

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
COMMERCIAL DIVISION  
CIVIL APPEAL NO. 661 OF 2010  
(ARISING OUT OF ARBITRATION CASUE NO. 2 OF 2010)**

**1. AYA BAKERY (U) LTD  
2. MOHMMED MOHAMMED HAMID.....APPLICANTS**

**VERSUS**

**ROKO CONSTRUCTION LTD.....RESPONDENT**

**Before the Hon Justice Geoffrey Kiryabwire**

**Judgment**

This application is brought by Chamber summons under Sections 34(1), 2(vi) and (vii) of the Arbitration and Conciliation Act and Rules 7 (1) and 13 of the Arbitration and Conciliation Rules for orders that the arbitral award in CAB/ARB No. 11 of 2007 be set aside and de-registered and costs. The application is supported by the affidavit of Mohammed Mohammed Hamid the second applicant and the Managing Director of the first applicant.

The brief background to this application is that the respondent filed a claim vide CAD/ARB No. 10 of 2007 for breach of a construction contract. The parties appointed Mr. Precious Ngabirano as arbitrator, but he was subsequently substituted by Hon. Rtd Justice Alfred Karokora during the course of the arbitral proceedings.

The subsequent arbitrator made an award dated 8<sup>th</sup> December 2009, in which the respondent was awarded the sum of Ushs 746,461,881/= as special damages, interest on special damages at the rate of 18% p.a from October 2007 until payment in full, Ushs 100,000,000/= as general damages, interest on general damages at the rate of 8% p.a. from the date of the award until payment in full, Ushs 16,150,000/= as the arbitrator's fees and Ushs 179,999,064.40 being the claimants taxed costs. On 9<sup>th</sup> March 2010, the said award was filed in the High Court (Commercial Division) for execution. The applicants, being dissatisfied with the award, filed this application.

The main ground for this application, as stated in the chamber summons and the supporting affidavit is that the arbitral proceedings were conducted in a manner contrary to the Arbitration and Conciliation Act and therefore the award is not in accordance with the Act.

At the hearing of this application, the applicant was represented by Senior Counsel G.S Lule while the respondent was represented by Mr. Enos Tumusiime.

It is the case for the applicant that when the Hon (Rtd) Justice Alfred Karokora took over as arbitrator from Mr Precious Ngabirano he decided to continue with the proceedings from where the previous arbitrator had stopped instead of starting afresh.

It is also the case for the applicant that whereas a receiver had been appointed pursuant to the Arbitral Award they were not aware of the process leading to the appointment of the receiver.

Mr. Hamid the Managing Director of the Applicant deponed that the applicant's Legal representative Mr. Moses Kimuli objected to the removal of Mr. Ngabirano and the appointment of a new arbitrator but lost the objection. Mr. Hamid further deponed that the arbitrator decided to continue with the proceedings from where the previous arbitrator had stopped and this was objected to by the applicant's lawyer, but the objection was overruled. Mr. Hamid deponed that all the witnesses who had been examined before the previous arbitrator were not recalled to give their testimony before the new arbitrator and the arbitrator proceeded to make an award.

Furthermore, that it was brought to the arbitrator's attention by the applicant's counsel that the proceedings should start afresh but the arbitrator over ruled this.

Mr. Hamid further deponed that sometime in August 2010, the applicant learnt that there was an advertisement in the Monitor Newspaper that the first applicant had been placed under receivership and a one Enoth Mugabi had been appointed as a receiver. Mr. Hamid deponed that he was not aware of any process leading to the appointment of the receiver and neither had the first applicant, its officers nor its counsels ever been served with Court process in respect of that matter. Mr. Hamid deponed that his counsel brought to his attention a notice of filing of the arbitral award, an application for execution and an affidavit of service stating that the respondent had served the applicant with a notice of filing of the award through a person named Regina, at the offices of the applicant. Mr. Hamid further deponed that there is no evidence of the existence of any person called Regina whom the respondent claims to have served.

