THE REPUBLIC OF UGANDA

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

HCT - 00 - CC - CS - 939 - 2004

CONTACT GRAPHICS LIMITED :: PLAINTIFF

VERSUS

VIVILAN METAL PROJECT LIMITED :::::::::::::::::::::::::::::::::::: DEFENDANT

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE.

J U D G M E N T:

This is an application by way of chamber summons under the provisions of Section 34(1), (2) (a), (vi) and b(ii) of The Arbitration and Conciliation Act (Cap 4 of the Laws of Uganda hereinafter to "ACACT") and schedule 1 of Rule 13 of the Arbitration Rules to The Act for orders to set aside the Arbitration Award of Mr. Mohammed Mbabazi (hereinafter referred to as the "Arbitrator") dated 24th July 2006 and other orders consequently to the said order to set aside the award plus costs.

The facts of this case are as follows; The Respondent instituted High Court Civil Suit No. 423 of 2004 (as Plaintiff) against the Applicant (as Defendant) claiming special damages totaling Ug.Shs.22,050,000/= being the balance due out of a contract dated 1st April 2003, general damages for breach of contract dated, interest and costs. It was the case for the Plaintiff (now Respondent) that in early 2003, they contracted the Defendants (now Applicants) to fabricate and erect for them advertising bill boards for various companies. The total cost of the contract

was said to be Ug.Shs.64,150,000/= of which Ug.Shs.42,100,000/= was paid leaving a balance of Ug.Shs.22,050,000/= as out standing.

For the Defendant (Applicant) on the other hand it was averred that the Plaintiff breached the contract and consequently the contract was terminated as a result of frustration. It was the defence of the Defendant that if any payment was due to the Plaintiff which was denied them, it should be computed based on the legal principle of quantum meriut.

This case generated a lot litigation with up to seven (7) different applications being filed. An attempt at court annexed mediation also failed.

At pre-trial conference and with the referred to arbitration as contract in question dated 1st April 2003 in paragraph 5.0 had an arbitration clause. It was agreed that the arbitration would be conducted within 30 days.

The arbitrator made his award on the 24th July 2006 and it is this award that the Applicant seeks to set aside. The grounds for setting aside the arbitral award in the amended summons are;

1- That, the arbitrator failed to comply with the stipulated time within which he should have completed the award.
2- The arbitrator expressed evident particularly in the conduct of the arbitral proceedings.
3- That, the award is in conflict with public policy in Uganda and it is bad on the face of it.
4- That, the award bears admitted material mistakes.
5- That, there is additional evidence established that deserves due consideration.
6- That, the arbitrator exhibited a lack of consideration for evidence on record and thereby made findings of fact which were not justified by the documents before him as he failed in his principle duty.

The summons were supported by the affidavit of Mr. Omar Kakonge Ssali the Managing Director of the Applicant company while it is opposed by the affidavit of Mr. Tonny Matovu the Managing Director of the Respondent company.

Mr. Brian Kaggwa appeared for the Applicant while Mr. Wilfred Niwagaba appeared for the Respondent.

Submissions in this application were delayed by the provision of a record of proceedings in the Arbitral Tribunal. The record made available to court was not certified by the Arbitrator but clearly both parties relied on it. Court shall therefore take the position in the legal maxim *"Omina praesumuntur rite et solemniter esse acta"* (All acts are presumed to have been done rightly and regularly…) and also rely on the said record as provided to court.

At the preliminary meeting of the Arbitration both parties agreed that the Applicant (then Respondent) file a counterclaim. This is significant because in the main suit the Written Statement of Defence did not contain a counterclaim. The Applicant then filed a counterclaim for Ug.Shs.814,923,361/= as special damages.

Before I address the grounds of the application, there are two matters I wish to address.
First, Counsel for the Applicant raised the issue that the Respondent did not file any affidavit to the one filed in the amended chamber summons and that *"…this leaves the Applicant's case unassailable and un rebutted…"*

Counsel for the Respondent in reply submitted there was no evidence that the amend chamber summons were served on the Respondent. I am not clear why Counsel for the Respondent would wish to contest the amended summons at such a case stage as they were on court record by 19th June 2007 well before the time. Application reached the time for setting the time frame for written submissions on the 4th February 2008.
I find that the Respondents simply did not file affidavits in reply to the amended chamber summons. That notwithstanding, I also find that Counsel for the Applicant's argument that failure by the Respondent to reply to the amended chamber summons makes the Applicant's case *"unassailable and rebutted"* to be legally incorrect. It is a well established rule of procedure and it is indeed provided for under Order 6 rule 24 of the CPR that where a party opposite does not plead to the amended pleading then he or she shall be deemed to rely on his or her original pleading in answer to that amendment. That means that the Respondent's reply to the original chamber summons is hereby deemed to be the Respondent's reply to the amended chamber summons. In any event Counsel for the Respondent in his written

submissions did grounds of the chamber summons as amended. I need not to say more on this matter.

