

CIVIL SUIT NO.436 OF 2016

Antony 1

defendants have no interest therein; an eviction order and mesne profits against the 2nd counter defendants, special, and general damages, as well as costs of the suit.

The plaintiffs/1st counter defendant's claim against the counter claimants was settled by consent dated 11th October 2022, by which the plaintiff/1st counter-
5 defendant agreed to relinquish his claim in the suit property upon receiving the refund of **Ug. x 200,000,000/= (Uganda Shillings two hundred million only)** after which the interest therein would revert to the counter-claimants.

Consideration by court.

When this matter came up for hearing, counsel for the 2nd counter defendant raised
10 a preliminary objection to the effect that the dispute is subject to arbitration. He therefore prayed that court proceedings be stayed; and the matter be referred to arbitration as per **section 5 of the Arbitration and Conciliation Act.**

Section 5(1) of the Arbitration and Conciliation Act, Cap 4 provides as follows:

"Stay of legal proceedings.

15 ***(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 —***

20 ***a. that the arbitration agreement is null and void, inoperative or incapable of being performed; or***

25 ***b. that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration."***

It follows therefore that the 2nd counter defendant ought to demonstrate to this court that there is a dispute between the parties before court, and that there is a binding and enforceable arbitration agreement; and that this court has no jurisdiction to determine the matter.

30 In regard to the 1st requirement, it is an agreed fact that there is in fact a dispute between the parties hereto. What is in contest however, is whether there is a valid, binding and enforceable arbitration agreement or clause.



Counsel for the 2nd counter defendant in his submissions argues that **clause 6** of the Memorandum of Understanding contains a valid, binding and enforceable arbitration agreement within the confines of **Section 5 (supra)** which means that the parties wilfully and conscientiously, expressly excluded this court from
5 intervening to resolve any dispute within the ambit of the act.

Counsel for the counter claimants on the other hand submitted that the arbitration agreement relied on by the counter defendants is not only illegal, but also null and void because MOU discloses obvious illegalities which render it illegal and that
10 whereas the MOU is a money lending agreement for all intents and purposes, the counter defendant did not have any money lender's license to lend money as per paragraph 3 of the MOU.

That despite the counter defendant's admission that he acted as a money lender, he did not attach a money lender's license to prove that he was licensed to lend money with interest thus because it was illegal for the counter defendant to purport to lend
15 money without a licenses, the said illegality renders the MOU and arbitration agreement embedded therein null and void.

Counsel cited **Section 2 of the Money Lender's Act** which requires every money lender to obtain a license, and further criminalises the act of operating without the same.

20 He also cited **Section 7 (1)** which states that any contract made for the loan of money by a money lender shall be illegal in so far as it provides for the payment of compound interest or for the amount of interest being increased by reason of any default in the payment of sums due in the contract.

Further, citing the case of **Kazooba Francis vs MK Creditors Ltd & 2 others Civil Suit No.218 of 2016**, counsel submitted that in that case, court overruled a similar
25 preliminary objection raised therein.

That court noted that the alleged arbitration agreement was null and void on account of the above illegalities; that there was no valid arbitration agreement that was binding on the plaintiff and as such, the main suit was properly before this court
30 and there is nothing to refer to arbitration.

Counsel submitted that the illegality vitiated the validity of the MOU thereby rendering the arbitration agreement inoperative, null and void and as such, there is


3

no valid arbitration agreement binding upon the counter claimants thus the counterclaim is properly before this court.

In rejoinder, counsel for the counter defendants maintained that not only is the MOU valid, but also binding and enforceable since the counter claimants and the 2nd counter defendant willingly and conscientiously executed a memorandum of understanding by which they received **Ug. Shs. 60,000,000/=**.

They undertook to forfeit their interest in the suit property to the 2nd counter defendant upon default of payment. That while the counter claimants indeed defaulted and have not paid the sums due, they later entered a consent with the 1st counter defendant by which they agreed to refund the purchase price to the 1st counter defendant which is a clear indicator and admission of their fraudulent dealings in the property with different parties.

