

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT NO. 674 OF 2014

SELECT GARMENTS LIMITED ::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

OLD STANLEY HOTEL LIMITED ::::::::::::::::::::::::::::::::::: DEFENDANT

BEFORE: HON. LADY JUSTICE PATIENCE T.E. RUBAGUMYA

RULING ON PRELIMINARY OBJECTION

Introduction

This Ruling is in respect of a preliminary objection raised by Counsel for the Defendant resulting from the institution of Civil Suit No. 674 of 2014 arising from alleged breach of a Tenancy Agreement. When the matter came up for hearing on 1st December, 2023, Counsel for the Defendant raised a preliminary objection to the effect that the suit is bad in law on the ground that it was founded on an Agreement which contained an arbitration clause.

Representation

The Plaintiff was represented by Learned Counsel Dr. Benson Tusasirwe of M/S Tusasirwe & Co. Advocates while the Defendant was represented by Learned Counsel Richard Omongole of M/S Omongole & Co. Advocates.

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The parties were directed to file written submissions which they did for which I am grateful and the same have been considered by the Court.

5 Preliminary objection for determination

Whether Civil Suit No. 674 of 2014 should be referred to arbitration under the Arbitration and Conciliation Act?

Submissions

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Defendant's submissions

In his submissions, Counsel for the Defendant stated that on the day of hearing the defence case, he had informed Court that they discovered that the impugned Agreement had an arbitration clause. Counsel for the
15 Defendant contended that on the basis of the arbitration clause, the matter should be referred to arbitration. Counsel relied on Section 5 of the Arbitration and Conciliation Act which provides for stay of legal proceedings. Counsel quoted the case of **Omugabe Mbabazi Sam Vs Tumwesigye Dan Civil Misc. Application No. 10 of 2023** where **Hon.**
20 **Justice Vincent Wagona** stated that;

*“Section 5 of the same Act provides that when a matter is presented to Court and there is a valid and enforceable arbitral clause in the transaction documents between the parties, then Court is required to stay
25 proceedings and refer the parties for arbitration”.*

Counsel further quoted the case of **Vantage Mezzanine Fund II Partnership Vs Simba Properties Investment Co. Ltd and Anor Misc. Application No. 201 of 2020** where Court held that;

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“To secure a reference of a matter such as this to an arbitral tribunal, the Applicant has to prove that:

i) A dispute exists between the parties before the Court;

ii) There is a binding and enforceable arbitration agreement;

5 *iii) The Court has no jurisdiction to hear the suit between the parties.*

Counsel contended that Court’s jurisdiction is ousted when parties agree to an arbitration clause and Courts cannot intervene unless as provided by law.

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Furthermore, Counsel relied on Sections 9 and 16(1) of the Arbitration and Conciliation Act. He stated that there is an existent arbitral dispute, which aspect falls under the second element, namely; whether there is a valid, binding and enforceable arbitration agreement or clause. He referred to the Tenancy Agreement executed between the Plaintiff and Defendant and stated that it contains an arbitration clause and specifically clause 38.3 and that the clause is valid, binding and enforceable as between the Plaintiff and Defendant.

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20 Counsel contended that by incorporating an arbitration clause in their contract, both parties hereto for all intents and purposes recognized arbitration as an effective means of solving any dispute that could arise. Counsel prayed that the Court finds that the impugned arbitration agreement exists, is valid, operative and capable of being performed, and that there is an arbitrable dispute between the parties herein and that this matter be referred to arbitration in accordance with Section 5 of the Arbitration and Conciliation Act.

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Plaintiff's submissions

In reply, Counsel for the Plaintiff submitted that it is true that under clause 38.3 of the Tenancy Agreement which was the basis of the relationship between the parties, it was stipulated that if a dispute arose
5 between the parties and was not amicably resolved within 30 days, the same was to be referred by either party to arbitration with the London Court of International Arbitration serving as the appointing authority, for the arbitrators. Counsel stated that the submission by Counsel for the Defendant that this Honourable Court has no jurisdiction in the matter
10 and its only role was to refer the same for arbitration is misconceived.

