**THE REPUBLIC OF UGANDA**

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

**COMMERCIAL COURT DIVISION**

HCT-00-CC-MA-0494-2012

KAMPALA CAPITAL CITY AUTHORITY …….. APPLICANTS

VERSUS

ZIMWE ENTERPRISES, HARDWARE & CONSTRUCTION LTD……. RESPONDENTS

BEFORE HON. MR. JUSTICE MASALU W. MUSENE

RULING:

This was an application by chamber summons under S. 34 (I), (2) (9) (VI) VII), b(ii), 3 of the Arbitration and Conciliation Act, Cap. 4, Laws of Uganda, and Rule 13 of the Arbitration Rules. It is an application by Kampala Capital City Authority that the Arbitral award made by the arbitrator (Can. Eng. Jonathan Grant Mwedde) on the 15th day of August 2012 be set aside. The Respondent is M/s Zzimwe Enterprises, Hardware's and Construction Limited. The grounds for the Application were briefly:

(1) That the arbitral award is not in accordance with the Arbitration and Conciliation Act, **Cap. 4 Laws of Uganda**.

(2) That the Arbitrator misconducted himself in disregarding the terms of the contract between the parties.

(3) The arbitral award bears errors on its face.

The Application was supported by an affidavit of Jenifer Semakula Musisi, the Executive Director of the Applicant. And in opposition was an affidavit sworn by Paul Kasagga, the Ag Managing Director of the Respondent. The Applicant was represented by Mr. Dickson Akena,

of the Directorate of Legal Affairs, Kampala Capital City Authority, while the Respondent was represented by Mr. David Kaggwa of M/s Kaggwa and Kaggwa Advocate Kampala.

Both sides filed written submission in addition to the affidavits in support and in opposition already mentioned. Section 34 of the Arbitration and Conciliation Act sets out grounds or reasons upon which an Arbitral award may be set aside.

And the three grounds set out herein above are some of those under the said S. 34 of the Act. Although the Applicant listed three grounds or so in support of the Application, when it came to submissions, the grounds were urged together and not separately, and one by one.

It was submitted on behalf of the Applicant that the Arbitral award was not issued in accordance with the conditions of the contract. And that the Arbitrator in his award attended S. 85 (5) and S. 34 2 (vii) of the Arbitration and Conciliation Act. S. 28 of the Arbitration Act and Conciliation Act provides-

> " **In all cases, the arbitral tribunal shall decide in accordance with the terms of the particular contract and shall take into account the usages of the trade applicable to the particular transaction**."

It was submitted for the applicants that the contract between the parties was an "**Ad-measurement Contract**", meaning that works are executed on the basis of agreed rates and payment is made for the quality of work actually executed. And that the process and procedures through which a sum would become certified as due and payable to the Respondent were such that the contractor submits to the project manager statements of the estimated value of the work executed less the cumulative amount certified previously. That would then be followed by the project manager checking the contractor's statement and thereafter certifying the amount to be paid to the contractor.

The contention therefore was that sum of UGX345,978,250/= awarded to the contractor by the Arbitrator as being half of the balance of the contract sum was not certified by the project manager. According to the Applicants submissions, the above amount of money was arrived at Arbitrarily without observing the contract terms. The Respondents' counsel on the other hand urged that the award of Shs345,978,250/= by the Arbitrator can Eng. Jonathan Grant Mwedde, a

Civil Engineer and a fellow of the Uganda Institute of Arbitrators, and an expert in construction law and practice was proper because he applied the law and usage of trade which relate to construction in accordance with S. 28 (5) of the Arbitration and conciliation Act.

And further, that in allowing the sum of Shs345,978,250/= to the Respondent, the Arbitrator applied the principal of Substantial performance, even where the employer had allegedly arrogantly refused to issue a completion certificate. The doctrine of substantial performance has according to CHITTY ON CONTRACTS, as quoted by counsel for the Respondents, has been stated to be performance by the plaintiff as a condition precedent to the active duty of performance by the Defendant. In the **case of Denis Semakula Vs Masaka Diocese & 2 others (1998) 11 KALR 128**, the court held that where the plaintiff has substantially performed the contract and further performance was deliberately made difficult by the defendant himself then the plaintiff was entitled to an order for the full contract price under the doctrine of substantial performance.

