

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA**

**COMMERCIAL COURT DIVISION**

**HCT-00-CC-MA-0592-2006**

(Arising from HCT-00-CC-AB-0002-2006)

Jubilee Insurance Co of Uganda Applicants  
Agrimag Limited

Versus

SDV Transami (Uganda) Limited Respondent

**BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE**

**RULING**

1. The applicants were the successful parties to an arbitration proceeding before Retired Chief Justice Wambuzi. He issued an award dated 29<sup>th</sup> March 2006. The respondent, now before me, was the unsuccessful party in those proceedings. It commenced proceedings to set aside the said award. Those proceedings have not been disposed of. The applicants now seeks an order for security for enforcement of the arbitral award, the costs of the applicants thereof, and the costs of the proceedings to set aside the award. This ruling is in respect of that application.
2. The applicants brought this application by chamber summons supported by an affidavit sworn by Mr. Noah Mwesigwa, an advocate with the firm of advocates acting for the applicants. The application is opposed and the respondent filed an affidavit in reply sworn by Ms Mary Male of F. Mukasa and Co Advocates, counsel for the respondents.
3. The brief history of this application is that when the same came up for hearing before the learned registrar of this court, Mr. Mukasa, learned counsel for the respondents raised an objection contending that Rule 12 of the Arbitration Rules, First Schedule to the Arbitration and Conciliation Act, (Chapter 4), cited by the applicants, was redundant in so far as the discretion available to the court under this rule was confined to acting as if there was an appeal to this court. As there is no provision in the law for provision of security for costs in respect of appeals to the High Court, this rule is redundant, and court does not have jurisdiction to exercise discretion it does not have.
4. The learned registrar, after hearing the application and this objection in particular, adjourned to write his ruling. However, before the ruling could be written the learned registrar decided to refer this matter to me, under Order 50 Rule 7 of the Civil Procedure Rules for disposal as I may see fit. I reheard the application and Mr. F Mukasa, learned counsel for the respondents raised the same objection before me. It is convenient to dispose of this matter first as

it goes to jurisdiction of this court, and if it succeeds, it would render the rest of the application moot.

5. Basically Mr. Mukasa repeated his submission before the learned registrar. As I have set it out the same, I need not repeat the same. Mr. Ezekiel Tuma, learned counsel for the applicants, conceded that there is no express provision dealing with security for costs in respect of appeals to the High Court. Nevertheless, in his view this presented no difficulty. He submitted that it is the practice of the High Court to order for security. He referred this court to the Kenya case of Kenya Shell Ltd v Benjamin Kibiru (1982/1988) Volume 1 Kenya Appeal Reports 1018.

6. It may be convenient at this stage to start by setting out the relevant provisions of the law with regard to the matters in issue. Section 34 (5) of the Arbitration and Conciliation Act states, '(5) If an application for the setting aside or suspension of an arbitral award has been made to the court, the court may, if it considers it proper, adjourn its decision **and may also, on the application of the party claiming recognition or enforcement of the arbitral award, order the other party to provide the appropriate security.**'

7. Rule 12 of the Arbitration Rules states,

'Where a party who has been ordered by an award to pay a sum of money or to hand over moveable property lodges objections to the award, any other party interested in the award may apply to the court for an order directing the objector to give security for the enforcement of the award and of any costs that may be ordered in the objection proceedings, and the court may thereupon order security to be given in like manner as though the objector were appealing against a decree.'

8. Clearly this court is granted substantive power to order appropriate security pending the disposal of an arbitral proceeding before it, if it is applied for by the party that seeks its enforcement under Section 34(5) of the Act. Regardless of whether rule 12 is redundant or not this court is seized not only with the jurisdiction to order security, but the substantive power to do so.

9. Mr. Mukasa's argument, if I understand him correctly, is that rule 12 enables the application of Section 34(5) of the Act, and that without a rule of procedure as rule 12, the power available under Section 34(5) of the Act, cannot be exercised by this court. In support thereof, he referred to Section 71 (2) of the Act, which provides that until the rules committee makes the rules of court to replace them, the rules in the First Schedule to the Act, shall apply to arbitration in Uganda. This argument, with respect, carries no favour with me. Firstly no authority is provided to support assertion that absent a rule of procedure, a court is incapable of exercising substantive power available to it in primary legislation. Secondly as has so often been written, rules of procedure are 'intended to serve as the hand-maidens of justice, not to defeat it.' See *Iron & Steelwares Ltd v C.W. Martyr & Co.* (1956) 23 E.A.C.A. 175 at 177. (This is a court of appeal for East African decision on appeal from Uganda.)

10. In my view whether rule 12 is redundant or not, this court, in appropriate cases, has the power to order security for enforcement of an arbitral award under Section 34(5) of the Act. Rule 12 does not fetter the court's discretion or authority to apply Section 34(5) of the Act. Rather rule 12 amplifies this authority. I am not able to read into rule 12 's last words, '...order security to be given as though the objector was appealing against a decree' the implication drawn there from by Mr. Mukasa that these words make the rule redundant as there are no written provisions for security for decrees being appealed to the High Court. What I understand from these words is that the court may exercise this power in a like manner as it does in respect of orders this court makes for security of performance of decrees in respect of which appeals have been filed.

