THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

COMMERCIAL DIVISION

HCT - 00 - CC - MA - 487 - 2010

(ARISING FROM ARB CAUSE NO. 3 OF 2010)

PAN AFRIC IMPEX (U) LTD …..……. APPLICANT

VERSUS

ROKO CONSTRUCTION LTD…….....DEFENDANT

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE

J u d g m e n t

This application is brought by chamber summons under S. 33 and 34 of the Arbitration and Conciliation Act for orders that the arbitral award dated 15th February 2010, arising from the arbitration between the parties before Hon. Justice E. Torgbor be set aside and costs.

The application is supported by the affidavit of Mohamed E.M Hamid the Managing Director of the applicant.

The brief background to this application is that the respondent filed a claim vide CAD/ARB No. 5 of 2008, for breach of a building contract. The applicant and the respondent had entered into a building contract in June 2005, by which the respondent was to construct an office block on the applicant's property at Plot 117 Bombo Road, Kawempe. The applicant undertook to pay the respondent a sum of Ushs 865,531,843/= plus VAT. The respondent claimed that the applicant and its architects committed several breaches, hence leading to the arbitration. Hon. Justice E. Torgbor was appointed arbitrator.

The arbitrator made an award, awarding the respondent a sum of Ushs 2,201,501,198/= as special damages, Ushs 500,000,000/= as general damages, interest and costs. A notice of filing of the award dated 18th May 2010 was served on the applicant by the respondent, notifying the applicant that the respondent had filed the arbitral award at the Commercial Division of the High Court, hence this application.

The grounds for this application as set out in the affidavit of Mr. Hamid and are as follows;

1. **The arbitral procedure was not in accordance with the provisions of the Arbitration and Conciliation Act, because, contrary to S.31 (8) of the Act, the signed copy of the award was delivered only to the respondent, but not to the applicant.**

2. **The award contains errors of law on the face of the award which if had not been committed, would have obliged the arbitral tribunal to dismiss the claim of the respondent or at least deny the respondent the sums awarded.**
3. **The award contains decisions on matters of law that are contrary to established legal principles and are in conflict with the public policy of Uganda and also, the findings of the arbitrator are not in accordance with the laws of Uganda, which is the law chosen by the parties as applicable to this dispute.**

At the hearing of this application, the applicant was represented by Mr. Didas Nkurunziza while the respondent was represented by Mr. Enos Tumusiime.

Ground one: That the arbitral procedure was not in accordance with the provisions of the Arbitration and Conciliation Act.

It is the case of the applicant that the award was contrary to section 31 (8) of the Act because a signed copy of the award was not delivered to the applicant.

It is the case for the applicant that the arbitrator though paid for his fees/costs did not deliver to the applicant a copy of the award despite requests for it which was contrary to the law.

Mr. Hamid the Managing Director of the Applicant deponed that the applicant made initial payments of its share to the arbitrator's costs and expenses amounting to USD 12,000 but ceased to make any further payments when the arbitrator's demands became excessive. Furthermore, that the applicant was preparing to make a legal challenge to the arbitrator's fees when it was served with Notice of filing of the award. Mr. Hamid further deponed that the respondent elected to pay the arbitrator the balance of the fees in order to access the award and therefore, there was no lawful reason for the arbitrator to ignore and reject the applicant's written request for a copy of the arbitral award.

Counsel for the applicant contended that the procedure was not in accordance with the provisions of Section 31 (8) of the Arbitration and Conciliation Act, a mandatory provision which provides that a signed copy of the award should be delivered to the parties. Counsel for the applicant submitted that although the arbitral tribunal is entitled to withhold the making of the award until fees have been paid in full, once the fees are paid by either all the parties contributing their share of fees or by one party paying the fees in full, then the award must be delivered to each party, and that in this case, the respondent having paid the balance of the arbitrator's fees, the applicant was entitled to a copy of the award. Counsel for the applicant submitted that the award was not delivered to the applicant despite the request for the same by the applicant, contrary to the law.

It is the case of the respondent that the arbitrator had the right of lien over the award against a party that had not paid his fees.

Mr. Dragomir Lakic the Managing Director of the respondent deponed that the applicant refused to pay the arbitrator and that is why the applicant did not receive a copy of the arbitral award.

