THE REPUBLIC OF UGANDA

IN THE CHIEF MAGISTRATES COURT OF PALLISA AT PALLISA

CIVIL SUIT NO. 005 OF 2024

1. KAUDE SIMON
2. OKIRA ONESMAS
3. MUZEI SHABAN:: PLAINTIFFS

VS

THE ARAB CONTRACTORS

(OSMAN AHMED OSMAN & CO.) :::::::::::::::::::: DEFENDANT

Before: His Worship Kyembe Karim ESQ

Learned Magistrate G.I

RULING

Brief background.

The plaintiffs jointly instituted this civil suit against the defendant seeking orders of specific performance, general damages and costs of the suit arising out of contracts of excavation of marram soil from the plaintiff's pieces of land. It is the plaintiff's averment that the defendant, by agreement, undertook to level up their respective pieces of land upon completion of the excavation of the marram soil, an undertaking that the defendant has since defaulted upon, hence this suit.

Representation:

M/S NANGULU & MUGODA ADVOCATES –for the plaintiffs

M/S MENYA & CO. ADVOCATES – for the defendant

Defendant's argument:

When the suit came up for hearing on the 16th May, 2025, learned counsel for the defendant raised a point of law in respect to the propriety of this suit before this court based on the provisions in clause 6 of the marram excavation agreements, the premises upon which this suit was instituted. Learned counsel submitted that this suit is prematurely before this hon. Court, since in his view, **Section 40** of the Arbitration and Conciliation Act, cap 5 empowers this hon. Court to order a stay of proceedings and refer the matter to an arbitrator. Learned counsel also cited for court **Order 47 Rule1(1)** for the proposition that where parties to a suit agree to undergo arbitration and are not under any disability, they may apply for an order of reference to undergo arbitration. Learned counsel concluded imploring court to invoke **Section 5** of the Arbitration and conciliation Act and stay these proceedings until mediation is concluded.

Plaintiff's argument in reply:

Learned counsel for the plaintiff who literary was ambushed with the preliminary objection sought and was granted leave to file his written reply.

First, he reproduced the content of the now impugned clause 6 of the marram excavation agreements as follows;

> *"Any dispute arising in connection with this agreement which cannot be solved amicably by the parties shall be submitted for mediation in accordance with the Arbitration and Conciliation Act cap 64 Laws of Uganda."*

Learned counsel further pointed out for court that on the 29th October, 2024 when he first appeared in court and after discussing with counsel for the defendant, an application was made and the matter was duly referred to mediation vide **mediation cause no. 40 of 2024** before **Mr. Osako Nicholas Epaja,** of which the defendants initially attended and later absconded on the subsequent days leading the mediator to close the mediation and a copy of the mediation report together with a certificate of non-attendance are on court record. Learned counsel assailed the defendant's argument insisting on *"arbitration"* whereas no such word was mentioned in the agreement and he submitted that *"arbitration"* is different from *"mediation."* He concluded submitting that the preliminary objection raised is devoid of merit and is only, but a delaying tactic of the defendants and attempt to justify their failure to comply with this hon Court's directives to file pre-trial documents.

Defendant's Rejoinder:

In rejoinder, learned counsel for the defendant filed written submissions reiterating his submissions and highlighting for court an excerpt:

> ***"...in accordance with the arbitration and conciliation Act cap 4..."***

Learned counsel invited this court to draw a distinction between "arbitration" and **"mediation"** under the **Judicature (mediation) rules, 2013.** He submitted that whereas the word **"mediation"** was used in the impugned clause 6 of the agreement, the same did not water down the agreed law under which the dispute ought to have been resolved and he concluded by citing for this court the decision in **Fulgesius Mungereza**

Vs Price Water House Coopers Africa Central SCCA no. 18 of 2002 for the proposition that:

> *"…there is nothing to stop the parties referring the matter to mediation if there is a chance of it being resolved amicably…"*

Consideration by court:

In a case like this, the burden and standard of proof under sections 101, 102 & 103 of the Evidence Act lays upon the defendant to satisfy court with the merits in its objection. Same holding was stated in **Maganja Hussein _VS- Mubiru Christopher HCCS NO. 129 OF 2010.**

I agree with the argument of learned counsel for the defendant that **Section 10(1)** of the contracts Act cap 284 stipulates what constitutes a contract and especially, that the parties thereto harbor the intention to be legally bound.

