

**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**  
**(Coram: Egonda – Ntende, Mugenyi & Kihika, JJA)**

**CIVIL MISC APPLICATION NO. 1104 OF 2023**

**ARISING FROM CIVIL APPEAL NO. 1190 OF 2023**

**(Arising out of High Court Misc. Cause No. 58 of 2021)**

**BETWEEN**

**INDUSTRIAL DEVELOPMENT CORPORATION**  
**OF SOUTH AFRICA LTD.....APPLICANT**

**AND**

**AYA INVESTMENTS (U) LIMITED.....RESPONDENT**

**RULING OF THE COURT**

[1] This is an application brought under the provisions of Rules 82, 43(1) & (2) and 44(1) of the Court of Appeal Rules by **Industrial Development Corporation of South Africa Ltd** (“the Applicant”) for orders that;

1. Court of Appeal Civil Appeal No. 1190 of 2023 be struck out as there is no right of appeal conferred by the Arbitration and Conciliation Act, Cap 4 or any other statute against a ruling in a Section 34 application in the High Court granting or refusing to set aside an Arbitral Award and accordingly no appeal lies, and
2. The Applicant be awarded costs of this application.

## BACKGROUND

- [2] The background to this application, which is somewhat involved, is as follows;  
Between 2007 and 2017 the Applicant and **Aya Investments (U) Limited** ('the Respondent') executed various Financial Credit Agreements (FCAs), as well as Security Agreements, to finance the construction of the Pearl of Africa Hotel in Kampala, Uganda.
- [3] Following a breakdown in the parties' business relationship and the supposed default of the Respondent on its financial obligations under the above agreements, the Applicant instituted foreclosure proceedings under the Ugandan legal regime as provided under the Security Agreements. The Respondent objected to these proceedings in deference to the reference of the dispute to arbitration as provided in the FCAs. Indeed, vide Miscellaneous Application No. 1166 of 2017 the Respondent obtained restraining orders in respect of the Applicant's foreclosure proceedings and a reference of the dispute to arbitration in South Africa.
- [4] In the meantime, given the attempt by the Applicant to continue with its foreclosure proceedings, the Respondent instituted Civil Suit No. 937 of 2017 that was, inter alia, grounded in contempt of court and breach of contract; to which the Applicant responded by filing Miscellaneous Application No. 204 of 2018 that sought to refer all the matters in the said suit to arbitration. Miscellaneous Application No. 204 of 2018 was successful and the dispute was referred to arbitration in South Africa.
- [5] The Respondent subsequently obtained a spot decision from this Court vide Civil Application No. 57 of 2019, which stayed the determination by the High Court of any matter arising from the said civil suit pending the determination of that civil application. That ruling has not been delivered to date.
- [6] An arbitral award was eventually made in the Applicant's favour, which the said party successfully registered as a decree of the High Court of Uganda vide Arbitration Cause

No. 12 of 2021 which was determined on the 22<sup>nd</sup> of June 2023.

- [7] Prior to the registration of the arbitral award, the Respondent had, on the 7<sup>th</sup> of October 2021, filed High Court Miscellaneous Cause No. 58 of 2021 seeking to set aside the arbitral award. The Respondent's application to set aside the award was dismissed with costs on the 15<sup>th</sup> of May 2023. The Respondent thereupon lodged Miscellaneous Application No. 271 of 2023, an application for leave to appeal the High Court's decision in Miscellaneous Cause No. 58 of 2021; as well as Civil Applications No. 410 and 411 of 2023, applications for substantive and interim orders of stay of execution of the arbitral award respectively.
- [8] Civil Application No. 410 of 2023 was heard on its merits and determined in favour of the Applicant. Dissatisfied by the ruling of the single judge of this Court, the Respondent lodged Civil Reference No. 20 of 2023 to three judges of the Court. Reference No. 20 of 2023 was heard and determined on the 23<sup>rd</sup> of October 2023 wherein it was dismissed with costs. Before the reference was heard, however, the Respondent on the 13<sup>th</sup> of October 2023, withdrew Miscellaneous Application No. 271 of 2023, the application for leave to appeal Miscellaneous Cause No. 58 of 2021.
- [9] In the meantime, on the 3<sup>rd</sup> of October 2023 the respondent filed Civil appeal no. 1190 of 2023 and served it on the respondent on the 17<sup>th</sup> of October 2023. The appeal sought to challenge the decision of the High Court dismissing Miscellaneous Cause No. 58 of 2021 that had sought to set aside the arbitral award. It is upon receipt of Court of Appeal Civil Appeal No. 1190 of 2023, that the Applicant filed this application seeking to strike out the said appeal.
- [10] The grounds of the application seeking to strike out Court of Appeal Civil Appeal No. 1190 of 2023, as stated in the Notice of Motion and affidavit in support of the application sworn by **Mahlatse Paul Johannes Mabo** on the 18<sup>th</sup> of October 2023 on behalf of the Applicant is essentially that;

