THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[CIVIL DIVISION]

MISCELLANEOUS CAUSE NO. 70 OF 2021

1. **UAP OLD MUTUAL INSURANCE UGANDA LTD**
2. **SANLAM GENERAL INSURANCE UGANDA LTD :::::::::::::::::::::::::: APPLICANTS**
3. **BRITAM INSURANCE UGANDA LTD**

VERSUS

1. **THE INSURANCE REGULATORY AUTHORITY**
2. **UGANDA RAILWAYS CORPORATION ::::::::::::::::::::::::::::::::::::::RESPONDENTS**

BEFORE: HON. JUSTICE ESTA NAMBAYO

RULING

UAP Old Mutual Insurance Uganda Ltd, Sanlam General Insurance Uganda Ltd and Britam Insurance Uganda Ltd (hereinafter referred to as the 1st, 2nd and 3rd Applicants respectively) brought this application under **Article 191 of the 1995 Constitution of Uganda, Sections 33, 36** and **38 of the Judicature Act, Sections 64 and 98 of the Civil Procedure Act** and **Rules 3, 5 (1) and 6 (1), of the Judicature (Judicial Review) Rules, 2009,** against the Insurance Regulatory Authority and Uganda Railways Corporation (hereinafter referred to as the 1st and 2nd Respondents respectively) seeking for orders of this court that: -

1. **An order of Certiorari be issued quashing the decision of the 1st Respondent in IRAB/COMP.121/10/19 Uganda Railways Corporation (URC) Ltd -v- UAP Old Mutual Insurance Uganda, Britam Insurance Uganda Ltd and Sanlam General Insurance Uganda.**
2. **A declaration that the 1st Respondent exceeded its authority in issuing the decision in IRAB/COMP.121/10/19 Uganda Railways Corporation (URC) Ltd**

-v- UAP Old Mutual Insurance Uganda, Britam Insurance Uganda Ltd and Sanlam General Insurance Uganda, as this matter should have been referred to Arbitration in accordance with the terms of the performance Bond signed by the Applicants.

3. **A declaration that the dispute between the Applicants and the 2nd Respondent should have been referred to arbitration in accordance with the terms of the Performance Bond signed by the Applicants.**
4. **A declaration that the Applicants' Performance Bond is the legitimate Performance Bond binding on all parties.**
5. **A declaration that the 1st Respondent exercised its authority wrongfully and acted contrary to the rules of fairness, fair hearing and natural justice during the conduct of the dispute proceedings, the process of arriving at its findings and issuing of its ruling in IRAB/COMP.121/10/19 Uganda Railways Corporation (URC) Ltd -v- UAP Old Mutual Insurance Uganda, Britam Insurance Uganda Ltd and Sanlam General Insurance Uganda.**
6. **A permanent injunction be issued restraining the Respondents and/or their nominees, agents or servants from enforcing and executing the ruling passed by the 1st Respondent and the 1st Respondent be restrained from further adjudicating this dispute.**
7. **Costs of the application be provided for.**

The grounds of this application are well laid out in the affidavits in support of the application by Maximila Byenkya, the 1st Applicant's Company Secretary, Belinda Mutebi Ojiambo the 2nd Applicant's Chief Risk and Compliance Officer, the additional affidavit by Stephen Chivokore, the 1st Applicant's Managing Director and the supplementary affidavit of Kiwanuka Ben, the 3rd Applicant's Underwriting Manager, but briefly are that;

1. **The Applicants are bodies corporate established under the Companies Act No.1 of 2012 and licensed to provide insurance services.**
2. **That the 1st Respondent is a body corporate created under the Insurance Act 2017, with the power to sue and be sued in its corporate name.**
3. **That the 2nd Respondent is a body corporate created under the Uganda Railways Corporation Act with the power to sue and be sued in its corporate name.**
4. **That the 2nd Respondent filed a complaint against the Applicants before the 1st Respondent demanding that the Applicants pay the 2nd Respondent USD 3,000,000 on the basis of a 'Performance bond' allegedly executed in favour of the Respondent. The 2nd Respondent alleged that the Applicants had committed to pay unconditionally on demand USD 3,000,000 in the event that Rift Valley Railways Uganda Ltd did not meet certain obligations owed to the 2nd Respondent under a concession agreement.**
5. **The Applicants responded to the complaint via written submissions on 16th October 2020 stating inter-alia that;**
    a. **The Applicants did not sign the performance bond, the 2nd Respondent was seeking to rely upon and that they were willing to provide evidence and witnesses for proof.**
    b. **That the performance bond signed by the Applicants (and even the impugned performance bond that the 2nd Respondent was relying upon, provided that any dispute between the parties should be resolved by arbitration and therefore the 1st Respondent had no jurisdiction to adjudicate this dispute and could only refer the dispute to arbitration as the parties had provided for in their agreement.**

