THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)

MISCELLANEOUS CAUSE NO. 0073 OF 2022

B & N BIOMASS LIMITED :: APPLICANT

VERSUS

OKECHO HARRIET AMOOTI :: RESPONDENT

(Before: Hon. Justice Patricia Mutesi)

RULING

Background

This application is brought under **Section 34** of the **Arbitration and Conciliation Act Cap 4, Section 98** of the **Civil Procedure Act Cap 71, Rules 7(1)** and **11** of the **Arbitration Rules** and **Order 52 rules 1, 2** and **3** of the **Civil Procedure Rules S.I. 71-1** seeking orders that:

1. The arbitration between the Applicant and the Respondent is set aside.
2. Costs of this application be provided for.

Briefly, the grounds of this application are that:

1. The Respondent lodged an arbitration in 2021 against the Applicant for breach of contract.
2. The Applicant filed a reply to the claim, along with a counterclaim against the Respondent also premised on breach of the same contract.
3. The arbitrators erred in law when they did not consider the counterclaim.
4. The arbitrators acted on a misdirection of the law when they held that the Applicant was liable yet the counterclaim had not been considered.
5. The arbitrators erred in law when they delivered the award out of time without an extension of the same contrary to the law.
6. The arbitrators acted with partiality when they only considered evidence relating to the claim by the Respondent and neglected the pleadings and evidence of the Applicant in the counterclaim.

7. The arbitrators acted with partiality and on a misdirection of the law when they failed to deliver a decision on the counterclaim in accordance with the law.
8. It is just, fair and in the interest of justice that this application is allowed.
9. This application has been brought without unreasonable delay.
10. The Respondent shall not be prejudiced by the grant of the orders sought.

The application is supported by the affidavit of Willy K. Niwagaba, one of the Applicant's directors. He stated that the Applicant holds a timber tree planting license in the Central Forest Reserves of Wankwayo, Nakaseke District. On 23rd June 2017, the Respondent entered into a contract with the Applicant purchasing thinnings from the forest. All disputes under the contract were to be settled through arbitration. On 22nd December 2021, the Respondent lodged an arbitration claim against the Applicant for breach of the contract following her expulsion from the forest by the Applicant's agents.

Mr. Niwagaba further stated that the Applicant filed a reply to the claim, along with a counterclaim also premised on the Respondent's breach of the contract which arose when she sawed timber from the trees she harvested in the forest contrary to the contract. He contended that in their award, the arbitrators analysed the claim and completely ignored the counterclaim even when there was cogent evidence proving it. That the award assigned a size and purpose to the thinnings yet this had not been agreed to in the contract. Further that the award was also delivered out of time.

The Respondent swore an affidavit in reply opposing the application. She told the Court that she executed a contract with the Applicant for the purchase of standing timber trees. Before this execution, she communicated her concerns about the harvesting method of pulling trees from the forest and the Applicant's director, a one Turyahumura Balla, assured her that she would be able to saw timber from the trees within the forest. The said director then introduced her to his manager on ground who designated for her an area for the sawing.

The Respondent stated that the arbitrators fully considered the Applicant's counterclaim and held, on page 15 of the award, that there was no evidence to support it. She also stated that, on 7th July 2022, the arbitrators had notified the lawyers of both parties that the award was to be delivered physically on 8th

August 2022 at 3:00pm and that counsel for the Applicant did not object to this development.

The Applicant filed an affidavit in rejoinder also sworn by Willy K. Niwagaba in which he reiterated that the contract was executed with the full knowledge of the Respondent that the harvest method was as pulling out the trees and loading them onto a truck. He maintained that the contract did not anticipate extraction of timber from the trees within the forest.

Issue arising

Whether the arbitral award should be set aside.

Representation and hearing

At the hearing of this application, the Applicant was represented by M/S CMS & Co. Advocates while the Respondent was represented by M/S Kikomeko, Kayiira & Co. Advocates. Counsel filed written submissions to argue the application. I have fully considered those submissions, the laws and authorities cited therein and all the other materials on the record.

Determination of the issue

Whether the arbitral award should be set aside.

