

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL SUIT NO. 423 OF 2014**

SOUTHERN RANGE NYANZA LIMITED ::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

UGANDA NATIONAL ROADS AUTHORITY ::::::::::::::::::::::::::::::::::: DEFENDANT

VERSUS

COWI LIMITED ::::::::::::::::::::::::::::::::::: THIRD PARTY

JUDGMENT

The plaintiff filed this suit seeking for a declaration that the defendant owes the plaintiff a sum of Uganda Shillings thirty billion four hundred seventy eight billion (UGX 30,478,000,000) arising out of a claim for injurious affection suffered by the plaintiff owing to expropriation of its property, special damages, and general damages of 2,000,000,000/= interest and costs of the suit.

In 2010 the 1st defendant planned and sought to construct a new bridge across River Nile at Jinja Uganda. Part of the Plaintiff's land comprised LRV 403 Folio 3 Plot No. 22-52 and 21-51 Yusuf Lule road, Njeru Town Council was identified as the most optimal alignment for construction of the New Nile Bridge. Through the Chief Government Valuer, the land was assessed a valuation report generated. In accordance with the report, the 1st defendant made an offer of **UGX 8,980,810,000/=** being compensation particularly for the administration block –UGX 1,150,000,000/=, bonded warehouse – UGX 6,210,000,000/=, weighbridge – UGX 6,210,000/=, parking shed – UGX 13,800,000/=, site works – UGX 296,700,000/=, residential block – UGX 92,000,000/=, land-Plot 22-52 & 21-51 – UGX 1,186,800,000/= and Plot M-35 – UGX 25,300,000/= plus 15% Disturbance Allowance making a total of 8,053,260,000/=

At the point of effecting the said compensation to the plaintiff, it raised several fears of some of its properties being injuriously affected by the construction works and it was agreed between both parties that further consultations would be made at the design stage to consider all effects identified in the Resettlement Action Plan and that it is at that point that all issues raised by the plaintiff would be addressed. At the design stage however, the plaintiff's claims for further compensation were not considered.

At the time of filing this suit, the construction of the New Nile Bridge had since began without the assessment of the plaintiff's injurious claim. The construction was completed and the 1st defendant contends that the construction works were carried out up to the end without occasioning any damage (as earlier feared) to the plaintiff's factory. The plaintiff claims that the defendant breached its promise to compensate it.

The plaintiff further claims that when its certificate of title formerly pledged as security to Bank of Baroda (plaintiff's banker), was released to the defendant and not returned within the agreed 90 days, it suffered business loss as it could no longer access credit facilities. It was on that claim that the defendant joined the third party to this suit claiming to be entitled to a contribution and/or indemnity from the Third Party for any liability, loss, damages or costs which the plaintiff claimed from the defendant as a result of the delay to return the title.

Representation

The plaintiff was represented by *Mr. Mugabi Enoth* while the defendant was presented by *Mr. Kanya Titus* and *Mr Pecos Mutatina* while the Third Party was represented by *Mr. Mubangizi Absolom*

During Scheduling, the following facts and issues were agreed upon by the parties.

Agreed Facts

- The plaintiff is the registered proprietor of land comprised in LRV 403 Folio 3, Plot No. 22-52 and 21-51 Yusuf Lule Road, Njeru Town Council.

- The defendants expropriated part of the suit land for the New Bridge Construction.
- The plaintiff was paid and acknowledged receipt of compensation of Ugx 8,980,810,000/=, which comprised payments in respect of expropriation of Administration block, Bonded Ware house, Weigh bridge, site works, Residential Block, Parking Shade, land and a 15%Disturbance Allowance.
- The suit land certificate of title at expropriation had been pledged as security to Bank of Baroda for a Loan by the plaintiff, that was released by the Bank to 1st defendant for sub-division and transfer of the expropriated portion.

Agreed Issues

1. Whether the plaintiff suffered any compensable loss over and above the compensation of UGX 8,890,810,000/= that was payable by the defendant as a result of the acquisition of the suit land for which the defendant is liable.
2. Whether the dispute between the defendant and Third Party should be referred to Arbitration.
3. Whether the Third Party is liable to indemnify the defendant as claimed.
4. What remedies are available to the parties?

The parties filed final written submissions that were considered by this court.

RESOLUTION OF ISSUES

Issue 1: Whether the plaintiff suffered any compensable loss over and above the compensation of UGX 8,890,810,000/= that was payable by the defendant as a result of the acquisition of the suit land for which the defendant is liable.