The Arbitrator in the present case found that there was substantial performance of the contract since Kampala City council admitted that the contract was completed up to 89%. This is contained in the findings of the Arbitrator on page 9 under paragraph 7.4.1.8, where he stated:

> "**As to proof, I have noted that the Respondent) Kampala Capital City Authority), in paragraph 5 (K) of its statement of Defence Stated that out of the Contract sum of UGX 6,218,180, 150/= value of work done for closure was UGX5,526,423,650/= This would constitute substantial performance. The difference between these two admitted figures would constitute the balance of the contract price**."

The arbitrator then went on to hold that it was evident that the claimant ( now Respondent) was prevented from earning the difference. And he awarded the claimant ½ of the balance of the contract price. His reasoning was that ad-measurement contract were unique in that the contractor is expected to utilize any payments made to him to execute the works in the next phase. And that if he is unfairly prevented from completing the works when he has substantially performed, then he has lost his earnings and profit.

Counsel for the applicant quoted the **Indian Supreme Court decision of Associated Engineers Co Vs Govt. of Andara Pradesh (1994) SCC 93** (AIR 1992 SCC 232) . In that case, it was held that the arbitrator could not act arbitrarily, irrationally, capriciously or independently of the contract. And that an Arbitrator who acts in manifest disregard of the contract acts without Jurisdiction.

In the present case, can it be said that the arbitrator disregarded the contract or deliberately departed from the same? According to Kampala Capital City Authority there was no certification of completion. This court nevertheless finds that the issue of certificate of completion was addressed by the arbitrator when he considered the principle of substantial performance already discussed. That was because despite the acknowledgment of completion of the contract up to 89% and deduction of full retention money up that scale of 89% as conceded in the testimony or witness statement of Eng. Joseph Musoke on behalf of Kampala Capital City Authority, the same Kampala Capital City Authority refused to issue completion certificate. This court finds that the Arbitrator did not in the circumstances act arbitrarily or outside the contract because of part performance or substantial performance up to 89%. The Respondents both at law and equity could not be chased away empty handed after accomplishing 89% of the work as spelt out in the contract. To do so would have been a denial of Justice to the Respondents and so the Arbitrator cannot in such circumstances be said to have acted outside the contract so as to set aside the award.

Section 9 of the Arbitration and Conciliation Act provides that the court shall not intervene in matters governed by the Act. This court's attention has been drawn to the ruling or decision of my learned sister, Hon. Justice Arach Amoko in **H.C. Miscellaneous Application No. 555/2002, Simbamanyo Estates Ltd. Vs Seyani Brothers Company (U) Ltd**. It was held that the court will not take upon itself the task of being a Judge of Evidence before the arbitrator. And that it may be possible that on the same Evidence, the Court might have arrived at a different conclusion than the one arrived at by the arbitrator, but that in itself is no ground for setting aside the award. I entirely agree with that decision by my Sister Judge as she then was, particularly in the circumstances of this case, and in the context of the principle of substantial performance followed by the arbitrator.

The Applicant in this case has not challenged the principle of substantial performance and has not furnished this court with evidence of deliberate or manifest departure from the contract by the Arbitrator. The finding and holding of this court therefore is that the allegation that the Arbitral award is not in accordance with S 34 (2) (VII) of the Act has not been proved by the Applicant.

The other leg of the award challenged was the award of accumulated retention. It was submitted by the Applicant that under contract, the amount to be retained was 10% of the value of the work. Counsel for the Applicant, in the Applicant's written submissions in rejoinder stated that under clause 48.2 of the contract, half of the amount retained shall be paid to the contractor on completion of the whole works and half when the Defects liability period has passed. It was further submitted that there **was no defects liability certificate**.

