

## YARI CORNACCHIA v. NSANAWE

[Rwanda SUPREME COURT – RCOMA0053/15/CS (Mutashya, P.J., Karimundana and Gakwaya, J.) February 26, 2016]

*Contract law – Contractual agreement and terms of reference – Admissibility of the claim initially submitted before arbitral tribunal – The subject matter on which parties agreed to refer to arbitration could not be referred to the court for modification – Ministerial Order N°16/012 of 15/05/2012 determining arbitration rules of Kigali International Arbitration Center (KIAC), article 29.*

*Arbitration law – Time limit for delivery of arbitral award – The validity of the arbitral award issued after the time limit set by both parties – The delivery of the arbitral award after the time limit set by both parties is not a ground to set it aside – Law N°005/2008 of 14/2/2008 on arbitration and conciliation in commercial matters, article 47.*

**Facts:** Papyrus Bakery Cafe Ltd, the company which belongs to Nsanawe Serge Ndekwe, sold off its shares amounting to 50% at 100,000 Euros to YARI CORNACCHIA. They concluded a contract titled *convention d'actionnariat* whereby they agreed that all possible contentions would be settled by courts. Later on, Nsanawe complained that he was only paid 60,000 Euros instead of 100,000 Euros.

Subsequently, YARI CORNACCHIA requested Nsanawe Serge Ndekwe to redeem the shares which were already paid equivalent to 60,000 Euros after the failure to pay 40,000 Euros that have been not yet paid. Nsanawe admitted the proposal and they entered into the second contract titled *contrat de cession d'action* and they agreed that the possible disputes from the contract would be settled by Arbitral Tribunal.

There arose disputes in connection to contract performance and YARI filed a complaint to Kigali International Arbitration Center and the latter affirmed that Nsanawe Serge Ndekwe was no longer bound by the contract titled *contrat d'actionnariat* but confirmed that the one titled *cession d'action* must be respected. Not satisfied, Nsanawe Serge Ndekwe appealed to the Commercial High Court requesting annulment of the arbitral award because Kigali International Arbitration Center examined the matter which was not in its competence as there was no arbitration clause in the contract titled *convention d'actionnariat*. The Commercial High Court decided that the Arbitral Tribunal was incompetent and hence quashed the award.

YARI CORNACCHIA appealed to the Supreme Court claiming that the claim that was submitted to the Arbitral Tribunal is related to performance or failure to perform the agreement in the contract titled *contrat de cession d'actions*, which, to him, was the one with arbitration clause. He continued further claiming that the first contract that was titled *convention d'actionnariat* provides that the possible disputes would be referred to Court while in the second contract titled *convention de cession d'actions*, the case would be referred to Kigali International Arbitration Center in case of disputes. He added that disputes which arose from *contrat de cession d'actions* are the same as those which are embodied in terms of reference.

Nsanawe Serge Ndekwe presented the defence that YARI CORNACCHIA lodged a suit before the Arbitral Tribunal requesting termination of the contract of *convention d'actionnariat* while that contract provides that it is the Court which shall be competent to adjudicate possible disputes. He asserted further that there is no evidence that YARI

CORNACCHIA filed a claim for *cession d'actions* and, hence, Kigali International Arbitration Center had no ground to assess the contract titled *convention d'actionnariat* while it was not competent.

In his cross appeal, Nsanawe Ndekwe Serge claimed that the procedure was not respected in connection to the time limit of delivering the arbitral award. He requested its annulment in consequence. He requested further procedural and advocate fees. YARI CORNACCHIA replied that the delay in delivery of arbitral award is not the ground to quash it. He added further that the damages that Nsanawe Serge Ndekwe requests have no basis.

**Held:** 1. Though the claim referred to Arbitral Tribunal was in connection with *convention d'actionnariat*, it is clear that during the hearing the debate concerned admissibility of the claim whereby both parties agreed that it was in connection with to the contract titled *cession d'action* and in that contract it was provided that the possible dispute would be settled by Arbitral Tribunal. Therefore, the subject matter referred to arbitral tribunal cannot be referred to court for its modification.

2. Arbitral award is pronounced within the time limit set by parties from the time when Arbitral Tribunal closes the hearing. However, after this period elapses without the pronouncement, the arbitral award cannot be invalidated for such a mere fact.

**The claim has merit.**

**Cross appeal has no merit.**

**Judgment rendered by the Commercial High Court is modified in all its content and hereby quashed  
Court fees to the defendant.**

**Statutes and statutory instruments referred to:**

Law N°005/2008 of 14/02/2008 on arbitration and conciliation in commercial matters, articles 8 and 47.

Ministerial Order N°16/012 of 15/05/2012 determining arbitration rules of Kigali International Arbitration Center (KIAC), article 29.