According to the plaintiff, the compensation received was on condition that the defendant first address the concerns raised at the design stage something that the defendant did not do. The plaintiff had fundamental credible concerns to the operation of the factory, possible interruption with production in the event of disabling the functioning of the Effluent Treatment Plant, any changes to the plaintiff's operation flow and resultant operational changes, inconvenient use and access of staff canteen

and Archives Section Development as well as dust and heavy vibrations expected during the construction phase of the bridge reaching equipment located close to the highway.

The defendant on the other hand submitted that the plaintiff was promptly & adequately compensated for the acquisition of its land and as such suffered no loss attributable to the defendant's actions. Counsel further submitted that the plaintiff's fear at the time it received the compensation was that if the issues raised then, remained unattended to, its factory would be severely affected by effects of the construction works however approximately 3 years since the New Nile Bridge project was completed, the plaintiff is fully operational and functioning without any effects registered.

Compulsory acquisition of private land for public use or interest is provided for under the Constitution which also highlights the principle of adequacy of compensation. The principle of adequacy of compensation is enshrined under **Articles 26 (2) and 237** of our **Constitution**. **Article 26 (2)** provides for *the prompt payment of fair and adequate compensation, prior to taking possession or acquisition of the property for public use in the event of compulsory land acquisition especially in instances where the land is required for public use or interest.*

In this case the plaintiff contends that it was not adequately compensated. That it was paid and acknowledged receipt of conditional compensation of **UGX: 8,980,810,000** which comprised payments in respect of expropriation of; the Administration Block (Modern & Executive Single Storied), Bonded Ware House, Weigh Bridge, **Site Works (2)**, Residential Block and land and a 15% disturbance allowance.

From the evidence on record, on the 9th July 2013, the plaintiff, the defendant and CGV visited the suit land, to which it was thereafter agreed there were fundamental credible

concerns to the future operation of the plaintiff of possible interruption with production in the event of disabling the functioning of the Effluent Treatment Plant (referred as the "ETP") literally disabling the factory from operation among others.

It was agreed, the CGV would nominate 2-3 names of consultants to carry out the injurious affection claim for the plaintiff, the defendant would coordinate the procurement of the consultants with the objective of enabling CGV receive the independent consultants report within 40 days (by the end of August 2013) to guide the settlement of the plaintiff's injurious affection claim. The CGV recommended three consultants from whom one was to be designated by the defendant to undertake the assessment however no appointment was done of the three (3) consultants recommended by the CGV and no assessment was done by the defendant during the design stage and throughout the entire project construction period which prompted the plaintiff to file this suit. It was the plaintiff's submission that, the compensation paid to the Plaintiff was conditional.

The plaintiff submitted that the defendant undertook to consider the concerns raised by the Plaintiff at design stage. To-date the New Nile Bridge is completed and in use, without the consideration raised by the Plaintiff being considered/assessed, contrary to the "*Principle of Equivalence*". The plaintiff's counsel submitted that, at Page 18 Paragraph 6.8 of the GCALA it is noted Severance and Injurious Affection; *assessments of the value lost due to injurious affection and severance would have to be undertaken and included in the compensation*. Severance occurs when the land acquired contributes to the value of the land which is retained, so that when severed from it, the retained land loses value while injurious affection is the depreciation in value of the property as a result of the proposed construction and use of the land acquired by the acquiring authority for the scheme and its treatment should be as provided for in the Common Law.

The plaintiff submitted that the orphaned land measuring approximately three (3) acres across the road, severed as a result of expropriation has been rendered cumbersome to use-confirmed by DW2, which entitles the Plaintiff to a "*severance damage*".

Furthermore, it was the plaintiff's case that it has suffered indirect loss as expounded by its' testimony and elaborated by a self-help prepared Consequential Loss Quantification Report - **EXHIBIT P17**. The loss as expounded in this report is non-physical entitling the plaintiff to compensation for "Injurious Affection"

The defendant submitted that whilst the parties had agreed by minutes 9th July, 2013 that the CGV would nominate 2-3 consultants to be tasked to assess the injurious affection claim from the plaintiff that was prepared by **M/S SURVESIS**, the plaintiff later changed its claim as prepared by Survesis and instead procured D. Craven Consulting to prepare the Consequential Loss Compensation Claim Report, contrary to the consultants nominated by CGV and the Report referred to by the CGV. This in effect altered that agreed terms resulting in each party relying on its own independent consultants. The plaintiff is therefore estopped on making reference to the initial arrangement or to insist on the assessment by the CGV in the circumstances. If the plaintiff believes that the CGV should have assessed the alleged consequential loss, it should have submitted its experts report to the CGV for his assessment which it failed to do.

