THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL DIVISION

HCT - 00 - CC - MA - 135 - 2011
ARISING FROM HIGH COURT ARBITRATION CAUSE NO 01 OF 2011
CAD/ARB NO 11 OF 2008
ARISING FROM CIVIL SUIT NO 489 OF 2006

1) FOUNTAIN PUBLISHERS ---------- APPLICANTS

VERSUS

1) HARRIET NANTAMU
2) ROSE NALUNGA ---------- RESPONDENTS

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE

R u l i n g

This is a ruling arising from a preliminary objection by the respondents that this application is time barred because it was filed one year and six months from the date the subject arbitral award was delivered.

The brief facts are that following an Arbitration in the matter of ***Harriet Nantamu and anor V Fountain Publishers Ltd*** CAD/ARB No 11 of 2008 an Award dated 7th September 2009 (hereinafter referred to as "the Award") was delivered by the Arbitrator Rtd Justice Alfred Karokora.

The present Notice of Motion seeks to set aside the said award. The brief grounds of the application are that the arbitrator exhibited partiality and made an award beyond the terms of reference given to him. It is also stated that the arbitrator misconstrued and wrongly applied the law. It is further stated that the arbitrator misconducted himself.

The applicants state that the application to set aside the award is not time barred because it was delivered late.

Ms A. Kemugisha Ssebunya and Alex Rezida appeared for the applicants while Mr. P. Ssebunya appeared for the first and second respondents.

It is the case of the respondents that the award was made by the arbitrator in the presence of the lawyers of the parties on the 7th September 2009. It also the case for the respondents that the said award was deposited at the Centre for Arbitration and Dispute Resolution (CADER) the institution under which the arbitration was conducted on the same day. The basis for the objection of the respondents is that this application was filed in Court one year and six months after the award was made and is therefore time barred. Section 34 (3) of the Arbitration and Conciliation Act (Cap 4 hereinafter referred to as the "ACA") enjoins one who is desirous to set aside an arbitration award to do so before the lapse of one month from the date on which the party making the application received the award. Counsel for the respondent referred me to the Tanzanian High Court case of ***East African Development Bank V Blue Line Enterprises Ltd*** M.A. 134 of 2006 where **Mandia J.** held that an application to challenge an arbitration award when time barred should be dismissed.

He further referred me to the recent Court of Appeal decision in ***Roko Construction Ltd V Mohammed Mohammed Hamid*** Civil Appeal No 51 of 2011 (U) where an application to challenge an arbitration award was made five months from the date the award was delivered by the arbitrator in the presence of the lawyers of the parties and the Court of Appeal found that the application to challenge the award was not competent before the High Court because it was time barred and thus a nullity.

Counsel for the respondents submitted that this application should be dismissed.

Counsel for the applicant submits that it received the award on the 3rd March 2011 and thereafter filed this application within 30 days of that that date.

Counsel for the applicant further submitted that Section 31 (8) of the ACA provides that

"…After the arbitral award is made a signed copy shall be delivered to each party…" and that this is mandatory. It is the case for the applicants that the award was not delivered on the 7th September 2009 but rather on the 3rd March 2011. Since this application was filed on the 11th March 2011 then it met the 30 day requirement of Section 34 of the ACA.

Counsel for the applicant further submitted that the applicant under Section 33 (1) (a) had a right within 14 days of receipt of the award to seek its correction for errors but that in this case this could only be done after the 3rd March 2011 when the applicant got the award.

Furthermore it is only when the applicant has the award that it can be registered in Court so there can be no delivery within the meaning of the ACA until a party actually has the award.

Counsel for the applicants' acknowledged that an arbitrator has a lien on an award until he is paid and submitted that if an arbitrator exercised that lien it, as happened in this case, then he cannot be said to have delivered the award.

Counsel for the applicants submitted that the arbitrator only became functus officio within the meaning of Section 32 of the ACA when he delivered the award to the parties on the 3rd March 2011 because it is then that the proceedings were terminated by the award being given to the parties.