**No case was referred to**

## **Judgment**

### **I. BRIEF BACKGROUND OF THE CASE**

[1] At the beginning of the year 2012, Mr. YARI CORNACCHIA bought shares in Papyrus Bakery Café Company Ltd which was owned by Mr. Nsanawe Ndekwe Serge, as sole proprietor. He bought 50% of shares. All shares were equivalent to 100,000Euros. That contract is titled "*convention d'actionnariat*" and was signed on 20/7/2012. Nsanawe Ndekwe Serge claims that YARI CORNACCHIA did not respect the contract because he paid 60,000 Euros only.

[2] YARI CORNACCHIA did not afford to pay 40,000 remaining Euros, and he requested Nsanawe Ndekwe Serge as the founder of that company to redeem shares equivalent to 60,000 Euros that he paid. This led to the conclusion of the contract entered into on

22/7/2013 titled “*contrat de cession d’actions*” which provides that Nsanawe Ndekwe Serge has bought shares of YARI CORNACCHIA equivalent to 54,000,000Frw (60,000 Euros) within 35 months by monthly payment of 1,500,000Frw. This caused the rise of disputes relating to performance of the contract which led YARI CORNACCHIA to referring the case to Kigali International Arbitration Centre (KIAC). In return, KIAC delivered an award N° 2013-2014/017 dated 06/03/2015 confirming that Nsanawe Ndekwe Serge was no longer bound by the contract titled *contrat d’actionnariat*, and that the contract titled *contrat de cession d’actions* must be respected. Nsanawe Ndekwe Serge was never satisfied of arbitral award.

[3] Nsanawe Ndekwe Serge appealed to the Commercial High Court, requesting annulment of that award.

[4] As the vital grounds of his appeal, he had among others the absence of any provision about arbitration clause in the contract titled *convention d’actionnariat* they concluded basing on article 47(1) section c and d of the Law on arbitration. He concluded that Kigali International Arbitration Center examined the matter which was not in its competence.

[5] The Commercial High Court ruled on the case on 9/07/2015 and affirmed that the Arbitrator had no competence to settle the dispute between YARI CORNACCHIA and Nsanawe Ndekwe Serge and it quashed the arbitrator’s award dated 6/3/2015 and its interpretative award of 17/4/2015.

[6] Represented by counsel Rukangira Emmanuel, YARI CORNACCHIA appealed to the Supreme Court, claiming that the matter which was submitted to arbitration was an issue related to the performance or failure of performance « *mise en exécution ou défaut d’exécution* » of agreement of the contracting parties in the contract termed *contrat de cession d’actions* which contained arbitration clause.

[7] In their submissions, Counsel Kiloha Olivier and Counsel Umupfasoni Blandine raised an objection that the Supreme Court has no jurisdiction to precede with YARI Cornacchia’s appeal since it does not comply with the provisions of article 28(2) of Organic Law N°03/2012/OL of 13/06/2012 determining organization, functioning and jurisdiction of the Supreme Court. Counsel Rukangira Emmanuel replied that their objection had no ground.

[8] That objection was rejected by the Court on 04/04/2015 and it affirmed that the Commercial High Court ruled, on the first instance, on arbitral award. The Supreme Court concluded that it must examine the claim on appeal level. The Court concluded that it has competence over the case, and hence must be adjudicated on merit.

[9] The case was adjudicated in merit on 26/01/2016, YARI CORNACCHIA was represented by counsel Rukangira Emmanuel while Nsanawe Ndekwe Serge was represented by his counsels Kiloha Olivier and Umupfasoni Blandine.

## II. ANALYSIS OF LEGAL ISSUES

**Whether YARI CORNACCHIA submitted a claim to Arbitral Tribunal relying on the contract titled *convention d’actionnariat* or on the one titled *contract de cession d’actions*.**

[10] Counsel Rukangira Emmanuel pleading for YARI CORNACCHIA claimed that the first contract titled *convention d’actionnariat* provides that potential dispute should be

submitted to the Courts of Kigali. However, he added, after Nsanawe Ndekwe Serge bought shares of YARI CORNACCHIA whereby they agreed on certain things which Nsanawe Ndekwe Serge did not comply with, it led to the conclusion of another second contract titled *convention de cession d'actions* which provides that Nsanawe Serge Ndekwe purchases shares of YARI CORNACCHIA equivalent to 54,000,000Frw (60,000 Euros), with a monthly payment of 1,500,000Frw within 35 months.

[11] He argues that there was partial execution of the second contract titled *convention de cession d'actions* to the side of Nsanawe Ndekwe Serge because for 54,000,000Frw he was obliged to pay, he had only paid 8,000,000Frw and, since then, he stopped. It is for this reason that based on article 12 of that contract, YARI CORNACCHIA referred the case to Kigali International Arbitration Centre (KIAC) because it is in that article that arbitration clause is embodied.