Counsel for the Respondent on that issue submitted that much has the Respondent had achieved substantial performance of the contract, the completion of their obligations was made impossible by the termination of their contract by the executive Director of Kampala Capital City Authority. And on that issue, the Arbitrator dealt with its on page 43 of his award. He observed that since he found that the contract was improperly terminated before the work were completed, KCCA would not prevent the contractor from completing the works while at the same time retain the money earned by the contractor as retention money. The arbitrator held that to do so would amount to eating one's case and having it at the same time. He concluded that the fact that defects liability certificate has not been issued did not absolve KCCA of its duty to refund all retention money.

The arbitrator went on to hold that the defects liability certificate was supposed to have been made by the project consultant and project managers who are KCC staff under clause 60 of the contract. This court in such circumstances find the reasoning of the Arbitrator as proper and cannot therefore interfere with the same. How could the Respondent have been expected to complete the works. When the contactor was wrongfully terminated by the Executive Director of the Applicant as the Arbitrator found and held? And the very KCCA people who were supposed to give the defects liability certificate terminated the contract before completion and turn round to allege that the work was not completed. That amount to giving with one hand and taking away with the other.

In such circumstances, I agree with the holding of my brother Justice Kiryabwire in **Mbale Resort Hotel Ltd. Vs Babcom Uganda Ltd HC MA No 256/2010, that …… where there are several possible views, then the view taken by the Arbitrator would prevail. This is because where the Arbitrator has applied his mind to the pleadings, the evidence adduced before him and the terms of the contract , then, it is not within the scope of the court to re appraise the matter as if it was an appeal. "**

And this court could not expect the Arbitrator to apply or strictly follow the contractual obligations even where the Applicant was the very person who has breached the very terms of the contract, such as it happened with termination of the contact pre-maturely. Who was the blame? This court therefore finds and hold that the allegation that the Arbitral award was procured by undue means or there was evidence of partiality contrary to S. 34 (2) (Vi) has not been substantiated.

The other issue raised by the applicant was with regard to the award of the cost of unpaid works. Counsel for the Applicant submitted that the sum of Shs384,997,687/= being a claim for additional works done was awarded on the basis of the Respondent's claim which was never certified by the project manager. And that the reasoning behind that award was erroneous.

The Advocates for the Respondent on the other hand submitted that there was over whelming evidence on record that the Respondent applied for Extension of time in a letter dated 10th May 2010, addressed to the consulting Engineer and copied to the Applicant. And that the Respondent clearly stated the reasons why it sought extension of time, such as the delayed delivery of bitumen as it was hijacked by Somali Pilates on its way from Iran, then the delay to issue the works order by the Applicant's agent increased scope of works and the weather.

In the Applicant's written submissions in rejoinder, it was stated that there were no options regarding extension of time of a contract except by express approval of the Applicants contracts committee but not by the conduct of the parties. I have had the opportunity to study the award by the Arbitrator and the issue of Extra or additional works claim and extention of time were considered. Under 7.4.3.1. on page 41, the Arbitrator found that KCC through the project manager instructed the Respondents to carry out three additional works notably:-

(a) Full construction of the road base of the section between Km 0 + 900 Kms 2+ 410 beyond the Northern by pass towards Najera ordered on 12the October 2009.

(b) Construction of side drains along Bwaise to Nabweru road

(c) Construction of 1200 mm diameter concrete culverts to desilt the Nakivubo channel and to de-silt Culverts along Bwaise- Naweru road on 21st October 2009.

The Arbitrator found that KCC did not challenge those additional works and he cited Engineer Joseph Musoke as having admitted what he called "**re-scoping exercise**." The Arbitrator also found that those extra works were cited as part of the reason why extention was sought. The Arbitrator concluded that since no attempt was made to dispute that claim relating to additional works, he awarded the sum of UGX384, 997,687/=.

