

**THE REPUBLIC OF UGANDA
IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA
LABOUR DISPUTE REFERENCE NO. 229 OF 2019
[ARISING FROM KCCA/NDC/118/2018]**

BETWEEN

GIORGIO ZENEGALIA.....CLAIMANT

VERSUS

SARI CONSULTING LTDRESPONDENT

BEFORE

1. Hon. Chief Judge Ruhinda Asaph Ntengye
2. Hon. Lady Justice Linda Tumusiime Mugisha

PANELISTS

1. Mr. Adrine Namara
2. Mr. Michael Matovu
3. Ms. Susan Nabirye

RULING ON A PRELIMINARY OBJECTION

Brief Background

The Claimant was an employee of the respondent under a contract that provided for a dispute resolution mechanism of arbitration and conciliation under rules of the Chamber of Commerce of Rome and in accordance with the Italian Law and Language. According to the Claimant as per the memorandum of claim, the respondent failed to pay him salary and other benefits as a greed causing arrears and a breach of the contract.

Before the matter could be heard on its merits the Respondent raised a preliminary objection that on the basis of the contract between the parties, this Court had no jurisdiction to entertain the dispute.

The Claimant was represented by Mr. Horace Nuwasasira of M/s. C.R. Amanyadvocates & Solicitors while the Respondent was represented by Mr. Omoloy Ivan of M/s. Okello Oryem & Co. Advocates.

SUBMISSIONS

The respondent argued that the claim was incompetent and misconceived since the **Employment Act** was not applicable to the same and the Industrial Court had no Jurisdiction because the parties chose mandatory arbitration to be done in Rome as provided for under clause 8 of the contract of service. According to counsel, the parties were strictly bound by the terms of the contract which provided for mandatory arbitration and this court could not entertain the dispute, it could only refer the dispute to arbitration in accordance with the contract. Counsel relied on **Section 91 of the Evidence Act, Sections 5 and 40 of the Arbitration and Conciliation Act** and **M.A 310/2013 – Daniel Delsetre & 6 others Vs Hits Telecom (U) Ltd.** He strongly submitted that Jurisdiction being a creature of statute this court could not entertain the claim because in **clauses 10 of the respective contracts**, the parties surrendered to Italian law. According to counsel this court is being asked to exercise jurisdiction that it does not have and it ought to decline to do so. He relied on **Section 14 (2) (b) (i) and 33 of the Judicature Act, Section 98 of the Civil Procedure Act** and **Civil Appeal 53/2015 Mujib Juma Vs Adam Musa & others.** Counsel submitted that the court could not apply the rules of procedure under Uganda law since the parties chose the rules of procedure of the chamber of commerce of Rome. He strongly asserted that except by mutual agreement of both parties neither of them could run away from the binding terms of the agreement. He was of the strong view that although the Industrial court is a court of Equity it could not apply the same since equity follows the law and where there is no remedy at law, neither can the court grant it in equity.

The Claimant strongly disagreed and asserted that under **Section 12(1) and (2) of the Employment Act and Section 8 (1) (a) of the Labour Dispute (Arbitration and Settlement) Act** both the Labour Officer and the Industrial Court are granted jurisdiction to entertain employment disputes. Counsel reiterated that **Section 6 of the Employment Act** promotes equality of opportunity and guards against discrimination in interpretation of employment laws. According to counsel a clause in the contract limiting Jurisdiction of the

court was rejected in the case of **Portland International (PTY) Ltd Vs Sembule Steel Mills Ltd & 2 Others, Civil suit 141/2014**. Counsel argued that reliability on an exclusive Jurisdiction clause in the contract was aimed at evading liability under the contract which this Court has mandate to stop. He relied on **Egbert De Smet Vs Nakassanga, Civil suit 387/2011**. He also relied on **CMA Cam Uganda Ltd Vs M/S. Sekatawa International Ltd Civil Appeal 27/2013** which according to counsel held that courts in Uganda had Jurisdiction by Virtue of the fact that the contract was performed in Uganda. According to counsel, one of the circumstances which could be considered in establishing whether court could exercise jurisdiction was set out in the above **CMA Cam Uganda Ltd Vs M/s. Sekatawa International Ltd Civil Appeal 27/2013** as whether the defendant genuinely desired trial in a foreign country or was only seeking Procedural advantages. It was his submission that in the instant case the defendant sought Procedural advantage as there was no plausible reason to have the matter tried in Italy.

Decision of Court.

We have no doubt that the position of the law is that parties have the freedom to contract and once they reduce the contract into writing they are bound by the provisions in the contract so reduced in writing.

It is also true that in interpreting the contract so reduced in writing, the courts have to take into account the intention of the parties at the time the contract was signed as well as the law prevailing not only at the time the contract was made but also at the time the court is making the decision.

There were two contracts executed by both parties dated 01/06/2017. One was for the **“consultancy services for road and transportation projects”** and the other for the **“Bumbobi – Lwakhakha project”**. Both contracts under paragraph 8 and 11 respectively provided **“Any dispute or difference arising from this agreement or connection therewith, which cannot be amicably settled between the parties shall be finally settled by arbitration in accordance with the rules of conciliation and arbitration of the chamber of commerce of Rome, by three arbitrators designated in accordance to the said rules. The arbitration will be held in Rome and the applicable law and language will be Italian one.”**

Under paragraphs 9 and 12 respectively both contracts specifically provided for the law applicable in the following terms:

“The present contract is subject to the Italian law. The language of the Agreement shall be English.”