Counsel for the defendant further submitted that while the plaintiff seeks for costs of replacement, relocation and re-alignment of various facilities, no evidence was led to show that following the completion of construction of the New Nile Bridge, there was need to replace, relocate and realign the said facilities. There was no technical expert or engineer who testified on part of the plaintiff to prove the effect if any on the facilities before, during and after construction of the bridge. The only expert report was prepared by D. Craven Consulting (Chandi Jamwa) who did not appear in court to defend their

report. It is noteworthy that these were neither engineers nor valuers. Indeed the defendant's documents P.17 and Exhibit D4 being the Expert Valuers reports prepared by Knight Frank (Judy Rugasira-MD) and UNRA Land Valuation Department Report (Solomon Arinaitwe, accompanied by a Civil Engineers report Morris Odwoch) respectively clearly show that the plaintiff's said facilities/properties were not affected following the completion of the bridge and there was no need for relocation, re-alignment or replacement of the same.

The following were the concerns raised by the plaintiff prior to the construction of the New Nile Bridge as discussed by the defendant in their submissions;

The staff canteen and archives section that would be cut off from the main factory rendering its access and use impossible.

According to the plaintiff, the staff canteen and archives section development would remain situate across the bridge following the bridge alignment hence use of these facilities would be compromised. The plaintiff would not be able to use these facilities conveniently as it would have wished.

The defendant submitted that during trial the plaintiff's director Mr. Richard Mubiru confirmed that the staff canteen and archives stores are still in place and can be accessed from the Njeru part. PW2 testified that the plaintiff had incurred additional business related costs because of hiring more space for storage and canteen services. Through cross examination, the PW2 testified that the canteen is still there and that some staff live there accessing it through an alternative route. The plaintiff rented space from picfare a sister company of the plaintiff where the canteen is now situate.

The plaintiff also contended that it had to rent archives stores in Kampala upon the expropriation of their land. PW 2 Sanjeev Sharma during cross examination testified that the renting of office premises in Kampala, instead of Njeru was for the convenience

of the plaintiff and not the New Nile Bridge project. He testified that previous archives and store are still accessible and they sit on a plot of land of about 3 acres which has ample parking space.

The defendant submitted that since the archives section is accessible, the plaintiff should not be paid for the cost of hiring stores and archives in Kampala for convenience purposes. Since PW1 testified rightly so that the archive stores and staff canteen were not among the buildings expropriated by the Defendant and where thereby not affected, they remained accessible and senior management still uses the canteen for its meals, counsel invited court to find that there is no justification for this claim for payment of alternative stores and canteen as these were purely for the convenience of the Plaintiff.

Permanent increase in the cost of production due to expropriation of the raw material warehouses which shall permanently affect the vertical production process flow, hence increased cost of production on account of transport cost for raw materials.

The plaintiff seeks for costs of relocation of the raw materials ware house. The plaintiff claimed that it might suffer a permanent increase in the cost of production due to expropriation of the raw materials ware house.

The defendant on the other hand submitted that the warehouses were compensated for by the defendant with a 15% disturbance allowance, which fact is acknowledged by the Plaintiff. Therefore, a claim for relocation of the same is superfluous, frivolous and vexatious, because under compulsory land acquisition, one is already compensated to relocate a structure from the expropriated land.

Costs of relocation of the Spinning Department

The plaintiff seeks for costs of relocation of the spinning unit stating that it might suffer vibrations from the bridge affecting the spinning unit.

The defendant submitted that no evidence of vibrations affecting the spinning unit was led or proved by the Plaintiff. On the contrary the defence Reports Exhibit P. 17 and Exhibit D4 show that neither the spinning unit nor the rest of the plaintiff's factory was or is affected by vibration from the traffic on the New Nile Bridge. Both Plaintiff's and Defendant's witnesses confirmed that the spinning unit was not affected by the expropriation of part of the plaintiff's land for construction of the New Nile Bridge. At the time of receiving compensation, the plaintiff feared that during the construction stage, there would be a possibility for vibrations and dust resulting in to impossibility for the plaintiff to maintain the spinning department at its current location and therefore it needed to have the same relocated to avoid such effects.

Counsel for the defendant further submitted that at the time this claim was raised it was speculative because the construction works had not commenced and so it was unreasonable for the plaintiff to demand its spinning department to be relocated. Counsel concluded that this claim was overtaken by events hence untenable under law.

Enhanced security at the present spinning department.

It was the defendant's submission that from the evidence adduced, it is clear that the spinning department was not affected by the construction of the bridge and there was no need to relocate the same. Furthermore, increased security at the present spinning department or elsewhere at the factory as a result of expropriation of land is a claim too remote and this inconvenience if any, is catered for in the 15% disturbance allowance.

Costs for relocation of the administration blocks and raw material ware houses.

