

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPLICATION NO.410(542) OF 2023
(Arising Out of Miscellaneous Application No. 271 of 2023)
(Arising from Miscellaneous Cause No. 58 of 2021)

BETWEEN

AYA INVESTMENT (U) LIMITED..... APPLICANT

AND

INDUSTRIAL DEV'T CORPORATION OF SOUTH AFRICA LTD.....RESPONDENT

RULING BY CHRISTOPHER GASHIRABAKE, JA.

(SINGLE JUSTICE)

Introduction

1.] The applicant filed this application by way of Notice of Motion under section 33 Judicature Act cap 6, rules 2(2), 6(2)(b), 42 (3), 43(1) and 44(1) of the Judicature (Court of Appeal Rules) Directions) SI 13-10. (hereafter referred to as the rules of this court) seeking for an Order of stay of execution of the Arbitral award in Miscellaneous Application No. 58 of 2021 by the respondent, his agents, servants or any person acting on his authority pending final determination of the main Application 271 of 2023 seeking leave to Appeal the High Court ruling in Miscellaneous Application No. 58 of 2021 until an appeal of the same is disposed. The applicant prayed for costs to be provided.

2.] The Application is supported by an affidavit deposed by Mr. Abdul Latif Hamid. The grounds of application were briefly summarized in the Notice of Motion. Mr. Abdul Latif Hamid averred that the applicant had lodged an

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application seeking leave of this Honourable Court to appeal against the decision of the High Court (Commercial Division) in Miscellaneous Application No. 58 of 2021. It was averred that the intended appeal raises serious questions of law and fact and has a high likelihood of success. Furthermore, it was averred that there is an imminent threat of execution of the arbitral award as High Court (Commercial Division) has recognized and registered the arbitral award as a decree of the High Court which the respondent is now seeking to execute. It was argued that the applicant's application for leave to appeal shall be rendered nugatory if the respondent executes the arbitral award. Additionally, it was averred that this application has been made without unreasonable delay.

3.] The respondent opposed the application on ground that the applicant had not furnished security for the due performance of the Decree securing payment of the colossal US\$ 165,043,605 decretal sum. The respondent raised a preliminary objection on ground that the application for an Order of stay of execution pending an application for leave to appeal is incompetent as the applicant has no right of appeal. The Ruling and Orders sought to be appealed against are not appellable whether with or without leave.

4.] In rejoinder, Mr. Abdul Latif Hamid averred that the affidavit in reply does not disclose any ground of objections and opposition to the application for substantive application for a stay of execution. In response to the preliminary objection, it was averred that it is premature and it deals with disposal of the application for leave which is not subject of this application. Additionally, it was averred that the respondent desires to execute by attaching property which already has encumbrances in form of mortgage registered by the respondent

itself and therefore that is enough to give comfort that the applicant has capacity to satisfy any decree.

Representation.

5.] The applicant was represented by Mr. Gibson Munanura. The respondent was represented by Mr. Timothy Lugayizi, Mr. Gulamu Hussein and Mr. Emmanuel Ankunda. Mr. Nzuzza Nzuzza senior legal advisor to the respondent was present in Court. The applicant's managing Director Mr. Mohammed Hamid was also present in Court.

Submissions

Submissions by counsel for the applicant.

1. Whether this application is properly before this Court?

6.] It was submitted for the applicant that under rule 42(1) of the rules of this Court instructs that whenever an application maybe made either in Court or in the High Court, it shall first be made in the High Court. However, Rule 42(2) of the same rules gives an allowance and jurisdiction to this Court to entertain an application under rule 6(2) in order to safe guard the right of appeal despite there not having been made such an application in the High Court. Counsel cited the case of **Nalongo Burashe vs. Kekitiibwa Mangadelana, Court of Appeal Civil Appeal No 89 of 2011.**

7.] The applicant filed in the High Court an application for leave to appeal. The application was dismissed hence the re-application in this Court vide Civil Application No. 271 of 2023. Counsel further submitted that the reason an application for stay of execution was not made in the High Court first is because the order they sought to appeal against was not appellable as of right.