The arbitrator did not award everything that the Respondent now claim. An example of liquidated damages of Shs310,909,008/= He went through evidence and the clauses in the contact particularly clause 49 and rejected that claim. Under 7.4.2.6, he stated:-

> **"Although there was no cross claim by KCCA for Liquidated damages, I would therefore find that KCC was and is correctly entitled to with held liquidated damages from the claimant's evolvements up to the tune of Shs310,909,008/= as claim in its termination letter. The claim is therefore unjustified and untenable. The award in Nil."**

In such circumstances, this court does not accept the submissions for the Applicant that the Arbitrator acted outside the contractual obligation or that he acted with partiality. And whereas counsel for the Applicant submitted that the arbitrator's award bears errors on its face, there is no substantiation of the errors alleged. Instead, this court is inclined to agree with the submissions by the counsel for the Respondent that the Arbitrator analysed the evidence on record and made a finding that **both parties appeared to have continued in acquiesces of the delay, or at the very least assumed and behaved as if they were still engaged in the contractual relationship**. The arbitrator observed that the period was extended from one month to another as KCCA continued to issue instructions to Zzimwe on the works and make payments. The

Arbitrator concluded that **KCCA would thus be stopped from denying the Natural consequences of its conduct and actions**.

That conclusion is supported under S.114 of the evidence Act, Cap 6, as correctly submitted by counsel for the Respondent. This court therefore finds and hold that such elaborate and logical findings of the arbitrator, based on the law of evidence cannot indeed be faulted. In fact, going by the doctrines of precedent and stare decisis, courts are reluctant to interfere in Arbitral awards. This is because the policy of the law is that the award is that the award of the Arbitrator is ordinarily final and conclusive and that court should approach the award with the desire to support it if it reasonable rather than destroy it. See **Rashid Moledina Co. Vs Hoima Ginners Ltd. (1967) E.A. 645**)

Lastly was the argument about unjust enrichment which is summarized under paragraph 19 of the affidavit in support by Jenifer Semakula Musis. It states:- "**19 that Iverily believe that the arbitral award is intended to unjustly enrich the Respondent, contrary to public policy of Uganda**."

Counsel for the Applicant quoted the case of **Kilembe mines Ltd Vs B M. Steel Ltd. High Court Misc. Application No 002 of 2005**, where Justice Egonda Ntende (as then was) held that the Arbitrator offered himself as a conduct for unjust enrichment of the respondent through duplicitous claims of collosal sums of money. Counsel for the Respondent on the other hand, submitted that the case of **Kilembe Mines Ltd Vs B. M. Still Ltd**. Was distinguishable from the instant case because in the Kilembe Mines case, the Arbitrator denied the Applicant from calling on of his witnesses, the Auditor.

In fact Justice Egonda-Ntnde held:-

> "… **in the instant case the arbitrator refused two of the witnesses called by the Applicant form testifying, for less that clear reasons. I find that the arbitrator thus prevented the Applicant from fully presenting its case to the obvious prejudice of the applicant**."

Justice Engonda-Ntende also talked about the arbitrator offering him as a conduct for unjust enrichment of the Respondent by Failing to consider the claim for special damages of the

respondent with the care he exhibited when dealing with the Applicant's claim. And that in so doing, the Arbitrator exhibited evident partiality to the respondents' case leading to a per verse award.

The present case is never the less different in that the Applicant who is alleging partiality or unjust enrichment has not substantiated the allegations as was done in the Kilembe Mines case.

Secondly, in the present case, the Arbitrator allowed both parties to call as many witnesses as they wished and they were cross-examined on the witness statements. And as already stated, no partiality was pleaded or substantiated, This court further finds and holds that the Arbitrator was appointed by consent of the parties pursuant to the express terms of the contract. He acted within the law above and no misconduct or partiality has been proved. In the premises, and in view of the law and practice relating to awards by Arbitrators as outlined, I find that the Applicant has failed to prove the grounds and test set out under S. 34 of the Arbitration and Conciliation Act so as to set aside the award.

The application is a accordingly hereby dismissed with costs. However, I decline to issue a certificate of two counsel.

Judge

16/11/2012

Mr. Byaruhanga Denis for the Applicant present

Mr. David Kagula and Edmond Kyeyune for the Respondent present

Ojambo Makoha Court Clerk Present

Judge

Court: Ruling read out in open court

Hon. Mr. Justice W. M. Musene

High Court Judge