c. **Without prejudice to the above, RVR had not defaulted on any of its obligations and therefore the 2nd Respondent was not entitled to make any claim of any nature against the Applicants. RVR would be available to confirm this to the 1st Respondent.**

d. **Furthermore, without prejudice, under the Applicant's performance bond, the 2nd Respondent could only make a claim after exhausting all remedies to recover any monies owed to the 2nd Respondent from RVR and after terminating the concession agreement the 2nd Respondent had entered into with the RVR.**

8. **That the 2nd Respondent did not file any rejoinder to the Applicant's submissions.**

9. **That in clear violation of the law, the 1st Respondent acted ultra vires its powers and ruled that it had jurisdiction to hear and determine this dispute despite the clear agreement by all parties to refer the dispute to arbitration by a mutually agreed arbitrator.**

10. **That in clear violation of the tenets of a fair hearing and natural justice, the 1st Respondent determined that the performance bond presented by the 2nd Respondent was genuine relying on the alleged email communication that the Applicants had never seen and never given an opportunity to rebut.**

11. **That in clear violation of the tenets of a fair hearing and natural justice, the 1st Respondent appointed M/S Claim Care Ltd to determine the alleged liability of RVR to the 2nd Respondent a report that could not be relied upon.**

12. **The 1st Respondent deliberately did not consult RVR with regard to any of the liability claims that the 2nd Respondent alleged were owed to it by RVR which formed a basis for the claim against the Applicants.**

13. The Applicants were not given a fair hearing during the adjudication of the complaint as the 2nd Respondent relied on evidence that the Applicants were neither aware of or consulted on.

The Respondents did not file their affidavits –in- reply in Court, with Counsel explaining that they had preliminary points of law to raise. Court permitted Counsel to raise their preliminary objections which they did and made submissions on. Court ruled that the preliminary objections required ascertainment of facts and as such, it was important that the Respondents file their affidavits in reply, so that the matter is heard on merit. The Respondents still did not file their affidavits-in reply.

Background to the application

The brief background to this application is that the 2nd Respondent entered into a concession agreement with Rift Valley Railways Uganda Ltd (RVRU) allowing RVRU to run the operation of railways for a period of twenty-five years effective 1st November, 2006, on condition that RVRU provides a performance bond from reputable insurers for a total of USD 3,000,000 throughout the concession agreement. The Applicants jointly issued a conditional performance bond undertaking to guarantee the obligations of RVRU for an aggregate amount not exceeding USD 3,000,000 payable in respect of a default made by RVRU occurring within the period when the performance bond is valid.

In October, 2019, the 2nd Respondent filed a complaint against the Applicants before the 1st Respondent demanding a pay of USD 3,000,000 on grounds that RVRU defaulted on its obligations. The Applicants made a reply to the said claim contending that the 1st Respondent had no jurisdiction to adjudicate on the dispute as the performance bond provided that any dispute would be referred to arbitration. That the bond documents presented by the 2nd Respondent was not the same as

the one signed by parties and that RVRU had confirmed that there were no sums owed by it to the 2nd Respondent and as such the 2nd Respondent had no basis to make a call on the performance bond. The 1st Respondent made its ruling against the Applicants. It is the Applicants' contention that the 1st Respondent's decision is ultra vires as it disregarded the arbitration clause in the agreement and the principles of a fair hearing, hence this application.

