THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL COURT]

MISCELLENEOUS CAUSE NO 31 OF 2013

[Arising From CAD –ARB-NO. 27 of 2012]

IN THE MATTER OF THE ARBITRATION & CONCILIATION ACT AND RULES (CAP 4)

KAMPALA CAPITAL CITY AUTHORITY ::::::::::::::::::::::::::::::::::::::: APPLICANT

VS

NALONGO ESTATES LIMITED :: RESPONDENT

BEFORE: HON JUSTICE. B. KAINAMURA

RULING

This application is brought by Chamber Summons under **Section 21, 28 and 34 of the Arbitration and Conciliation Act** cap 4, **Section 14 and 33 of the Judicature Ac**t cap 13, **Section 98 of the CPA** and Order 51 rule 1 of the CPR. The applicant seeks the following orders;

a) The Arbitral award in CAD-ARB No. 27 of 2012 be partially remitted and or set aside.

b) Costs of the application be provided for.

The general grounds of the application as set out in the Chamber Summons are;

a) The arbitrator did not decide on the substance of the dispute according to considerations of natural justice and fairness in contravention or **Section 28 (4)** of **the Arbitration and Conciliation**

b) The arbitral award is not in accordance with the terms of the agreement between the applicant and the respondent in contravention of **Section 28 (5) of the Arbitration and Conciliation Act.**

c) The arbitration award is vague, ambiguous, and contradictory thereby making it unjust and incapable of implementation.

d) The award is unconscionable and contains errors in law and fact on the face of the record thereby making it unjust and unfair.

e) It is just and equitable that the arbitral award be set aside.

The background to this application is that the applicant's predecessor KCC and the respondent executed a management agreement dated 16th May 2006. This was to manage, develop, control and maintain Centenary Park. The applicant alleged numerous violations of the agreement and thereby terminated the agreement on 26th April 2012. A number of meetings were conducted to sort out the dispute and failing that an arbitrator was appointed in accordance with the provision of the agreement. The arbitrator made an award partly in fevour of the respondent. Discontented with the decision, the applicant brought this application to partially set aside the award.

The grounds of the application as set out in the affidavit sworn by Mr. Charles Ouma, the Deputy Director Litigation Services of the applicant in support of the Chamber Summons are that;

- On the 26th September 2013, the applicant obtained its copy of the arbitral award in CAD-ARB- No. 27 of 2012 which was signed by the appointed arbitrator Mr. Robert Kafuko.

- The applicant administers Kampala Capital City on behalf of the Central Government and the Chief Executive of the applicant is the custodian of all assets and records of the applicant.
- The arbitrator decided that the Executive Director cannot commit the authority in contract, therefore can neither contract nor terminate a contract but rather has a duty under **Section 19 (h)** to implement lawful decisions taken by the authority. This therefore meant that the letter dated 28th June 2012 addressed to the Managing Director of Nalongo Estates did not terminate the management contract between the applicant and the respondent.
- The arbitrator ruled that the recommendation of the contracts committee terminating the contract was illegal and did not terminate the contract. He thereby granted a declaration that the management agreement dated 4th December 2008 is still subsisting.
- The arbitrator granted a permanent injunction restraining the applicant from implementing or taking over the park until expiry of the management contract term.
- The arbitrator awarded the respondent unconscionable compensatory damages in the sum of UGX 732,553,055/= to cover the costs of demolition when the respondent was in breach of contract by putting up illegal structures without authorization.
- The glaring inconsistencies and contradictions in the arbitral award have made the same vague, ambiguous, uncertain, illegal, unjust, unfair and not in accordance with the agreement management contract and the Arbitration and Conciliation Act.
- Finally the errors in law and fact on the face of the record and award are unjust and are unfair.

