

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[COMMERCIAL DIVISION]
MISCELLANEOUS CAUSE NO. 133 OF 2023

GREAT LAKES PETROLEUM (U) LIMITED | **APPLICANT**

VERSUS

VIVO ENERGY UGANDA LIMITED	RESPONDENT
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Before: Hon. Justice Ocaya Thomas O.R

RULING

Introduction

The Applicant brought the following cause under **Section 6** of the Arbitration and Conciliation Act [“ACA”] and Rule 13 of the Arbitration Rules seeking orders that:

(a) An interim measure of protection be issued against the Respondents, its agents, servants, representatives, or assignees from evicting the Applicant from its convenience shop at Shell Kiira Mulawa Service Station and alienating or otherwise interfering with the Applicant's usage of the convenience shop until the conclusion of Arbitration proceedings.

(b) Costs of this Application be provided for.

The Respondent opposes the application.

Background

The Applicant contends that on 30th April 2023, it entered into a three-year convenience store Retailing License Agreement [“RLA”] relating to a convenience shop at Shell Kiira Mulawa Service Station with the Respondent. Pursuant to the said agreement, the Applicant began to use the said convenience store and

5 operates the same to date. On 6th November 2023, the Respondent served a notice of termination of the retailing license agreement and eviction on the Applicant.

The Applicant contends that Clause 26.3 of the RLA provides that where there is a dispute arising out of the contract, including a question regarding to its termination, the same shall be referred to arbitration. Clause 26.5 provides that,
10 where arbitration fails, the parties may refer the dispute to determination by court. The Applicant contends that on 10th November 2023, the Applicant notified the Respondent of its decision to trigger the Application of the above dispute resolution provisions and have the matter referred to arbitration.

15 The Applicant further contends that there is an imminent threat of eviction by the Respondent from the above-stated convenience store hence the need for the reliefs sought by way of this application.

For the Respondent, this application was opposed. The Respondent contended that
20 under the RLA, a party is entitled to terminate the same without giving any reason by not less than ten (10) days' notice. According to the Respondent, on 6th November 2023, it terminated the RLA and gave the requisite notice. The Respondent contended that the said termination has already taken effect and therefore all rights and obligations of the parties have ceased.

25 The Respondent further contended that the termination and post termination processes were agreed to by the parties, that the Applicant seeks an order to preserve the Applicant's occupancy of the convenience shop when the same rights have already been extinguished by termination. That there is no valid arbitration
30 clause warranting the invocation of court's powers to issue interim protections, that there is no dispute warranting a reference to arbitration and therefore no basis for the utilization of the court's powers to issue interim protective measures, that the grant of the reliefs sought would compel the parties to continue a contractual relationship which has been terminated thereby occasioning hardship



5 to the Applicant and that it was not in the interests of justice for this court to grant the reliefs sought.

Representation

The Applicant was represented by M/s Birungyi, Barata & Associates while the
10 Respondent was represented by M/s S&L Advocates.

Evidence and Submissions

The Applicant led evidence by way of an affidavit in support deposed by Elijah
Edwin Musinga, the Applicant's director. The Respondent led evidence by way of
15 an affidavit in reply deposed by Stephen Chomi, the Head of Legal and Company
Secretary of the Respondent.

Both sides made submissions in support of their respective cases which I have
considered in arriving at my decision below but have not felt the need to reproduce
20 herein. I however note that when this matter came up for mention before me on
the 7th December 2023 counsel for the Applicant informed court that they would
file submissions in rejoinder by 8th December 2023. By the time of delivering this
ruling this had not been done.

Decision

The Applicant's application is premised on Section 6 of the Arbitration and
Conciliation Act ["ACA"] which reads thus:

"(1) A party to an arbitration agreement may apply to the court, before or
during arbitral proceedings, for an interim measure of protection, and the
30 court may grant that measure.

(2) Where a party applies to the court for an injunction or other interim
order and the arbitral tribunal has already ruled on any matter relevant to
the application, the court shall treat the ruling or any finding of fact made in
the course of the ruling as conclusive for the purposes of the application."

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5 In the instant case, Clause 26 (*see annexure A to affidavit in support*) which provides for dispute resolution is a multi-tier dispute resolution clause. It provides for all disputes, as a first measure, to be referred to three (3) senior representatives of each party for resolution within five (5) days. Where this fails, they may refer the dispute to arbitration within the following forty-five (45) days. The arbitral
10 tribunal is to be comprised of a single arbitrator, the procedure for determination shall be agreed by the parties, the place for arbitration is Kampala, Uganda and the language of arbitration is English. The provision further provides that where parties fail to agree on the appointment of a sole arbitrator, either party may refer the dispute to court.

15

For the Respondent, two “preliminary” contentions were raise namely;

(a) that the arbitration agreement is invalid and

(b) that there is no dispute creating a basis for interim protection reliefs.