PW3 Richard Mubiru during cross examination testified that the administration block and warehouses were compensated. There is no need for this court to address this concern.

Relocation of the Effluent Treatment Plant (ETP), without which the process house cannot work.

PW3 testified that after construction of the bridge, the ETP was affected. He testified that the channel that evacuates water from the effluent plant is underneath the bridge. He further testified that channels of this nature once they are covered they can't be opened since they are susceptible to blockages which could then kill off the entire facility. The witness also testified that they were experiencing leakages affecting the operations of the plaintiff.

The defendant's second witness testified that the defendant mitigated any damage to the factory to ensure its continued operation which wasn't interrupted. The ETP was protected by site hooding. Exhibit D4 appendix 1 showed that the ETP and sewerage system were protected which enhanced and improved the plant's capacity extending its functional life as per DW2.

Counsel for the defendant submitted that during trial the defendant led evidence (**see appendix 1 of Exhibit D 4**) to show that the effluent line crossing the project site was encased in high strength concrete which eliminates any possibility of future leakage because even if the encased asbestos pipe is worn off, the hollow section equivalent to the external diameter of the pipe would have formed the high strength concrete that would successfully facilitate the flow of the effluent liquid. In addition, all effluent manholes within the site area were improved under the project cost on the request of the plaintiff. Furthermore, there is no structural loading on the encased pipe running from the effluent treatment plant across the project area to the downstream side that will endanger or affect the functionality of the pipe as shown in the photos and notes on page 1 of Appendix 1 to Exhibit D4. Consequently, there was no need for the construction of a brand new Effluent Treatment Plant because the existing one was not affected. Counsel further submitted that the plaintiff's insistence on the second

assessment of the issues that remained unattended to is misconceived and of no effect the construction works having ended without the feared damage taking place.

Relocation of other critical infrastructure like power, drainage channels underneath the present factory for storm water, whose blockage at construction would mean flooding of the entire place.

Counsel for the defendant submitted that the plaintiff reasoned that if infrastructure like power and drainage channels were affected at the construction stage, it would be difficult to avert any likely damage but adduced no evidence of damage caused to the power lines and drainage channels during construction to warrant the compensation claimed.

PW1 testified that there were no electricity lines in need of relocation within the right of way.

Counsel further submitted that in any event from the evidence adduced in court, the construction is now completed and there has not been any electricity, water or sewage lines that were cut off or rendered nonfunctional by reason of the expropriation and construction of the New Nile Bridge.

The super sensitivity to vibration and dust by hugely electronics based machinery in the spinning department.

The plaintiff contended that the bridge alignment being too proximate to the spinning department that has hyper dust and vibrations sensitivity machinery, there would be a high likelihood that the equipment would be damaged.

Under Minute 2 following the meeting of 9th July 2013, it was noted by the plaintiff that the large electronics driven machinery and equipment- spinning department located

close to the highway would obviously reach by dust and heavy vibrations expected during the construction phase.

The defendant led evidence (see **appendix 1 of Exhibit D4**) during trial that best construction methods were used by the contractor whereof a retaining wall of approximately 4 meters high bordering the plaintiff's premises and the right of way before actual road works which effectively eliminated the impact of vibration on the adjacent properties.

Analysis

The court shall now resolve the concerns raised by the plaintiff and claims of injurious affection and severance.

The plaintiff claimed that it suffered injurious affection severance. As cited by counsel for the plaintiff, **Paragraph 6.8 of the Guidelines-for-Compensation-Assessment-under-Land-Acquisition (GCALA)** provides for severance and injurious affection; assessments of the value lost due to injurious affection and severance would have to be undertaken and included in the compensation.

Severance; occurs when the land acquired contributes to the value of the land which is retained, so that when severed from it, the retained land loses value. For example, if a new road is built across a field, it may no longer be possible to have access by vehicle to part of the field, rendering it virtually useless and therefore less valuable.

Injurious Affection; injurious affection is the depreciation in value of the property as a result of the proposed construction and use of the land acquired by the acquiring authority for the scheme and its treatment should be as provided for in the Common Law. Claims arising injurious affection under Common Law may include lack of access to homes, amenities, means and sources of livelihood, drainage, privacy, noise and compatibility of existing land use among others. It is the impact of the whole of the

proposed scheme that is to be considered not just the effect on the area acquired from the land owner.

In the case of *Abbey Homesteadys Group Ltd v Secretary of State for Transport* [1982] 2 EGLR 198 The land Tribunal found that compensation for land taken must be as a matter of law be assessed separately from compensation for severance and injurious affection to the land retained. In the present case, it appears both assessments for the land and possible assessment of loss where done together and the practice is more convenient, although the plaintiff had anticipated more loss which lead to the filing of this suit which never happened.

