THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

COMMERCIAL DIVISION

MISCELLANEOUS APPLICATION NO 90 OF 22

(ARISING FROM HIGH COURT CIVIL SUIT NO 73 OF 2012)

INTERNATIONAL INVESTMENT HOUSE COMPANY LLC}

EMIRATES AFRICA LINK FOR STRATEGIC ALLIANCE LLC} ..... APPLICANTS

VERSUS

AMOS NZEI}

HON. RUKAHANA RUGUNDA}

NATIONAL BANK OF COMMERCE (U) LTD}..... RESPONDENTS

BEFORE HON. JUSTICE CHRISTOPHER MADRAMA

RULING

This ruling arises from a preliminary objection to an application for a temporary injunction by the Applicants. The application was filed under section 98 of the Civil Procedure Act, the Constitution of the Republic of Uganda, section 33 of the Judicature Act, order 41 rule 2 and 9 of the Civil Procedure Rules for orders that a temporary injunction issues restraining the defendant's, their servants, agents or otherwise from bustling, enforcing, effecting or otherwise implementing the rights issue and or the rights issue letter of invitation issued to the plaintiffs dated first of February 2010 and the same be suspended until the determination of the main suit. Secondly that a temporary injunction issues restraining the defendant's, they are summons, agents or otherwise from enforcing, effecting or otherwise implementing the entire rights issue of 13 January 2012 and which affects the plaintiffs by the third defendant specifically and that the same be suspended until the determination of the main suit. Thirdly that a temporary

injunction issues restraining the defendant's, the summons or agents or otherwise from issuing, the issuing, and voting, transferring, selling, disposing or otherwise dealing with the shares acquired by the Applicant/plaintiff and do the determination of the main suit and for costs to be provided for.

The application was fixed for 25 April 2012 at 2:30 PM. When it came for hearing, Dr. Byamugisha assisted by Didas Nkrurunziza and Fred Muwema appeared for the Respondents while Noah Mwesigwa appeared for the Applicant.

When the application came for hearing learned Counsel for the Applicants on the ground that they were served with affidavits in reply on 24 April 2012, just a day before, and on the ground that he needed to discuss the affidavits with his clients who were in Abu Dhabi and Dr Alan Shonubi who was out of the country. His clients and Dr Alan Shonubi may have to swear additional affidavits in rejoinder.

Learned Counsels for the Respondents opposed the application for adjournment. Dr Byamugisha firstly objected to the extension of the interim order which he submitted was obtained in the absence of the Respondents Counsel. He contended that the interim order was issued by the Registrar after she had referred this matter to a High Court judge. Therefore the judge was already seized with jurisdiction over the matter. He submitted that the application for a temporary injunction is incompetent. Any application of the nature should be made under section 6 of the Arbitration and Conciliation Act. The application whose adjournment is being sought by learned Counsel for the Applicants is incompetent because the main suit was stayed pending arbitration. He prayed that the interim order be vacated for the reasons stated above. Additionally learned Counsel submitted that the interim order is improper under section 5 of the Arbitration and Conciliation Act. The jurisdiction in the matter was deferred for arbitration and it was improper to file this application. What is proper is to file a fresh application under the Arbitration and Conciliation Act.

Learned Counsel Fred Muwema associated himself with the submissions of Dr Byamugisha and reiterated that when a suit is stayed, the act of staying this suit stays everything under the suit. Secondly he contended that applications for interim relief in which the application was granted proceeded on the basis that

there was a pending suit. He made reference to section 9 of the Arbitration and Conciliation Act which provides that "Except as provided in this Act, no Court shall intervene in matters governed by this Act." Therefore learned Counsel contended that the all interlocutory applications including the interim order are barred. Learned Counsel Dr Byamugisha concluded that the submission was that the application should have been made under section 6 of the Arbitration and Conciliation Act and a suit which is stayed, stays everything interlocutory matter in the suit. Moreover the remedy of applying under section 6 of the Arbitration and Conciliation Act has been available to learned Counsel for the Applicant since the last time they made an appearance before court.