It required leave of Court, without which it would fail and it would be dead on arrival for reasons that the most important requirement of existence of an appeal could not have been met. The applicant then applied for leave to appeal which was dismissed therefore disentitling the applicant from applying for an application for stay of execution.

2. Whether the applicant has fulfilled the conditions necessary for the grant of an order of stay of execution.

8.] The applicant's counsel submitted that rules 6(2) and 2(2) give this court a wide range of discretion to grant a stay of execution where the applicant has filed a notice of appeal in accordance with rule 76 of the rules of this Court. It was submitted that the applicant filed a notice of appeal in accordance with rule 76 of the rules of this Court. It has also applied for leave to appeal. Counsel cited the case of **Hon. Theodore Ssekikubo and others vs. The Attorney General and others, Constitutional Application No. 03 of 2014**, where court held that that the applicant must prove that he lodged a notice of appeal.

9.] Counsel further submitted that rule 76(4) of the Judicature (Court of Appeal Rules) Directives, SI 10-13, provides that it is not necessary to obtain leave before lodging a notice of appeal. Counsel further cited the case of **Lawrence Musiitwa Kyazze vs. Eunice Busingye, Civil Application No. 18 of 1990**, where the Supreme Court held that the applicant for stay of execution must prove, that substantial loss may result if the application is not granted, the application has been made without unreasonable delay, and the applicant has given security for due performance of the decree.

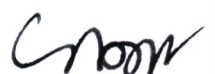
10.] On whether the applicant will suffer irreparable damage or substantial loss, counsel submitted that the property the respondent seeks to attach and sale is already subject of management and lease agreement with international hotel management brands such as “Marriot” and shall injure the applicant’s reputation and expose it adversely on account of breach of contract yet the application for leave to appeal has a high likelihood of success.

11.] Furthermore, it was submitted that failure to grant the application shall cause more harm, because the subsequent sale of the applicant’s hotel shall upset every commitment made by the applicant with the guests and innocent parties that had already booked and pre- paid the applicant as the on – going G-25 Coffee Africa Coffee summit, the G-77 conference in November, 2023 and several other conferences expected to feature heads of State and other dignitaries.

12.] Additionally, the subject of attachment is a hotel of international standing and of very sentimental value to the applicant. It is one of her star investments for which she has received international recognition. The hotel is very near and dear to the applicant losing it to the respondent through an attachment and sale yet there is a pending appeal process shall not restore the injury occasioned even through the appeal is successful. It was further submitted that it has been held that substantial loss would be impossible to repair and replenish the sentimental attachment and value one has to his or her property.

Whether the application was lodged without unreasonable delay.

13.] On lodging the application without reasonable delay, counsel submitted that the application for execution of decree and notice to show cause why



execution should not issue was received by the respondent / applicant herein on the 1st day of August, 2023 and this application was lodged in this court on the 7th day of August, 2023. It is evident that the applicant was diligent in lodging the application

Whether the applicant has provided security for due performance

14.] On furnishing security for due performance, counsel submitted that there is no specific requirement to furnish security for due performance an application for stay of execution pending hearing and determination of the main application to set aside. It was submitted that this court is clothed with inherent power to dispense with the requirement to pay security for due performance of the decree. Counsel cited the case of **Margaret Kato and Anor vs. Nalulu Nalwoga, Civil Misc. Application No. 11 of 2011**, which pointed out that the requirement is a rule of practice based on case law and it is only discretionary.

15.] Counsel prayed that court dispense with the requirement for security for costs.

16.] Counsel prayed that this court be pleased to entertain this application for the ends of justice to be met.

Submissions by counsel for the respondent

Preliminary objection

17.] Counsel for the respondent cited section 9 of the Arbitration and Conciliation Act, Cap 4 (later referred to as “ACA”), which is provides that;

“except as provided in this Act, no court shall intervene in matters governed by this Act,” and



Section 34(1) of the ACA, provides that,

“Recourse to the court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3).”

Counsel cited the case of **Babcon Uganda Limited vs. Mbale Resort Hotel Ltd, Supreme Court Civil Appeal No. 6 of 2016**, where court held that;

“in the instant case the right of appeal was specifically barred by s 9 of the ACA which provides for the extent of Courts intervention as follows: - Except as provided in this Act no Court shall intervene in matters governed by this Act.