Counsel for the applicant submitted that Section 15 (2) of the Arbitration and Conciliation Act provides that where a sole arbitrator or presiding arbitrator is replaced, any hearing previously held shall be started afresh. Counsel for the applicant submitted that this provision is mandatory and should have been followed after the previous arbitrator was substituted.

Counsel for the applicant further submitted that there is no estoppel against the provisions of a statute, what the statute provides must be adhered to and therefore, the failure to start the proceedings afresh was an illegality which can not be sanctioned by the court. He relied on the cases of **MAKULA INTERNATIONAL LTD V. HIS EMINENCE CARDINAL NSUBUGA & ANOR (CA NO. 4 OF 1981)** and **ELMANDRY VS SALAM (1956) 23 EACA 313** for this submission.

For the respondent in reply two issues are raised. First that this application is time barred and secondly that the applicants did not raise this objection during the arbitral hearings and therefore waived the application of the said provision of the Act.

As to the argument of being time barred counsel for the respondent submitted that the application was time barred, having been filed about 8 months after service of the notice of filing the award and the award itself and as thus, the application is time barred.

Counsel for the respondent submitted that Section 34 (3) of the Arbitration and Conciliation Act provides that an application to set aside an arbitral award shall be brought within a period of one month unless a party upon showing good cause has been granted extension to file the application out of time. However no extension of time had been given.

As to the applicant's contention that the procedure adopted by the subsequent arbitrator was contrary to the Act Mr. Acali Manzi the Corporation Secretary of the respondent, by affidavit deponed that it was not the respondent who forced the previous arbitrator Mr. Ngabirano to resign but the appointing authority CADER made a ruling vide Misc. Application No.12 of 2008 as a result of Mr. Ngabirano's undue delay in handling the case, and that no appeal was preferred by the appellant against this ruling. Mr. Acali further deponed that the arbitral proceedings before Justice Karokora commenced on 10<sup>th</sup> September 2008 until 15<sup>th</sup> April 2009 and both Mr Hamid and Mr. Clive Matiso gave evidence before the said arbitrator on behalf of the applicants, and Mr Saul Mukobe testified for the respondent. This was also confirmed by Mr. Dragomir Lakic in his supplementary affidavit in reply.

Counsel for the respondent submitted that the appellant had waived the provision of section 15 of the Act because the applicant did not raise this objection but chose to continue with the proceedings. Counsel relied on the authorities; **PRASAN ROY V. CALCUTTA METROPOLITAN DEVELOPMENT AUTHORITY & ANOR (INDIAN SUPREME COURT) and SULAIMAN VERSI LTD (in Liquidation) Vrs. I. H. LAKHANI & Co. (EA) LTD** [1957] EA 491. He submitted that on that basis of this, the award should be upheld.

As to the notification and filing of the arbitral award Mr. Stephen Musisi (Advocate who served the notice of filing the arbitral award and filed an affidavit of service to that effect) deponed a supplementary affidavit that he had mixed up the place of service in his earlier affidavit and that it was at the law firm of the applicant's lawyers M/s G. S. Lule Advocates at Insurance House Kampala and not the premises of the applicant in Kawempe. It is at the said law firm that service was accepted by one Regina.

I have carefully read the application and considered the submissions of both counsel for which I am grateful.

Before I delve into the substance of this application there is a preliminary issue that has to be dealt with and that is whether the application is time barred as put by counsel for the respondent.

The arbitration and Conciliation Act, provides for the time limit within which an application to set aside an award may be filed. According to Section 34 (3) of the Act,

***“An application for setting aside the arbitral award may not be made after one month has elapsed from the date on which the party making that application had received the arbitral award, or if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral award.”***

However Rule 7 (1) of the Arbitration and Conciliation Rules also provides for a time limit, within which such an application may be made as follows,

***“Any party who objects to an award filed or registered in the court may, within ninety days after notice of the filing of the award has been served upon that party, apply for the award to be set aside and lodge his or her objections to it, together with necessary copies and fees for serving them upon the other parties interested.”***

The Act is inconsistent in as far as it and the rules under it provides different time lines under the provisions above and this inconsistency has been a source of confusion in applications of this nature. In the recent decision of **Roko Construction Ltd V Mohammed Mohammed Hamid** CA No 51 of 2011 **Hon Justice S Kavuma** (JA) after reviewing several High Court decisions on the matter held

***“...that Rule 7 of the Arbitration Rules could not over ride the specific substantial sections as to the time within which to lodge the applications in the High Court...”***

This definitively settles the matter and binding on this court. Therefore the reference by the applicants inter alia that this application was also brought under Rule 7 of the Arbitration Rules was erroneous.