In reply learned Counsel for the Applicant Noah Mwesigwa submitted that there was nothing improper in the interim order or the manner in which it was issued. The interim order of 29 March 2012 was by consent of the parties and was still in place. He contended that it was being abused and misinterpreted when they contacted the Registrar and sought advice as well. The Registrar was made the order of the 13 April 2012 in the absence of the Respondents Counsels to ensure her order is not misrepresented. The bank of Uganda wanted clarification on the order.

Learned Counsel for the Applicant contended that it was the decision of this Court that the suit should be stated. The High Court has jurisdiction in miscellaneous application 90 and 91 and the Court found so in the earlier ruling. In the previous ruling learned Counsel contended that he had submitted on the question of the jurisdiction of the High Court and the Court found that it was seized with jurisdiction.

Learned Counsel further submitted that section 6 of the Arbitration and Conciliation Act takes into consideration applications filed before and during arbitration. Before coming to section 6 one should start with section 5 which allows the Court to hear if an application is made. After that, the act provides for interim reliefs which can be issued before or during arbitration. He contended that if the Court was to lose jurisdiction once the application for stay is made, then it will have no jurisdiction to hear any application. He submitted that even if

the Court stays the main suit, the Court still retains jurisdiction in an application filed under that suit for interim orders. The Court cannot lose its inherent jurisdiction. Counsel contended that the stay of proceedings did not freeze interlocutory application under the main suit. He submitted that section 6 of the Arbitration and Conciliation Act was drafted in such a way that it made provision for interim reliefs to be applied for before the arbitration proceedings commenced and the Court could grant the same. The only requirement under the section is that the party applying must also be one of the parties to an arbitration agreement. He contended that in the authorities cited in the previous application, the net effect was that the Court has jurisdiction to hear these applications and there was no need to rely on section 6 of the Arbitration and Conciliation Act. Regarding the citation of the wrong law the case of **Saggu vs. Road Masters [2002] EA 258,** held that the citation of the wrong law can be cured by amendment. Even the provisions of article 126 (2) (e) of the Constitution of the Republic of Uganda allows the Court to apply substantial justice without undue regard to technicalities. Secondly the submission that the application is not under section 6 is still premature and would best be canvassed at the hearing of the application. It does not bar an existing application and ensures that applications like the current one survives and allows the Court to grant an interim relief. As far as section 5 of the Arbitration and Conciliation Act is concerned the suit is not dismissed and survives so applications like the one before court survive until the suit is closed, whether by arbitration or by determination of the suit itself. This application remains valid and Court retains jurisdiction.

In rejoinder Dr Byamugisha lead Counsel for the Respondents submitted that the last interim order was by consent of the parties. Therefore the extension of the interim order was improper without reference to him or his colleagues. Secondly section 6 of the Arbitration and Conciliation Act allows the Court to maintain an application in which jurisdiction is derived from section 6 of the ACA and not the Civil Procedure Act or Civil Procedure Rules. So any interlocutory application made under the Civil Procedure Act or the Civil Procedure Rules is stayed together with the main suit. One cannot apply for an interim order for a suit that is stayed.

Learned Counsel Fred Muwema rejoined and submitted that the Arbitration and Conciliation Act provides for a different procedural regime from the Civil Procedure Act and the Civil Procedure Rules. When a suit is in arbitration Counsels have file new pleadings. A party applying for release under the Arbitration and Conciliation Act should put himself under the ambit of the Act. He contended that section 9 of the Arbitration and Conciliation Act requires the Court to deal with an application filed under the Arbitration and Conciliation Act and this includes section 6. The considerations for interim reliefs under the Arbitration and Conciliation Act differ from those under the Civil Procedure Rules for instance under the Civil Procedure Rules there must be a pending suit. If the Court were to assist the Applicant, it should be under the Arbitration and Conciliation Act. The proposal that a party should amend is too late to after an objection has been made. He therefore concluded that the interlocutory application had been stayed and it would be absurd for the Court to stay the main suit and hear applications under it.

Ruling

I have carefully considered the submissions of Counsels for both parties and studied the relevant authorities I was referred to in their submissions and those forwarded to court by letter. There are basically two issues for the consideration of this Court.