[12] He states further that another evidence that YARI CORNACCHIA submitted the claim to the Arbitral Tribunal based on contract titled *convention de cession d'actions* is that the content of terms of reference signed by both parties are the exact terms in the contract titled *convention de cession d'actions* since his request was to be paid the remaining amount of money on 54,000,000Frw referred to in *convention de cession d'actions*. He added that the judge has never mentioned *convention d'actionnariat* from the terms of reference and that no single provision from that contract was ever debated on.

[13] Counsel Umupfasoni Blandine states that as indicated by the claim that had been submitted to the Arbitral Tribunal, YARI CORNACCHIA claimed for cancellation of the contract titled *convention d'actionnariat* (constater la dénonciation de la Convention d'actionnariat) while that contract provides that it is Courts which are competent to settle possible disputes. He stressed that Counsel Rukangira Emmanuel had never specified in his submissions that the subject matter concerns *cession d'actions*.

[14] She argues that the fact that Counsel Rukangira Emmanuel relies on article 12 of the contract titled *cession d'actions* which provides that all disputes relating to the contract shall be settled by Kigali International Arbitration Centre (KIAC) must not be considered because the contract titled *convention d'actionnariat* which is the subject matter of litigation and the contract titled *cession d'actions* are two different contracts. He added that the contract titled *cession d'actions* has nothing to do with *convention d'actionnariat* though litigants are the same.

[15] Counsel Kiloha Olivier also states that the arguments advanced by Counsel Rukangira Emmanuel that their response to their submissions implies the acceptance of the contract titled *cession d'actions* as the object of litigation is not true because it would not stop them from drafting court submissions as alternative pleading and it is not the meaning that their response was a direct response to the contract titled *cession d'actions* which was breached. He argued further that Kigali International Arbitration Centre (KIAC) could not examine anything on the contract titled *convention d'actionnariat* while it had no competence. He stressed that the statement *constater la dénonciation de la convention d'actionnariat* is totally different from the statement *constater la dénonciation de convention de cession d'actions*.

## **THE VIEW OF THE COURT**

[16] Article 29 of Ministerial Order N°16/012 of 15/05/2012 determining arbitration rules of Kigali International Arbitration (KIAC), provides that “the Arbitral Tribunal shall draw up, on the basis of documents or in the presence of the parties and in the light of their most recent submissions, a document defining its Terms of Reference. This document shall include the following particulars:

2° A summary of the parties’ respective claims and of the relief sought by each party, together with the amounts of any quantified claims and, to the extent possible, an estimate of the monetary value of any other claims

4° Unless the Arbitral tribunal considers it inappropriate, a list of issues to be determined;

and 7° Particulars of the applicable procedural rules and, if such is the case, reference to the power conferred upon the Arbitral tribunal to act as *amiable compositeur* or to decide *ex aequo et bono*.

The terms of Reference signed by it and by the parties shall be submitted by the Arbitral Tribunal to the Centre within two months of the date on which the file has been transmitted. The Centre may extend this time limit pursuant to a reasoned request from the arbitral tribunal or on its own initiative if it decides it is necessary to do so.

If any of the parties refuses to take part in the drawing up of the Terms of Reference or to sign the same, they shall be submitted to the Centre for approval. When the Terms of Reference have been signed or approved by the Centre, the arbitration shall proceed.

After the Terms of Reference have been signed or approved by the Centre, no party shall make new claims which fall outside the limits of the Terms of Reference unless it has been authorized to do so by the Arbitral tribunal, which shall consider the nature of such new claims, the stage of the arbitration and other relevant circumstances”.

[17] The Court finds that YARI CORNACCHIA submitted to Arbitral Tribunal a claim of this nature: to confirm the termination of the contract titled *convention d’Actionnariat* by the defendant and therefore orders the refund of money paid to the defendant and not repaid by that date equivalent to 46,000,000Frw. *Constater la dénonciation de la Convention d’Actionnariat par le défendeur et par conséquent ordonner la restitution des sommes versées au défendeur et non remboursées à cette date équivalentes à 46,000,000Frw.*

[18] The Court finds that during the hearing before Arbitral Tribunal, litigants, after contradictory debate on the issue of the admissibility of the claim, agreed that the subject matter is the contract titled *cession d’actions* and they also submitted new court briefs as seen in paragraph 55 and 56 of the arbitral award which served as the basis for the Arbitral Tribunal to continue with the proceedings because it is in that contract whereby it is provided that disputes that will arise will be settled by Kigali International Arbitration Centre (KIAC).

[19] The Court finds that the adjudicated subject matter after mutual agreement of parties thereon as aforementioned is all about the contract titled *convention de cession d’actions* whose partial execution was done by Nsanawe Serge Ndekwe, because for 54,000,000Frw which was supposed to be paid, he paid 8,000,000Frw only and that contract was entered into as a replacement of that of the contract titled *convention d’actionnariat* since YARI CORNACCHIA had already sold his shares to Nsanawe Serge Ndekwe and was no longer bound by the contract titled *convention d’actionnariat*.