11. The wording is not by accident or a failure on the part of the draftsman as suggested by Mr. Mukasa. Awards are enforceable as a decree only after their registration in court and or upon completion of objection proceedings. The award takes on a decree character. Section 36 states, 'Where the time for making an application to set aside the arbitral award under section 34 has expired, or that application having been made, it has been refused, the award shall be enforced in the same manner as it were a decree of the court.

12. As at the time of making an application for security envisaged under Section 34(5) of the Act, the award would not have taken on a decree character, and hence the wording of the last portion of rule 12, ' and the court may thereupon order security to be given in **like manner as though** the objector were appealing against decree'. Though in fact there was no decree and no appeal in the matter the court is to act as if that were the case, as it considered whether or not to grant security for performance of the award.

13. The appeals in question need not be appeals to the High Court. Rule 12 does not say so, and I cannot read that into it. What is important is that the exercise of the courts' discretion shall be upon the same principles as the court applies in cases where the court orders security for performance of decrees from which appeals have been made. It is useful to consider the whole statute in trying to give meaning to one part of the same.

14. I am unable to see, assuming that Mr. Mukasa's interpretation of rule 12 is correct, how redundancy of rule 12, can void, or fetter the discretion of the court, available under, Section 34 (5) of the Act, the primary legislation in this area to order security for enforcement of the award. Rule 13 of the Arbitration Rules provides the procedure that a party wishing to make any application under the Act or the rules is to adopt. In cases such as the current application, the procedure is by way of chamber summons, and the applicant has proceeded accordingly.

15. The objection by Mr. Mukasa is accordingly rejected.

16. I now turn to the merits of the application. The main thrust of the submission of Mr. Tuma for the applicants is that the respondent has adopted an approach whose objective is to deny the applicants their arbitral award by delaying the proceedings. He referred to the respondent's challenge of the award before the arbitrator, after the award was made and now the application to set aside the award itself as evidence of this approach. He referred this court to the case of Alexandria Cotton & Trading Company (SUDAN) Ltd v Cotton Company of Ethiopia Ltd [1965] Vol.2 Lloyd's Rep. 447, a Court of Appeal (England and Wales) decision for the proposition that delay of proceedings is a proper consideration to be taken into account in ordering security.

17. Mr. Mukasa submitted that the award in question was void ab initio and as a result this application should not succeed. He further indicated that the respondent is able to meet the award should it be ordered to do so but was unwilling to offer security for payment of the award as the award is void ab initio.

18. I am not able to agree with Mr. Tuma that respondent's conduct in this matter is necessarily intended to delay the proceedings in question as the respondent is clearly entitled to pursue any remedies that may be available to it at law. Nevertheless delay in finalisation of the proceedings may be a relevant consideration to take into account if security for payment of the award is to be ordered. Delay was considered a relevant factor in Alexandria Cotton & Trading Company (SUDAN) Ltd v Cotton Company of Ethiopia Ltd [1965] Vol.2 Lloyd's Rep. 447. In that case the dispute between the parties had been going on for about 5 years. Delay was a factor that the Court of Appeal took into account in affirming the decision of the lower court.

19. Mr. Mukasa argues that the award in this case is void ab initio. The award is a nullity for

it is besieged with uncertainty. I am not sure if at this interlocutory stage I can decide the main application by expressing an opinion one or the other way on whether this award is a nullity or not. It would appear to me premature, at least without the benefit of full argument of counsel on the issue, to decide the same now and yet it will only be fully argued at the hearing of the main application. Unless an award was clearly illegal on the face of it, which is not the argument put forth here, it would be premature to take a position on the issue at this stage.

20. The cause of action giving rise to the award in question arose in 2000. Since then to date the respondent has resisted the applicants' claim, leading to the commencement of arbitral proceedings, the award and the present proceedings to set aside the award. That the respondent has resisted the applicant's claim is not to be taken against it in these proceedings. The respondent is entitled to seek justice both in the manner that the parties agreed and as provided by law. Nevertheless the delay to put this dispute at rest is one of the factors that may be considered relevant in deciding whether security should be ordered or not.

21. The respondent has indicated that it is able to pay the award, should the award be confirmed, given that it is a leading freight forwarding company in Uganda, and it owns substantial properties in the form of vehicles, according to the affidavit for the respondent. I suppose if the respondent is able to pay award, it should not suffer any prejudice if it provided security thereof. The respondent objected to provide security on account of the claim that the award is a nullity. At this stage I am not able to decide that issue as it will be finally decided with resolution of the main application.

22. Given the time it has so far taken without resolving this dispute between the parties, the self proclaimed ability of the respondent to meet the award should it be confirmed, and the lack of prejudice to the respondent if an order for security is made, I am satisfied that it is in the interests of justice to order the respondent to provide security for payment of the award to the applicants. I order that the respondent shall, not later than 30 days from today, deposit in this court, a local bank irrevocable guarantee that such bank will pay such sums of money as shall be due on the award that this court may confirm, on behalf of the respondent, to the applicants, on demand by the applicants. In the alternative the respondent may deposit in this court, such other security as may be acceptable to the applicants. Costs of this application shall be in the cause. Signed, dated and delivered this 18<sup>th</sup> day of October 2007

FMS Egonda-Ntende  
Judge

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