1. Whether they learned Registrar had jurisdiction to extend the interim order issued by her on 2 April 2012 by consent of Counsels for both parties.

2. Secondly, whether the Court can hear an interlocutory application for a temporary injunction pending determination of the suit after the dispute has been referred to arbitration under the Arbitration and Conciliation Act.

Whether the learned Registrar had jurisdiction to extend the interim order issued by her on 2 April 2012 by consent of Counsels for both parties

The interim order in question indicates that it is by consent of all parties and with the approval of the honourable Court and is worded as follows:

1. That nothing shall happen in respect of the rights issue until the determination of this application on Friday, 2 March, 2012 at 2 PM or until such further orders of this Court.
2. The costs shall abide the determination of the application.

The interim order is entitled Miscellaneous Application No. 91 of 2012 arising from Miscellaneous Application No. 90 of 2012 and arising from High Court civil suit number 73 of 2012.

I have had the opportunity to peruse the handwritten notes of the Registrar and it shows that the learned Counsels for both parties appeared before the Registrar on 29 February 2012. The order of the Registrar provides: "By agreement of both Counsel, it is hereby ordered that nothing takes place in respect of the rights issues until Friday, 2 PM or until further orders. Costs in the cause." The extracted order is however signed on 2 April 2012. Miscellaneous Application No. 0132 of 2012 came for hearing on 27 March 2012 before me that is when I referred the dispute for arbitration in accordance with the arbitration clause relied on by both parties. I therefore take it that the interim order by consent of the parties was issued on 29 February 2012. For purposes of this ruling, the date of the issuance of the interim order by consent of the parties is not important. This is because both parties are in agreement that this order expired by the time of the issuance of the next order dated 13th of April 2012 by the Registrar hence the extension and challenge to extension.

The issue is narrowed down to whether the Registrar had jurisdiction to entertain an application by the Applicants Counsel for extension of the interim order issued by consent of the parties and after the order of the judge staying proceedings pending arbitration. First of all, the first order was by agreement of the parties. The order was supposed to last until 2 March 2012 at 2 PM or until such further orders of this Court. Whether it was proper for the Registrar to issue another order in the absence of the Respondents Counsel's is the first complaint. I will not take much time on the matter because an order may be made ex parte and at the discretion of the Court. The consent order left room for further orders of the Court. It was obviously improper but not without jurisdiction for the learned

Registrar to entertain an extension of an order obtained by consent of the parties without having both parties before Court. This is not a ground for impeachment of the interim order. In any case for the order to be impeached on the ground of failure to give notice, would require a full hearing as to why it was extended ex parte and not in an objection as has occurred in this case.

Secondly the issue is whether the Registrar has jurisdiction to issue an interim order or extend the same after the Court has granted a stay of proceedings in the suit. A stay of proceedings pending arbitration, unless otherwise set aside, stays all proceedings in the action including all interlocutory matters. Once a judge has stayed proceedings the Registrar has no jurisdiction to entertain any proceeding of any kind in the suit. The ruling of the Court issued on 27 March 2012 is very explicit and provides:

> "Accordingly in those circumstances the dispute which has arisen between the parties is referred to arbitration in accordance with clause 18.2 of the agreement between the parties which reads as follows:
>
> "Any dispute whatsoever and howsoever arising out of this agreement including determination thereof or the validity or not of its provisions shall be referred to arbitration in accordance with the rules of the International Chamber of Commerce ("ICC") for determination by the arbitration of one arbitrator to be appointed by the Vendors and one arbitrator be appointed by the Purchasers acting jointly together with the third arbitrator (who shall act as Chairman) who shall be appointed by such arbitrators. The application shall be held in London, England."