Counsel submitted that the position that when a dispute arises between parties to a contract containing an arbitration agreement and one of the parties to the contract files a suit, the court is, on application by the
15 other party, bound to refer the matter to arbitration; is not absolute. The Defendant may and does lose the right to move court to halt proceedings and refer the matter to arbitration, if the doctrine of waiver and or its sister doctrines of election and acquiescence come into force.

20 Counsel submitted that waiver generally refers to the voluntary abandonment or relinquishment of a known right, claim or privilege. Counsel submitted that in the case of ***Agri-Industrial Management Agency Ltd Vs Kayonza Growers Tea Factory Ltd & Anor, HCCS No. 819 of 2004, Hon. Justice Geoffrey Kiryabwire*** (as he then was), at
25 page 7 of the Judgment, adopted the definition of waiver set out in **Halsbury's Laws of England, 4th Edition Vol. 9(g) at paragraph 1025**, where waiver is defined as follows:

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“Waiver in contract is most commonly used to describe the process whereby one party unequivocally, but without consideration grants a concession or forbearance to the other party by not insisting upon the precise mode of performance provided for in the contract, whether before or after any breach of a term waived”.

Counsel quoted the decision of the Supreme Court of the United States in the case of **Morgan Vs Sundance Inc.** decided on **23rd May 2022** wherein the Supreme Court disagreed with the lower Court and held that the right to arbitrate, being a contractual right like any other, can be waived and that is so even if the other party is not prejudiced by the delay in asserting the right. If the Defendant, by its actions demonstrates that it has elected to abandon the right to arbitrate, then it cannot belatedly turn around and seek to assert the right.

Counsel submitted that in the instant case, the Defendant submitted to the jurisdiction of the Court and filed an amended defence and a counterclaim and that the Defendant did not make reference to the arbitration clause. He further submitted that both parties filed interlocutory applications and that all this time no reference was made to the arbitration clause. He stated that the matter went for mediation and there was also active participation at conferencing and that no reference was made at all to the arbitration clause.

In conclusion, Counsel submitted that the Defendant waived the arbitration agreement by initiating and participating in the Court proceedings for over 11 years from June 2012 to December 2023. The

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agreement therefore became inoperative in the terms of Section 5(1)(a) of the Arbitration and Conciliation Act.

Defendant's submissions in Rejoinder

5 Counsel for the Defendant belatedly filed submissions in Rejoinder on the date set for the Ruling on 11th January 2024 at 8:16am. I have however considered the same in the interest of justice. In summary, Counsel submitted in rejoinder that the Defendant did not waive her right to arbitration as alleged by the Plaintiff as the same cannot be
10 inferred from the mere inaction of the Defendant. He further contended that it is trite that points of law can be raised at any stage of the proceedings whether or not they were pleaded in the pleadings.

Analysis and Determination

15 Having analyzed the gist of the preliminary objection and the submissions by both Counsel, I find as hereunder;

An arbitration clause was defined by Viscount Simon L.C in the case of ***Heyam and Another Vs Darwins Ltd [1942] 1 All ER 337*** to mean a
20 written submission agreed to by the parties to the contract and, like other written submissions to arbitration, must be construed according to its language and in the light of the circumstances in which it was made.

It is trite that an arbitration agreement may cover not only “disputes” but
25 also “disagreements” and “differences of opinion.” The existence and the validity of an arbitration agreement should be determined primarily in light of the common intent of the parties, the requirement of good faith, and the belief that the person who signed the clause had the power to bind the company (see ***Premium Nafta Products Ltd and others Vs***

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Fili Shipping Company Ltd and others [2007] UKHL 40; Fiona Trust and Holding Corporation Vs Privalov [2008] 1 Lloyd's Rep 254, [2007] 4 All ER 951).

5 The construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless
10 the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. This type of presumption provides that a valid arbitration clause should generally be interpreted expansively and, in cases of doubt, extended to encompass disputed claims.