*“Court of Appeal Civil Appeal No. 1190 of 2023, in which the Respondent is appealing against the ruling refusing to set aside the Arbitration Award (High Court Misc. Cause No. 58 of 2021) is barred by law as neither the Arbitration and Conciliation Act, Cap 4 or any other statute confers a right of appeal, whether with or without leave, against rulings in Section 34 applications seeking to set aside an Arbitral Award and accordingly no appeal lies.”*

**[11]** The Respondent filed an affidavit in reply deposed by **Abdul Latif Hamid** on the 20<sup>th</sup> of October 2023, opposing the application. The grounds for opposition, as set out in the affidavit in reply, can be summarised as follows;

- 1. The Respondent filed Misc. Cause No. 58 of 2021 before the High Court seeking a declaration that the Arbitration proceedings were commenced by the Applicant in contempt of court orders, in violation of the principles of res sub judice, public policy and thus the resultant award is illegal, null and void and seeking an order that the Arbitral Award made by Bruce Collins QC on 11<sup>th</sup> September 2021 be set aside.*
- 2. Misc. Application No. 58 of 2021 was dismissed with costs.*
- 3. Civil Appeal No. 1190 of 2023 is an appeal against the decision of the High Court in failing to find that the Applicant was in contempt of court orders.*
- 4. Civil Appeal No. 1190 of 2023 is also an appeal against the violation of the Respondent’s non-derogable right to a fair hearing.*
- 5. This Honorable Court has original, appellate and unfettered jurisdiction to entertain any matter on contempt of its orders and make declaration whether in Appeal or otherwise, and therefore CACA1190 of 2023 is rightly before this Court as there is an automatic right of appeal in respect of Contempt of Court matters.*

6. *The ex-parte arbitration proceedings conducted by the Applicant were a violation of the Respondent's constitutionally guaranteed right enshrined in Article 28 and 40 of the 1995 Constitution of the Republic of Uganda and that everything done under a violation of a constitutional right is un constitutional and cannot stand; this applies to the registration of the arbitral award and this application.*

**[12]** At the hearing of the application, the Applicant was represented by Messrs. Timothy Masembe Kanyerezi, Hussein Gulam Dawud, Patrick Turinawe and Phillip Muhumuza, while the Respondent was represented by Messrs. Godfrey S. Lule, Fox Odoi, Gibson Munanura, Henry Byansi and Derek Nkwasiwe.

#### **DETERMINATION**

**[13]** Counsel for both the Applicant and the Respondent filed written submissions which this court has considered. However, as Mr. Kanyerezi was presenting the written submissions made on behalf of the Applicant, he orally raised a second ground in support of the application. Mr. Kanyerezi submitted that the appeal had been filed out of time and that their written submissions had canvassed this point.

**[14]** He referred the court to the Registrar's certificate which was after page 1070 at the very end of volume 3 of the Record of Appeal. Counsel submitted that according to the certificate, the proceedings of the High Court were availed to the Respondent on the 17<sup>th</sup> of July 2023. The appeal therefore, should have been filed within 60 days thus making the 17<sup>th</sup> September 2023 the 60<sup>th</sup> day and therefore the last day on which the appeal ought to have been filed. However, counsel further submitted, the appeal was filed on the 3<sup>rd</sup> of October 2023 and was therefore out of time.

[15] In response Mr Munanura, conceded that the appeal was indeed filed out of time on account of an over sight. He, however, argued that under Rules 2(2) and 5 of the court of Appeal Rules, we could exercise our discretion to extend time and thus validate the appeal. Mr. Kanyerezi in rejoinder submitted that no sufficient cause had been established by the Respondent to warrant exercise of the court's discretionary powers to grant an extension of time.