Secondly a review of this Application, regardless that the correct law and procedure has been cited and followed, gives the impression that it is being handled as an appeal from the award of the Arbitrator.

This is a common error in such Applications. An Application to set aside an Arbitral Award under Section 34 of The A. C. Act (Cap 4) is simply that and nothing more.

It is not an appeal. You cannot appeal the decision of an Arbitrator.

The reason for this is quite clear, an arbitration is not a court trial, but rather an alternative dispute mechanism to such a court trial chosen by the parties themselves by agreement (called an *"arbitration agreement"* or *"arbitration clause"* within an agreement itself). Applicants wishing to set aside arbitration awards must bear this in mind and not mix up issues when prosecuting their application.

An Arbitral Award can only be set for the 9 (nine) reasons set out in more detail set out in Section 34 2(a) and (b) of the AC Act (Cap 4) [which I shall not replicate here]. In this regard, I agree with the submissions of Counsel for the Respondent that the Applicant has in effect itself to the reasons set out in Section 34 (2), (a), (iv), (v) and b (ii) namely that (paraphrased).

a) The arbitral award deals with a dispute not contemplated by or falling within the terms of reference of the arbitration or contains decision beyond the scope of the reference to arbitration.
b) 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.
c) The award is in conflict within the Public Policy of Uganda by calling it illegal…"

As a matter of policy, I agree with the learned author on that point. However, that does not mean that the said award cannot be brought up for scrutiny by the courts. The learned author Sujan (supra) makes the observation that where

> *"…the award is shown to be bad on the face of it or there has been something radically wrong or vicious in the proceedings amounting to a violation of natural justice…"*

then the court in the wards of the learned author will

> *"…make a shifting investigation of the entire arbitration proceeding…"* (emphasis mine)

This shifting investigation by the court is one of superintendence and not substitution of decision making.

Having address the above two matters, I shall now address the grounds for setting aside the Arbitrator's Award.

That being the case the courts role in setting aside an Arbitral Award arises in clearly defined circumstances. The author M.A. Sujan in his book *"The Law Relating to Arbitration and Conciliation"* 2ed Universal Law Publishing Company (which interprets the Arbitration and Conciliation Act of India whose provisions are similar to those in Uganda) comments on the role of the courts in setting aside an Arbitral Award and this authority is also referred to by Counsel for the Applicant. In that text the learned author **Sujan** (supra) writes

> *"…The policy of the law is that the award of the arbitrator is ordinarily final and conclusive and that the court should approach the award with a desire to support it if it is reasonably rather than destroy it".*

Ground 1: The Arbitrator failed to comply with the stipulated time within which he should have completed the award.

The case for the Applicant here is fairly straight forward. Counsel for the Applicant says that order of court appointing the Arbitrator is dated 21st July 2005 and that therein it was ordered that the arbitration be completed within 30 days but this was not done thus making the award a nullity. The Award is actually dated 24th July 2006.

Counsel for the Respondent submitted that the delay was caused by the Applicant when they failed to adhere to the time frame given by the Arbitrator especially in preparing written

submissions. It is the case for Respondent that the Applicant should not be seen to benefit from its own wrong.

Furthermore, Counsel for the Respondent submitted that by the Applicant's very conduct they waived the 30 day period. Finally that court should apply the provisions of Article 126 (2) (c) of The Constitution of Uganda to deliver substantive justice and no rely on technicalities.

A review of the order of court dated 21st July 2005, shows that both Counsel did not read it well. There is a sense that the Arbitrator was expected to deliver his award within 30 days after the date of the order. The actual wording however of the order on the point reads

> *"…and that the arbitration shall be completed within 30 days from the date of his (i.e. The Arbitrator) acceptance…"* emphasis mine.