The respondent opposed the application by filling two affidavits in reply. One affidavit was deposed by Patricia Nyangoma; an Advocate with M/s Nyanzi, Kiboneka & Mbabazi Advocates. She stated that the applicant has only advaliced grounds seeking to appeal against the decision of the arbitrator which contrary to the provisions of **Section 34** of the Arbitration and Conciliation Act and is precluded from doing so. She further stated that challenging the quantum of damages awarded to the respondent by the arbitrator is not actionable as a ground to set aside an arbitral award under **Section 34 of the Act**. Additionally that the applicant has not shown grounds to warrant setting aside the arbitral award within the considerations set out in **Section 34 of the Act**. She concluded by stating that it is just, fair equitable and legally proper that this application is dismissed with costs to the respondent.

Sarah Kizito the respondent's director's averments were along those of Ms. Nyangoma Patricia. She in addition stated that the application is in disguise seeking to appeal against the arbitrator's decision. She further stated that it is just, fair equitable and legally proper that this application is dismissed with costs to the respondent.

Submissions

Counsel for the applicant submitted that there was a Management Agreement between the applicant and respondent. However, there were numerous violations of the agreement by the respondent. It had been agreed that the respondent would submit new plans in respect of new structures for approval by Kampala City Council and that the park was to remain a green open space with unlimited access to the general public all of which were violated. This led to the termination of the contract and the matter was referred for arbitration in accordance with a provision in the Management Agreement.

Counsel for the applicant argued the grounds concurrently. Counsel took issue with the way the arbitrator resolved the issues. He submitted that the Arbitrator departed from the law by asserting that the Executive Director of KCCA cannot commit the authority in contract or terminate a contract because that is the responsibility of the Authority. Further that the Arbitrator erroneously found that since there were no minutes adduced in evidence to show that the Authority terminated the Management Contract, it could be assumed that no minutes existed authorizing the termination. He argued that it is clear that according to regulation 263 (1), (2) and (3) of the Public Procurement and Disposal of Public assets Regulations the Kampala Capital City contracts committee had authority to terminate the contract. He added that the Executive Director was discharging her duties as envisaged in **Section 19** of the KCC Act. Counsel further submitted that the termination decision was communicated to the respondent by the Accounting Officer of the applicant after the approval of the contracts committee and is therefore valid and unassailable on account of procedural propriety.

Counsel further argued against the remedies awarded by the arbitrator on the following arguments;

Regarding the compensation, Counsel submitted that the arbitrator had no ground to grant compensation of award of UGX 732,553,055/= to the applicant who had breached a contractual term in the Management Contract by putting up structures without approved plans. He added that despite the locus inspection done by the arbitrator, he still granted compensation to the applicant when the illegal buildings still stand today. In conclusion of this, Counsel argued that it was only fair and just that compensating the applicant would be disallowed.

Counsel further submitted that the award was contrary to **Section 28(5) of the Arbitration and Conciliation Act** which is to the effect that the arbitral tribunal shall decide in accordance with the terms of the particular contract. Counsel stressed that the applicant commenced works on the property without the prior approval by the council contrary to Clause 2 of the Management Agreement, and secondly erected structures on Centenary Park without express permission of the Council contrary to Clause 7 of the Management Agreement. He added that the applicant failed to keep Centenary Park at all times free from obstruction and failed to maintain the green free and open for public use in violation of Clause 8 of the Management Agreement. Counsel stated further that the acts constituted fundamental breach which as a result led to termination of the contract. He cited the case of ***Associated Engineering Co. vs. Gov't of Andra Padesh (1991) 4 SCC 93: [AIR 1992 SC 232]*** where it was held that an arbitrator who acts in manifest disregard of the contract, acts without jurisdiction. It was held in the same case that a conscious disregard of the law or provisions of the contract from which the arbitrator derives authority vitiates the award.

