THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)
HCT-00-CC-MA-532 -2012
(*Arising from Arbitration Cause No. 1 OF 2012)*

1. MONICA KAMPIRE
2. JACK HAMILTON::APPLICANTS

VERSUS

JUSTUS KARANGIRA::RESPONDENT

BEFORE: LADY JUSTICE HELLEN OBURA

JUDGMENT

The applicants brought this application under section 34 of the Arbitration and Conciliation Act Cap. 4 (hereinafter called the Act) and rule 13 of the first schedule thereto seeking for orders that the arbitral award in which the applicants were ordered to pay the respondent a total sum of Ug. Shs. 142,380,100/= be set aside and an independent arbitrator be agreed and appointed as well as an order that costs of this application be provided for.

The brief background to this application as gathered from the documents is that on 15th January 2007 the parties signed an agreement by which the respondent was to carry out renovation, installation, construction and restructuring of the applicants' house in Entebbe. Upon completion of the construction work, the parties agreed that the balance of Shs. 9,125,900/= would be paid on 31st August 2007. That sum was never paid. Consequently, the respondent filed a civil suit in the Chief Magistrate's court in Entebbe for alleged breach of contract. With consent of both parties the presiding magistrate referred the matter to arbitration.

The respondent approached Ms. Gloria Basaza an advocate to be the arbitrator. On 15th November 2011, Ms. Basaza wrote to the parties informing them of the same

and requested that if the applicants did not find her a suitable candidate they should consider another person and inform court within seven days from the date of that letter. She proposed a meeting of the parties on 19th November 2011at a specific venue if all was agreeable with them.

On 5th December 2011, Ms. Basaza again wrote to the parties notifying them that she was setting down the matter for hearing on 10th December 2011 since no document had been filed in accordance with her previous letter. The applicants neither responded to the letters nor attended the arbitration proceedings. Consequently, arbitral proceedings were held ex parte and an award made. It is that award which is the subject of this application.

Two affidavits were deposed in support of this application. The first applicant's affidavit contains the grounds on which the award should be set aside. The first ground is that the arbitral award was made without the applicants being given proper notice of the appointment of the arbitrator or arbitration proceedings. Secondly, it was averred that the applicants never agreed to the appointment of the arbitrator in the cause. Thirdly, that the applicants were not given an opportunity of presenting their case before the arbitral award was made. Lastly, that the damages, costs and interest in the arbitral award are excessive and have no legal basis.

The 2nd affidavit sworn by Mr. Brian Kirima a lawyer by profession basically stated that the deponent was availed a copy of the arbitration decision and the arbitral award which he perused and found the award of damages, costs and interest to be excessive and yet the arbitral decision did not justify it.

The respondent deposed an affidavit in reply in which he contested the application. The gist of his reply is that the applicants brought this application in bad faith with intention to defeat justice since they were given reasonable notice of appointment of the arbitrator and the arbitration proceedings.

Two supplementary affidavits were also filed for the applicants after the submissions were made moreover without leave of court. Apart from being irregularly filed, I do not think they were necessary. The 1st one dated 11th December 2012 was sworn by Mr. Ssekaggya Gerald who is stated to be a former

Magistrate Grade One and a lawyer by profession. He reiterated what was stated by Mr. Kirima.

The 2nd supplementary affidavit dated 12th December 2012 was deposed by the applicants' counsel Mr. Gibbs Baryajunwa. He basically denied receipt of the notice of appointment of the arbitrator and explained that he received and endorsed on the notice of arbitration proceedings that the applicants would be away.

The issues for determination of this court as submitted on by counsel for the applicant are as follows:

1. Whether the appointment of the arbitrator was lawful.
2. Whether the arbitration proceedings were proper.
3. Whether the arbitral award should be set aside and an independent arbitrator appointed.
4. Whether the applicant is entitled to costs of the application.

For convenience I will proceed to resolve issues one and two together. Mr. Baryajunwa Gibbs, representing the applicant submitted that the applicant was never informed of the appointment of an arbitrator who went ahead and heard the proceedings exparte and also made an exparte award. According to him that was irregular. He argued that it is trite law that in the interest of justice, a party to a suit should be given an opportunity to be heard.

