REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMAPALA

[COMMERCIAL COURT]

HCT-00-MA-88-2008

SALINI CONSTRUCTION S.P.A::::::::::::::::::::::::APPLICANT

VERSUS

BISONS CONSULT INTERNATIONAL::::::::::::::::RESPONDENT

BEFORE: HON LADY JUSTICE M.S ARACH-AMOKO

Ruling:

This ruling is in respect of an application by Salini Construction S.P.A (hereinafter referred to as the applicant), under the provisions of section 98 of the Civil Procedure Act (cap. 71) , Order 52 Rules 1 and 3 of the Civil Procedure Rules , (S.I 71-1), seeking orders from this Court that :

i) Paragraphs 4 and 6 of the Consent Order dated 3rd December 2007 be reviewed.

(ii)The Defendant's Barclays Bank Account No. 0001424232, be unfrozen to enable the defendant to access the sum of U shs. 567,915,271 held on the said account.

(iii) Costs of the application be provided for.

The grounds of the application are briefly that :

(1) That negotiations for an amicable settlement of the main suit has failed;

(2) That the hearing of the main suit is likely to take a long time before it is finally determined by Court ; and

(3) It is in the interest of justice that the defendant be allowed to access money held on its account pending the disposal of the main suit.

The application was supported by the affidavit sworn on the 27th February 2008 by Mr. Mel England its Project Manager. Mr. Bisangwa Kasimba Josephant, the respondent's Managing Director swore an affidavit in reply on the 11th March 2008.

The brief background to the application is that the parties executed an agreement by which the respondent agreed to supply 30,000 tons of rock-fill material within a radius of three kilometers for the Northern Bypass Project. The respondent complied. Thereafter, the parties agreed orally that the respondent supplies extra materials beyond the three kilometers. The respondent again complied. It appears, however, that the parties did not agree on the rate for transporting the extra materials. This resulted into a dispute which ended up in HCCS No. 790 of 2006 being filed by the respondent against the applicant claiming shs.338,559,240 for the said materials plus other additional claims which came to a total of a total of shs. 535,646,848, together with inter alia general damages and costs.

On the 24th April 2007, the Registrar entered default judgment under Order 11 rule 6 of the CPR against the applicant on the ground that the applicant had failed to file a defence within the prescribed time. A decree was extracted on the same day. On the 27th of November 2007, the applicant was served with a garnishee order attaching its account No.0001424232 with Barclays Bank, in an attempt to satisfy the decree. The applicant responded by challenging the default judgment vide Misc. Applications No. 749, 810 & 811 of 2007 on the ground that it had a good defence to the claim and prayed that the execution and the garnishee order be stayed and leave be granted to it to file a defence . While the application was pending in Court, the parties reached a consent and on the 29th November 2008, they filed the Consent Order the subject of this application.

It is now well settled that a consent judgment has to be upheld unless it is vitiated by a reason that would enable a court to set aside an agreement, such as fraud, mistake, misapprehension or contravention of court policy .This is on the premise that a consent is a fresh agreement between the parties.

The principle upon which the Court may interfere with a consent judgment was outlined by the Court of Appeal for East Africa in Hirani vs-Kassam (1952) E.A 131 in which it approved and adopted the following passage from Seton on Judgments and Orders, 7th Edn. Vol. 1 p .124.

"Prima facie, any order made in the presence and with consent of counsel is binding on all parties to the proceedings or action, and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the Court ……..or if the consent was given without sufficient facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable a court to set aside an agreement"

Subsequently, the same Court reiterated the principle **in Brooke Bond Liesbig (T) Ltd. Vs. Mallya (1957) E.A 266 and the Supreme Court of Uganda followed it in Mohammed Alibhai vs. W.E. Bukenya and Another SCCA No. 56 of 1996 (unreported), and in Attorney General and The Uganda Land Commission vs. James Mark Kamoga and James Kamala SCCA No.8 0f 2004,also relied on by Mr. Muzamil Kibeedi, learned counsel for the respondent unreported.** This is what Mulenga JSC, as he then was said at p. 13 of his judgment:

' …unlike judgments in uncontested cases, consent judgments are treated as fresh agreements and may only be interfered with on limited grounds such as illegality , fraud , or mistake.'

In the instant application, the grounds pleaded are indeed, failure of negotiation for an amicable settlement by the parties, delay by Court to hear the suit and interest of justice. From the affidavits on record, Court finds that whilst it is true that the various efforts made by the parties to try and settle the matter amicably were futile, that mediation by the Registrar has also failed, and that the suit filed way back in December 2006 is still dragging in Court due to the busy Court schedule, among others, this evidence per se on the basis of the authorities above does not justify the review of the Consent Order sought from this Court.

Further, it is the Court's view that the words *"until further orders from Court"*, used in the paragraphs which the applicant seeks to be reviewed are really clear and unambiguous and should be given their natural meaning. It may well be that both parties had in mind a situation

where they would have to resort to court in case negotiations failed and indeed both parties have a right to do so especially since the suit is still pending in court, they did not include among the agreed terms any express provision that the Consent Order would be reviewed once negotiations failed. It is therefore difficult for this Court to read that intention into the clear wording of the Consent Order.

According to me, and based on perusal of the evidence on Court record, the Consent Order was reached in exchange for the respondent relinquishing the default judgment and decree, and allowing the applicant to file a defence in the main suit. As Mr Bisangwa explained in his affidavit in reply, he was present in court when his lawyer gave conditional consent to the applicant's application for leave to file a defence . He stated that the underlying reason for their instruction was that the applicant is a foreign registered company without any assets in Uganda and was in the process of winding up the project for which the respondent had supplied the land fill materials, the Consent Order was therefore intended to protect the respondent's interest since it would be very difficult to recover from the applicant the moment the project wound up. These averments were not rebutted by the applicant. Court therefore finds some element of truth in them especially after the failure by the applicant to obtain a bank guarantee from a reputable bank in Uganda, a condition which the respondent had accepted for unfreezing the said account.

The global financial crisis is also no ground for review of a Consent Order negotiated by parties with the assistance of counsel because as stated earlier on in this ruling, a consent order is a special category of remedies, it creates a new legal relationship which should not be tampered with by Court unless the exceptional circumstances aforementioned exist .

The case of **National Union of Clerical , Commercial ,Professional & Technical Employees vs. National Insurance Corporation ,SCCA No. 17 of 1993** ,relied on by Mr. Benard Namanya, learned Counsel for the applicant clearly says that: *"the question whether a court should invoke its inherent powers in a given case is a matter for the court's discretion which should be exercised judicially" and "The court will in exercise of this discretion grant the relief sought only where to do so otherwise would be to deny a right or to do injustice"*

The evidence on court record does not indicate that the applicant would be denied any right, on the contrary, it is apparent that to grant the order sought would leave the respondent's claim without any security should the case go in its favour .

In the premises I find that no case has been made out to justify the grant of the order sought.

I accordingly do not find any merit in the application. The application is dismissed with costs to the respondent.

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M.S Arach-Amoko
Judge.

Ruling delivered in Court on the 24th February 2009 in the presence of:

1) Mr. Namanya for Applicant.
2) Mr. Kibeedi for Respondent.
3) Mr. Okuni Court Clerk.

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M.S Arach-Amoko
Judge
24/2/2009