That they have never raised any issue or complaint regarding the memorandum of understanding since its execution in 2014 and even abandoned the suit property because they were evading payment of their debt until they found out that there was a pending suit against them at which point they filed this counter claim which raises issues that are a supposed to be subject to arbitration as agreed in the memorandum of understanding.

That this claim was raised to defeat their obligations under the memorandum of understanding they willingly entered for their own benefit and now claim to be illegal. That while the counter claimants are challenging the validity of the memorandum of understanding, the same can only be determined upon hearing the merits and that **Section 16** clearly states that an arbitration clause which forms part of a contract shall be treated as an independent of the other terms of the contract.

Counsel further stated that the counter claimants have not faulted the arbitration clause in their submissions and only seek to rely on the provisions of the **Money Lenders Act** to allege illegalities which are not applicable at this stage and can only be probed into upon hearing the merits, and all the circumstances of how the money was obtained before an arbitrator considering the fact that money was advanced and is not denied.

Under **Section 2 (1) (c) of ACA**, an "arbitration agreement" is defined as "**an agreement by the parties to submit to arbitration all or certain disputes which**


4

have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not”.

In the present case, **Clause 6** of the Memorandum of understanding states that;

5 *‘In case of any misunderstandings or dispute arising from the interpretation or fulfilment of the duties and obligations herein, the same shall be resolved through Arbitration by M/S NAKAFEERO, MAWEMUKO & CO. ADVOCATES as the agreed Arbitrators of both parties thereto.’*

10 It is not in dispute that the memorandum of understanding included an arbitration clause. Counsel for the counter claimants however disputes the enforceability thereof on grounds that because the memorandum of understanding was not only illegal, but also null and void, implying that the arbitration agreement therein is equally affected and is invalid.

15 An arbitration clause in its nature operates autonomously from the contractual provisions governing the rights and responsibilities of the involved parties. The independence of the arbitration agreement from the rest of the contract within which it is embodied, is specifically provided for under **section 16 (1) (a)** which provides that an arbitration clause which forms part of the contract shall be treated as an agreement independent of the other terms of the contract, and secondly that a
20 decision by the arbitral tribunal that the contract is null and void shall not itself invalidate the arbitration clause.

In the case of **British American Tobacco Uganda Ltd v Lira Tobacco Stores (HCMA 924 of 2013)** court observed that **section 16 (1)** recognises that the expiry of an agreement or the invalidity of an agreement itself does not render an arbitration
25 clause incapable of enforcement or inoperative.

Court further noted that:

30 *‘In other words, the dispute between the parties can be about the validity of the contract itself and the arbitration clause would be sufficient to submit that dispute with the arbitral tribunal agreed upon.’*

It follows therefore that the issue of illegality of the memorandum of understanding raised by the counterclaimant arises from the memorandum itself and as such falls within the ambit of disputes the resolution of which ought to be by way of arbitration.

5
Anthony

Section 9 of the ACA provides for the extent of court intervention in matters within the ambit of the Act. It provides –

“Except as provided in this Act, no court shall intervene in matters governed by this Act.”

- 5 **Section 3(1) ACA** stipulates that the arbitration agreement may be enclosed within an existing contract or captured in a different agreement which is distinct from the subject matter contract.

10 With all due respect the counterclaimant ought not to have pegged the legality of the arbitration clause which is governed **ACA** onto the legality of the entire contract which is governed by **Contracts Act, No.7 of 2010** requiring the court at this stage to delve into the merits of the suit.

The objection in effect was not raised in good faith. The questions concerning the legality of the arbitration clause could have been raised earlier even before the execution of the contract.

- 15 I could not agree more therefore. It does not follow that the invalidity of the contract, be it for illegality or any other vitiating factor will automatically invalidate an arbitration clause.

It is accordingly ordered that the hearing of this matter be stayed and referred to arbitration in accordance with **Section 5 of the ACA**.

20

Costs in the cause.

.....*Alexandra*.....

Alexandra Nkonge Rugadya

Judge

- 25 **8th November, 2023.**

Delivered by email

Alexandra

8/11/2023