I also held that under section 5 of the Arbitration and Conciliation Act read together with section 9 of the Arbitration and Conciliation Act, an order of reference to arbitration is a mandatory requirement for the Court to do. The Court also held that it would not intervene in matters governed by the Act in accordance with section 9 of the Arbitration and Conciliation Act. A reference to arbitration under section 5 of the Arbitration and Conciliation Act operates as a stay of proceedings in that the dispute itself which is the subject matter of the suit is no longer for determination by the Court but has been referred for

determination to the arbitrator. The head note of section 5 reads: "Stay of legal proceedings". The head note gives the intention of Parliament in enacting section 5 of the Arbitration and Conciliation Act. Section 5 deals with stay of legal proceedings. Consequently a reference to arbitration is an order of stay of legal proceedings. There may be no need to define the term "legal proceedings". Indeed if there was such a need, legal proceedings mean any proceedings affecting the dispute between the parties who are privy to an arbitration clause. Section 2 of the Civil Procedure Act defines a suit to mean "all civil proceedings commenced in any manner prescribed". They word "prescribed" means "prescribed by the rules". Every application has to be prescribed by the rules and qualify to be a civil suit as defined. Secondly, section 9 ensures that the Court shall not intervene in matters governed by the Act except as provided for under the Act. The extension of the interim order reads as follows:

> "That nothing shall happen in respect of the rights issue until the hearing and determination of miscellaneous application No. 90 of 2012 fixed for the 25th day of April, 2012 at 2.30 PM or until such further orders of this Court."

Secondly,

> "The costs shall abide the determination of the application."

This order was a step in the proceedings which had been stayed by a high Court judge. It is further necessary to consider one small aspect in this matter. This is the fact that in the ruling of the Court referring the dispute to arbitration, the Court said that it could not comment on the application for an interlocutory injunction which was not before the Court at that time. Consequently the argument may be advanced that the application for the interim injunction order was still pending before the Court. Indeed the matter before Court now is the very application for a temporary injunction. I was referred to an Indian Case of **Allahabad High Court in Ram Sujujh vs. State and another AIR 1962 ALL 80**, the decision of W Broome J. In that case the Applicant contended that the learned magistrate had no jurisdiction to pass any decision in the case because one day earlier the High Court had passed orders on the transfer application asking him not to pronounce judgment in the case. The learned judge held on the principles

that an order of stay should be deemed to take effect as soon as it is passed, irrespective of whether it is communicated or not. This is contrasted with injunctions which is an order addressed to individual litigants and requires it to be communicated to them before it can operate. Stay orders on the other hand are meant for the Court and not for the litigants. If the Court proceeds with the case in ignorance of the stay order, it will not render itself liable to any kind of penalty. The only result would be that whatever proceedings are taken after the stay has been granted will be deemed to be without jurisdiction and a nullity. The learned judge further held that where a transfer has been ordered, any proceedings which take place after the stay order is passed are a nullity.

I have found that the authority is very persuasive on the question of jurisdiction of the Court particularly the jurisdiction of the Registrar after the High Court has issued an order transferring proceedings in the dispute for arbitration in accordance with the contract of the parties. In other words after the Court has pronounced a stay of proceedings of the suit pending arbitration, the entertainment of an application for extension of the interim order of stay was without jurisdiction.

It was therefore unlawful for the Registrar to entertain any application even if it was for an extension of an interim order. In the premises, the Registrar had no jurisdiction to entertain an application for extension of the interim order which had expired on 2 March 2012 and after the Court had referred the dispute to arbitration. The application and order of the Registrar granting an interim order of the injunction by way of an extension of an earlier consent order was a nullity on the ground of lack of jurisdiction.

Finally the relevance of the objection of the Respondents is in the fact that learned Counsel for the Applicant applied for extension of the interim order when the matter came for hearing of Miscellaneous Application No. 90 of 2012 on the 25th day of April 2012 at 2.30 PM. On an application for adjournment of the said application, the extension of the interim order became a necessity. In practical terms, the Respondents had not been prejudiced by the interim order in the sense that the matter had come for hearing on the 25th of April, 2012 and no

grievance was an advanced as to what prejudice had been occasioned to the Respondents. Consequently the only relevance of the objection of the Respondents relates to the application for extension of the order of the Registrar on the ground that it was an illegal order. There can be no further extension.

The second issue is whether the Court can hear an interlocutory application for a temporary injunction pending determination of the suit after the dispute has been referred to arbitration under the Arbitration and Conciliation Act.