Tracking the time lines here, the award was delivered on 8<sup>th</sup> December 2009. The Managing Director of the Respondent deponed that counsel for the applicant was aware of the date of the delivering the award but did not attend that particular session. The notice of filing of the award was filed in the Court on 9<sup>th</sup> March 2010. It is the case for the applicants that they were not aware of the filing of the award in court.

Mr. Stephen Musisi in his supplementary affidavit deponed

***“2. That on the 15<sup>th</sup> day of July 2010, I swore an affidavit of service of Notice of filing the award and of the award in Arbitration Cause No. 2 of 2010 vide annexure “A” hereto.***

***3. That I still stand by and confirm the contents of the said affidavit save that under paragraphs 4 and 5 of the said affidavit, I stated that I served the Notice of filing the award at the offices of the applicant in Kawempe along Bombo Road whereas not because I served the said Notice of filing the award itself upon the Law Firm of G.S Lule, Advocates, Insurance House, Plot 14 Kampala Road, P.O Box 1624 Kampala who are counsel for the applicants and the said Notice and award were received by one Regina on behalf of G.S Lule Advocates who duly endorsed my copies on 16<sup>th</sup> March 2010 but she inadvertently dated it 16/03/09.***

**4. That I sincerely believe that the mix up between the places of service, “Kawempe” along Bombo Road” and “Insurance House, Kampala” was as a result of the time between service, 16/3/2010 and swearing the said affidavit 6/7/2010”**

However the present counsel Mr. Lule received the taxation notice of 4<sup>th</sup> May 2010 and participated in the taxation on the 1<sup>st</sup> June 2010 and the respondents argue that there is no way the applicants could have participated in the taxation without knowing the contents of the award.

There has been much argument as to when the notice of filing the award in court was served on the applicants. The affidavits of Mr. Musisi do not make it easier as at one stage he deponed that this service was made on one Regina at the applicant’s offices at Kawempe along Bombo road and then later he corrects himself and says service was made on Regina at the offices of the applicant’s lawyers at Insurance House on Kampala Road. Whereas the applicants deny knowledge of the lady Regina counsel for the applicants remains silent about her. The question of service of the filing of the arbitral award stems from the wording in Rule 7 (1) of the Arbitration Rules which as seen above cannot override the Act. Section 34 (3) of the Act has different wording and states that an application to set aside an arbitration award may not be made after one month has elapsed from the date on which the party making the application “**had received the arbitral award**”. Section 34 of the Act therefore does not concern itself with the filing of the award in Court which is the basis of Rule 7 (1) (supra). It seems to me therefore that the relevant question is when the present applicant received the award but not when the award was filed in Court. Even if it were to be argued that the applicants did not receive the award on or about the time it was filed in Court as stated by the respondents there is little doubt in my mind that by the 1<sup>st</sup> June 2010 when they participated in the taxation of the Bill of Costs they must have had the award to have effectively participated in that taxation hearing. This application however was filed on 22<sup>nd</sup> November 2010 (more than 5 months later). To my mind all the evidence before me suggests that this application was made after more than one month had elapsed after the applicants had received the Arbitral Award and so the application is time barred. Therefore based on the **Roko construction Ltd v Mohammed Mohammed Hamid** appeal case (supra) there is no competent application before this court and it is hereby dismissed with costs

Geoffrey Kiryabwire

Judge

Date: 19/02/13

19/02/12

9: 29 a.m.

**Ruling read and signed in open court in the presence of;**

- G. Lule for Appellant
- E. Tumusiime for Respondent

**In Court**

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

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**Geoffrey Kiryabwire**

**JUDGE**

**Date: 20/02/2013**