The intervention is provided for in the ACA by section 34 and section 38 of the ACA. But as I have stated above section 38 is not an issue in this dispute since it had not been originally agreed in the arbitration agreement and there was no leave of Court granted to the appellant.

The appellant could not invoke the general provisions of the CPA [Section 66] when there is a specific law which governed the proceedings of the case.”

Counsel observed that the Court also held that neither section 66 of the Civil Procedure Act nor section 10 of the Judicature Act, Cap 13 were applicable to confer a right of appeal in this case.

- 18.] Counsel further submitted that the above position was fortified in the case of **Mohammed Mohammed Hamid vs. Roko Construction, Supreme Court Civil Appeal No. 14 of 2015**, wherein the Supreme Court clearly noted that the leave to appeal had been granted in error by the High Court albeit with the consent of the appellant but it is that consent to the leave to appeal which was interpreted by the Supreme Court as having conferred Section 38 (3)(a) &(b) appellate jurisdiction which otherwise would have been non-existent.

19.] Additionally, counsel cited the case of **Bilimoria and anor vs Bilimoria, [1962]1 EA 198**, where court held that;

“O.40, r 2[now Order 44 rule 1(2), cannot operate to confer a right of appeal, even with leave, in the case of an order not made under the Civil Procedure Rules. It would appear, therefore, that orders made in an arbitration under order of a court by virtue of the provisions of order 43 of the Civil Procedure Rules, if not appealable as of right, would be appealable with the leave of the appropriate court as falling within the ambit of order 40, R. 1(2). On the other hand, orders made in relation to an arbitration under the arbitration Ordinance and Rules, unless they fall within the specific categories mentioned in s. 77 of the Civil Procedure Ordinance, are not appealable even with the leave of a court.”

20.] Counsel submitted that on the basis that there is no right to appeal whether with or without leave, the application for stay of execution is incompetent. Counsel cited the case of **Lukwago Erias vs. The Attorney General and KCCA, Supreme Court Civil Application No. 6 of 2014**, where the Supreme Court held that where the right of appeal does not exist, the notice of appeal is incompetent and cannot form the basis of the application for stay of execution. Counsel argued that on this basis this application should fail because it is incompetent before Court.

21.] In the alternative, counsel for the respondent submitted that the application must fail because the applicant did not furnish security for the due performance of the Decree securing payment of the colossal US\$165,043,605 decretal sum. Counsel further contended that the case of **Margaret Kato and another vs. Nuulu Nalwoga, Supreme Court Misc. Application No. 11 of 2011**, was not applicable because court held clearly that the dispute was not

commercial in nature, did not involve corporate entities, related to ownership of land and involved a decree that had been partly executed.

22.] Counsel further submitted that the application to set aside the Arbitral award having been dismissed on 15th May 2023, an application for stay of execution filed on the 9th August 2023 being three months later cannot be said to have been made without unreasonable delay. Counsel prayed that the application for stay be dismissed with costs.

Rejoinder

23.] On the issue of the preliminary objection, counsel for the applicant submitted that it was premature to resolve it now. Counsel argued that the same ought to be resolved in the application for leave to appeal vide civil application No. 27 of 2023. Additionally, section 12(1) of the Judicature Act Cap 13 and Rule 53 (2)(a) of the rules of this court forbid a single justice from entertaining an application for leave to appeal. In counsel's view entertaining the objection would amount to disposing of the application for leave to appeal.

24.] Counsel cited Rule 76(4) of the rules of this Court, which is to the effect that it shall not be necessary to obtain leave before lodging a notice of appeal. Counsel submitted further that the submission that the right of appeal does not exist or exist is a preserve of a full bench of three justices.

25.] Counsel argued that the application of this nature to succeed, the applicant needs to prove that they would suffer substantial loss and that the application has been made without unreasonable delay. Counsel cited the case of **Geoffrey Gatete and Anor. Vs. William Kyobe, Civil Application 199 of 2004.**

A handwritten signature in black ink, appearing to read 'C. M. N.', is located in the bottom right corner of the page.