20 **Section 16(1)** of the ACA provides thus:

“The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose—

(a) an arbitration clause which forms part of a contract shall be treated as
25 an agreement independent of the other terms of the contract; and
(b) a decision by the arbitral tribunal that the contract is null and void shall not itself invalidate the arbitration clause.”

This is a codification of the competence-competence principle in arbitration which
30 holds that that an arbitral tribunal is empowered to decide for itself whether or not it has jurisdiction over a particular dispute. See **Nigel Blackbay and Constatine Paratasides, QC, Redfern and Hunter On International Arbitration. 6th Edition. Para 10.42, Article 16 of the UNICTRAL Model Law, Article 23 of the UNICTRAL Arbitration Rules, Republic of Serbia v. Imagesat International NV [2009] EWHC 2853 (Comm).**
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5 In my view, the matters raised by the Respondent are matters that can be put to the determination of the arbitral panel for a decision. Accordingly, in my view, and in the circumstances of this case, these two contentions could not form a basis for declining the reliefs sought by the Applicant.

10 In **Polat Yol Yapi Sanventic SA v UNRA HCMA 3/2022**, Hon Justice Stephen Mubiru held thus on the considerations applied by this court in determining applications of this nature;

“When court is called upon to grant injunctive relief as an interim measure of protection pending arbitral proceedings, the court will generally have regard to the following: (a) the nature and strength of the applicant’s case, i.e., whether there is a serious question to be arbitrated, in respect of which the Applicant demonstrates a sufficient likelihood of success; (b) whether there is an imminent risk of irreparable loss, by considering whether damages are an adequate remedy to the perceived risk of harm; and (c) the course of action favoured on a balance of convenience, i.e. the course of action that results in the lower risk of injustice if the decision to grant the restraining order is incorrect. The purpose of granting an interim protective measure is for preservation of the parties’ legal rights pending arbitration. The court doesn’t determine the legal rights that will be the subject of the arbitration but merely preserves it in its current condition until their respective rights can be established or declared by the arbitrator. If failure to grant the restraining order might compromise the applicants’ ability to assert their claimed rights, there is a very high likelihood of occasioning a loss that cannot be compensated for with money.”

30 I agree with the above threshold and I will use the same in assessing the Applicant’s application.

Nature and Strength of the Applicant’s Case/ Whether there is a Serious Question to be Arbitrated.

35 The court notes that the parties have not yet filed pleadings in the arbitration proceedings. The Applicant has not filed a statement of case/statement of claim so



5 it is not easy to identify the matters which it intends to put arbitration. A diligent litigant ought to indicate these in its affidavit or annexures thereto, to better assist the court.

From the review of the documents on record, it is evident that there was a
10 termination of the RLA by the Respondent with notice. The Applicant contends that this constitutes a dispute which ought to be referred to resolution in accordance with Article 26. The documents on record do not show why the Applicant believes there to be a dispute. Was there no right to terminate the agreement as the Respondent did? Was the termination in bad faith? Was the
15 termination in breach of another provision of the RLA? Was the termination in breach of another agreement between the parties? Etc.

There is no need to be satisfied that a permanent restraining order is probable at arbitration; the court only needs be satisfied that the claim is not frivolous or
20 vexatious; in other words, that there is a serious question to be arbitrated. A serious question is thus any question that is not frivolous or vexatious. As long as the claim is not frivolous or vexatious, the requirement of a prima facie case is met. See **Polat Yol Yapi Sanventic SA v UNRA HCMA (Supra)**

25 In **John Garuga Musinguzi & Anor v Dr. Chris Baryomunsi & Anor HCMC 817/2016**, court defined frivolous and vexatious claims thus:

“A frivolous claim or complaint is one that has no serious purpose or value. Often a “frivolous” claim is one about a matter so trivial or one so meritless on its face that investigations would be disproportionate in terms of time and cost. The
30 implication is that the claim has not been brought in good faith because it is obvious that it has no reasonable prospect of success and/or it is not a reasonable thing to spend time complaining about. A “vexatious” claim or complaint is one (or a series of many) that is specifically being pursued to simply harass, annoy or cause financial cost to their recipient.”

35 See **Meera Investments Ltd & Ors v Nelson Lukozi HCMA 339/2022**

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In my view, without this narration, an on the surface review of the documents does not show a meritorious case, especially in light of the Respondent's averment that it terminated the agreement in accordance with a clearly provided procedure in the agreement, which averment was not rejoined with evidence. As noted above, this
10 does not mean that the Applicant's claim against the Respondent for purposes of the arbitration is not merited, as that is a question to be determined by the arbitral tribunal. Rather, in my view, the Application does not disclose sufficient facts making out a clear claim against the Respondent; the Applicant seems to take issue with the Applicant's termination of the RLA but does not indicate the basis of that
15 objection/challenge.