Compensation for severance and injurious affection therefore represents the difference between the value of the retained land 'with or 'without' the project. In the case of *Melwood Units Pty Ltd v Commissioner of Roads* [1979] 1 All ER 161; The Privy council noted that it is permissible to apply the Pointe Gourde principle to the assessment of compensation for severance and injurious affection as well as for compensation for land taken. Therefore any increase or diminution in the value of retained land due to matters having developed in a different way because of the scheme should be left out of the account.

The valuation of compensation for the land acquired and compensation for injurious affection for the retained land must be made on a consistent basis as noted in the case of *Horn v Sunderland Corporation* [1941] 2 KB 26.

A claim for depreciation in the existing use value of retained land should be resisted to the extent that such depreciation would have been an inevitable consequence of dividing the land for the purpose of realising a price for development purposes for the land taken. The main objective should be to ensure that- within what the law allows-

the claimant receives in total compensation no less, but more, than the claimant's real loss.

With those guidelines and principles in mind, court ought to determine whether the plaintiff's circumstances fall within the stipulation above.

All the witnesses called by the parties testified that the alleged orphaned land can still be accessed by the plaintiff. PW1 testified that the staff canteen remained accessible and senior management still uses the canteen for its meals whereas the archives are used as residences for some of the staff. Indeed, the plaintiff witness confirmed that the archives were transferred to Kampala for their convenience and not necessarily due to inaccessibility.

The plaintiff's land was therefore not rendered virtually useless as a result of the project however PW2 testified that it was disturbance for the senior management to move a longer route than they usually used to stating that the distance from the factory to the canteen was now longer than it was before. PW3 also testified that the old structures were still in place but accessing the old canteen was inconveniencing hence the plaintiff had to rent other premises leaving the original canteen to accommodate some of its employees. PW3 further testified that like for the canteen, accessing the old archive stores was possible but with difficulty. When asked by court why the archive stores were then transferred to Kampala, PW3 testified that it was because of strategic considerations.

From this evidence the court is comfortable to conclude that the plaintiff did not suffer injurious affection and/or severance when it came to the orphaned land. The plaintiff made a conscious decision to move their archive stores to Kampala alive to the fact that the old stores were still accessible and available for use. It was not a decision that was caused by the New Nile Bridge project. The same applies to the canteen, severance and

injurious affection cannot be claimed owing to the fact that the canteen is still accessible and available on foot and by vehicle, is in use by senior staff and accommodates other employees of the plaintiff. The inconvenience experienced by the plaintiff with regard to a longer route is part of the general upheaval as a result of the expropriation was provided for in the compensation awarded as part of the 15% disturbance allowance.

There is no stated basis upon which compensation for severance and injurious affection should be assessed. The measure of compensation should be value to the owner and not open market value. The damage due to severance mainly arises when the land acquired reduces the value of the land retained. The measure of compensation in respect of severance is depreciation in the value of the claimant's retained interest arising from severing of land acquired from the original whole. It is not known by evidence whether the land in issue indeed reduced in value and on the contrary it could have increased in value due to its accessibility on the main road. Compensation for severance and injurious affection should relate to the depreciation in the market value of the claimant's retained interest. See *Budgen v Secretary of State for Wales* [1985] 2 EGLR 203; *R A Vine (Engineering) v Havant BC* [1982] 2 EGLR 15

The permanent increase in the cost of production due to expropriation of the raw material warehouses which shall permanently affect the vertical production process flow, hence increased cost of production on account of transport cost for raw materials. The raw material warehouses were expropriated and compensated for as confirmed by PW2. The consequences of their relocation were catered for under the 15% disturbance allowance hence the plaintiff cannot credibly raise this is a concern to seek more payment from the defendant.

Costs of relocation of the Spinning Department; the plaintiff's witnesses did not lead evidence to show that the plaintiff suffered was or is affected by vibration from the traffic on the New Nile Bridge. It was therefore unreasonable for the plaintiff to relocate

the spinning department with no evidence of suffering dust or vibrations from the New Nile Bridge to warrant its relocation.

The effect of compulsory acquisition may be to increase substantially the costs of using the retained land. The cost of working on the land will however be reflected in its open market value. It is therefore not the increased cost of using the land retained that can be claimed but the depreciation in the open market value of that land following the acquisition compensation for the liability of a claimant for the increased costs of working the land comprises injurious affection and not disturbance.

Enhanced security at the present spinning department. There was no evidence from the plaintiff's witnesses to prove that the plaintiff has to pay above and beyond for enhanced security as a result of expropriation. The court can therefore not make an award in absence of evidence to back up this claim.