Counsel stressed that the award of UGX 732,553,055/= for the demolition of illegal structures was irrational, illegal and unconscionable and amounts to an attempt to validate an illegality. He cited the decision of ***Kilemebe mines Ltd versus B.M Steel Ltd, High Court Misc. Application No. 002 OF 2005(unreported)*** where the Egonda Ntende J (as he then was) stated:-

> **"***The arbitrator offered himself as a conduit for unjust enrichment of the respondent through clear duplicitous claims of colossal sums of money and in doing so the arbitrator exhibited evident partiality to the respondent's case leading to a perverse* award"

Counsel thus prayed that the arbitral award made by the arbitrator on 15th August 2012 under serial number UIPE Arbitration Cause No.1 of 2012 be partially remitted/ or set aside to the following extent;

a) Setting aside the compensation award of UGX 732,553,055/=
b) Declaring that the Kampala Capital City contracts committee had the authority to terminate the Management Contract pursuant to regulations 263(1), (2) and (3) of the Public Procurement and Disposal of Public assets regulations.
c) Declaring that the communication by the Executive Director KCCA on the termination of the contract was lawful and
d) Costs of the application.

Counsel for the respondent submitted that from an analysis of the grounds and arguments, the applicant seeks to appeal against the arbitrator's decision than to set it aside contrary to the requirements of **Section 34 of the Arbitration and Conciliation Act cap 4**. Counsel cited the case of ***Seyani Bros Vs Cassia Ltd HCCA No. 128 of 2011*** where Kiryabwire J (as he then was) stated:-

> *"It is now settled law that an application to set aside an arbitral award is not an appeal. Arbitration is final unless it can be shown that the award was procured contrary to the law as provided for under **Section 34 of the Arbitration and Conciliation Act"***

Counsel further stated that the applicant's affidavit in support of the application is devoid of facts to show that that the award contravenes **Section 34** of the Act as required. Counsel further

argued that the application is an attempt by the applicant to have court re-evaluate evidence which court cannot do.

Counsel cited the Clause 9 of the Memorandum of Understanding which gave the arbitrator the mandate to determine any matter that arises out of the agreement, under which the termination of the contracts falls. Counsel highlighted the fact that the arbitrator was clear that the contract was not terminated.

In conclusion, Counsel submitted that the applicant had not shown any grounds to warrant setting aside the arbitral award within the confines of **Section 34 of the Act** but rather sought to appeal against the arbitrator's decision.

In rejoinder, Counsel for the applicant submitted that setting aside an arbitral award is provided for under **Section 34 of the Arbitration and Conciliation Act** upon proof that the award deals with the dispute not within the terms of reference to the arbitration or is not in accordance with the Act. Counsel submitted that the unreasonableness of the award is borne out by the award of compensation to the respondent even when a locus visit found that the structures in contention stood undemolished. Counsel added that the arbitrator acted without jurisdiction by making an award contrary to **Section 28(5) of the Arbitration and Conciliation Act** which provides that in all cases the tribunal shall decide in accordance with the terms of a particular contract and take into account the trade usages. Counsel added that it is clear from the facts and the provisions of the agreement that the respondent was in breach of the agreement by commencing works without approval contrary to Clause 2 of the agreement and erection of structures in Centenary Park without express permission of the Council contrary to Clause 7, and failure to maintain the park

free from obstruction and failure to maintain the park green free and open to public use contrary to Clause 8.

Counsel submitted that the decision of the arbitrator that the contract still subsisted notwithstanding the fact that it had been fundamentary breached, constituted acting without jurisdiction. Further the arbitrator found the acts of the respondents illegal but still went ahead to award them compensation. This according to Counsel exhibited partiality on the part of the Arbitrator which rendered the award perverse. Counsel cited ***Halsbury's laws of England***, volume 24th Edition par 626 at page 337, where it is stated that an award may be impeached if the arbitrator exceeded his jurisdiction by purporting to decide a dispute not submitted by the parties for determination.

Counsel further reiterated that the Arbitrator misdirected and misconducted himself by making of the award contrary to the provisions of the agreement manifestly disregarding the limits of his jurisdiction and bounds of the contract from which he derived authority.

Counsel in conclusion stated that the glaring inconsistencies and contradictions in the award have rendered the same ambiguous, uncertain, illegal, unjust , unfair and not in accordance with the Management Agreement and the Arbitration and Conciliation Act thereby rendering the award liable to be set aside. Counsel reiterated his earlier prayers that the application be allowed.