26.] On the need to furnish security for costs, counsel for the applicant submitted that there is no specific requirement to provide security for an application for stay of execution pending hearing and determination of the main application for leave to appeal. Counsel cited the case of **Abundant Life Faith Church of Uganda vs. J.N Walusimbi, Court of Appeal Civil Application 38 of 2004** and Rule 6(2)(b) of the rules of this Court. Counsel further cited the case of **Halai and another vs. Thorton and Turpin (1963) Ltd, Court of Appeal of Kenya, Civil Application No. 15 of 1990**, where court held that there is no requirement in rule 5 of the Court of appeal rules of Kenya which is *on pari- materia* with rule 6 of the rules of this Court, that an applicant for stay should give security for due performance of the decree. It was argued further that there is no threat of disposal of the Applicant's property and the respondent may revert to the property in the unlikely event the appeal is decided against the applicant. Therefore, the requirement for providing security for due performance of the decree is only an academic one in this case because the respondent has a registered encumbrance on the applicant's property which has a value of over USD 350,000,00 [United States Dollars Three Hundred Fifty Million] which amount is over and above the decretal sum as alleged.

Consideration of Court

27.] I have carefully considered the Notice of Motion, the affidavits together with the submissions and cited authorities and those not cited by both parties.

28.] The grant of a stay of execution in this court is governed by rules 6(2)(b) and 2 (2) of the Rules of this court which provide that;

"Subject to sub-rule (1) of this rule, the institution of an appeal shall not operate to suspend any sentence or to stay of execution, but the court may-

- a)
- b) *In any civil proceedings where a notice of appeal has been lodged in accordance with rule 76 of these Rules, order a stay of execution, an injunction or stay of proceedings as the court considers just”*

And Rule 2(2)

- 1)
- 2) *Nothing in these Rules shall be taken to limit or otherwise affect the inherent power of the court, or the High Court, to make such orders as maybe necessary for attaining the ends of justice or to prevent abuse of the process of any such court, and that power shall extend to setting aside judgments which have been proved null and void after they have been passed, and shall be exercised to prevent abuse of the process of any court caused by delay”*

29.] The Supreme Court has laid down the conditions to be satisfied before court can grant a stay of execution. In the case of **Hon. Theodore Ssekikubo & Others vs. The Attorney General and Another, Constitutional Application No 06 of 2013**, the Supreme Court restated the conditions as follows;

- “(1) The application must establish that his appeal has a likelihood of success; or a prima facie case of his right to appeal*
- (2) It must also be established that the applicant will suffer irreparable damage or that the appeal will be rendered nugatory if a stay is not granted.*
- (3) If 1 and 2 above has not been established, Court must consider where the balance of convenience lies.*
- (4) That the applicant must also establish that the application was instituted without delay.”*

30.] Additionally, it must be proved that the applicant has lodged a notice of appeal in accordance with rule 76 of the rules of this Court.

31.] The respondent raised an objection that this application was incompetent because there's no right of appeal, with or without leave, in relation to an application seeking to set aside or refusing to set aside an Arbitral award brought under section 34 of the Arbitration and conciliation Act, Cap 4. In other wards the respondent was questioning the jurisdiction of this Court in entertaining the appeal. The applicant stated that the objection was pre-mature and would be considered in the main application of leave to appeal. I disagree with the submissions of the applicant on ground that, one of the considerations for grant of stay of execution is whether the appeal has a likelihood of success. Where the jurisdiction of court is questionable it casts doubt on the possibility of the success of the intended appeal. Lack of jurisdiction is lack of everything.