Counsel for the applicant submitted that the ***Roko Construction case*** (Supra) and ***East African Development Bank*** (Supra) could be distinguished because in this situation the award was not delivered until the arbitrator released it on being paid his fees.

I have considered the submissions of both counsels on this objection for which I am grateful.

The objection as I see it is that this application is time barred and is therefore incompetent.

Counsel for the respondents referred me to Section 34 (3) of the ACA which reads

> ***"…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 the application had received the award, or if a request had been made under section 33, from the date on which that request had been made under section 33, from the date on which that request had been disposed of by the arbitral award…"***

This provision has been the subject of a lengthy discussion and findings in the recent Court of Appeal decision in ***Roko Construction Ltd*** (Supra). In that unanimous decision of the Court it was held that section 34 (3) of the ACA was emphatic that an application to set aside an award

must be made within one month from the dated the award is received by the party. In that case a period of about six months was found to be out of time.

The Indian Arbitration and Conciliation Act 1996 is largely in pari materia to that of Uganda. However the wording in the Indian section 34 (3) is slightly different from that in Uganda and reads

> ***"… An application for setting aside may not be made after three months have elapsed from the date on which the party making that application 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 tribunal:***
>
> ***Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter…"***

The author **M.A. Sujan** in his book **The Law Relating to Arbitration and Concilaition** Universal Law Publishing Co Page 537 writes

> ***"…section 34 (3) of the 1996 Act prescribes a period of three months (negatively stated) from which the date of receipt of the award, extendable for a further period of a maximum 30 days. Thus, the outside limit is three months + 30 days. It is a self contained provision for limitation in the Act itself with an inbuilt provision for extension…"***

It would appear to me from a reading of the affidavits in support and against the Motion that the award was read by the arbitrator on the 7th September 2009 and filed with CADER on the same day but was not physically given to the parties because of an issue of payment. This was not resolved until on or about the 3rd March 2011 when the award was also filed in this Court.

To my mind receiving an award like receiving a Judgment is on the day the Judgment is read and signed. I respectfully do not agree that it is on the day that the award is physically given or is available to a party. That in this case would have been the 7th September 2009. The Arbitration was filed in Court on the 3rd March 2011 which is provided for under Rule 2 of the Arbitration Rule (first schedule to the ACA). The Court of Appeal decision **in Roko Construction Ltd Appeal** (supra), their Lordships made it clear that the Rules are Subject to the provisions in the main Act.

As to time it is also apparent to me that the ACA of Uganda does not have the same in built extension provisions as in the Indian Act (which none the less has a long period of 3 months compared to the Ugandan one month). The Court had taken a liberal approach to Section 34 of the ACA in light of the conflict with Rule 7 (1) of the Arbitration Rules on the issue of time. However since the **Roko Construction Ltd Appeal** (Supra) decision it is clear that the time line of 30 days in Uganda is mandatory and there is no way round it. If that period is regarded as too tight for the parties then the law will have to be amended to reflect something similar to that in India. Until then it is up to the parties on receipt of the award to ensure that they pay the arbitrators fees promptly in order to meet the 30 day rule. Any dispute on fees can be handled subsequently.

In this case section 33 of the ACA would not be applicable because it is up to the parties to pay to get the award so as to make the corrections so any application to set aside the arbitral award must meet the time line in section 34 (3) of the ACA. In this case the application in M.A. 135 of 2011 was made about one year and six months after the award was made in the presence of Counsel for the parties. Clearly it was out of time and so is incompetent. I accordingly dismiss this application with costs.

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Geoffrey Kiryabwire
JUDGE

Date: 13/05/2013

13/05/13

9:47am

Ruling read and signed in Court in the presence of;

- A. Rezida for Applicant

In court

- G. Mwangushya GM of Applicant
- Rose Emeru – Court Clerk

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Geoffrey Kiryabwire

JUDGE

Date: 13/05/2013