[16] We are mindful of the fact that Mr. Kanyerezi adopted a rather unorthodox approach by orally introducing a second ground in support of the application, which ground ought to have been included in the Notice of Motion in the first place. However, rather than object to the introduction of the second ground, Mr. Munanura in reply, opted to concede that the appeal had been filed out of time and proceeded to informally apply for extension of time on the premise that there was lapse on the part of the Appellant/Respondent.

[17] Ordinarily, the right course of action, would have been to apply for amendment of the Notice of Motion to include the second ground. Upon obtaining the leave to amend, the Applicant would then lay out the evidential material, which would be the basis for supporting the ground. We, however, think that since there was no objection proffered, no prejudice was visited upon the Appellant/Respondent. Further on, upon reading the affidavit in support of the Notice of Motion and perusing the Record of Appeal, we are of the view that there is enough material before us to judiciously consider the second ground introduced by the Applicant.

[18] Counsel for the Applicant, in their written submissions framed three issues as follows;

- 1. Whether there is a right of appeal conferred by the ACA or any other statute against a Section 34 Ruling granting or refusing to set aside an Arbitration Award.**

**2. Whether the present appeal was filed out of time.**

**3. Whether the arbitration proceedings were commenced in contempt of Uganda Court orders and accordingly whether the Award is in conflict with Uganda public policy.**

[19] We shall consider issues 2 and 1 in that order and then decide whether it is necessary to consider issue 3.

[20] **Whether the present appeal was filed out of time.**

We have considered both the oral submissions of Mr. Kanyerezi and the written submissions filed on behalf of the Applicant. We have also considered the oral submissions in reply on this issue made by Mr. Munanura. We note, however, that the written submissions filed on behalf of the Respondent did not canvass this issue.

[20] Not much discussion can be had as to whether the present appeal was filed out of time. Mr. Munanura, in his oral submissions on this issue, conceded that the appeal had been filed out of time.

It is plain from the record that the ruling in Misc. Cause No. 58 of 2021, which is the subject of Court of Appeal Civil Appeal No. 1190 of 2023, was delivered on the 15<sup>th</sup> of May 2023. Rule 83 of the Rules of this court provides as follows;

**83. Institution of appeals.**

***“(1) Subject to rule 113 of these Rules, an appeal shall be instituted in the court by lodging in the registry, within sixty days after the date when the notice of appeal was lodged—***

***(a) a memorandum of appeal, in six copies, or as the registrar shall direct;***

**(b) the record of appeal, in six copies, or as the registrar shall direct;**

**(c) the prescribed fee; and**

**(d) security for the costs of the appeal.**

**(2) Where an application for a copy of the proceedings in the High Court has been made within thirty days after the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the High Court as having been required for the preparation and delivery to the appellant of that copy.”**

[21] Mr. Kanyerezi rightly pointed out that the Registrar’s certificate, which is to be found after page 1070 at the very end of volume 3 of the Record of Appeal, does indicate that the copy of the proceedings of the High Court were availed to the Respondent on the 17th of July 2023. That being the case, and going by the provisions of Rule 83 (2) of the Rules of this court, the appeal ought to have been filed by the 17<sup>th</sup> of September 2023. It was instead filed on the 3<sup>rd</sup> of October 2023, sixteen days beyond the time the appeal ought to have been filed. We therefore find that the present appeal was indeed filed out of time.

[22] The consequence of filing an appeal out of time is that it is liable to be struck out. This is stipulated in the provisions of rule 82 of the Court of Appeal Rules which provides as follows;

**“ 82. Application to strike out notice of appeal or appeal.**

**A person on whom a notice of appeal has been served may at any time, either before or after the institution of the appeal, apply to the court to strike out the**

***notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.”***

[23] That being the case we also find that the present appeal ought to be struck out on account of the fact that the Respondent did not file the said appeal within the prescribed time.