15 In the instant case, both parties agree that there is an arbitration clause, which provides for arbitration in the event that the matter is not resolved within 30 days. Clause 38.3 of the Tenancy Agreement provides that;

20 *"If after thirty (30) days from the commencement of such informal negotiations the parties have been unable to amicably resolve the dispute or difference, either party shall require that such dispute be settled by arbitration in accordance with the Arbitration Rules of the United Nations Commission on International Trade Laws*
25 *(UNCITRAL Rules) as at present in force under the auspices of the London Court of International Arbitration which shall also serve as the appointing authority for arbitrators under such Rules. The resulting award shall be final and binding on the parties and shall be in lieu of any other remedy".*

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From the above, it is evident that the parties intended to arbitrate any disputes that would arise under the Agreement. The parties have also not disputed the clause or intention as expressed in their Agreement.

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The circumstances of the case before me are that both parties do not dispute the existence and validity of the arbitration clause and the prayer for Counsel for the Defendant is that the matter be referred to arbitration
10 on the basis of the arbitration clause. I have noted that this matter was filed in 2014 and that both parties have actively participated in the Court proceedings including the Defendant filing a defence and counterclaim on 11th May 2016.

15 I respectfully disagree with the submission of Counsel for the Defendant which he made on day of hearing the defence case that they had discovered that the impugned Agreement had an arbitration clause. The crux of this dispute resolves on the issues of whether or not there was a breach of the aforementioned Tenancy Agreement. The Tenancy
20 Agreement is in the trial bundle of the Plaintiff as Ex. P.2. The same Tenancy Agreement is in the Defendant's trial bundle specifically on pages 9 to 37 with the aforementioned clause 38.3 on page 32. The Defendant's trial bundle was filed in Court on 1st December 2017 and therefore the presumption is that Counsel for the Defendant was aware
25 of the arbitration clause contained in the Agreement which formed part of the pleadings of both parties.

I agree with Counsel for the Plaintiff that a counterclaim is a suit in its own right and that the Defendant is actually a claimant. This in my view

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is a clear indication that the Defendant waived the right to arbitrate and elected to proceed with the civil suit filed in Court. The issue of arbitration was not raised in any of the proceedings until the hearing of the Defendant's case on 1st December 2023. This in my view was very late since the matter had progressed to the stage of cross examination of the Defendant's witness.

As was held in the case of ***Agri-Industrial Management Agency Ltd Vs Kayonza Growers Tea Factory Ltd & Anor (supra)***, where one party to a contract unequivocally, grants a concession or forbearance to the other party. By the conduct of the Defendant failing to raise the issue of the arbitration clause and actively participating in all the court proceedings, waived the right to rely on the arbitration clause for dispute resolution and this was clear from its conduct to the extent of filing a counterclaim and never raised the issue of arbitration.

Section 5(1) of the Arbitration and Conciliation Act requires a Court before which proceedings are being brought in a matter which is the subject of an arbitration agreement, if a party so applies after the filing of a statement of defence and both parties having been given a hearing, to refer the matter back to the arbitration unless the Court 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.

While "inoperative" covers situations where the arbitration agreement has become inapplicable to the parties or their dispute, "incapable of being performed" relates to situations where the arbitration cannot effectively be set in motion.

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The term “inoperative” was considered in the case of **Broken Hill City Council Vs. Unique Urban Built Pty Ltd [2018] NSWSC 825**, where it was defined as “having no field of operation or to be without effect.” It covers those cases where the arbitration agreement has ceased to have effect. The ceasing of effect to the arbitration agreement may occur for a variety of reasons, including; - where the parties have implicitly or explicitly revoked the agreement to arbitrate; where the same dispute between the same parties has already been decided in arbitration or court proceedings (principles of *res judicata*); where the award has been set aside or there is a stalemate in the voting of the arbitrators; or the award has not been rendered within the prescribed time limit; where a settlement was reached before the commencement of arbitration, and so on.