Relocation of the Effluent Treatment Plant (ETP), without which the process house cannot work. PW3 when asked by defence counsel whether the ETP suffered any damage attributed to construction of the bridge, he evaded the question however testified that the plaintiff was experiencing leakages but did not reliably inform this court whether the leakages were attributed to the construction of the bridge. The court cannot engage in speculation to assign responsibility of the leakages to the defendant for the leakages at the plaintiff's factory.

Relocation of other critical infrastructure like power, drainage channels underneath the present factory for storm water, whose blockage at construction would mean flooding of the entire place. The plaintiff did not lead any evidence to prove that there was relocation of any critical infrastructure as a result of construction of the New Nile Bridge. With no evidence the court cannot reliably believe that there was any relocation then or now after construction of the bridge.

The super sensitivity to vibration and dust by hugely electronics based machinery in the spinning department. There was no evidence by the plaintiff to show that the hugely electronics based machinery closely situate to the bridge was affected by vibration and dust from the bridge. The defendant led evidence **Exhibit D4** during trial that best construction methods were used by the contractor whereof a retaining wall of approximately 4 meters high bordering the plaintiff's premises and the right of way before actual road works which effectively eliminated the impact of vibration on the adjacent properties. The court found this evidence reliable.

On that note, I find all the concerns raised by the plaintiff incredible. However the defendant acted improperly and besides their agreement with the plaintiff, had they honored their promise to assess these concerns before construction of the bridge these concerns would have been ruled out earlier and the plaintiff's fears laid to rest. However, it was also a blessing in disguise since the court was able to assess the entire project after its completion rather than making assumptions of the anticipated losses arising out of the construction of the project.

In addition to the above, the plaintiff contends that they suffered loss as a result of the defendant and 3rd party staying in possession of their certificate of title longer than the agreed 90 days.

The Suit Land Certificate of title at expropriation had been pledged as security to Bank of Baroda for a loan by the plaintiff that was released by the Bank to 1st Defendant for sub-division and transfer of the expropriated portion. The Defendant returned the residue Certificate of Title to Bank of Baroda on 11th May 2015. Counsel for the plaintiff submitted that the defendant ought to have returned the Title to the Bank on **31st September 2010** however the defendant contended that this period was extended. PW3 testified that the plaintiff took on best endeavours to seek for the return of the Certificate of Title as borrowers. PW3 in cross-examination testified that the 90 days

were entered upon the clear background that the plaintiff had one certificate of title, which was pledged to Baroda so the possibility of extension was not there because this title was the only security for the business.

Counsel further submitted that because of the delay in return of the Title the Bank could not enhance the Plaintiff's borrowing limits, this curtailed growth. PW3 noted the Plaintiff's turnover increased on return of the title to 62.3 Billion in 2015, 74.6 Billion in 2016, 83.8 Billion in 2017, 88.7 Billion in 2018 and 108 Billion at end of 2019 from 56 Billion at end of 2014; which is a demonstration that the plaintiff had capacity to have Bank of Baroda enhance access to working capital so as to cause business growth. This explains clearly why the plaintiff's turn-over that was UGX 41. 2 Billion in 2010 only grew to UGX 62.3 Billion by end of 2015 in five years yet in the subsequent 4 years from 2015, turn-over grew to UGX 108 Billion. Clearly, the less than optimal business performance as herein explained is directly linked to the less than optimal borrowing/credit facilities up-take dictated by conditions visited on plaintiff by defendant's failure to return the title in 90 days.

The defendant on the other hand submitted although the parties had initially agreed to ensure subdivision and return of the residue title is completed within 90days, there were circumstances beyond the control of the defendant that necessitated the further extension of time to complete the exercise and return of title. The parties having agreed to waive the time, the same ceased to be of essence especially given the fact that the parties collaborated to ensure that the plaintiff mortgages/credit facilities were registered on the title while it was still in the custody of the land office.

Counsel further submitted that save for the allegations made by the Plaintiff that it suffered such losses, no scintilla of evidence was produced in court of any credit applications made by the plaintiff and rejected on grounds of non-availability of its title whereas the defendant led evidence to show that even with the absence of the said title

from the plaintiff's custody, it enabled the plaintiff to have all its facilities registered on title. A perusal of the certificate of title particularly on the encumbrance page, it is evident that all mortgages executed between the plaintiff and its bankers during the period when the title was with the defendant's agent COWI (June, 2010 – May, 2015), the said mortgages were effectually registered on the title. This fact was not denied by the plaintiff, in fact during cross examination both Sanjeev Sapkota Sharma-the plaintiff's Finance Manager and Mr. Richard Mubiru-one of the plaintiff's directors confirmed to court that the plaintiff obtained credit facilities from Bank of Baroda, its banker between 2011 and 2015 (the period when the title was with the defendant's agents).