[24] However, Mr. Munanura, during his oral submissions, made an informal application for extension of time within which to have the appeal filed. We are of the view that having realised that the present appeal had been filed out of time, the Respondent ought to have formally applied for extension of time under Rule 5 of the Court of Appeal Rules which provides as follows;

***“5. Extension of time.***

***The court may, for sufficient reason, extend the time limited by these Rules or by any decision of the court or of the High Court for the doing of any act authorised or required by these Rules, whether before or after the expiration of that time and whether before or after the doing of the act; and any reference in these Rules to any such time shall be construed as a reference to the time as extended.”***

[25] In the Supreme Court case of ***Semakula Musoke & Another vs Nabamba & 2 others, Civil Application No. 22 of 2019*** the Applicants applied to have the Notice of Appeal struck out on account of the fact that it had been filed out of time. The Respondent conceded that the Notice

of Appeal had indeed been filed out of time, and then proceeded to informally apply for extension of time to have the Notice of Appeal validated. In rejecting the informal application for extension of time the Supreme Court held as follows;

**“.....Counsel for the respondent in his written submissions acknowledges the fact that the respondents' Notice of Appeal was filed out of time but prays that the same should be validated by this court on the oft used excuse that the negligence of counsel should not be visited on the clients..... the prayer by counsel for the respondents is not sustainable. The proper procedure available to the respondent is provided under Rule 5 of the Rules of the Court..... The respondents should have filed an application before this Court under Rule 5 of the Rules of the Court giving reasons why it was not possible to file a Notice of Appeal in time and giving justification why the application should be granted. This was not done. We therefore strike out the respondents' Notice of Appeal filed in this Court on 22nd July, 2019 because it was filed out of time.....”**

[26] Our view that the Respondent should have filed a formal application for extension of time is supported by the **Semakula Musoke** (*supra*) case. The Respondent ought to have filed a formal application justifying why this court should exercise its discretion to extend time and thereby validate the present appeal. The Respondent's informal application for extension of time is not tenable as it was not possible from the bar, to establish sufficient cause as to why an essential step was not taken in time. The explanation from the bar that there was lapse on the part of the Respondent could not and does not amount to sufficient cause. The Respondent's application for extension of time is therefore dismissed.

- [27] In the premises, the answer to issue 2 is that the present appeal, Court of Appeal Civil Appeal No. 1190 of 2023, was filed out of time and is hereby struck out.
- [28] Resolution of issue No. 2 in effect resolves the application to strike out the present appeal. We are of the view that there is no need to delve into the rest of the issues. Having said that though, it is perhaps necessary, for completeness, to briefly state that we would have resolved issue No. 1 in the negative.
- [28] It is now settled that the nature of arbitration is such that when parties agree to arbitration as a mode of dispute resolution, they submit to the Arbitrator's award as the final order. Should the parties envisage the option of an appeal to the conventional courts, then their intentions must be evident in the same document. See, **Lakeside Diary Limited vs Midland Emporium Limited and 3 Others, Court of Appeal Civil Application No. 858 of 2022**
- [29] The only option open to a person aggrieved by an arbitral award, is an application under Section 34 of the Arbitration and Conciliation Act seeking to set aside the award. This was the gist of Misc. Application No. 58 of 2021 which was dismissed with costs at the High Court, and therefore the subject matter of Court of Appeal Civil Appeal No. 1190 of 2023.
- [30] It is trite law that an appeal is a creature of statute. Sections 9 and 34 of the Arbitration and Conciliation Act expressly bar interventions by the courts, including appeals. See **Babcon Uganda Limited vs Mbale Resort Hotel Ltd, Supreme Court Civil Appeal No. 6 of 2016**. It is only Section 38 of the Arbitration and Conciliation Act which confers a right of appeal in circumstances where the parties have so agreed and the court grants leave. See the **Lakeside Diary Limited** case (*supra*) and the **Babcon Uganda Limited** case (*supra*). See also **Muhammed Hamid vs Roko Construction Ltd, Supreme Court Civil Appeal No. 14 of 2015**.

**[31]** Given the above it would have been our finding that the Respondent does not have a right of appeal.

**[32] CONCLUSION**

In the result we find that Court of Appeal Civil Appeal No. 1190 of 2023, was filed out of time and it is ordered as follows;

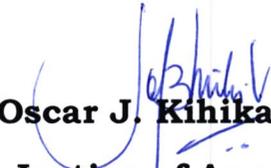
1. Court of Appeal Civil Appeal No. 1190 of 2023, is struck out with costs.
2. Costs of this application are granted to the Applicant.

It is so ordered.

**Dated and delivered at Kampala this .....<sup>19</sup> day of  
.....<sup>November</sup>.....2023**

  
**Fredrick M. S. Egonda Ntende**  
**Justice of Appeal**

  
**Monica K. Mugenyi**  
**Justice of Appeal**

  
**Oscar J. Kihika**  
**Justice of Appeal.**