The phrase “incapable of being performed” was considered in **Lucky-Goldstar International (HK) Ltd Vs NG Moo Kee Engineering Ltd [1993] HKCFI 14 and Bulkbuild Pty Ltd Vs Fortuna Well Pty Ltd & Ors [2019] QSC 173** where it was said to relate to the capability or incapability of parties to perform an arbitration agreement; the expression would suggest “something more than mere difficulty or inconvenience or delay in performing the arbitration”. There has to be “some obstacle which cannot be overcome even if the parties are ready, able and willing to perform the agreement”. It applies to cases in which; - the arbitration cannot be effectively set in motion; the clause is too vague or perhaps other terms in the contract contradict the parties' intention to arbitrate; an arbitrator specifically named in the arbitration agreement refuses to act or if an appointing authority refuses to appoint; the parties had chosen a specific arbitrator in the agreement, who was, at the time

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of the dispute, deceased or unavailable, and so on. These are situations in which the arbitration agreement is frustrated or becomes incapable of being fulfilled or performed, due to unforeseen contingencies. The grounds for holding that a contract has been frustrated apply to an arbitration clause (see ***Yan Jian Uganda Company Ltd Vs Siwa Builders and Engineers, H.C. Misc. Application No. 1147 of 2014.***

As quoted by the **Court of Appeal** in the case of **National Social Security Fund Vs Alcon International Ltd CA No.2 of 2008, David St. John Sutton** in **Russell on Arbitration, (22nd Ed. Sweet & Maxwell)** paragraph 2-119, page 80, states that;

“...a party may abandon its right to arbitrate for example by delay or inaction, or by commencing court proceedings in breach of an arbitration agreement. However, the courts are slow to find such repudiation or abandonment without very clear evidence of, an intention to abandon the right to arbitrate together with reliance by the other party to its detriment. Even if the right to arbitrate a particular dispute has been abandoned, that does not necessarily mean that the arbitration agreement itself has been abandoned”.

Based on the above authorities and conduct of the Defendant, I agree with Counsel for the Plaintiff that the Defendant’s delay in invoking the arbitration clause, coupled with the active participation in the proceedings in this suit without referring to the arbitration clause meant that the Defendant had indeed waived the right to invoke the arbitration clause and submitted to the jurisdiction of Court to handle the dispute. The arbitration agreement in my view became inoperative in accordance with Section 5(1)(a) of the Arbitration and Conciliation Act.

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As stated in the **Court of Appeal** in the case of **National Social Security Fund Vs Alcon International Ltd CA No.2 of 2008, David St. John Sutton** in **Russell on Arbitration, (22nd Ed. Sweet & Maxwell)**

5 **paragraph 2-119 (supra)**, delay is one of the examples given where a party may abandon its right to arbitrate. Accordingly, I am convinced that the Defendant waived the right to arbitrate and submitted to the jurisdiction of this Court by actively participating in the proceedings since the suit was filed in 2014 and never raised the issue of arbitration
10 until 1st December 2023 when the suit had been fixed for hearing of the defence case and this in my view was very late. Furthermore, the filing of a counterclaim by the Defendant also meant that the Defendant had indeed elected to abandon its right to arbitrate and decided to proceed with Court litigation.

15 Accordingly, the preliminary objection is overruled. I hereby order that this suit proceeds to its conclusion. The suit is accordingly fixed for cross examination of the Defendant's witness on the 27th day of February 2024 at 9am.

20 I so order.

Dated, signed, and delivered this **11th** day of **January, 2024.**

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Patience T. E. Rubagumya

JUDGE

11/01/2024

Ruling Read in Chambers

11th January 2024

5 9:20am

Attendance:

Learned Counsel Dr. Benson Tumasirwe, Counsel for the Plaintiff.

Learned Counsel Richard Omongole, Counsel for the Defendant.

10 Mr. Isiagi, Director of the Defendant.

Ms. Mary Wokape, Court Clerk.



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Patience T. E. Rubagumya

JUDGE

11/01/2024