Counsel for the respondent submitted that the applicant refused to pay its share of the arbitrator's fees, amounting to USD 49,868 after paying the initial deposit of USD 12,000. Counsel for the respondent

further submitted that under Section 31 (9) of the Arbitration and Conciliation Act, the amount and mode of payment of the fees is determined by the arbitral tribunal, and that an arbitrator has a lien to withhold the award from a party that has not paid the fees. Counsel in this regard referred to the text **RUSSELL ON ARBITRATION** 22nd Ed pg 126 (at par 4-101). Counsel for the respondent further submitted that if the applicant complained that the fees were excessive then the only remedy was to apply to court under Section 6 of the Arbitration and Conciliation Act to adjust the same, but this was not done by the applicant.

I have addressed my mind to the application and the submissions of both counsels on this matter of providing the applicant with a copy of the Award.

Section 31 (8) of the Arbitration and Conciliation Act provides that

"After the arbitral award is made, a signed copy shall be delivered to each party."

Furthermore Section 31 (9) of the Arbitration and Conciliation Act also provides that

"…Unless otherwise agreed by the parties—

(a) the costs and expenses of an arbitration, being the legal and other expenses of the parties, the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration shall be as determined and apportioned by the arbitral tribunal in its award under this section, or any additional award under section 33(5); or

(b) in the absence of an award or additional award determining and apportioning the costs and expenses of the arbitration, each party shall be responsible for the legal and other expenses of that party and for an equal share of the fees and expenses of the arbitral tribunal and any other expenses relating to the arbitration…"

There is no direct provision under the Act on what an arbitrator should do in relation to the award if he/she is not paid his/her fees/costs. The authors of **RUSSEL ON ARBITRATION** (22nd Ed by David St. John Sutton and Judith Gill (pg 126, par 4-101) however write that an arbitrator has a lien on the award, for any outstanding fees. The authors note that:-

*"**The traditional method by which arbitral tribunals have secured payment has been to withhold the award from the party or parties seeking to take it up until any outstanding fees have been paid, effectively to exercise a lien over the award. This is now sanctioned by statute in a provision that the parties can not exclude. When the award is ready for delivery, the tribunal notifies the parties that it is available on payment of the fees. It does not concern the tribunal which party pays the fees. Where the party who takes up the award is not under its terms liable to pay the fees, he may recover from his opponent all the costs the award imposes including the arbitrator's fees. If neither party takes up the award, the tribunal may have no sanction but to forego its fees or sue for them."***

The learned authors further write (pg 124, par 4-097)

*"Excessive fees: If the fees of the tribunal are agreed by the parties, there is no basis for reducing those fees if they are excessive. If the fees that are alleged to be excessive have been fixed by an appointing authority agreed by the parties, it is doubtful whether the parties have a remedy. If the fees have not been agreed by the parties or fixed by the appointing authority, they must be reasonable. **On the application of a party, the court may order the amount of an arbitrator's fees and expenses to be***

adjusted, or repaid if they have already been paid. Such an application may be made by a party who does not wish to be liable for excessive fees of an arbitrator appointed by the other party. *" (Emphasis mine)*

In this case, it is not disputed that the mode of payment of the arbitrator's fees was that both parties had to contribute to the arbitrator's fees. This is clear from the affidavits and the submissions of the parties. In fact, the applicant agreed that it paid the initial deposit of USD 12,000 to the arbitrator, but restrained from paying the outstanding fees because the fees were excessive.

It would appear to me on the authorities above that where the applicant took the view that the fees sought by the arbitrator were excessive then the applicant should have brought an application to Court to challenge those fees. However, no such application was made by the applicant to the court to adjust the said fees. In fact, the applicant's counsel submitted that the applicant was about to make an application when it was served with a notice of filing of the award. In the premises, there was no application made, and therefore, the applicant is precluded from contesting the excessiveness of the arbitrator's fees in this application. Furthermore, it is clear that the applicant had not paid the outstanding fees of the arbitrator at the time the award was delivered.

The applicant contends that since the respondent in order to be able to enforce the award paid the outstanding fees and therefore, the applicant was entitled to a copy of the award from the arbitrator. I find that a strange argument to put forth. The applicant does not have clean hands in the matter it did not pay their portion of the fees and there are consequences to that they cannot shy away from by turning around and blaming the arbitrator. The best way round such thorny issues of arbitrators fees is to agree to them before hand.

In the premises, I find that the arbitrator's refusal to deliver the award to the applicant was justified on the ground that the arbitrator had a lien over the same for any unpaid fees. The applicant therefore fails on this ground.

Ground two: That the Award contains errors of law on the face of the award which if had not been committed would have obliged the arbitral tribunal to dismiss the claim of the respondent or at least deny the respondent the sums awarded.

