the tribunal, may request from the court assistance in taking evidence, and the court may execute the request within its competence and according to its rules on taking evidence*." The other is Section 34 regarding setting aside an arbitral award and Section 38 concerning determination of questions of law arising in domestic arbitration where parties agree to that effect. Therefore, to the extent of such exceptions, the ACA does not make a blanket ouster of jurisdiction of court.

The next question would be, if the matter is a subject of arbitration and the same is filed in court, does court have jurisdiction to entertain the same? In my view this question is answered by Section 5( 1) of the ACA which 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 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 matters agreed to be referred to arbitration."***

It deducible from section 5 (1) of the ACA that where there is a valid and enforceable arbitration agreement or arbitral clause, and an application is made to have the case referred for arbitration, court stays the proceedings and orders that the case be referred for arbitration. The basic guiding principle as to whether a matter should be referred for arbitration or not rests on the validity of the arbitration agreement or clause.

Whereas section 5 (1) talks about an application by a party to have the case referred for arbitration, I believe that the court on its own motion can also refer the case for arbitration if is satisfied that there is a valid and enforceable arbitration agreement in the contract that a party seeks to enforce.

It was contended for the defendant that there is a valid and enforceable arbitral clause in the lease agreement that the plaintiff sought to enforce. That the said clause was enforceable against either party to the dispute and thus the suit at hand was incompetent amidst the said clause.

On the other hand the plaintiff maintained that the arbitral clause was not enforceable and or inoperative since the defendant admitted the breach in the defence and counter claim and the fact that he defaulted on the payment of the annual rent. It was contended that although Section 9 restricts the power of courts in matters subject to arbitration, that the main suit was an exception under Section 9 and thus court has jurisdiction to hear the case.

Section 5 (1) of the ACA provides thus:

> ***"A judge or magistrate before whom proceedings are being brought in a matter which is the subject of an arbitration agreement <u>shall</u>, if a party so applies after the filing of a statement of defence and both parties having been given a hearing, <u>refer the matter back to the arbitration</u> unless he or she finds—***
>
> ***(a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or***
>
> ***(b) (b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration."***

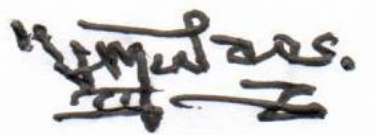
Section 5 (1) suggests in strong terms that where after a case is filed in court and a party applies that the same is referred for arbitration and it is established that; (a) the arbitration agreement is null, void, inoperative or incapable of being performed; (b) that there is not in fact any dispute between the parties with regard to the matter agreed to be referred to arbitration; then in such circumstances court can decline referring the case for arbitration and proceed to hear the same on merits. This is one of the permitted exceptions where courts can exercise limited jurisdiction in matters subject of arbitration. This extends to cases where a party admits the claim by the plaintiff on the basis of the pleadings or where the law bars arbitration in some cases like in employment disputes or contracts then the court in such circumstances can proceed and hear the case on the merits even in the presence of an arbitral clause.

In the case before me, parties in the lease agreement dated 28th August 1967, agreed under clause 6 that: "***In the event of any difference of opinion arising between the parties hereto in connection with any matter under or in the construction of these presents the matter shall be referred to the arbitration of two arbitrators appointed in accordance with the provisions of the Arbitration Act (Cap. 55) as from time to time amended or replaced and the decision of such arbitrators shall be final and binding on the parties and such arbitrators shall have power to decide to and by whom and in what manner the cost of the reference and award shall be paid and borne and these presents shall be deemed to be a submission to arbitration within the meaning of the Arbitration Act Cap. 55 amended and replaced as aforesaid the provisions whereof shall apply as far as applicable and not hereby varied."***

The above clause in my view was a general arbitration clause in relation to any issue arising from the lease agreement and was binding on both parties. Counsel for the plaintiff seems to agree that there was a valid and enforceable arbitration agreement whose force of operation it is contended, was invalidated by the defendant's acts to wit; failing to comply with the terms of the lease. Secondly, it is contended that the plaintiff admitted the claim and as such there is no dispute to refer for arbitration.

