

**REPUBLIC OF UGANDA**

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

**FAMILY DIVISION**

**HCT-00-FD-MC-0008-2009**

W

Applicant

Versus

W

Respondent

**BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE**

**RULING**

1. The applicant and respondent were married on 5<sup>th</sup> September 1999 in Ottawa in a civil ceremony at Manotic Registry. Irreconcilable differences are stated to have arisen between the parties in 2003. On 13<sup>th</sup> March 2006 the applicant filed a statement of claim with CADER to resolve the dispute. Arbitration proceedings followed with a Mr. Jimmy Muyanja as an arbitrator. On 25<sup>th</sup> August 2006 the arbitrator issued a decree nisi. On 4<sup>th</sup> July 2007 the arbitrator issued a decree absolute.
2. The applicant then attempted to register an Award in the form of the Decree Absolute in this court early 2008 and this was refused by the Registrar of this court. The applicant has now filed a formal application seeking registration of this award and this is my ruling in respect of that application.
3. The application is stated to be made under Section 35 (2) (a) of the Arbitration and Conciliation Act, Sections 98 of the Civil Procedure Act, Order 12 rule 3, Order 52 Rules 1 & 3 of the Civil Procedure Rules and Rule 4 of the Arbitration Rules. The application is supported by the affidavit of the applicant.

4. At the hearing of this application Mr. Fredrick Obbo appeared for the applicant. He submitted that the parties in this case had complied with the Arbitration and Conciliation Act and the applicant was entitled to have the award by the Arbitrator registered in this court. He was supported by the Ms Matovu, learned counsel for the respondent. Mr. Obbo also noted that he is not been able to come across any precedent in support of the position of the applicant.
5. The parties in this case signed an agreement at the commencement of the arbitration proceedings. I will set out the same in part.

‘PROTOCOL FOR REFERENCE OF COURT CASES TO  
ARBITRATION REFERENCE FORM  
IN THE MATTER OF EMILY SUSANNE DYCK WISSANJI  
(PETITIONER)

AND

ZAHID ASAFALI WISSANJI (RESPONDENT)  
ARBITRATION REFERENCE AGREEMENT

(A) That the case be referred to arbitration before Mr. Jimmy Muyanja a CADER certified arbitrator.

B) The law of arbitration shall be the Arbitration and Conciliation Act.

C) Seat of arbitration shall be Uganda.

D) That in the event of the nominated arbitrator either declining the invitation or declaring conflict of interest then the following persons may be appointed by the Registrar CADER to preside over the dispute, as sole arbitrator in the following order of priority:-

a. Mr/Mrs/Ms [not applicable]

b. Mr/Mrs/Ms [not applicable]

E) That we both jointly agree to pay the amounts due to CADER by 15<sup>th</sup> June 2006 for the following scope of work:-

a. Filing fees on Arbitration

b. Filing fees on Arbitration Claim

c. Filing fees on Respondent’s Statement

d. Requests to hold hearing and presentation of evidence

e. Rooms for arbitration

f. Delivery of Final Award

F) That we both jointly undertake to appear before the arbitrator either in person or through our appointed legal counsel within 4 days to work out and establish the timetable of proceedings for the case.

G) That the arbitrator shall provide a copy of the award of the record of proceedings to both parties.

H) That the arbitrator shall rule:-

i) On all the issues, or

ii) The following issues:

a. Whether there is an irretrievable breakdown in the marriage

b. Whether the parties should be granted a divorce

And the award shall be incorporated as a substantive part of the judgment of the court.

I) that parties are at liberty to state questions of law for determination by court or matters arising in the course of arbitration or appeal on questions of law arising out of the award.

J) That the arbitrator shall tax costs in this matter.

K) That the parties shall lodge all payments directly with CADER.'