As it is none of the parties addressed court as to when the Arbitrator accepted his appointment. However, the record of proceedings shows at page 5 that the Arbitrator put a precondition of payment by 28th September 2005 so perhaps it is fair to state that his acceptance could be pegged to that date. That notwithstanding, the award was not made within 30 days of that date and no extension of time was sought by the parties. A perusal of the Arbitral proceedings shows slow progress which can be attributed to both parties as the Arbitrator kept prompting them to file written statements on time. The hearing did not start until 28th December 2005 which is three months after what can be deemed the acceptance date.

Section 4 of The A.C. Act (Cap 4) provides under the arbitration agreement which has not been complied with and yet proceeds with the arbitration without stating his or her objection to the non compliance without undue delay or, if a time limit is prescribed, within that period of time, shall be deemed to have waived the right to object…"

A perusal of the Arbitral proceedings does not show any objection to the issue of time by the Applicant. The challenge to time therefore is not sustainable and I agree with Counsel for the Respondent that such a challenge is deemed as waived by the Applicant.

I find therefore that the Award is not a nullity.

Grounds 2 and 4: **The Arbitrator expressed evident partiality in the conduct of the arbitral proceedings and The award bears admitted material mistakes.**

Counsel for the Applicant submitted that the Arbitrator acted with partiality by favouring the Respondent without properly evaluating the evidence adduced by the Applicant. As a result, the Arbitrator made erroneous decision. Counsel for the Applicant submitted that the Bell Lager Bill Board was invoiced twice and that this was conceded by the Respondent. It was therefore wrong for the Arbitrator not to take this into account and put the value of the contract at Ug.Shs.64,150,000/= instead of Ug.Shs.61,950,000/= as was clearly explained by the Applicant. Counsel for the Applicant referred to this as unjust enrichment and a miscarriage of justice. I was referred to the case of

> **Campbell V Irwin** (1913) 25 CWN 853: 5CWN 957 (a Canadian decision) for the proposition that an award of excessive costs may amount to evidence of partiality.

Counsel for the Applicant submitted that where impartiality is established, then the court should set aside the Arbitral Award. In this regard, I was referred to the decision of Justice Fred Egonda Ntende (as he then was) in the case of

> **Kilembe Mines Ltd V B. M. Steel Limited** M.C. 02 of 2005.

Counsel for the Respondent on the other hand denied that the Arbitrator had exhibited impartially. He submitted that evidence was adduced by the Respondents to show that the two Bill Boards in question for Bell Lager were of different sizes (that is 10” x 12” and 6” x 12”) and had been ordered by the Applicant. Counsel for the Respondent submitted that the evidence showed that the 6” x 12” Bill Board had not been paid for and that the Applicant requested the Respondent to include it in the invoice No. 063 for Bell Lager.

Counsel for the Respondent submitted that Arbitrator took into account the work done, the sum admitted by the Applicant as paid (that is Ug.Shs.19,530,000/=) and using simple mathematics/ arithmetic arrived at the outstanding figure due to the Respondent.

Counsel for the Respondent disagreed with the position taken by the Applicant that the outstanding amount due to the Respondent were costs within the meaning of The Campbell case (Supra).

Counsel submitted that there was no evidence of impartially on the part of the Arbitrator that could be borne out from the pleadings, record of proceedings and the Award itself.

I have addressed myself to the submissions of both Counsel. The onus of proving impartially lies on who has alleged it and in this case that is the Applicant. Impartiality on the part of the Arbitrator amount to misconduct as used to be the test under the Old Arbitration Act (Cap 55). Mere mistake by the Arbitrator does not amount to misconduct. In this regard, I follow the wise finding of **Justice James Ogoola** (as he then was) in the case of

Total (U) Limited V Buramba General Agencies Arb: Cause No. 03 of 1998

In the case of **National Social Security Fund & Anor V Alcon & Anor** (CA) Civil Appeal No. 02 of 2008 **Lady Justice Alice Mpagi Bahigeine** (JA) held

> *"…not all kinds of misconduct could give rise to setting aside an arbitral award. It is only gross misconduct which gives power to the court to set aside an award…"*

Shifting through the record of the tribunal the Award and the evidence adduced in this application, I am unable to see on the face of the records or otherwise evidence gross mistake of fact and or error of judgment. The Arbitrator has explained the basis of his award and on the face of it the award looks good. That is all that court need concern itself with.

I therefore find that the Arbitrator was not impartial. Furthermore, I also find that the award does not bear material mistakes. Grounds 2 and 4 of the Application therefore must fail.