Representation

Learned Counsel Sim Katende is for the Applicants, Learned Counsel Dr. Byamugisha Joseph together with Counsel Kwikiriza appeared for the 1st Respondent while Counsel Mwasame Nicolas was for the 2nd Respondent.

When the matter came up for hearing on the 2nd June, 2021, Counsel for the 2nd Respondent, Nicolas Mwasame informed Court that the 2nd Respondent did not file its affidavit-in-reply because the parties intended to settle the matter out of court and there had been on-going discussions. Counsel prayed that time now be extended to the 2nd Respondent to file its affidavit- in-reply out of time. This Court declined to grant his request explaining that the Respondents were given sufficient time which they deliberately disregarded despite the court ruling specifically directing that they should file their replies. Counsel for the 1st Respondent prayed for time to file his submissions and this Court went ahead to give timelines to Counsel for the parties to file written submissions. All submissions have now been duly filed and are on Court record.

Counsel for the Respondents raised preliminary objections in their submissions that;

1. **The Application was not handled within the stipulated time of its disposal;**
2. **The Applicants' affidavits are argumentative;**

3. **The Applicants did not exhaust all the existing remedies in the public body.**
4. **The Applicants' annexures to the affidavits were unsealed and unsigned;**

I will address the objections in the same order they were raised.

Preliminary objection No. 1: That the Application was not handled within the stipulated time of its disposal

Submissions

Counsel for the 1st Respondent submitted that this application was filed on the 26th February, 2021 and that by the time the parties appeared in Court on the 2nd June, 2021, to argue the application, the ninety days within which applications for Judicial Review must be disposed of as provided for under Rule 7B of the Judicature (Judicial Review) (Amendment) Rules, 2019 had expired and therefore, this Court is barred from disposing of this application. He explained that the rule is mandatory and does not permit any exceptions. That Rule 1A (C) of the rules requires clarity, consistency and uniformity in handling of the applications for Judicial Review and this includes time for disposal of the applications.

In reply, Counsel for the Applicants submitted that the alleged delay was occasioned by Court which has control over its schedules and not the Applicant. Counsel argued that Rule 7B above was not meant to lock the Court to a 90-day completion rule. That the trial Judge has powers and discretion under S. 98 of the Civil Procedure Act to stay proceedings in the interest of justice so as to first address the more urgent, pressing and pertinent issues such as imminent threat/danger by way of interlocutory applications. He relied on the cases of ***Regina –v- Horseferry Road Magistrates' Court, ex parte Bennet (No.1), [1993] 3 WLR 90, [1994] 1 ac 42,***

(1993) All ER 138, (1994) 98 Cr App R 114) and Isadru v Aroma & Ors (Civil Appeal-2014) [2018] UGHCLD 3 (11 January 2018*) and *Grace Jones Namulondo and Others v Jone Jones Serwanga Salongo and Others Misc. Appl No.1 of 2019, MTN V UCC, May 2021 and Guild Uganda Limited and Anor v Attorney General (Misc. Cause 20202/400 [2021] UGHCCD 2(18 January 2021), where Judicial Review matters were determined in excess of the ninety days timeline.

Analysis

S. 33 of the Judicature Act provides that;

"the High Court shall, in the exercise of the jurisdiction vested in it by the Constitution, this Act or any written law, grant absolutely or on such terms and conditions as it thinks just, all such remedies as any of the 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."

S. 98 of the CPA provides that nothing in this Act shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

In this case, the application for Judicial Review was filed in Court along with two applications for an interim order, vide MA No. 144 of 2021 and another application, MA No. 143 of 2021 for a temporary injunction. The interim order application required urgent attention by Court and it was therefore fixed for hearing first. When the interim order application came up for hearing, Counsel for the Respondents raised preliminary objections which Court had to first address and yet there was also

the application for a temporary injunction fixed and pending hearing before Court. After the ruling in the interim order, Counsel for the parties agreed under the guidance of court and in the interest of time and justice to maintain the status quo so that the substantive application for Judicial Review is heard. This was done so as to cut down on delays in hearing the substantive application for Judicial Review. There was no way that Court would have moved to hear the application for Judicial review without first disposing of interlocutory matters which required urgency. This court's failure to address the urgent interlocutory matters first would have resulted into a miscarriage of justice. Therefore, I find that failure by this court to hear the substantive application for Judicial Review within the 90 days' period provided for under the law is justified. I don't find it proper to dismiss this application on grounds that time has run out as that would amount to a miscarriage of justice. In the circumstances this preliminary objection is overruled.