32.] Generally speaking, the Arbitration and Conciliation Act limits the intervention of court in matters of arbitration. Section S. 34 of the Arbitration and Conciliation Act provides that recourse to Court against an arbitral award can only be by way of an application for setting aside the award under subsections 2 and 3. It provides that;

“Application for setting aside arbitral award

- I. Recourse to the Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3)*
- II. An arbitral award may be set aside by Court only if (a) a party making the application furnishes proof that*
 - i. a party to the arbitration agreement was under some incapacity.*



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- ii. the arbitration agreement is not valid under law to which the parties have subjected it or if there is no indication of that law, the law of Uganda.
- iii. The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was unable to be sent his or her case
- iv. the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, except that if the decisions on matters referred to arbitration can be separated from those not referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside.
- v. the composition of the arbitral tribunal or the procedure was not in accordance with the agreement of the parties unless the agreement was in conflict with a provision of this Act from which the parties cannot derogate or in absence of an agreement was not in accordance with this Act.
- vi. the arbitral award was procured by corruption, fraud or undue means or there was evident partiality or corruption in one or more of the arbitrators or the arbitrator award is not in accordance with the Act.
- (b) The Court finds that
- i. the subject matter of the dispute is not capable of settlement by arbitration under the law of Uganda or
- (ii) the award is in conflict with the public policy of Uganda

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(3). An application for setting aside the arbitral award may not be made after one month has elapsed from the date on which the party making that application had received the arbitral award, or if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral award.”

33.] Jurisdiction is a creation of law. Article 134 of the Constitution of Uganda 1995 and section 10 of the Judicature Act provides for the Jurisdiction of Court of Appeal.

Article 134 (2) provides that;

“An appeal shall lie to the Court of Appeal from such decisions of the High Court as may be prescribed by law.”

And

Section 10 provides that;

“An appeal shall lie to the Court of Appeal from decisions of the High Court prescribed by the Constitution, this Act or any other law.”

34.] Both provisions clearly state that the jurisdiction of Court of Appeal shall be prescribed law.

35.] Section 9 of the ACA provides that;

“Except as provided in this Act, no court shall intervene in matters governed by this Act.”



36.] In dealing with a similar matter, Mwendha JSC, in the case of **Babcon Uganda Limited vs. Mbale Resort Hotel Ltd, Supreme Court, Civil Appeal No of 2016**, held that;

“the instant case the right of appeal was specifically barred by S.9 of the ACA which provides for the extent of Court’s intervention as follows: -

Except as provided in this Act no Court shall intervene in matters governed by this Act.

The intervention is provided for ACA by section 34 and section 38 of the ACA. But as I have stated above S. 38 is not as issue in this dispute since it had not been originally agreed in the arbitration agreement and there was no leave of Court granted to the appellant.

The appellant could not invoke the general provisions of the CPA when there is a specific law which governed the proceedings of the case.”

37.] While considering a grant of stay of execution, court is required to generally look at the whole case and see if the appeal has a likelihood of success. In the circumstances of this case, it would require this court to evaluate the fact that this court’s intervention in arbitral matters is limited by section 9 of the ACA. This fact should not be ignored. This is because it casts doubt on the likelihood of success of the appeal the applicant is seeking leave to appeal against. See **the case of Dr. Ahamed Muhammed Kisuule vs. Green land Bank (in liquidation), Supreme Court Civil Application No. 07 of 2010.**

38.] In paragraph 9 and 10 of affidavit in support Mr. Abdul Latif Hamid deponed to the fact that the applicant will suffer irreparable loss if the application was not granted. However, the applicant did not adduce any

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evidence of substantial loss either in the fact that the loss cannot be quantified in damages or that the respondent did not have the capacity to pay the same. Section 101 of the evidence Act provides that whoever wants court to give a decision in their favour, they must prove their assertion. It is not enough for any applicant for a stay of execution to just aver that they will suffer substantial loss if the application is not granted. The applicant is expected to adduce cogent evidence to that effect. In the absence of such evidence, court cannot stop the respondent from enjoying the fruits of their judgment or award.

39.] Having found that this court has limited jurisdiction to intervene in Arbitral awards, which has an effect on the likelihood of the success of the appeal, the preliminary objection is upheld. The application for stay of execution is not granted.

- 1) The application is dismissed
- 2) The costs abide the outcome of the main application for leave to appeal.

I so order.

Dated, signed and delivered at Kampala this ...^{12th}..... Day...^{Sept}..... of 2023



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C. GASHIRABAKE.

JUSTICE OF APPEAL