I have carefully listened to the submissions of both parties and considered the authorities submitted by learned Counsels. It is a fact acknowledged by both Counsels that the current application for a temporary injunction was filed pending determination of the suit. It is after the application for a temporary injunction was filed that the Respondents applied to the Court under section 5 of the Arbitration and Conciliation Act to refer the dispute for arbitration in accordance with the contract of the parties. After the order of the Court referring the dispute for arbitration as stated above, can the Court proceed to hear an application for a temporary injunction?

It was strongly submitted for learned Counsels for the Respondent that this application is incompetent because the order is made pending determination of the main suit on merit. Following this line of argument learned Counsels advance argument that the application in any case was made under the Civil Procedure Act and the Civil Procedure Rules and not under section 6 of the Arbitration and Conciliation Act. Learned Counsel submit that because it is not application under section 6 of the Arbitration and Conciliation Act, the Court has no jurisdiction to entertain an application for a temporary injunction pending determination of the suit. They did not however dispute the jurisdiction of the Court founded on section 6 of the Arbitration and Conciliation Act.

The position of the Applicants Counsel on the other hand is that the application may survive the order of stay of proceedings by reference of the dispute for arbitration in accordance with the contract of the parties. Secondly, learned Counsel contends that the Applicant is at liberty to apply for amendment of the application to reflect the provisions of section 6 of the Arbitration and

Conciliation Act which gives this Court jurisdiction to make orders for interim measures of protection on any application made by the parties to the arbitration clause before or after arbitration proceedings have been commenced. In support of the Applicants case learned Counsel referred to the case of **Saggu vs. Road Master Cycles [2002] EA 258.** In the case the learned trial judge on an objection made by the Respondents that the wrong law had been cited, did not uphold the objection. On appeal it was held at page 262 by the Court of Appeal:

> "Regarding the second point in objection that the notice of motion did not cite the law under which it was being brought. The general rule is that where an application omits to cite any law at all or cites the wrong law, but the jurisdiction to grant the order sought exists, then the irregularity or omission can be ignored and the correct law inserted.

The Court of Appeal referred to the case of **Nanjibhi Prabhudas and Company vs. Standard Chartered Bank [1968] 1 EA 670** per Sir Charles Newbold P of the Court of Appeal at 682:

> "The Court should not treat any incorrect act as a nullity with the consequence that anything founded thereon is itself a nullity unless the incorrect act is of the most fundamental nature. Matters of procedure are normally not of a fundamental nature."

In that case it was held that irregularity in service of the summons outside jurisdiction; that is summons issued by a Kenyan Court and served in Uganda was not a nullity. Though I was referred to cases dealing with the inherent jurisdiction of the Court, the jurisdiction of the Court is not in issue. The contention of the Respondents is that the application was made pending determination of the suit which had been stayed pending arbitration. That the application ought to have been made under section 6 of the Arbitration and Conciliation Act and not under the Civil Procedure Rules. Therefore the question for determination is whether an application made pending determination of the suit is not the kind of application envisaged by section 6 of the Arbitration and Conciliation Act. Even if that was the case, whether any prejudice has been occasioned and whether it was a mere

irregularity or a fundamental defect that renders the application a nullity in the circumstances of the case.

It is not in dispute that section 6 of the Arbitration and Conciliation Act gives the High Court jurisdiction to entertain applications for an interim measure of protection and that the Court has power to grant the same. Section 6 of the Arbitration and Conciliation Act provides as follows:

> "6. Interim measures of the Court.
>
> (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 Court may grant the same.
>
> (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 of a new finding of fact made in the course of the ruling as conclusive for the purposes of the application."

The above provision enables the party to an arbitration clause to apply to the Court for an interim measure of protection either before or during arbitral proceedings. The provision is specific to the arbitration clause and arbitral proceedings. There is no need for a pending suit before an application for a temporary injunction is filed for an interim measure of protection. In other words, a party may originate an application as envisaged by the Arbitration and Conciliation Act for an interim measure of protection.

Learned Counsel for the Applicants referred me to rule 13 of the Arbitration Rules made under the first schedule of the Arbitration and Conciliation Act. This reference was in the list of authorities submitted to Court after the submissions of the parties. Before considering the rules applicable to applications made under section 6 of the Arbitration and Conciliation Act it is necessary to refer to section 9 of the Arbitration and Conciliation Act which formed one of the basis of the Respondents objection.