Preliminary objection No. 2: That the Applicants' affidavits are argumentative

Counsel for the 2nd Respondent submitted that paragraphs 12-14 of Maximilia Byenkya and Belinda Mutebi Ojiambo's affidavits merely argue the application instead of laying down the facts in evidence to be relied on in determining the application. That it is a narrative of 20 paragraphs. Counsel relied on the cases of **Nakiridde –v- Hotel International [1987] HCB 85 and Re: Bukeni Gyabi Fred HCMA No.63 of 1999[1999] KALR, 918,** where affidavits were struck out for being argumentative and submitted that since the said affidavits do not conform to Order 19 Rules 3 (1) and (2) of the Civil Procedure Rules, the same should be struck off the record.

Analysis

Order 19 rule 3 of the Civil Procedure Rules provides that;

(1) Affidavits shall be confined to such facts as the deponent is able of his or her own knowledge to prove, except on interlocutory applications, on which statements of his or her belief may be admitted provided that the grounds thereof are stated.

(2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay, or argumentative shall, unless the Court otherwise directs, be paid by the party filing the affidavit.

(See also Re: Bukeni Gyabi Fred (supra), where Court held that an affidavit should contain facts and not arguments or matters of the law.

In the case of ***Hon. Theodore Ssekikubo & 3 Others -v- The Attorney General & 4 Others Constitutional Application No.6/2013***, court held with approval the case of ***Banco Arabe Espanol vs Bank of Uganda Civil Application No.08 of 1998*** that;

"... a general trend is towards taking a liberal approach in dealing with defective affidavits. This is in line with the Constitutional directive enacted in Article 126 (2) (e) of the Constitution... Rules of procedure should be used as handmaidens of justice but not to defeat it."

Justice Tsekooko, JSC, (as he then was) in ***Rtd. Col. Dr. Kizza Besigye –v- Yoweri Kaguta Museveni & the Electoral Commission, SC Presidential Election Petition No.1 of 2006***, stated that;

"even if some paragraphs [in the affidavit] might contain hearsay matters and even if the deponent did not specify the source of certain information contained in the affidavit, those were not sufficient grounds for a whole affidavit [to be declared] a nullity." ***See also Kasaala Growers Co-operative Society -v- Kakooza Jonathan & Anor, SCCA No. 19 of 2010,***

I have looked at the said affidavits and the paragraphs referred to by Counsel for the 2nd Respondent, I agree with Counsel that parts of paragraph 12 and 13 of the affidavit of Maximila Byenkya are argumentative, however as guided by the holdings in the above court decisions, this court cannot strike the entire affidavit of the record for only some of the paragraphs of the affidavit being offensive. This court will disregard the offensive parts and consider only those parts that are properly drafted. Accordingly, the prayer to strike of record the affidavits for some parts of the affidavits being argumentative is declined.

Preliminary objection No.3: The Applicant did not exhaust all the existing remedies in the public body:

Counsel for the 1st Respondent relied on **S. 137 of the Insurance Act** which provides for an appeal to the Insurance Appeals Tribunal in cases where one is not satisfied with the decision of the 1st Respondent. He also relied on the case of ***Former Employees of G4S Security Services Uganda Ltd -v- G4S Security Services Uganda Ltd S.C.C.A No.18 of 2010, 201 [unreported],*** in which Court considered a similar position under S. 94(1) of the Employment Act with Justice Dr. Kisakye, JSC noting that;

"Apart from the Supremacy of the Constitution which was discussed earlier in this judgment, it is important to note that the industrial Court currently only exists in name, despite the law creating it having come into force over five and a half years ago. It would, in my opinion, not be proper for this court to hold that persons with employment disputes cannot resort to the ordinary courts of law for justice where the industrial Court is non- existent. Such a holding would leave the aggrieved Ugandan employees and employers with no legal forum to seek justice and peaceful negotiation of their employment disputes."