Mr. Asiimwe Ronald, counsel for the respondent submitted that the appointment of the arbitrator was lawful and that the proceedings were proper since the applicants were given time to inform court of their objection of the arbitrator's appointment. This was because the appointment had been compelled by a court order but that the applicants refused to do so and allowed the arbitration to proceed ex parte as was provided for in the arbitration clause.

I have carefully analysed the affidavit evidence as well as the annextures thereto and considered the submissions for and against this application. Section 34 (2) of the Arbitration and Conciliation Act provides the grounds upon which an arbitral award may be set aside by court. The first ground of this application is catered for

under section 34 (2) (a) (ii). The applicants contend that the arbitral award was made without them being given proper notice of the appointment of the arbitrator and the arbitration proceedings.

On the other hand the respondent contends that notice for the appointment of the arbitrator was effected on the applicants' counsel through annexture "B" and notice for the hearing was given vide annexture "B" to the affidavit in reply. The applicants' counsel in turn denies ever receiving or signing the notice of appointment of the arbitrator although it bears the stamp of his law firm. As regards the notice of hearing, he claimed to have received it under protest as by indicating on it that the applicants would be away most of the Christmas season.

Section 8 of the Act provides for the mode of service of written communications in arbitration. It provides that unless otherwise agreed by the parties, any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his or her place of business, habitual residence or mailing address.

Order 3 rule 4 of the Civil Procedure Rules provides that;

> *"Any process served on the advocate of any party or left at the office or ordinary residence of the advocate, whether the process is for the personal appearance of the party or not, shall be presumed to be duly communicated and made known to the party whom the advocate represents, and, unless the court otherwise directs, shall be as effectual for all purposes as if the process had been given to or served on the party in person."*

The above rule which relate to matters before court clearly states that process served on a party's advocate is presumed effectual unless court directs otherwise. I believe this provision is applicable where a party to an arbitration proceeding is represented by an advocate. In any case section 8 of the Act allows the parties to agree otherwise.

In the case of **Benjino and others v Kamanda [1977] HCB 331 Akhuud J.** held that service on an advocate for a party is effectual and sufficient under Order 3 rule 4 of the Civil Procedure Rules.

Turning to the service that is faulted in the instant case, annexture "B" to the affidavit in reply bears a stamp of the applicants' advocate, M/s Baryajunwa Gibbs and an endorsement that it was received on 16th November 2011. I agree with counsel for the respondent that annexture "B" was served on the applicants' counsel. That was a notice of appointment of an arbitrator which the applicants were required to respond to within 7 days. It was received in the chambers of the applicants' advocate and no action was taken. That to me was proper service in accordance with order 3 rule 4 which cannot be faulted under section 34 (2) (a) (iii) of the Act.

I find that the applicants' failure to respond to that notice is not due to lack of service. If at all their advocate did not bring the letter to their attention it would be another matter all together. That disposes of the first issue and leads me to consider the argument that the applicants were not served with the notice of arbitration proceedings and as such were denied an opportunity to be heard in violation of Article 28(3) of the Constitution.

In his supplementary affidavit, counsel for the applicants confirmed receiving annexture "B" to his affidavit which was a notice of arbitration hearing. The arbitration hearing was slated for the 10th of December 2011. Upon receipt of the notice, counsel for the applicants chose to protest by making a note thereon that his clients needed to agree on the selected arbitrator and that the applicants would be away for the larger part of the Christmas season.

He did not bother to formerly respond to the letter or even notify counsel for the respondents of his client's inability to attend the proceedings. Worse still he never bothered to appear at the proposed venue on the date set for the hearing to either raise an objection to the appointment of the arbitrator or seek an adjournment. He took a very casual view of the whole process and did nothing to the detriment of his clients. If anybody denied the applicants the right of a fair hearing then it was their advocate who did so by not taking the necessary action.

From the foregoing, I am unable to fault the respondent on the ground of lack of proper service of the notice of appointment of the arbitrator or of the arbitral proceedings.