Section 9 provides as follows:

> "Except as provided in this Act, no Court shall intervene in matters governed by this Act"

The first consideration is that the Court should look at the provisions in the Arbitration and Conciliation Act for the exceptions referred to in section 9 of the Arbitration and Conciliation Act. Section 9 is mandatory in that it commands the Court not to intervene in matters covered by the Arbitration and Conciliation Act except as otherwise provided by the said Act. It is true that section 6 permits any of the parties to apply for an interim measure of protection and the Court may grant the remedy of interim measure of protection before or during arbitration proceedings. When the read together with section 9 of the arbitration and conciliation act, it is imperative that the Court establishes what orders may be granted and which orders and procedure has been excepted by the Act. Section 71 of the Arbitration and Conciliation Act provides for the rules applicable under the Act. The section gives mandate to the Centre to make rules for the filing of applications for setting aside arbitral awards, the staying of any suit or proceedings instituted in an arbitration agreement and generally all proceedings in Court under the Act. I further made reference to section 71 (2) of the Arbitration and Conciliation Act which provides as follows:

> "(2) Unless the rules committee make rules of Court to replace them, the rules specified in the first schedule of this act shall apply to arbitration in Uganda."

The above section is couched in mandatory terms. It makes it mandatory for applications to be made under the first schedule to the Act. Secondly, it specifies under sub rule one of section 71 of the Arbitration and Conciliation Act that it is the Centre which is to make the rules unless otherwise replaced by the rules made by the Rules Committee. The Centre for Arbitration and Dispute Resolution is established by section 67 of the Arbitration and Conciliation Act. The functions of the Centre for Arbitration and Dispute Resolution are catered for under section 68 of the Arbitration and Conciliation Act and in subsection 68 (c) thereof provides that the centre is:

> "To make appropriate rules, administrative procedure and forms for effective performance of the arbitration, conciliation or alternative dispute resolution process;"

The Arbitration Rules, rule 13 thereof is the relevant rule for any other application including applications for challenging arbitrators and provides as follows:

> "All applications for the appointment of or challenge to arbitrators, and all other applications under the Act, other than those directed by these Rules to be otherwise made, shall be made by way of chamber summons supported by affidavit."

The Respondents Counsels contended that the Applicants application for a temporary injunction was made under the Civil Procedure Rules and the Civil Procedure Act and was not the kind of application envisaged by the Arbitration and Conciliation Act. In view of the provisions of the law quoted above, this submission has merit in that an application made under the Arbitration and Conciliation Act is provided for by the Act itself. The provisions of the Act are mandatory. The rules made under the Act are made by the Centre for Arbitration and Dispute Resolution which is responsible for the policy matters under the Act.

The Applicants application is made under order 41 rules 2 and 9 of the Civil Procedure Rules, section 98 of the Civil Procedure act, the Constitution of the Republic of Uganda and section 33 of the Judicature Act. Order 41 rule 2 of the Civil Procedure Rules specifically deals with injunctions to restrain breach of contract or other injury. It provides that:

> "In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgement, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or other injury complained of."

In this case the Applicant had filed civil suit number 73 of 2012. This suit has been stayed under section 5 of the Arbitration and Conciliation Act pursuant to the

application of the Respondents to refer the matter to an arbitrator in accordance with an arbitration clause in the contract between the parties. Order 41 rule 2 deals with applications pending determination of the suit and is not applicable to proceedings under the Arbitration and Conciliation Act particularly section 6 thereof. Secondly, order 41 rule 2 deals with interlocutory applications. Section 6 of the Arbitration and Conciliation Act read together with section 71 and the first schedule to the Act envisages an originating chamber summons either before or during arbitration proceedings.

As far as the proper procedure for proceedings under the Arbitration and Conciliation Act and particularly proceedings for interim measures of protection are concerned, I am satisfied that the wrong procedure has been used by the Applicants.