Counsel also relied on **Rule 7A (1) (b) of the Judicature (Judicial Review) (Amendment) Rules, 2019** which requires an aggrieved person to exhaust the

existing remedies available within the public body or under the law and submitted that the Applicant should have proceeded by way of appeal to the High Court and not Judicial Review.

He went on to explain further that whereas the Applicant while referring to annexture "A" to Stephen Chivokore's affidavit that the 1st Respondent admitted that the Insurance Appeals Tribunal was not constituted and not in operation, the Applicants have not presented any evidence to back up the allegations. That they relied on a letter authored by the 1st Respondent in respect of a different matter vide; ***Paul Tibenda Akiiki –v- UAP Old Mutual Uganda Ltd)***, ***IRAB/COMP.25/10/20;*** which is not in this application. Counsel averred that the Applicants did not even indicate to the 1st Respondent their intention to appeal.

In reply, Counsel for the Applicants contended that the Applicants have exhausted all existing remedies in the public body since by the 1st Respondent's own admission, the 1st Respondent's Appeals Tribunal has not been set up and therefore there is no way the Applicants could have appealed against its decision.

Analysis

In Leads Insurance Ltd -v- Insurance Regulatory Authority of Uganda & Anor, Civil Appeal No.237 of 2015, Musota, J, (as he then was), upheld a preliminary objection by the Insurance Regulatory Authority & Anor, where Leads Insurance LTD applied for Judicial Review yet Section 92B of the Insurance Act (Cap 213) (now repealed), provided for appeal against the decision of the Regulatory Authority to the Insurance Appeals Tribunal, Leads Insurance appealed against the decision of the trial judge to the Court of Appeal, the Court of Appeal allowed the appeal and directed the High Court to hear the application for Judicial Review on its merits. Annexure "A" to the supplementary affidavit in support of the application by

Stephen Chivokore is a letter dated 8th February, 2021 in respect of another matter vide; ***IRAB/COMP.25/01/20: Paul Tibenda Akiiki –v- UAP Old Mutual Insurance Uganda Ltd.*** written by Racheal Kabala for the Chief Executive Officer of the 1st Respondent. Ms. Kabala's letter states that;

> ***2. Please note that the Insurance Appeals Tribunal Regulations which are intended to operationalize S.137 of the Act were passed but are yet to be laid before parliament in line with S. 137(8) of the insurance Act, 2017. The Insurance Appeals Tribunal is also yet to be constituted by the Ministry of Finance, Planning and Economic Development.***
>
> ***3. In the premises, we advise that you file a Civil Suit to have the matter determined by the High Court.***

This application was filed on the 26th/02/2021, about two weeks after the 1st Respondent made the above communication to the 1st Applicant. The 1st Respondent did not challenge the evidence presented by Stephen Chivokore, who is the 1st Applicant's Managing Director. In the circumstances, I find no reason to doubt the evidence by the 1st Applicant that the Insurance Appeals Tribunal in not yet in existence. In view of the finding of the Court of Appeal in the case of ***Leads Insurance Ltd -v- Insurance Regulatory Authority of Uganda & Anor, (supra),*** it is my finding that the Applicants exhausted the existing remedies in the public body and therefore, their application for Judicial Review was properly brought before this Court.

Preliminary objection No. 4: The Applicants' annexures to the affidavits were unsealed and unsigned

In his submissions, Counsel for the 2nd Respondent argued that all the annexures to Maximilia Byenkya and Belinda Mutebi Ojiambo's affidavits in support of this

application are neither sealed nor signed by a Commissioner for Oaths and therefore, they cannot form part of the sworn affidavits and must be struck out for contravening Rule 8 of the Commissioner for Oaths Rules. That Rule 8 of the schedule to the Commissioner for Oaths (Advocates) Act, provides that all exhibits to the affidavits should be securely sealed to the affidavits under the seal of the Commissioner and should be marked with serial letters of identification. Counsel averred that the said default is not an irregularity and should not be treated as one. He relied on the case of ***Amongin Jane Frances Okili -v- Lucy Akello [2015] UGHC 1***, where Court stated that;