The contention of the respondent, as we understand it, is that the claimant having been party to the above contractual obligations that strictly provide for arbitration using foreign rules and procedures and in a foreign jurisdiction, the same claimant cannot be seen to purport to bring an action on allegations for breach of the same contract using the domestic rules and procedure in a domestic court.

On the other hand, the contention of the claimant is that given the provisions of the **Employment Act** and the **Labour Dispute (Arbitration & Settlement) Act** providing for Domestic courts to have jurisdiction in all matters relating to employment and this being an employment dispute involving a contract that was performed in this country, this court is empowered to entertain the dispute.

We have carefully perused the submissions of both counsel. Counsel for the respondent referred this court to **Section 5 and 40 of the Arbitration and Conciliation Act** which provide for a mandatory arbitration where parties have agreed to such dispute resolution mechanism. We have internalised the case of **DANIEL DELESTRE & 06 OTHERS VS HITS TELECOM (U) LTD, M.A 310/2013** (Commercial Division) where the court relied on **Section 5 and 40 of the above law to refer the dispute to arbitration**. We have at the same time looked at and internalised **Section 9 of the Labour Dispute (Arbitration & Settlement) Act 2006** which provides:

“9 Arbitration and conciliation Act not to apply.

The Arbitration and Conciliation Act shall not apply to any proceedings of the Industrial Court under this Act, or to any award made by the Industrial court.”

Considering that the law which gives jurisdiction to this court outs the application of the Arbitration and Conciliation Act by this court, it is our considered opinion that the said Act does not apply to the instant case and therefore unlike in the above **Daniel Delestre case** this court is not bound or

obliged to refer the matter to arbitration under the said arbitration & Settlement Act.

There is no doubt and we entirely agree (as much as counsel for the claimant agreed) that as directly expressed in the case of **Mujib Juma Vs Adam Musa & 8 others Civil Appeal 53/2015 (Land Division)** once a court of law finds that it has no jurisdiction, proceedings have to be halted and transferred to a Court with competent jurisdiction. It is very clear from the construction of the contracts that the parties intended their disputes to be resolved outside the jurisdiction of this court. The question, however, is **whether or not the exclusion of the jurisdiction of the courts in the contract would automatically oust the court's jurisdiction?** In proff. **Egbert be Smet Vs Juliet Nakassaga, Civil suit 387/2011 (Commercial Division)** the court resolved the above question when in dismissing the Preliminary Objection it relied on the case of **Huadar Guangdong Chinese Co. Ltd Vs Dance Logistics Uganda limited, Civil suit No. 4/2012** which was reported to have held:

“It is settled law that a simple clause in an enforceable contract does not oust the unlimited original jurisdiction of the High court as conferred to it by the supreme law of the land.”

The court also found that the expenses likely to be incurred when a matter was to be handled outside the domestic Jurisdiction would be a factor to be reckoned with in determining the question of jurisdiction embedded in a contract. In the case of **Justice Ruhinda Asaph Ntengye & Justice Linda Lillian Tumusiime Mugisha Vs Attorney General, Const. Petition 33/2016** it was held that this court is equipped with the same jurisdiction as the High Court and consequently the authority of **Proff Egbert Smet** mentioned above applies to it. Even if the above Constitutional Petition was found not applicable, by virtue of **Section 5 of the Labour Dispute (Arbitration & Settlement) Act** this court is vested with power to entertain this dispute. The section provides that the labour officer has to refer the matter to this court if within 4 weeks he/she has not resolved it and if not, either of the parties may within 8 weeks refer the same to this court for resolution. **Section 8 of the same** law expressly vests this court with jurisdiction to entertain matters referred to it by virtue of a reference in accordance with **Section 5** above mentioned. In referring the dispute to this court, a labour officer will have entertained it by virtue of

Sections 12 and 13 of the Employment Act which grants jurisdiction to the said Labour Officer.

Given the huge expense that would be incurred by the respondent if the claim was referred to Rome in accordance with the contract, and given that no special and reasonable explanation has been given to this court for such expensive expedition, it is our conclusion that by raising this preliminary objection, the respondent was merely seeking procedural advantage intended to halt the progress of the claim under the contract of service and this cannot be acceptable given the provision of **Section 27 of the Employment Act** which provides:

“27 variation or exclusion of provisions of the Act

- (1) Except where expressly permitted by this Act, an agreement between an employer and an employee which excludes any provision of this Act shall be void and of no effect.**
- (2) Nothing in this Section shall prevent the application by agreement between the parties, of terms and conditions, which are more favourable to the employee than those contained in this Act”.**

When the above section of the law is read together with **clauses 8 and 11** embedded in both contracts of the claimant it becomes clear that the contracts, contrary to the said section, excludes **Section 12 and 13 of the Employment Act** that grants jurisdiction to the labour officers and to that extent the clauses are void and of no effect. In the result we find the objection of the respondent without any merit and it is hereby overruled. The claim shall proceed on its metis. No order as to costs is made.

Delivered & Signed by:

- 1. Hon. Chief Judge Ruhinda Asaph Ntengye
- 2. Hon. Lady Justice Linda Tumusiime Mugisha

PANELISTS

- 1. Mr. Adrine Namara
- 2. Mr. Michael Matovu
- 3. Ms. Susan Nabirye

Dated: 06/09/2020