Arbitration, as a form of alternative dispute resolution, thrives on the policy of party autonomy. See **Roko Construction Ltd v Kobusingye Janet, HCMC No. 0022 of 2021**. This policy sanctifies the entitlement by disputing parties to select an independent person or a team of independent people to decide their dispute finally. This Court's attitude has always been to encourage such out-of-court settlements in a bid to speed up the resolution of commercial disputes. For this reason, this Court does not intervene in disputes that are subject to arbitration except within the confines of the law.

That attitude is also a result of the command of **Section 9 of the Arbitration and Conciliation Act Cap 4 ("ACA")**. This provision expressly enjoins this Court not to intervene or interfere in any matters that are subject to arbitration agreements or clauses except as provided for by the Act. The ACA anticipates both pre-award and post-award judicial interventions in domestic arbitration.

The post-award interventions include handing of applications to enforce or set aside arbitral awards under Sections 34 and 35 of the ACA, respectively.

In the instant application, the Applicant seeks an order setting aside the arbitral award of 8th August 2022. I note that many of the Applicant's complaints relate to alleged wrongful findings of fact and law by the arbitrators. However, except as prescribed in **Section 38 of the ACA**, a court has no power to sit in appeal of an arbitral award and cannot reconsider the merits of the award *per se*. In this type of applications, a court can only decide on the legality or the validity of the award. In **Roko Construction Ltd V Kobusingye Janet (supra)**, this Court stated:

> ***"... If the arbitrator acted within his or her jurisdiction, has not been corrupt and has not denied the parties a fair hearing, the court should accept his or her reading as the definitive interpretation of the contract even if the court might have read the contract differently. Save for specified circumstances, parties take their arbitrator for better or worse as per the decision of fact and the decision of law."*** Emphasis mine.

My initial impression of this application is that the Applicant is simply dissatisfied with the decision taken by the arbitrators on the counterclaim. The Applicant is convinced that the counterclaim ought to have been allowed on the basis of the evidence adduced in its proof. This grievance is misconceived and misplaced. On the strength of the afore-cited findings in **Roko Construction Ltd V Kobusingye Janet (supra),** this Court cannot sit in reconsideration of the merits of an arbitral award outside the strict bounds of **Section 38 of the ACA**. In any case Section 38(1)(b) of the ACA allows appeals on questions of law only.

This implies that an arbitrator is the first and final trier of fact in all arbitrable disputes. This Court cannot, for any reason whatsoever, disturb an arbitrator's findings of fact and, even when an award is set aside, the dispute would merely be remitted back for re-trial. Only findings of law may be interrupted through an appeal on questions of law if the parties expressly anticipated such an appeal in the arbitration agreement. On its face, this application appears to be an attempt by the Applicant to drag the Court into questioning the reasonableness of the Tribunal's findings, yet this would be an unlawful exercise *ab initio*.

It follows that, outside the bounds of Section 38 of the ACA, an arbitral award can only be challenged and set aside on very narrow grounds as prescribed

under Section 34(2) of the ACA. These grounds include circumstances where the award was procured by corruption, fraud or undue means, where there was evident partiality or corruption in one or more of the arbitrators and where the award is not in accordance with the Act. In this case, the Applicant claims that, in ignoring the counterclaim and delivering the award out of the prescribed time, the Tribunal acted with partiality and the award was not in accordance with the Act.

I will first address the claim of fact that the Tribunal ignored, and did not address, the counterclaim. At pages 5 – 8 of the award, the Tribunal noted the material allegations of fact in the Applicant's counterclaim. Briefly, the Applicant alleged that the Respondent's agents cut trees which were not part of the thinning, that they cooked from the forest thereby putting it at a fire risk and that they sawed timber from the forest which conduct had not been agreed to by the Applicant. At pages 9 – 10 of the award, the Tribunal took note of the Respondent's reply to the counterclaim. Therein, she had stated that, when her workers reached the forest to harvest the trees for timber, the trees that the Applicant's manager showed them were too small. She asserted that she later reached an informal understanding with the Applicant's management which enabled her to harvest other trees other than the ones her workers had been initially shown and to saw timber from the trees within the confines of the forest.

Both the claim and the counterclaim made accusations of breach of the contract by both parties against each other. At scheduling, 2 issues were framed. The 1st issue was *"whether there was breach of contract"*. The 2nd issue dealt with the remedies available. In my considered view, the 1st issue was framed so generally that it encompassed both the claim and the counterclaim. By deciding to generally investigate whether there was breach of contract, the arbitrators objectively contemplated that they would thereby deal with all the counter accusations of breach of contract in both the claim and the counterclaim.