The second arm of the issue is whether the order of the Court issued on 27 March 2012 referring the dispute between the parties for arbitration in accordance with the agreement between the parties to submit any dispute to arbitration stayed the application for an interlocutory injunction pending determination of the suit. At the time that application was argued before me, I observed that I could not comment on the application for a temporary injunction which was not before me. The same arguments had been advanced in that application. In effect, this is the right time to consider the said arguments opposing the application for a temporary injunction on the ground that it was not made under section 6 of the Arbitration and Conciliation Act. To that extent, the Court reserved the question for determination on the merits of the application and it cannot be said that the application had been frozen by the order of the Court referring the dispute to arbitration.

It is material to examine the arbitration clause the basis of the reference to arbitration in accordance with the contract of the parties. The relevant contract of the parties is dated 1st of June 2008. The assignment of the rights under that contract to other parties is not material in the consideration of the arbitration clause to which both sides conceded. The arbitration clause which in the circumstances is binding clause 18.2 which reads as follows:

> "Any dispute whatsoever and howsoever arising out of this agreement including the termination thereof or the validity or not of its provisions shall be referred to arbitration in accordance with the rules of the International Chamber of Commerce ("ICC") for determination by the arbitration of one arbitrator to be appointed by the Vendors and one arbitrator to be appointed by the Purchasers acting jointly together with the third arbitrator (which are act as Chairman) who shall be appointed by such arbitrators. The arbitration shall be held in London, England."

As far as the reference to arbitration is concerned, the Court will not interfere with any dispute arising out of the contract because of the use of the term "any dispute whatsoever and howsoever arising out of this agreement". The application for a temporary injunction pending determination of the suit by its nature deals with the dispute itself and matters arising out of that dispute. The injunction as quoted above at the beginning of this ruling seeks to restrain the Respondents, their servants or agents from enforcing effecting or otherwise implementing a rights issue of 13 January 2012 the subject matter of the dispute between the parties pending the resolution in this suit. My conclusion is that though the Arbitration and Conciliation Act is applicable, the Court should be wary of an injunction pending determination of the suit which is not the application envisaged by the Act. The parties are not prejudiced by this approach for the simple reason that they provided under clause 18.2 of the contract that the arbitrators shall apply the laws of Uganda. In other words the laws of Uganda would apply.

Under the laws of Uganda, notwithstanding an arbitration clause or a reference to arbitration by the Court under section 5 of the Arbitration and Conciliation Act, a party is at liberty to apply for an interim measure of protection under section 6 of the Arbitration and Conciliation Act. Such an application is a specific application made under the Arbitration and Conciliation Act and not under the Civil Procedure Act or any rules made there under. The application is not interlocutory but originating in that it commences an action in the High Court or any other court without the need for a pending suit as in applications for interlocutory injunctions. In the case of **Boyes vs. Gathure [1969] EA 385, It was** held that

where the relevant Act provides for an application by summons, this refers to an originating summons. In **Masaba vs. Republic [1967) EA 488,** Sir Udo Udoma CJ held that the prescribed procedure under the **Civil Procedure (Fundamental Rights and Freedoms) rules 1963** was by originating motion. Where a statute provides that an application shall be made by chamber summons or notice of motion, such an application originates proceedings and is either originating summons or originating motion.

Finally, the question is whether failure to follow the provisions of the law in the application for a temporary injunction should vitiate the application. Having considered the Court of Appeal authority of Saggu versus Roadmaster Cycles Ltd (supra) the question to determine is whether the defect in the citation of the law or the wrong procedure used is of a fundamental nature. I particularly addressed my mind to the submission of Dr Byamugisha lead learned Counsel for the Respondents. He submitted that the Applicant had all the time to file a fresh application from 27 March 2012 until 25 April 2012 when this matter was argued before me. Within that time the Applicant ought to have withdrawn the wrong application and filed a fresh application under section 6 of the Arbitration and Conciliation Act. In other words even after the Respondents submission in the previous application, the Applicant maintained its application as it is without seeking to amend the same or file a fresh application. In other words the application for amendment would be belated. In this case the applicant did not deem it necessary from 27 March 2012 up to now a period of about 1 Month to apply for amendment of the application or to file a fresh application.