Grounds 3 and 6: **The Award is in conflict with Public Policy of Uganda and it is bad on the face of it and that the Arbitrator exhibited lack of consideration for the evidence on record and thereby made findings of fact which were not justified by the documents before him as he failed in his principal duty: The end result being a partial decision and Award.**

This combined ground is fairly wide and I have already in this ruling. I shall therefore concentrate on what has not been previously addressed.

Counsel for the Applicant submitted that the Arbitrator did not sufficiently address the issue framed for him as to *"whether the claimant (now Respondent) satisfactorily performed the fabrication and erection works in accordance with the contract terms and conditions…"*
In particular Counsel for the Applicant took issue with the Arbitrator's finding that there was no warranty on the durability and longevity of the bill boards yet by the parties very contract the Respondent represented to the Applicant that it possessed the required skills and expertise necessary to provide the contracted services. Counsel for the Applicant submitted that it was not contested that the bill boards actually collapsed after they were erected by the Respondent. He further submitted that even where the contract was silent on terms such as these, the law will apply a reasonable as determined by custom, usage or the rest of an officious bystander.

Counsel for the Applicant submitted that had the Arbitrator paid due regard to the final field reports and the pictures of the collapsed bill board that were adduced in evidence, he would have reached a different conclusion. Instead however, the Arbitrator unduly favoured the evidence of the Respondent to the extent that he imported evidence into the record which, is contrary to Public Policy.

Counsel submitted that under Section 18 of the AC Act (Cap 4) it provides

> *"The parties shall be treated with equality, and each party shall be given reasonable opportunity for presenting his or her case…"*

I was also referred to case of **Kilembe Mines Ltd** (Supra) where **Justice Egonda Ntende** held

> *"The discretionary power of the Arbitrator in the conduct of the case, though large, is not absolute and his decision may be reviewed by court and his award set aside if it appears that in the course which he has acted, though with the best intention, unfairly to either party…"*

It is the case for the Applicant that the said bill boards with or without serving should have at least stood for 6 (six) months; but that they collapsed after one month. Counsel for the Applicant submitted that the Arbitrator in reaching his decision placed undue reliance on the MTN/Applicant contract instead of the Applicant/Respondent contract (under which the fabrication was done) thus in effect re-writing the parties mutual contract.

Furthermore, the Arbitrator misapplied the law when he found that there was no frustration of contract. It is the case for the Applicant that by the Respondent not fulfilling it part of their mutual contract the MTN contract was terminated and hence the entire arrangement got frustrated as the MTN contract was the foundation on which the Applicant/Respondent contract was based. That being the situation, it is the case of the Applicant that since there was frustration, no liability would ensure and any payment should be determined on the principle of quantum meruit.

I was referred to the India decision of

> **N. Chellapan V Secy, Kerala Estate Electricity Board** (1975) 1 SCC 289 (AIR 1975 SC 230)

where it was held

> *"When a proposition of law is stated in the award and which is the basis of the award and it is erroneous, that the award can be set aside or remitted on the ground of error of law apparent on the face of the record…"*

Counsel for the Applicant raised an argument that Public Policy does not condone wrongs and or a party who benefits or seeks to benefit from a wrong. He further submitted that it is the primary duty of the courts to enforce contracts and it is against Public Policy to do so with partially.

Finally Counsel for the Applicant submitted that the Arbitrator gave partial treatment to the counterclaim and just dismissed it whereas there was overwhelming evidence in support and proof of it. He in particular referred to exhibits D1 and D2 which stated were unrebutted.

Counsel for the Respondent in reply asked court to also dismiss grounds 3 and 6 as baseless. On the issue of collapsing, he submitted that bill boards did not have a direct bearing to the Applicant's failure to pay the Respondent as the ordinary time of guarantee coupled with the nature of how the works were executed had expired as shown in exhibits 23 (a) and (b).

Mr. Tonny Matovu the Managing Director of the Respondent during the hearing testified that the guarantee period was about four months depending on the method of fabrication and erection of the bill board.

Counsel for the Respondent further submitted that as far as the MTN contract was concerned, the Applicant also had many other sub-contractors who could have been responsible for the substandard bill boards.

He further submitted that in finding as he did that the Respondent was not liable all the parties were accorded equal treatment.

The issue as to whether the Respondent satisfactorily performed the fabrication and erection of the bill boards in accordance with the contract terms and conditions is largely a question of fact.