I accordingly find for the Respondent on this head.

Whether there is an imminent risk of irreparable loss, by considering
20 **whether damages are an adequate remedy to the perceived risk of harm**

In the case of **Proline Soccer Academy v Commissioner Land Registration HCMA 494 of 2018**, the court defined irreparable damage in the following way;

"By irreparable injury it does not mean that there must not be physical possibility of repairing the injury, but it means that the injury or damage
25 must be substantial or material one, that is one that cannot be adequately atoned for by way of damages."

As a general rule, where execution is based on a claim for payment of money, a stay should not be granted except if such an application is for interim stay or if the
30 judgment creditor is unlikely to repay the judgment sum if they lose the appeal or if there are exceptional circumstances warranting the grant of stay. See **UMEME Limited v Jane Nankabirwa HCMC 154/2021, Luwa Luwa Investment v URA HCMA 1336/2022, Celcom Limited v Huwa & Ors. (Civil Appeal 8 of 2015) [Malawi HC], China Henan International Cooperation Group Company
35 Limited v Justus Kyabahwa CACA 101/2021**



5 The purpose of granting a restraining order is for preservation of the parties' legal rights pending arbitration. The court doesn't determine the legal rights to the property but merely preserves it in its current condition until the legal title or ownership can be established or declared. If failure to grant the restraining order might compromise the applicants' ability to assert their claimed rights, for
10 example when intervening adverse claims by third parties are created, there is a very high likelihood of occasioning a loss that cannot be compensated for with money. See **Polat Yol Yapi Sanventic SA v UNRA (Supra)**

As a restraining order is an equitable and discretionary remedy, it is a general rule
15 that a restraining order will not be granted where damages are an adequate remedy. Before a restraining order is ordered, it must be established that an award of damages is not an adequate remedy. That type of claim can be made in exceptional cases involving breach of contract, akin to a breach of fiduciary duty, where the normal remedies are inadequate and where deterrence of others is an
20 important factor.

In order to establish that damages are not adequate, the innocent party will generally have to evidence either that a) the subject matter of the contract is rare or unique or b) damages would be financially ineffective. Damages may be found
25 to be an inadequate remedy in the following circumstances, among others: (a) the damage is impossible to repair; (b) the damage is not easily susceptible to be measured in economic terms; (c) the harm caused is not a financial one; (d) monetary damages are unlikely to be recovered; (e) an award of damages is inappropriate in light of the importance of the interest in issue; and (f) the harm
30 has not yet occurred or the wrong is continuing. If there is an adequate alternative remedy, the claimant should pursue such remedy.

From the Applicant's pleadings, it appears that the irreparable harm it complains of is the eviction of the Applicant from the said convenience store. The Applicant
35 did not draw the nexus of the impact of the eviction on it (the correlation between



5 the eviction and the suffering of harm). In my view, it was not, in the circumstances of this case, sufficient to contend that the eviction would cause harm.

As was held in **Night Nagujja v Namuwonge Agnes & Ors HCMA 1878/2021**, it is not enough for a party to throw unsubstantiated allegations at the court, hoping
10 that the court will fill in the gaps, speculate or use its powers to separate the hay from the chaff. It is trite law that courts base their decisions on evidence and not assumptions, abstractions or innuendos. See Also **Centenary Bank v Federation Of Association Of Uganda Exporters Limited & Ors HCCS 474/2016, Luswata Mary Veronica v Exim Bank HCMA 1118/2023, Kisam Investments Limited v**
15 **The Attorney General HCMA 742/2023**

It was noted by both parties that the RLA was for a three-year term. It was not indefinite, and was bound to end. The Applicant ought to have adduced more evidence on the impact of the eviction to it (the harm to be caused) for example (a)
20 if the harm would severely compromise its financial position and prevent it from asserting its claim in arbitration, (b) the convenience store had a unique value that damages would not atone (such as a special nexus, access to niche market, indistinguishable connection with the Applicant's brand) etc, (c) the eviction would have the effect of precluding the Applicant from tangible or intangible assets
25 that it could not use, (d) the eviction was aimed at disconnecting the Applicant from a client base it had created which the Respondent or third parties would exclusively use to the Applicant's detriment, (e) the eviction is part of a fraudulent or unequitable scheme by the Respondent, (f) the Applicant has invested significant resources to pursue the said business which are not capable of
30 compensation, (h) compensation will either be insufficient or be obtained too late to rescue the Applicant's business, (i) the eviction is aimed to benefit or will benefit a direct competitor of the Applicant and harm them in a manner incapable of atonement among other examples.



5 In my view, an eviction, by itself, of the Applicant from the said convenient store would not expose it to irreparable harm from the evidence before me.