In the authorities cited the Court has jurisdiction to waive the strict application of the rules. Particularly I have considered section 33 of the Judicature Act which deals with the remedies available to the High Court. It provides that the High Court shall in the exercise of the jurisdiction vested in it by..

> "...the Constitution, this Act or any other written law grant absolutely or on such terms and conditions as it thinks just all such remedies as any parties to a cause or matter is entitled to in respect of any legal or equitable claim properly brought before it so that as far as possible all matters in

> controversy between the parties may be completely and finally determined and all multiplicities of legal proceedings concerning any of those matters avoided."

The legal or equitable claim must be properly brought before the Court can use the provisions of section 33 of the Judicature Act. In this matter the Respondents contend that the application for a temporary injunction is not brought properly before the Court. In other words a preliminary objection has been raised as to the competence of the application and section 33 of the Judicature Act cannot be invoked without a determination of the preliminary objection. Learned counsel for the applicant also relied on article 126 (2) (e) of the Constitution of the Republic of Uganda which provides that:

> In adjudicating cases both of a criminal and civil nature, the courts shall subject to law, apply the following principles: (e) substantive justice shall be administered without undue regard to technicalities.

The courts interest is to administer substantive justice without undue regard to technicalities. The question would be whether any prejudice has been occasioned by use of the wrong procedure. Secondly, whether failure to comply with the rules for commencement of proceedings is fatal to the application. In this case, no steps have been taken in the proceedings and objection was made at the commencement of the hearing. The procedural error can still be rectified.

The Supreme Court in **Utex Industries vs. Attorney General S.C.C.A. NO. 52 OF 1995, held** that legislature did not intend to do away with the rules of procedure by enacting article 126 (2) (e) of the Constitution. Secondly, under article 126 (2) (e) the principles to be followed by the court are subject to law. The Supreme Court also held in **Kasirye Byaruhanga & Co. Advocates vs. U.D.B. S.C.C.A. NO. 2 of 1997,** that a litigant who relies on the provisions of article 126 (2) (e) must satisfy the court that in the circumstances of the particular case before the court it was not desirable to have undue regard to a relevant technicality. They held that article 126 (2) (e) is not a magical wand in the hands of defaulting litigants.

In the premises, learned counsel for the applicant should file a fresh application under the relevant Legislation. Such an application is only with reference to the arbitration process and not pending determination of any suit in this court. In any case proceedings in the suit have been stayed pending arbitration. Had the arbitration proceedings commenced, the arbitrators have jurisdiction and the mandate to rule on the applicants application and the court is obliged under section 6 (2) of the Arbitration and Conciliation Act to endorse any ruling of the arbitrators. Secondly, the applicant has not used the time to file a proper application. The applicant has further sought an adjournment of the application. I therefore see no prejudice to the applicant in the finding that the application for a temporary injunction cannot be considered within the suit. In fact it has been stayed together with the dispute which has been referred to arbitration. The arbitrators may consider it. As far as this court is concerned, it will only entertain any application for an interim order as enabled by the Arbitration and Conciliation Act section 6 thereof and under the procedure stipulated by the first schedule to The Arbitration and Conciliation Act and sections 71 of the Act.

In the premises, the application of the Applicants is also stayed pending arbitration. The arbitrators may also consider the application on its merits provided the Applicant's move the arbitrators as enabled by the rules of the arbitration. The Applicant is not precluded from filing an application in this court within the time sought for the adjournment. Costs of this application are to be included in matters to be considered by the arbitrators and will abide the outcome of the arbitration.

Ruling delivered at Kampala this 30th day of April 2012 in open Court.

Hon. Justice Christopher Madrama

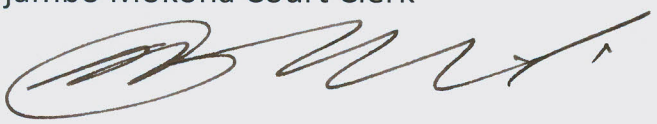
JUDGE

Ruling delivered in the presence of:

Dr. Byamugisha assisted by Didas Nkrurunziza and Fred Muwema for the Respondents

Noah Mwesigwa for the Applicant

Ojambo Mokoha Court Clerk



Hon. Justice Christopher Madrama

30th of April 2012.