The plaintiff's claim was repossession, rent in arrears, interest, general damages and costs. In the written statement of defense, the defendant denied the plaintiff's claim and indicated that his predecessors in title had paid rent up to 2016 and he was ready to pay rent after 2016 but he failed to agree with the plaintiff on the amount to be paid. He went ahead and filed a counter claim for relief from forfeiture and a declaration that the plaintiff is not entitled to re-enter the suit land. This in my view is not an admission of the plaintiff's claim. An admission should be clear, precise, and unambiguous and should not require an explanation or extrinsic evidence for such conclusion. It is thus my view that there was no admission of the plaintiff's claim since there is a pending dispute as to whether the defendant defaulted on rent payment for the period alleged by the plaintiff (31 years), the validity of the payment alluded to by the defendant up to 2016, the rent to be paid and the engagements the parties had. Therefore, I find that there was no admission of the plaintiff's claim by the defendant.

As regards the contention that the arbitral clause was rendered in operative by the manner in which the defendant responded when he was served with the letter

inviting him for arbitration, this dilemma in my view is answered by section 11 (3) (4) & (5) of the ACA which provides thus:

***11(3)***

***Where;***

***(a) In case of three arbitrators, aparty fails to appoint the arbitrator within thirty days after receipt of a request to do so from the other party or if the two arbitrators fail to agree on the third arbitrator within 30 days after their appointment.***

***(b) In the case of one arbitrator, the parties fails to agree on the arbitrator, the appointment shall be made upon application of a party, by the appointing authority.***

***11(4)***

***"Where, under a procedure agreed upon by the parties for the appointment of an arbitrator or arbitrators;***

***(a) a party fails to as required under that procedure;***

***(b) the parties or two arbitrators fails to reach the agreement expected of them under that procedure or;***

***(c) a third party, including an institution, fails to perform any function entrusted to it under that procedure***

***any party may apply to the appointing authority to take the necessary measures; unless the agreement otherwise provides for securing compliance with the procedure agreed upon by the parties.***

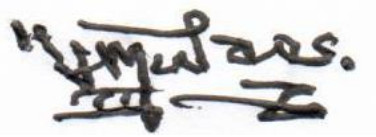
***11(5)***

***A decision of the appointing authority in respect of a matter under subsection 3 or 4 shall be final and not subject of appeal***

It is my view that if the defendant failed to respond to the notice of appointment of arbitrators as per the letter from the plaintiff's former lawyers of KRK Advocates, the plaintiff should have applied to the Authority which is defined under Section 2 and 67 of ACA to connote the Centre for Arbitration and Dispute Resolution (CADRE) for appointment of an arbitrator. The law provided for scenarios where a party does not respond and the basis of such was to respect the arbitral clause and the alternative mechanism that parties agreed to resolve their disputes without necessarily going to court. In this case the plaintiff ought to have invoked the provisions of the ACA as opposed to filing this suit. It is therefore my view and finding that there is a binding and enforceable arbitration agreement between the plaintiff and the defendant.

It is my considered opinion that the current suit was occasioned by the defendant's default to respond to the notice of appointment of arbitrator and the arbitration process commenced by the plaintiff pursuant to the letter dated 2nd November 2015. If the defendant had responded on time either by paying the rent in arrears and other demands by the plaintiff or by appointing his own arbitrator per clause 6 of the arbitration agreement, this suit could have been avoided. Therefore, although none of the parties made an application to have the case referred for arbitration in accordance with section 5(1), since there is a valid and enforceable clause, I do

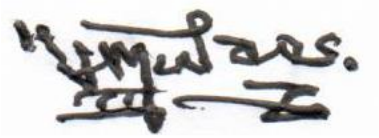




hereby refer the matter for arbitration. Further since Civil Suit No. 048 of 2021 has served its purposes and the claims therein shall be adjudicated upon by the arbitrator, the same is hereby dismissed with costs to abide the outcome of Arbitration. Since clause 6 gave parties an opportunity to each appoint an arbitrator which they have neglected, I find that it is in the interest of justice that the dispute be handled by International Centre for Arbitration and Mediation (**ICAMEK**) which is a body of arbitrators and the same shall handle and conclude the arbitration within 90 days from the date hereof. This suit dismissed with the following orders:

1. **The parties are referred for arbitration in accordance with clause 6 of the lease agreement dated 28th August 1964.**
2. **The dispute shall be arbitrated by ICAMEC which is a body of professional arbitrators and concluded within 90 days from the date of delivery of this ruling.**
3. **The costs of the suit shall abide the outcome of the Arbitration.**

**It is so ordered.**



8/6/2023

Vincent Wagona

**High Court Judge / FORT-PORTAL**