However, it is clear from the above analysis that counsel for the applicants took a very negligent view of the correspondences that were served on him on behalf of his client. He did not properly represent his clients' interest by making formal response to the communications he received from the arbitrator. In view of the now well established principle that mistake of an advocate however negligent cannot be visited on a litigant, I would be inclined to find that although service was effected on the applicants through their counsel, they cannot be blamed for failure to participate in the appointment of the arbitrator and subsequent arbitration hearing.

Consequently, I will take into account the above finding when dealing with the next issue even though strictly speaking the first two issues are answered in the affirmative.

For the principle on mistake of counsel I found very instructive the holding in ***Banco Arabe Espanol v Bank of Uganda SCCA No. 8/1998 [1997-2001] UCL 1*** and ***Yowasi Kabiguruka v Samuel Byarufu C.C.A No. 18 of 200.*** In ***Yowasi Kabiguruka*** (supra) the Court of Appeal referred to its earlier decision in ***Hajati Safina Nababi v Yafesi Lule, Civil Appeal No. 9 of 1998*** where it had held inter-alia that; *it is axiomatic that a party instructs counsel, he assumes control over the case to conduct it through out, the party cannot share the conduct of the case with his counsel. He must elect either to conduct it entirely in person or to entrust it to his counsel.*

Issue 3:
Whether the arbitral award should be set aside and an independent arbitrator appointed.

Counsel for the applicant based his submission on this issue on the grounds already discussed under the first two issues. Following my finding on those issues, and considering the mistake of counsel, this court would be inclined, in the interest of

justice, to set aside the arbitral award so that both parties can participate in the appointment of the arbitrator and the arbitration proceedings.

In addition, this court has also observed some irregularities with the arbitral award that would constitute an illegality and therefore cannot be ignored. First of all, the respondent's claim according to the record of arbitral proceedings was for Shs. 9,125,900/= being payment due to him under two contracts entered into between him and the applicants. I have not seen any reasons given by the arbitrator for the award she made as required by section 31 (6) of the Act. The arbitrator concluded the arbitration decision as follows:-

> *"Therefore, I find that the respondents breached the contract and the award is for the claimant in the form of general damages, interest on general damages, special damages, the decretal sum and interest on the decretal sum to date".*

Although a thorough perusal of her decision did not show how she arrived at the awards, the arbitrator went ahead to make the final award in the following terms:-

(a) *"As an arbitrator in the matter, the decretal sum awarded as prayed of 9,125,900 Ug. Shs. (Nine million, one hundred twenty five thousand, nine hundred)*
(b) *Interest on the decretal at 25% from 2007 till payment in full to date standing at 18,251,800 (Eightenn million two hundred fifty one thousand eight hundred).*
(c) *General damages of one hundred million shillings only (Ug. Shs. 100,000,000/=)*
(d) *Interest on general damages at 25% p.a. from the date of award till payment in full.*
(e) *Cost of the suit at Five million eight hundred seventy five thousand five hundred Uganda shillings (Ug. Shs. 5,876,500/=).*
(f) *Special damages at nine million one hundred twenty five thousand, nine hundred Uganda Shillings only (Ug. Shs. 9,125,900/=).*

(g) *The total costs of the award is one hundred forty two million three hundred eighty thousand one hundred Uganda Shillings only. (Ug. Shs. 142,380,000/=) .*

This award is enforceable by the High Court (Arbitration & Conciliation)".

I curiously looked at the awards as stated in items (a) and (f) of the final award. To my mind the special damages in (f) appears to be a duplication of what was already awarded as the decretal sum in (a). As I indicated earlier in this ruling the arbitrator did not give any reasons for this award. This makes it difficult to tell whether this claim was separately presented and proved in evidence. I have also not had the benefit of looking at the statement of claim that was presented by the respondent so as to discern how that claim arose and whether it was separate from the decretal sum.

Be that as it may, the identical resemblance of the two figures only leads to the conclusion that the awards relate to the outstanding amount that was claimed under the contracts. That being the case it would be unjust and unfair for the arbitrator to award it twice never mind that she baptised them differently.