"Gilbert Oulanya's affidavit was commissioned before Alice Latigo. Alice Latigo did not securely seal the exhibit to the affidavit. This offends rule 8 of Schedule (Section 7) of the Commissioner for Oaths Rules under the Commissioners for Oaths (Advocates) Act Cap 5, which provides that; "All exhibits to affidavits shall be securely sealed to the affidavits under the seal of the commissioner and shall be marked with serial letters of identification." That this rule is meant to identify the exhibits by the commissioner for oaths to certify that they are authentic. That an affidavit which does not comply with the provisions of the statute as to a prescribed form cannot be admitted. An affidavit is evidence and evidence must be proved…That paragraph of Gilbert Oulanya's affidavit attaching annexure A is not admissible because annexure A has no author and was not formally tendered and admitted in court however persuasive it may be to either party, court cannot rely on it."

Basing on the above, Counsel prayed that the said affidavits be struck off the court record and the motion be dismissed as it cannot stand without evidence.

Analysis

It is trite that an affidavit and the annexures attached to it constitute evidence. ***Rule 8 of Schedule (Section 7) of the Commissioner for Oaths Rules, under the Commissioners for Oaths (Advocates) Act, Cap 5,*** provides that;

"All exhibits to affidavits shall be securely sealed to the affidavits under the seal of the commissioner and shall be marked with serial letters of identification."

In the case of ***Nambowa Rashida –v- Bavekuno Mafumu, Godfrey Kyeswa & Anor EPA No. 69 of 2016, the Court of Appeal cited with approval the case of Uganda Corporation Creameries Ltd and Anor –v- Reamaton Ltd CACA No. 44 of 1998, where Engwau JA, (as he then was)*** made an elaborate distinction between exhibits and annexures and stated as follows: -

"***I think it is very pertinent at this juncture to have the words 'exhibits' and 'annexure' defined as a paper or document produced and exhibited to a court during a trial or hearing in proof of facts. 'Annex' means to tie or bind to or to attach. The word expresses the idea of joining as a smaller or subordinate thing with another, larger or of higher importance. In that context, it is my well-considered view that the word 'exhibit cannot be used interchangeably with the word 'annexure'. An exhibit is a document or thing tendered in court during a trial or hearing to prove a fact but an 'annexure' is a smaller or subordinate thing attached to a larger or principal thing which does not affect that thing of higher importance. In my view, whether or not those annexures have been securely sealed with the seal of the advocate who commissioned the affidavits thereof, does not offend Rule 8 because they were not exhibits produced and exhibited to a court during a trial or hearing in proof of facts. In any case, the annexures in the present case are not in dispute. Even if those annexures were detached, the affidavits thereof would still be competent to support the Notice of Motion. Rule 8 though mandatory, is procedural and does not go to the root***

as to the competence of affidavits. In the premises, substantive justice should be administered without undue regard to technicalities."

The above decision is binding to this Court and I therefore, find as the learned Justices did that failing to securely seal the annexures with the seal of the advocate who commissioned the affidavits does not offend rule 8 of Schedule (Section 7) of the Commissioner for Oaths Rules, under the Commissioners for Oaths (Advocates) Act, Cap 5, because the annexures are not exhibits produced and established to a court during trial or a hearing in proof of the facts. The Applicants' affidavits have not been contested by the Respondents and therefore, even if the annexures were removed, the uncontested affidavits would still stand. In the circumstances, the preliminary objection also fails and is hereby overruled. In the result therefore, all the objections raised by Counsel for the Respondents fail and I now turn to the application itself.

I have already pointed out that the Respondents did not file their affidavits-in- reply as shown on page 5 hereinabove. This means that the application is not opposed. See the case of ***Massa –Vs- Achen [supra] HCB 297,*** where it was held that: -

"where the facts are sworn in an affidavit and these are not denied or rebutted by the opposite party, the presumption is that those facts are accepted."

In this case, the Applicants' contention is that the 1st Respondent acted outside its powers when it declined to refer the case for arbitration as provided for under clause 12 of the performance bond which states that;

"the Bond shall be governed and construed in all respects in accordance with the laws of Uganda and further that any dispute arising out of the said Bond shall be referred to arbitration."