[20] The Court finds further that, though the parties themselves had first agreed on the subject matter that was supposed to be examined by the Arbitral Tribunal, YARI CORNACCHIA also had no problem in that contract titled *convention d'actionnariat* in a way that he could file a claim thereto because it was no longer binding him. Instead, he had the problem on the contract titled *cession d'actions* because it is him who was not paid the totality of the money that Nsanawe Serge Ndekwe owed him. Another evidence that it is the contract titled *cession d'actions* which was at issue, is that as seen in paragraph 15 and 16 of the arbitral award, Nsanawe Ndekwe Serge manifested the desire to pay through amicable settlement but YARI CORNACCHIA did not accept. It is understandable then that the payment he desired to execute through that settlement was provided in the contract termed *cession d'actions*.

[21] The Court finds also that another issue which proves that it is the contract titled *cession d'actions* which was the cause of litigation is that 46,000,000Frw referred to in the terms of reference as well as moratoria damages, being computed from 28/12/2013 to 28/6/2014, and damages for the loss that YARI CORNACCHIA states that he incurred are all referred to in the issues that must be examined by the Arbitral Tribunal and are also found in *convention de cession d'actions* which provides for arbitration clause (*des points litigieux à être résolus par le Tribunal Arbitral*) since it is in that contract whereby 54,000,000Frw which Nsanawe Ndekwe Serge owed YARI CORNACCHIA while he had only paid 8,000,000Frw.

[22] The Court finds that pursuant to the aforementioned findings, YARI CORNACCHIA lodged a claim before Arbitral Tribunal based on the contract titled *cession d'actions* that provides for arbitration clause in its article 12. Therefore, this Arbitral Tribunal had competence to hear the case.

**Whether cross appeal filed by Nsanawe Serge Ndekwe requesting the annulment of the arbitral award due to the elapse of the time limit fixed by parties for Arbitral Tribunal's delivery has merit.**

[23] Counsel Kiloha Olivier states that before the Commercial High Court, they had filed the claim relying on two grounds, one being annulment of arbitral award while the second was the failure to comply with the procedural formalities because both had agreed that the award would be pronounced on 17/9/2014 while it was issued on 06/03/2015, just after 45 days, the time limit fixed by parties in that agreement. He specified that article 47(1°, d) of Law on arbitration states that the award shall be quashed if litigants had not complied with the terms of reference. Thus, he concluded, the Judge of the High Court examined only one issue. He also stated that they seek from Nsanawe Ndekwe Serge damages amounting to 1,500,000Frw and 4,000,000Frw for procedural and advocates fee respectively.

[24] Counsel Rukangira Emmanuel states that the effects of failure to deliver the arbitral award in accordance with the fixed time limit should not be its annulment; instead, administrative sanctions are imposed. He added that the procedural formalities before the arbitrator are the same as those in ordinary proceedings. Therefore, the fact of failing to comply with the time limit is not a ground for annulment of the arbitral award. He stressed further that the damages he seeks have no merit since it is three years while, YARI CORNACCHIA is demanding the payment. On the contrary, it is him who would otherwise seek damages.

## THE VIEW OF THE COURT

[25] Article 47, 1<sup>o</sup> d of the Law N°005/2008 of 14/02/2008 on arbitration and conciliation in commercial matters that counsel Kiloha Olivier relies on, provides that: an arbitral award decided by an arbitration may be set aside by the court specified in article 8 of this Law only if: 1<sup>o</sup> the party seeking cassation furnishes proof that: (...) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such an agreement is in conflict with provisions of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law.

[26] The Court finds that the provisions relied on by Counsel Kiloha Olivier to request annulment of the arbitral award due to the failure to comply with 45 days do not emphasize his allegations to prove that this ground leads to immediate annulment of the arbitral award when the latter was not pronounced within the time fixed by parties. He does also show that the effect is to quash the arbitral award in accordance with the provisions of that Law on arbitration. Therefore, this ground has no merit.

[27] With regard to the damages requested by Nsanawe Serge Ndekwe, the Court finds that those damages have no basis since his claim has no merit.

### **III. THE DECISION OF COURT**

[28] Decides the claim filed by YARI CORNACCHIA with no merit.

[29] Decides that Arbitral Tribunal had jurisdiction to hear the case between YARI CORNACCHIA and Nsanawe Ndekwe Serge.

[30] Decides that cross appeal filed by Nsanawe Ndekwe Serge has no merit.

[31] Quashes the judgment RCOMA0248/15/HCC rendered by the Commercial High Court on 09/07/2015.

[32] Orders Nsanawe Ndekwe Serge to pay court fees equal to 100,000Frw.