Section 28 (4) of the Act obliges an arbitrator to decide the substance of the dispute according to consideration of justice and fairness without being bound by the rules of law. This section was considered by my learned brother Madrama, J in **CFC Freight Services Ltd v Uganda Property Services Ltd Miscellaneous Application No. 10 of 2012 (Arising from CADER Arbitration No. 15 of 2011**) where the applicants sought to set aside the arbitral award on among other grounds, that the arbitrator had not complied with section 28 (4) of the Act and as such was not in accordance with the Act.

After considering the different aspects of section 28 (4) the judge stated thus:-

> *"Finally, section 28 (4) incorporates the legal doctrine expounded in the case law that the arbitral tribunal is not bound by legal doctrine provided the substance of the dispute is decided according to the considerations of justice and fairness. Such considerations include commercial prudence or commercial sense. The court must look*

> *beyond the law to establish whether the award was in accord with considerations of justice and fairness. The principle that the arbitral tribunal may be right or wrong as far as legal doctrine is concerned cannot stop the court from considering whether there was justice and fairness in the award".*

I share that view because consideration of justice and fairness underpins our judicial system and must always be born in mind by any court or tribunal that sits to dispense justice. Any decision that is not guided by that principle would be open to challenge. Awarding a party an amount claimed twice would fall short of the standard of justice and fairness.

Under section 34 (2) (a) (vii) an arbitral award can be set aside if it is not in accordance with the Act. An award that does not take into consideration justice and fairness as provided under section 28 (4) would therefore not be in accordance with the Act.

For the reasons stated above, I find the arbitral award in this case not in accordance with the Act in so far as an award for the decretal sum was made twice without taking into consideration justice and fairness. I would therefore be inclined to set aside the award on that ground also.

Furthermore, I do find that the award also breaches yet another fundamental principle of law regarding award of general damages and interest. This was one of the grounds of this application although it was never submitted on by counsel for the applicants. That notwithstanding, I do find an award of general damages of Shs. 100,000,000/= against a claim of Shs. 9, 125,900/= excessive, oppressive and contrary to the known principle of law applied in determining general damages. No reason was even given as to why that amount was awarded.

In **Paragraph 812 of Harlsbury's Laws of England Vol 12(1)** it is stated that general damages are losses, usually but not exclusively non-pecuniary which are not capable of precise quantification in monetary terms. Similarly, in the case of **Stroms v Hutchinson [1905] A.C 515** Lord Macnaghten held that general damages are, as such as the law would presume to be the natural or probable

consequence of the act complained of on account of the fact that they are its immediate, direct and proximate result.

In our jurisdiction, Bamwine, J. (as he then was) stated in the case of **Kituni Construction Company Ltd v Julius Okeny HCT-00-CC-CS-0250-2004** that general damages are awarded to compensate the plaintiff, not to punish the defendant, and that the general effect of an award for general damages is to place the plaintiff in the same financial position as if the contract had been performed.

Looking at the award for general damages in the instant case vis-a-vis the above authorities, it is clear that the principles were not at all followed by the arbitrator. On the whole courts usually award just a small percentage of the decretal amount as general damages. In most cases where interest has been awarded on the decretal amount at a commercial rate only nominal damages are allowed if at all. In the instant case the general damages awarded was more than ten times the decretal amount! That in my view was punitive thereby defeating the rationale for award of general damages.

For the above reasons, I find the award of general damages contrary to the well established principles of law on award of general damages. In the circumstances I would set aside the award on that ground as well.

Finally, much as an award of interest is also discretionary, I did not find any basis for awarding interest of 25% on general damages. I find it excessive and oppressive just like the award of general damages itself.

In the circumstances of this case as highlighted above, this court would be inclined to set aside the arbitral award on account of mistake of counsel for the applicants and some of the awards being made contrary to the law. In the result, the arbitral award is set aside.

The parties are at liberty to appoint an arbitrator as per their agreement and if they fail to agree they can apply to the appointing authority to appoint one for them in accordance with section 11 of the Act.

Issue 4 on Costs

Considering that none of the parties contributed to the errors that led this court to set aside the arbitral award, I order that each party bears its own costs.

I so order.

Dated this 22nd day of February 2013.

Hellen Obura
JUDGE

Ruling delivered in chambers at 3.30 pm in the presence of Mr. Ronald Asiimwe for the respondent who also present. The applicants and their counsel were absent.

JUDGE
22/02/13