It is the case of the applicant that the arbitral award contains errors of law on the face of the award.

Mr Hamid deponed that that the arbitral tribunal relied on evidence complied by Mr. Eridard Nyanzi who held out as a Quantity surveyor yet he was not a registered Quantity Surveyor, and had no practicing certificate. Furthermore, that this fact had been brought to the attention of the tribunal during the arbitral proceedings before Mr. Nyanzi could testify. Mr. Hamid deponed that the finding of the arbitral tribunal on the basis of a valuation prepared and signed by Mr. Nyanzi is an error on the face of the record and is also contrary to the public policy of Uganda that abhors the condoning of illegality or criminality by a court of law.

Counsel for the applicant submitted that the issue of Mr. Nyanzi holding out as a Quantity Surveyor was in breach of the law, particularly Sections 19 and 27 of the **Surveyors Registration Act** and that all documents including valuations and final accounts signed by Mr. Nyanzi were of no legal effect.

Counsel for the applicant submitted that Court cannot sanction an illegality and once this is brought to its attention overrides all questions of pleadings, including any admissions made thereon. For this

proposition counsel for the applicant among others referred me to the celebrated case of **Makula International Ltd V Cardinal Nsubuga** CA No 4 of 1981. He further submitted that the arbitral tribunal could not ignore this illegality once brought to its attention and by not heeding this caution by the applicants caused an error on the face of the record.

The case for the respondents is that there is no error on the face of the record.

Mr. Lakic for the respondent company deponed that the Quantity Surveyor named in the contract was M/s Integrated YMR Partnership and not Mr. Eridard Nyanzi. Furthermore, that on 25th November 2008 from 9.30am, the tribunal heard evidence of Ms Patricia Musisi a senior Quantity Surveyor with Integrated YMR Partnership, who prepared the bill of quantities that the Architect and the applicant relied upon to engage the respondent as the contractor. Furthermore, that Mr. Nyanzi was neither called as witness, nor did he carry out any measurements of the contract work at all, and that the certificates of payment upon which the contractor was paid were issued by the architect.

Counsel for the respondent submitted that Mr. Nyanzi's non registration as a Quantity Surveyor was not the basis of the award. Counsel for the respondent submitted that under the contract, the employer appointed J.E Nsubuga and Associates as the Architects and Integrated YMR Partnership as the Quantity Surveyors and not Eldard Nyanzi. Furthermore, that Mr. Nyanzi was stated as a witness in the contract, but had role to play in the contract and therefore, stating his name as a witness would not render the contract illegal. Counsel further submitted that in the award, it was noted at page 5 that Ms. Patricia Musisi was the project Quantity Surveyor and that after the examination of the measurements and valuations of the project surveyor, the tribunal accepted and adopted the award of the quantity surveyor. Counsel for the respondent also submitted that it was Ms. Musisi and not Mr. Nyanzi who testified and that Mr. Nyanzi was not party to the breach of contract and hence, there was no illegality.

Section19 (3) of the **Surveyor's Registration Act** Cap 275provides

*"…**Subject to this Act, no person shall engage in or carry out the practice of surveying, by whatever name called, unless he or she is the holder of a valid practicing certificate granted to him or her in that behalf under this Act..."***

Section 28 of the above Act goes further to provide for offences and penalties, for any person who contravenes the provisions of this Act.

In a letter dated 24th November 2008, signed by the Secretary Surveyor's Registration Board, marked Annexture L to the application, it is confirmed that Mr. Nyanzi was not a registered surveyor. The letter reads in part as follows;

"I have searched the Register of Registered surveyors and find that the above named is not and has not been a Registered Surveyor under the requirements of Cap 275 of the Laws of this country.

This therefore means that he could and would not have been issued with a Practicing Certificate for any period."

This letter was not challenged by the respondents and therefore, on that basis, it proves that Mr. Nyanzi was not a registered surveyor. In the premises, the fact that Eridard Nyanzi described himself as a

surveyor, in the absence of a practicing certificate was in contravention of the provisions of the Surveyor's Registration Act.

I however have also carefully considered Annexture M, which is the valuation of the Quantity Surveyor, signed by Eridard Nyanzi, for Integrated YMR Partnership. The issue for determination is whether that valuation, in view of the fact that it was signed by Mr. Nyanzi who was not a registered surveyor, can be said to be the basis of the award.