The plaintiff also contended that that it was charged interest of 3% following its excess drawing beyond sanctioned limits of UGX 2.5 Billion and USD 3.75 Million. The plaintiff relied on **Exhibit P 11**- a letter from Bank of Baroda wherein it was stated that due to the plaintiff's failure to prevail over the defendant to return its title, constrained the bank's capabilities to continue enhancing the plaintiff's credit due to breach of lending terms which thereby triggered penalties. Counsel for the defendant submitted that the document ought to be studied cautiously owing to the fact that the letter was written to the defendant by Bank of Baroda upon request from the plaintiff to provide the defendant with information in respect of financing terms, particularly; regarding the delay by the defendant to return the certificate of title. Counsel wondered why in the first place this information (on penalties levied against the plaintiff as a result of non-availability of title) was not available to the plaintiff itself.

Counsel for the defendant further submitted apart from the said letter, there is nothing that was adduced in court showing the exact interest that was levied. The plaintiff neither produced original sanction letters from the bank addressed to it detailing the percentages and amounts that were to be levied for its alleged breaches of lending

terms, nor was there evidence of the bank accounts from which the alleged drawings over the permitted limits were made and bank statements showing that interest levied as a result of the said breaches.

The plaintiff also alleged to have missed a business opportunity to supply textiles to South Sudan attributed to the defendant's failure to return the title within the agreed 90 days. The defence counsel submitted that exhibit PE.19 (Annexure 10 reading contract award from South Sudan; letter dated 8th December, 2014) presented showed a different company (Ms. Southern Nytil Garments Ltd) from the plaintiff that was addressed. The exhibit was not signed by the issuing authority. It fell short of a contract between the plaintiff and the Government of South Sudan as alleged or an offer/bid. Furthermore that plaintiff was at all times able to register credit facilities with on the title during the period is issue. Therefore the claim that it missed a business opportunity on account of the missing title is unfounded.

It has been clear from the evidence adduced before this court, the title not being in physical possession of the plaintiff's bankers did not stop the plaintiff from acquiring credit facilities from the bank. This was confirmed by all three of the plaintiff's witnesses. The court concurs with counsel for the plaintiff that the title was returned out of the time agreed by the parties however the plaintiff did not prove to this court what loss was suffered as a result of this delay. Counsel's submission that because of the delay in return of the Title the Bank could not enhance the plaintiff's borrowing limits, this curtailed growth is not tenable since there was no evidence led by the plaintiff showing that they were ever denied credit facilities by the bank as a result of not having physical possession of the title. All evidence on the encumbrance page of the title shows that the plaintiff continued to access credit facilities as usual despite the title being in the possession of the defendant and/or third party. Secondly, the third party witness also testified that the leases expired and they had to make applications for renewal.

The plaintiff contention that it was charged interest of 3% following its excess drawing beyond sanctioned limits of UGX 2.5 Billion and USD 3.75 Million was also not reliably proved before this court. The plaintiff relied on **Exhibit P 11**- a letter from Bank of Baroda wherein it was stated that due to the plaintiff's failure to prevail over the defendant to return its title, constrained the bank's capabilities to continue enhancing the plaintiff's credit due to breach of lending terms which thereby triggered penalties. However evidence showed that even before the title was submitted to the defendant there was still a clause saying 5% additional interest will be charged. PW2 in his cross examination while explaining the bank's sanctions and penalties testified that whether the bank's client has the title or not, it is standard of norms that the bank will penalize this money. PW2 testified that these are standard norms of the bank whenever they sanction any letters they always add that clause.

Furthermore PW2 did not reliably inform this court if the plaintiff had drawn beyond the permitted limit.

The plaintiff also alleged to have missed a business opportunity to supply textiles to South Sudan attributed to the defendant's failure to return the title within the agreed 90 days. PW3 stated there was award for the contract but rather an invitation to quote for the business. The plaintiff failed to prove correlation between the absence of the title and the failure to be awarded the contract.

Therefore everything considered, I do not find that the plaintiff suffered any compensable loss over and above the compensation that was paid by the defendant that included 15% disturbance allowance. On that note, issue 1 fails.

Issue 2: Whether the dispute between the defendant and third party should be referred to arbitration.

The involvement of the third party in this case is only limited to indemnification of the defendant in the event court finds it liable to the plaintiff.