Ruling

The applicant being aggrieved by the decision of the Arbitrator brought this application to partially remit and or set aside the award.

The arbitral award had the following orders:-

a) *A declaration that the Management Agreement dated 4th December 2008 is still subsisting and has not been terminated and it is so declared.*

b) *An injunction is granted restraining the respondent its operatives, agents, servants or anyone working under its direction or authority from enforcing and implementing the termination or taking over Centenary Park until the expiry of the Management Agreement term.*

c) *Compensatory damages of UGX 732,553,053/= as per valuation report (Exb VI) for damages caused to the claimants by acts of the respondent and its agents and workmen on 27/09/2012 are awarded to the claimant in this matter.*

d) *Costs awarded to the claimant*

As ably set out by Egonga Ntenda J (as he then was) in ***SDR Transami Vs Agrimag Ltd Arb Cause 2 of 2006***, recourse against an arbitral award is governed by **Section 34 of the Arbitration and Conciliation Act Cap 4** Laws of Uganda 2000 and it is only upon those grounds laid down in the section that court is authorized to set aside an award. The section provides.

Section 34. *Application for setting aside arbitral*

(1) Recourse to the court against an arbitral award may be made only by an application for setting aside the award under subsection (2) and (3).

(2) An arbitral award may be set aside by court only if;

a) The party making the application furnishes proof that;

i) a party to the arbitral agreement was under some incapacity.

ii) the arbitral agreement is not valid under the law on which the parties have subjected it or if there is no indication of the law, the law of Uganda.

iii) the party making the application was not given properly notice of the appointment of an arbitrator or of the arbitral proceedings or was unable to present his or her case.

iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration except that the decision on matters referred to arbitration can be separated from those not so referred only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside;

v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties unless that agreement was in conflict with a provision of this Act from which parties cannot derogate or in the absence of an agreement was not in accordance with this Act;

vi) the arbitral award was procured by corruption, fraud or undue means or there was evident partiality or corruption in one or more of the arbitrates or

vii) the arbitral award is not in accordance with this Act.

b) The court finds that;

i) the subject matter of the dispute is not capable of settlement b arbitration under the law of Uganda or

ii) the award is in conflict with the public policy of Uganda.

As already set out above, the gist of the applicants grounds upon which the application is based centre around **Section 28 (4) and (5) of the Ac**. The two sub sections provide:-

(4) The arbitral tribunal shall decide on the subsistence of the dispute according to consideration of justice and fairness without being bound by the rules of law, except if the parties have expressly authorized it to do so.

(5) In all cases the arbitral tribunal shall decide in accordance with the terms of the particular contract and shall take into account the usage of the trade applicable to the particular transaction.

Learned Counsel for the applicant goes at great length to submit on the questions that were agreed upon before the arbitrator as forming the basis of the dispute between the parties. In a nutshell he faults the Arbitrator for arriving at the award first set out above in this ruling. I will highlight what I perceive are the salient arguments of the applicant.

These are:-

- That the arbitrator should have found that the Management Contract was lawfully terminated.

- That the arbitrator after making a factual finding that the structures at the park were erected in breach of the terms of the Management Agreement between the parties he should not have gone ahead to award compensatory damages for damages caused to the structures by acts of the respondent and his agents.
- That the arbitrator did not follow the provision of the Management Contract as such acted without jurisdiction.
- That the arbitrator failed or refused to decide the dispute in accordance with the rules of the law chosen by the parties and the award of compensatory damages was irrational, illegal and un conscionable and amounted to validation of an illegality.

To my mind what the applicant seeks this court to do is to open up the decision of the Arbitrator and as it were to review it. With due respect, this cannot be. Clause 9 of the MOU upon which the arbitratonr is based provided:-

> *"The parties hereto have mutually agreed that in case of any dispute arising out of the interpretation and implement such disputes shall be amicably resolved between the parties in case of failure to resolve the same disputes and the same shall be referred to a mutually agreed upon arbitrator"*

This clearly gave the arbitrator mandate to determine the matters arising from the agreement, which he did. The above clause did not provide for an appeal on questions of law arising out of the award as contemplated by **Section 38 of the Act** which in my view is what the applicant wants this court to do when one looks at the salient arguments of the applicant first set out above.