As stated earlier, the role of the court in this is not to examine the correctness of the findings of the arbitrator as if it were sitting in appeal over its findings. As the author **Sujan** (supra) states at page 383

> *"…As the parties choose their own arbitrator, they cannot, when the award is good on the face of it, object either upon the law or facts…"*

I agree with that position. It is not enough that there is a mere error, there must be a mistake either in law or fact that is apparent on the face of record. As **Sujan** (supra) further states at page 383

"…The reason of this rule is that the arbitrator is the Judge of law and fact and if he makes a mistake in determining the matters referred to him, the award will be good not withstanding the mistake if such mistake does not appear on the face of the record…"

By referring to error on the face of the record, it was decided in the case of **Kanyebwera V Tumwebaze** [2005] 2 EA 86 (SC-U)

It was held that it must be

"…an evident error which does not require any extraneous matter to show its incorrectness. It must be an error so manifest

and clear that no court would permit such an error to remain on the record…"

Looking through he record of the arbitration, it is clear that the parties from a contractual point of view the terms and condition that pointed to satisfactory performance are not expressly provided for especially with regard to the contested issue of guarantee. The record shows that the Applicant put the guarantee period at six months while the Respondent put it at four months. No independent evidence of custom or trade usage was adduce the arbitration either. I am unable to see an error on the face of the record that the Arbitrator made on the matter of performance. All the Applicant wants court to rely on is the fact that some of the bill boards fell and that should be enough to establish liability on the part of the Respondent. However, the Arbitrator addressed his mind to collapsing bill boards and found that once erected the Applicant was obliged to inspect and carry out repairs of the bill boards on quarterly basis (every 3 months) which was not done. The Arbitrator also found that outside the contractual terms, nothing else on the face of the record regarding this finding either. All in all I find no basis to set aside the Award or the basis of his findings on satisfactory performance of the contract.

On the issue of frustration, Counsel for the Respondent submitted that the Arbitrator was correct to find that the both the legal doctrines of frustration and quantum meriut do not apply to this case. He does not see how the MTN contract would have affected payment for the Celtel, Bell Lager, Total Uganda and British Airways bill boards.

Looking again at the record, it is clear to me that the Arbitrator evaluated the evidence presented to him in the context of the doctrine of frustration. He reviewed the legal authorities on the doctrine of frustration and answered the issue in the negative.

The finding of the Arbitrator does not have to be technically perfect. An application to set aside an Arbitral Award is not a chance at second adjudication because one of the parties is dissatisfied with the result [See **Sujan** (supra) page 384] which what I see the Applicant attempting to do here. Again I see no error on the face of record or any thing that is radically wrong or vicious with the Award and or how it was arrived at. I therefore see no ground to set aside the Arbitral Award based on the finding relating to frustration of contract.

Regarding the issue of Public Policy, Counsel for the Respondent submitted that the arguments raised by the Applicant were an afterthought and were misconceived and so the Arbitrator was correct to dismiss them.

I must agree that I too had difficulty understanding what the Applicants case based an public policy was or that it was indeed a new ground. At that root of it in my understanding was the question of impartiality which I have already dealt with. I see no reason to repeat myself on this issue and find that there is no basis to set a side the Award on the basis of Public Policy.

The last area of this joint grand to cover is that of the counterclaim.

Counsel for the Respondent in response to this, submitted that the Arbitrator was very clear why he dismissed the counterclaim. He submitted that the Arbitrator at page 40 (paragraph 29) stated that he had largely dealt with the counterclaim while handling issue No. 5 during the hearing which was

"Whether the claimant is liable to Respondent for the termination of the MTN contract?"

Since the Arbitrator answered that issue in the negative then the counterclaim did not stand and therefore was no need for the Arbitrator to repeat himself on the issue of the effect of that on the counterclaim and so the counterclaim was dismissed. I agree with the submissions of Counsel for the Respondent. The counterclaim was a claim in special damages that on established legal principles would have to be especially pleaded and strictly proved. However, since the Arbitrator found no liability on the part of the Respondent, then a claim for special

damages was not sustainable. That being the case, I find no basis to set aside the Arbitral Award on the grounds that the counter claim was handled in a partial manner.

Having now considered all the grounds of the Application and made my findings, I hold that this Application has failed. I accordingly dismiss it with costs to the Respondent.

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Geoffrey Kiryabwire

JUDGE

Dated: 14/02/08

14/02/08

9:45am

Judgment read and signed in Court in the presence of;

- S. Kisubi h/b for Mr. Kimuli for plaintiff
- S. Odong for defendant / A.G.
- Rose Emeru – Court Clerk

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Geoffrey Kiryabwire

JUDGE

Date: 14/02/08