In the case of ***Power and City Contractors Ltd –v-LTL Project (PVT) LTD MA No.62 of 2011 [arising from HCCS No.29 of 2011], at page 5, Musota, J, (as he then was), noted 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."

In National Social Security Fund and WH. Ssentongo T/A Ssentongo & Partners –v- Alcon International Ltd CA No. 02 of 2008 Court noted that: -

"An arbitration clause in a contract has an enduring and special effect, that is; even if parties decide to adopt a different dispute resolution mechanism for a particular dispute that arises under a contract, the arbitration continues in force and is not thereby totally repudiated unless there is solid reason for doing so. Courts will always refer a dispute to arbitration where there is an arbitration clause in a contract"

In this case, it is the Applicants case that the two performance bonds in issue provided for arbitration as their dispute resolution mechanism. That the Respondents did not show any reason for not referring the case for arbitration as provided for under the performance bonds even when the Applicants objected to the 1st Respondent's trial of the matter praying that the case be referred for arbitration. The Applicants relied on court authorities arguing that once there is an arbitration clause in the contract or agreement like in this case, then the matter should be referred for arbitration. The 1st Respondent, while ruling on this issue observed that;

"our position is that those cases are distinguishable because the matter was before court as opposed to the instant matter where it is before a forum the complaints Bureau established by statute"

However, in the same ruling, the 1st Respondent relies on case authorities like the case of ***Chartis Uganda insurance Company Limited –v- Insurance Regulatory Authority of Uganda & Anor HCT 2013 (UGCOMM 8418 April 2013, Miller –v- Minister of Pensions [1947]ALLER 372, Attorney General –v- Niko Insurance Uganda Ltd HCCS No. 240 of 2012, Wuhan Guoyu Logistics Group Co Ltd & anor –v- Emporiki Bank of Greece SA(2013)***

The 1st Respondent having declined to rely on the case law cited by Counsel for the Applicants/Respondents in his objection, it was not proper for it to rely on court decisions while addressing subsequent or other issues. The law should not be applied selectively. It is my view and finding basing on the above that by incorporating an arbitration clause in their performance bond that was signed by both parties, the parties recognized that arbitration was an effective means of solving disputes that could arise. It was therefore, not right and proper for the 2nd Respondent to file their complaint with the 1st Respondent instead of referring the matter for arbitration as provided under the performance bond. In as long as the arbitration clause is in force, the parties cannot just push aside the arbitration clause in preference for other dispute resolution mechanisms without justification. Therefore, the 1st Respondent had no mandate to adjudicate the complaint that was filed before it by the 2nd Respondent. The matter should have been referred for arbitration. Therefore, I find that by hearing the matter, the 1st Respondent acted outside its jurisdiction. Therefore, this court now makes the following orders and declarations: -

1. **An order for Certiorari be and is hereby issued quashing the decision of the 1st Respondent in IRAB/COMP.121/10/19 Uganda Railways Corporation (URC) Ltd -v- UAP Old Mutual Insurance Uganda, Britam Insurance Uganda Ltd and Sanlam General Insurance Uganda.**

2. **A declaration be and is hereby made that the 1st Respondent exceeded its authority in issuing the decision in IRAB/COMP.121/10/19 Uganda Railways Corporation (URC) Ltd -v- UAP Old Mutual Insurance Uganda, Britam Insurance Uganda Ltd and Sanlam General Insurance Uganda, as the matter should have been referred to Arbitration in accordance with the terms of the performance Bond signed by the parties.**
3. **A declaration be and is hereby made that the dispute between the Applicants and the 2nd Respondent should have been referred to arbitration in accordance with the terms of the Performance Bond signed by the parties.**
4. **A permanent injunction be and is hereby issued restraining the Respondents and/or their nominees, agents or servants from enforcing and executing the ruling passed by the 1st Respondent**
5. **A permanent injunction be and is hereby issued restraining the 1st Respondent from further adjudicating the dispute between the 2nd Respondent and the Applicants.**
6. **Costs of this application be provided for by the Respondents.**

I so order.

Dated, signed and delivered by mail at Kampala this 13th day of August, 2021.

Esta Nambayo

JUDGE

13th/08/2021.