From my determination of issue 1, the court has found the plaintiff's claim devoid of any merit therefore the defendant is not liable in any way to the plaintiff. It would be redundant for the court to delve further into the determination of this issue however regardless of that it is worthy to note that had the defendant been found liable to the plaintiff, the question of indemnity between the defendant and the third party would have been referred to arbitration.

Although judicial power is an essential prerogative of any country, the parties may if they express the wish to do so, give jurisdiction to arbitrators to settle their disputes. However, a country retains the power to prohibit settlement of certain types of disputes outside its courts.

The contract between the defendant and third party clearly stipulated that disputes arising would be referred to arbitration. Despite this court being clothed with inherent unlimited original jurisdiction under **Article 139**, it has also pronounced itself several times that when it comes to arbitration this court it has limited jurisdiction in arbitration matters as per **section 5** of the **Arbitration and Conciliation Act**. It provides as follows:

"5. Stay of legal proceedings.

(1) A judge or magistrate before whom proceedings are being brought in a matter which is the subject of an arbitration agreement shall, if a party so applies after the filing of a statement of defence and both parties having been given a hearing, refer the matter back to the arbitration unless he or she finds—

(a) that the arbitration agreement is null and void, inoperative or incapable of being performed;

or

(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

(2) Notwithstanding that an application has been brought under subsection (1) and the matter is pending before the court, arbitral proceedings may be commenced or continued and an arbitral award may be made."

The arbitration clause in the contract is very clear about referring any dispute between the defendant and 3rd party to arbitration which both parties validly entered into and there were no grounds in these circumstances warranting refusal of this dispute to arbitration. Arbitration is ultimately a matter of consent. Parties' intentions and expectations and arbitrators' discretion should be given priority.

The underlying basis of arbitration is that it is a consensual process in which parties refer disputes to a neutral third party to make a binding decision. Therefore the consensual nature and the principle of freedom to contract give the right to arbitrate mutuality right to arbitrate which is so sacrosanct that negating it would be contrary to public policy.

The court in **British American Tobacco Uganda Limited vs Lira Tobacco Stores M.A No. 924 of 2013** extensively discussed the jurisdiction of this court when it comes to arbitration matters. Justice Christopher Madrama Izama held; *"Before taking leave of this issue, the Respondents Counsel referred to section 14 of the Judicature Act which provides for the unlimited original jurisdiction of the High Court. However under section 14 (2) (a) of the Judicature Act, the jurisdiction of the High Court shall be exercised in conformity with the written law. Particularly under section 14 (2) (b) of the Judicature Act provides that subject to any written law, the High Court may apply any established and current custom or usage. In other words, any customs or usage is subject to the written law. The court therefore has no*

jurisdiction or discretionary powers to try any customs or usages which are in conflict or not in conformity with section 5 of the Arbitration and Conciliation Act."

Where a valid arbitration agreement exists between the parties to a dispute, they will be discouraged by the courts from commencing any court action until the terms of arbitration agreement are satisfied. The provisions of the Arbitration and Conciliation Act are quite instructive on this matter and the net effect of those provisions is that once the parties have agreed to settle their disputes by arbitration and one party, attempts to side-step this procedure by commencing legal proceedings, such proceedings will not be allowed to proceed until the arbitral process has been completed. The law makes it obligatory for the judicial authority not only to make an order for staying the proceedings on an application from the party, but also refer the parties to arbitration.

The defendant brought third party proceedings in breach of an existing arbitration agreement and it may seem that this was due to the suit filed against it and they were forced to have the third party explain the delay in processing the land title for the plaintiff. It was out of fear of being condemned for actions of the third party and the court would have apportioned responsibility and liability to that extent.

In the premise therefore, the defendant was wrong to take out third party proceedings against the Third Party and any proceedings against it ought to have been determined through an arbitral process. It is moot to determine issue 3 as the resolution of the preceding issues disposed of it.

Issue 4: What remedies are available to the parties?

Since it was determined that the plaintiff's claims were devoid of merit, there are no available remedies to the parties.

The suit is dismissed with no order as to costs between the plaintiff and defendant. The defendant is ordered to pay costs to Third party for erroneously dragging them to court instead of initiating arbitral proceedings.

I so order.

Obiter dictum

There is need for clarity and precision in the law of compensation in order to help ensure both that a land owner obtains fully the compensation the law intended and that the land owner is not paid twice for what is essentially the same loss.

The court has a duty to balance between doing justice to individuals and equitably preserving tax payers' funds for greater priorities and this is the most pervasive considerations. In pursuit of that balance it is inevitable that the distinctions will be drawn in order to avoid any arbitrary awards or inconsistent awards which may be influenced through corrupt tendencies.

SSEKAANA MUSA

JUDGE

19th/04/2021