At the hearing, the Respondent brought 2 witnesses while the Applicant brought 5 witnesses. All these witnesses appear to have testified on both the claim and the counterclaim simultaneously. The Tribunal expressly set out the relevant parts of these testimonies, including the testimonies of the Applicant which asserted, in furtherance of the counterclaim, that the Respondent's workers had felled unmarked trees and sawed them in the forest (page 13 of the award). In

its summary of findings at page 15 of the award, the Tribunal then expressly disallowed the counterclaim after considering all the evidence adduced.

It is therefore not true that the Tribunal ignored the counterclaim. The Tribunal was, at all material times, alive to the material allegations in the counterclaim, the responses thereto and the evidence adduced in a bid to prove the same. The Tribunal also made an unequivocal decision disallowing the counterclaim. This finding substantially settles this application.

The Applicant has insisted that the Tribunal ought to have set out a separate detailed analysis in the award for the counterclaim. That insistence is misconceived. It is an insistence on the form of the award and not its substance. The principles governing the writing of judgments equally apply to the writing of arbitral awards. It is trite law that there is no particular format required in the evaluation of evidence. The task may be carried out in different ways depending on the circumstances of each case. Judgment/award writing is a matter of style by individual judicial officers/arbitrators. A judgement/award will be valid once it is the court's/arbitrator's final reasoned determination of the rights and duties of the parties based on the evidence adduced. (See **Labeja Ticiyano V Olanya Bosco, HC Civ. Appeal No. 0028 of 2018.**)

Furthermore, it is a settled position of the law that the evaluation of evidence is an exercise involving its interpretation and the assessment of its quality. It is a process involving a determination of which pieces of evidence are more reliable than others. There is no requirement that the court/arbitrator should comment on each and every aspect of the body of evidence adduced. The court/ arbitrator only has a duty to explain the more important pieces of evidence and to provide reasons for the weight accorded to them. (See **Labeja Ticiyano v Olanya Bosco (supra)**). In the instant case, the mere fact that evidence was adduced in a bid to prove the counterclaim does not imply that the arbitrators were bound to allow the counterclaim. The arbitrators had a duty to weight this evidence, as they did, against the general body of evidence adduced before them at the trial.

Since the arbitrators considered, addressed and decided the counterclaim, the Applicant's allegations of partiality also crumble. Partiality relates to actual or implicit bias by one or more arbitrators in the course of arbitration. The factual basis for the Applicant's claim of partiality against the arbitrators in this case was that they failed to consider and decide the counterclaim, but this has already

been disproved. The mere fact that the arbitrators did not dedicate a specific or substantial portion of the award to explain away the Applicant's counterclaim does not imply that they acted with partiality. Additionally, the mere fact that the arbitrators did not allow the counterclaim does not, in and of itself infer partiality on their part.

Finally, I agree with counsel for the Respondent that the Applicant's claim on the delivery of the award out of time is an afterthought which holds no merit. **Rule 60 of the ICAMEK (Arbitration) Rules, 2018** provides that a party who proceeds with arbitration without raising an objection to a failure to comply with any part of those Rules is deemed to have waived his right to object. In this case, the Tribunal communicated to counsel for the parties on 7th July 2022 that the award would be delivered on 8th August 2022. Counsel for the Applicant did not object to this communication, and their silence binds the Applicant who is now estopped from raising late delivery of the award as a ground to set it aside.

In any case, it is trite law that, in order for delay to be a sufficient ground for setting aside an award, the party intending to set aside the award should prove and establish the consequences of the delay and its effects on the award (See **Fountain Publishers Ltd V Harriet Nalunga & Anor, HC Arbitration Cause No. 1 of 2011**). In other words, a court, like this one, would be very reluctant to set aside an award on grounds of delayed delivery if there is no proof that the delay prejudiced the party seeking to have the award set aside in some significant way. In this case, the Applicant has not proved any such prejudice.

Consequently, this application fails and I make the following orders:

i. This application is hereby dismissed.

ii. Costs of this application are awarded to the Respondent.

Patricia Mutesi

JUDGE

(15/03/2024)