6. The said agreement was signed by the parties and their counsel. The arbitrator purported to proceed on the basis that that agreement constituted the parties agreement to refer their dispute to an arbitrator, and authorised the arbitrator to decide among other issues whether the parties should be granted a divorce.
7. I am not sure that the agreement referred to above can be the arbitration agreement envisaged under the Arbitration and Conciliation Act. That agreement signed by the parties and their counsel seems to be the reference to arbitration of the dispute between the parties rather an arbitration agreement in which parties express their intention to refer a dispute that will arise or has arisen to arbitration. Its heading is clear. It is headed 'a protocol for reference of court cases to arbitration'. There is no court case here.

8. That agreement contains no express or implied arbitration clause setting out the dispute that has either arisen or which will arise and give rise to the reference to arbitration.
9. Without deciding that point, however, it is clear to me that the parties purport to grant jurisdiction to an arbitrator to decide questions which, in my view, can only be decided by a competent court. And that question is whether or not the parties ought to be granted a divorce.
10. Section 3 of the Divorce Act deals with jurisdiction in relation to divorce matters. It states,
  - '(1) Where all the parties to a proceeding under this Act are Africans or where a petition for damages only is lodged in accordance with Section 21, jurisdiction may be exercised by a court over which presides a magistrate grade 1 or a chief magistrate.
  - (2) In all other cases jurisdiction shall be exercised by the High Court only.'
11. Apart from the scenario envisaged under Section 3(1) of the Divorce Act jurisdiction in all cases of divorce under the Divorce Act is confined to the High Court only. The words are clear and plain. It is only the courts that have jurisdiction to issue orders for divorce be it decree nisi or decree absolute. The parties have no option of constituting their own tribunal for the grant of divorce and then rush to court and say 'recognise what the tribunal we constituted,' (in this case an arbitrator), 'has decided.' That is the decree nisi and decree absolute in the awards of the arbitrator.
12. Even if the parties agreed in an arbitration agreement that an arbitrator will conduct divorce proceedings and award decree nisi and or decree absolute, which, I am doubtful that it is the case here, whether ante nuptial or post nuptial agreement, such agreement would be void for it would be granting that which parties can not grant. It is a matter for the legislature to provide for in the form of legislation. Parties cannot confer jurisdiction on any private or public tribunal over a matter in which jurisdiction is reserved to the courts only.
13. Mr. Obbo, learned counsel for the applicant argued that since the Arbitration and Conciliation Act is a latter statute to the Divorce Act it should be taken to have

impliedly amended the Divorce Act, and allowed an arbitrator to exercise jurisdiction over dissolution of marriage. He provided no authority for this view. A general statute cannot impliedly amend a specific statute which has exclusive provisions for the subject at hand. It is an argument that I am unable to accept.

14. Secondly the Judicature Act has provided specifically for arbitration in cases which have been filed in the courts, as has the Civil Procedure Rules. Had the parties in this case been so intent on arbitration, the divorce matter ought to have been filed in the competent court and the parties would have applied under Section 27 of the Judicature Act, or the Civil Procedure Rules, to have the matter referred to arbitration by court, if this matter was of the kind that could be referred to arbitration.
15. Even if it may be supposed in this particular case that there was an arbitration agreement between the parties in writing, either an ante nuptial agreement or post nuptial agreement, which, among other things, provided for resolution of whether the parties' marriage should be dissolved such an agreement would be void on grounds of public policy. Children may be a consequence of a marriage. The legal relationship between two people, who are spouses, that is the relationship of marriage, may give rise or birth to children. It would not be right that the rights of these other people, that is the children or issue of such marriage, should be determined by an agreement between the spouses without the participation of those people.
16. It is possible for parties to have an arbitration agreement in respect of a number of matters in relation to their marriage including property but such matters may not extend to those over which the law has placed exclusive jurisdiction in the courts. In such situations once in court the parties may invoke mediation or other permissible mode of alternative dispute resolution as provided for by the law to settle some or all of the questions before the court as the court may direct.
17. In the result I find that the proceedings before the arbitrator chosen by the parties were void. I dismiss this application with no order as to costs given that both parties hereto supported this application and proceeding by agreement of some sort before the arbitrator.

Signed, dated and delivered at Kampala this 23<sup>rd</sup> July 2009

FMS Egonda-Ntende

Judge