The arbitrator in his award clearly dealt with this issue and found on the agreed issue for determination of ***"whether there were variations to the contract and if so, whether the claimant is entitled to costs therefore"*** **that :-**

"…The respondent also disputed the letters and documents signed by one Eridard Nyanzi for not being a registered Quantity Surveyor with a practicing certificate. In the result, Mr. Nyanzi did not testify.

The project Architect quantified variations at Ushs 143,175,016 but without reference to or evidence of the measurements of the valuations upon which that figure was based. The Quantity Surveyor Miss Musisi, produced a valuation of variations at Ushs 138,519,025 based on measurements taken by her and her firm YMR Partnership. It is contended that the work in support of this valuation was done by an unqualified person whom Miss Musisi had attempted to cover up, thereby committing an act of professional misconduct.

Issues of criminal or professional misconduct were neither pleaded nor canvassed in the arbitration, besides they might have been outside the scope of this arbitral reference. Secondly, Mr. Nyanzi did not offer any testimony and therefore, any allegations against him were not tested in cross examination. On the other hand, Miss Musisi offered testimony and her evidence, that she personally attended the project site throughout, was neither contradicted nor challenged. Moreover she produced her measurements of all the areas of work disputed by the Respondent which measurements were produced by consent of the parties/advocates and were not challenged. The tribunal has examined these measurements which provided the foundation of her valuation of the variation of works. Other than the unsupported and therefore questionable quantification of variations offered by the Architect there was no other measurement, valuation or quantification from the Respondent to challenge those produced by the Project Quantity Surveyor. For these reasons the Project Quantity Surveyor's variation cost of Ushs 138,519,025 is preferred and accepted."

From the award of the tribunal above, it is clear that the tribunal took into consideration the fact that Mr. Nyanzi was not qualified, and for that reason he did not testify. Secondly, it took into account the fact that the document was drawn by him, although he was not qualified, and furthermore, it took into account the valuations done by Miss Musisi the Project Quantity Surveyor, whose own valuations she testified to, and were admitted by consent of the parties. In its conclusion, the tribunal considered that the valuations done by Miss Musisi were more credible, and gave its reasons why. The tribunal did not rely on the valuations done by Mr. Nyanzi and therefore, I find that the valuations of Mr. Nyanzi were not the basis of the award.

I also find that merely witnessing or attesting to the contract does not make the contract illegal. According to WORDS AND PHRASES LEGALLY DEFINED VOL 1 pg 138,

"Attestation in its primary meaning, as the dictionaries show, involves witnessing and witnessing only".

Furthermore, according to BLACKS LAW DICTIONARY by BRYAN A. GARNER 7th ED at 1596, an attesting witness is,

*"**One who vouches for the authenticity of another's signature by signing an instrument that the other has signed."***

In the premises, I find that Mr. Nyanzi's role in the contract was to merely prove the authenticity of the contract and nothing more. This to my mind does not render the contract illegal. In any case, the parties did not challenge the validity of the said contract, but merely the valuations done by Mr. Nyanzi, which I have found, were not the basis of the award. I can not therefore see that there is any error of law apparent on the face of the award.

Ground three: That The award contains decisions on matters of law that are contrary to established legal principles and are in conflict with the public policy of Uganda and also, the findings of the arbitrator are not in accordance with the laws of Uganda, which is the law chosen by the parties as applicable to this dispute.

Counsel for the applicant relied on the same submissions in respect of this ground, as those made on the ground before that the award contained errors of law on the face of it. Counsel for the applicant in his submissions in substance adds that by the tribunal making such errors of law on the face of the award, the arbitral award is in conflict with the public policy of Uganda that abhors the condoning of illegality or criminality by a court of law or lawfully appointed tribunal. Counsel in this regard referred to my decision in the case of **CHEVRON KENYA LIMITED & CHEVRON UGANDA LTD V. DAGARE TRANSPORTERS LIMITED** (MA NO. 490 of 2008).

In light of my of my findings in the last ground that the applicant failed to prove that the award was based on the valuations of Mr. Nyanzi or that the contract is illegal the public policy too must fail as not being founded.

In the premises, the application by the applicant to set aside the arbitral award fails and is accordingly dismissed with costs to the Respondent.

Geoffrey Kiryabwire

Judge

Date: 19/02/13

19/02/13

9: 49 a.m.

Judgment read and signed in open court in the presence of;

- E. Tumusiime for Respondent
- D. Nkuruziza for Appellant

In Court

- H. Magino C/S of Respondent
- Rose Emeru – Court Clerk

……..……
Geoffrey Kiryabwire
JUDGE

Date: 19/02/2013