However that aside, it is now settled that an arbitrator cannot act arbitrarily, capriciously or independently of the contract (see ***Associated Engineering Co. Vs Government of Andra***

Pradesh (1991) 4 SCC 93 (AIR 1992 Sc 232). In a later case the Supreme Court of India while comenting on setting aside an award (the Indian Arbitrations and Conciliation Act 1996 is similar to the Uganda Act Cap 4) had this to say:-

> "*In* ***Associated Engineering Co. Vs Govt of Andra Pradesh……*** *Wherein it was held that the arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract and his sole function is to arbitrate in terms of contract as his authority is derived from the contract. It was also held that if he has remained inside the parameters of the contract and has constructed the provisions of the contract his award cannot be interfered with unless he has given reasons on the face of it. The law is well settled that if the award is non-speaking award the court can look into the question as to whether the arbitrator has travelled beyond the scope of the contract as he delives his jurisdiction from the contract and if this arbitrator exceeds his jurisdiction the award can be set aside. An award can also be set in case of misconduct apparent on the face of the award. It can also be interfered with if the arbitrator has given reasons for the award disclosing an error apparent on the face of it" (see* ***V.G George V India Rare Earths Ltd AIR 199 SC 1409****)*

In the affidavit in support of the Chamber Summons Charles Ouma for the applicant deponed in paragraph 11 that:-

> *"……..i believe that the glaring inconsistencies and contractions in the arbitral award have made the same vague, ambiguous, uncertain, illegal, unjust, unfair*

> *and not in accordance with the Management Contract and the Arbitration and Conciliation Act"*

The applicant does not demonstrate anywhere any irrational, capricious, or arbitrary act by the Arbitrator. The arbitrator is rather faulted for making an erroneous, un conscionable decision with no legal baris. As was ably stated in ***NSSF Vs Alcon HC Arbitration Cause No. 4 of 2001*** by Stella Arach Anono J (as she then was):-

> *"Court cannot re-examine and reappraise the evidence which has been considered by the arbitrator, sit on appeal over conclusions of the arbitrator in an application to set aside the award if it is not perverse"*

The applicant has not been able to demonstrate that the decision of the arbitrator is the exception i.e that it is perverse. Accordingly this court does not have authority to re-evaluate the evidence given before the arbitrator.

In a later case, Amoko J (as she then was) had this to say:-

> *"The court will not take upon itself the task of being a judge of the evidence before the arbitrator. 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 its self is no ground for setting aside the award"*.

Consequently it would therefore be remiss of this court to re-open the award of compensatory damages as determined by the arbitrator.

Before I take leave of this application I need to comment on the other prayer sought by the applicant i.e remission of the award. It is now settled that broadly the following are the grounds on which an award may be remitted for consideration of the arbitrator.

a) That there is some defect or error apparent on the face of the award.
b) That the arbitrator has admittedly made some mistake and desires the award to be remitted in order that he can have it corrected.
c) That the material evidence which could not be discovered with reasonable diligence before the award was made has been produced.
d) That there has been misconduct on the part of the arbitrator of a technical nature.

From my findings above, the applicant has not satisfied the said considerations as there is no defect or error apparent on the face of record which has been pointed out, no material evidence which was discovered later has been mentioned and the applicant has not proved any misconduct on the part of the Arbitrator. Accordingly the grounds for remission have also not been made out.

In addition i have read the award and I see no inconsistence in it as alleged by the applicant. It may not win an award for draftsmanship but that is not ground to set it aside.

Accordingly in light the above I am satisfied that this application has no merit. Is it therefore dismissed with costs.

B. Kainamura
Judge
5.09.2014