I am more inclined to agree with counsel for the Respondent that issuing the order in respect of an agreement which it has already terminated will compel it to
10 continue a contractual relationship it does not seek to continue. In my view, the possible result of this is flooding this court with applications and converting the court into almost a day to day abiter of the parties' squabbles until the dispute is resolved.

15 I therefore find for the Respondent on this head.

The course of action favoured on a balance of convenience

Balance of convenience means comparative mischief or inconvenience that may be caused to the either party in the event of refusal or grant of restraining order. It is
20 necessary to assess the harm to the Applicant if there is no restraining order, and the prejudice or harm to the Respondent if a restraining order is imposed. The courts examine a variety of factors, including the harm likely to be suffered by both parties from the granting or refusal of the restraining order, and the current status quo as at the time of the restraining order. The court should then take whichever
25 course appears to carry the lower risk of injustice if it should turn out to have been "wrong." It is thus necessary to weigh in the balance of convenience the public interest as well as the interest of the parties. The Court has the duty to balance or weigh the scales of justice by ensuring that the arbitration is not rendered nugatory while at the same time ensuring that a Respondent is not impeded from
30 the pursuit of his or her contractual rights. No doubt it would be wrong to grant an injunctive interim protective measure pending disposal of the arbitration where the claim is frivolous or where such order would inflict greater hardship than it would avoid. Save in the simplest cases, the decision to grant or to refuse an injunctive interim protective measure will cause to whichever party is
35 unsuccessful on the application, some disadvantages which his or her ultimate

5 success at the arbitration may show he or she ought to have been spared and the disadvantages may be such that the recovery of damages to which he or she would then be entitled would not be sufficient to compensate him or her fully for all of them. See **Polat Yol Yapi Sanventic SA v UNRA (Supra)**

10 The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his or her succeeding at the arbitration is always a significant factor in assessing where the balance of convenience lies. The governing principle is that the court should first consider whether if the Applicant were to succeed at the arbitration in establishing his or her right to a permanent
15 restraining order, he or she would be adequately compensated by an award of damages for the loss he or she would have sustained as a result of the respondent's continuing to do what was sought to be enjoined between the time of the application and the time of the arbitration. If damages in the measure recoverable at common law would be adequate remedy and the Respondent would be in a
20 financial position to pay them, no interlocutory restraining order should normally be granted, however strong the Applicant's claim appears to be at this stage. If, on the other hand, damages would not provide an adequate remedy for the Applicant in the event of his succeeding at the arbitration, the court should then consider whether, on the contrary hypothesis that the Respondent were to succeed at the
25 arbitration in establishing his right to do that which was sought to be enjoined, he would be adequately compensated by the Applicant for the loss he or she would have sustained by being prevented from doing so between the time of the application and the time of the arbitration. If damages would be an adequate remedy and the Applicant would be in a financial position to pay them, there would
30 be no reason upon this ground to refuse an interlocutory restraining order. See **Polat Yol Yapi Sanventic SA v UNRA HCMA (Supra)**

In determining this head, the court takes note of the fact that both sides may or will experience some hardship whichever way this decision goes. However, the
35 court must consider who is likely to suffer the most harm. See **Ssalongo Kakumba**



5 **Bonny v Nyombi Eric HCMA 761/2021, Uganda Debt Network v Ronald Sekyewa HCMA 1657/2023, Hon. Mohammed Katoto v Justus Kyabahwa HCMA 875/2023, Donati Kananura v Tribet Rujugiro HCMA 1782/2022.**

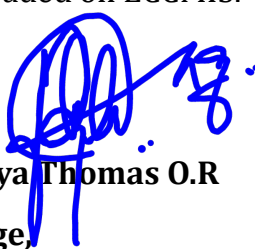
10 In the present circumstances, there is no evidence that the refusal to grant the reliefs sought will compromise in any way the Applicant's ability to pursue arbitration proceedings or obtain or enforce reliefs therefrom. It has not for instance been shown that the property which the Applicant may enforce a successful award is likely to be sold, removed or dissipated or that the impugned action will compromise the Applicant's ability to pursue and/or participate in
15 arbitration. On the other hand, the impact of compelling the Respondent continue its relationship with the Applicant is fairly significant, not least because the parties are likely to develop operation/functional disputes on a day to day that will suck this court into determining while arbitration proceeds. I also take note of the fact that arbitral proceedings are by their nature quick (as opposed to litigation, and
20 especially domestic arbitration). Accordingly, the Applicant is more likely than not to get a timely resolution of its dispute after which it can pursue enforcement of the same if it succeeds. In my view, these factors favour

Conclusion

25 Having held as I have above, I decline to grant the Applicant's application and dismiss the same with costs.

I so order.

30 Delivered electronically this 14th day of December 2023 and uploaded on ECCMIS.


Ocaya Thomas O.R

35 Judge,

14th December, 2023