I also agree that where parties agree to terms in their contract, it is not court's place to read terms there-into which otherwise were not agreed upon.

It appears to me, the center of contention is the construction of clause 6 of the agreement. I reproduce it hereunder:

> *"Any dispute arising in connection with this agreement which cannot be solved amicably by the parties shall be submitted for mediation in accordance with the Arbitration and Conciliation Act cap 64 Laws of Uganda."(UNDERLINING ADDED FOR EMPHASIS)*

It seems to me the dispute is:

i. Whether to refer the matter to mediation *(which has already been concluded)*? Or;
ii. Whether to refer the matter to arbitration?

Reading the relevant clause 6 which is now under contention, there seems to be a mix up. That is, it talks about:

> *"… mediation in accordance with the Arbitration and Conciliation Act…"*

It goes without saying that mediation is different from arbitration. Similarly, under the Arbitration and Conciliation Act, there is no provision for mediation. What, then were the parties referring to when they made the said clause 6?

This court is aware that **Under Section 60** of the Evidence Act cap 8, contents of a document are to be proved by primary evidence.

This is sometimes called the ***parole evidence rule.*** It is settled as a general rule that no oral evidence which purports to testify to or vary the contents of a document is to be admitted. I am also aware that this rule has exceptions.

Where contractual terms appear vague, this court can slightly explore the circumstances, antecedents, conduct before, during and after the execution of the document to ascertain the contractual intentions of the parties.

In the instant case, I have perused the mediation report cum certificate of non-attendance filed on court record on the 23rd May, 2025.

In the 1st paragraph thereof, it is stated:

> *"Both parties were in court and the defendant being represented by Kakuku Charles and Lajja Aaron of mobile no....."*

It appears to me that both parties originally submitted themselves to mediation until the defendants later changed their minds and stopped appearing, hence closure of the mediation.

In **Kabale District Local Government Council vs Musinguzi (2006) 2 EA at 131** it was stated that a party presenting unchallenged evidence has no duty to prove it further. Same reasoning was adopted in **Uganda Commercial bank ltd vs Yakub (2013) UGCOMMC 153.**

I also note that this matter was filed on 30th January, 2025 and so far, I have not seen any evidence to show commencement or existence of any arbitration proceedings initiated by either party.

> According to **Section 2 of the Evidence Act Cap 8** "evidence" denotes: the means by which any alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved and includes testimonies by accused persons, admissions**,** judicial notice, presumptions of law and ocular observation by the court in its judicial capacity. [Bolding added for emphasis].

Therefore, if the defendants did not agree to mediation in the impugned clause 6 of the agreement as they want this court to believe, what were

they doing in the mediation proceedings in **mediation cause no. 40 of 2024** before **Mr. Osako Nicholas Epaja?**

Similarly, why have they not commenced the Arbitration if they honestly believed it was the appropriate tribunal?

This seems to me a clear case where estoppels by conduct or acquiescence have to be invoked.

In **Elgonia One Café International ltd & 3 others vs stanbic bank & Another Misc. Applic no. 259 of 2020.**

> *The applicants challenged an arbitral award arguing that it was delivered 15 days late without written extension as required under section 31 of the Arbitration and Conciliation Act, thereby rendering it a nullity.*
>
> *While dismissing the application, **Lady justice Margaret Apiny** noted that the applicants had waived their right to object when they failed to raise those concerns during the trial making the subsequent challenge an after-thought designed to obstruct justice.*

Similarly, in this case, while the wording of the contract was vague as discussed here-above, it is the finding of this court that the contractual intention discerned from the conduct of the parties was to refer the disputes to mediation and not arbitration as argued by the defendants.

And even if it was the case for arbitration, I find that the defendants waived their right to object when they participated in the mediation

proceedings in **mediation cause no. 40 of 2024** before **Mr. Osako Nicholas Epaja.**

In the result, I make the following orders:

1. The preliminary objection is overruled.
2. The suit shall be set down for hearing, unless if the parties agree to explore mediation the 2nd time.
3. Costs are granted to the plaintiffs and the same shall remain in the cause.

I so order.

Dated at PALLISA this ____15TH__day of ___September_____ 2025.

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HW KYEMBE KARIM

Magistrate G.I