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THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
MISCELLANEOUS CAUSE No. 228 OF 2017

DOTT SERVICES LTD ::: APPLICANT

VERSUS

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1. UGANDA NATIONAL ROADS AUTHORITY
2. ATTORNEY GENERAL ::: RESPONDENTS

BEFORE: HON. MR. JUSTICE B. KAINAMURA

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RULING

The applicant brought this application under Section 6 of the Arbitration And Conciliation Act seeking orders that;

A temporary injunction doth issue to restrain the 1st respondent from entering into another contract for the rehabilitation of Nakalam-Tirinyi-Mbale road (100.2km) with any other contractor other than the applicant until the adjudication/arbitral proceedings in CAS/ARB. No. 31 of 2017 (*Dott Services Ltd Vs Uganda National Roads Authority*] and all the proceedings arising there from are heard and disposed of;

A temporary injunction doth issue to restrain the 2nd respondent from approving and clearing any other contract for the rehabilitation of Nakalama-Tirinya-Mbale Road (100.2KM) that the 1st respondent intends to sign with any other than the applicant until the adjudication/arbitral proceedings in CAD/ARB. No.31 of 2017 (*Dott Services Ltd Vs Uganda National Roads Authority*) and all the proceedings arising there from are heard and disposed of.

And costs of the application be provided for.

The facts of the case are that the applicant and the 1st respondent entered into a contract for the rehabilitation of the Nakalama-Triniya-Mbale Road (102 km) at a contract price of UGX 73,363,489,275. A dispute arose between the applicant and the 1st respondent. The applicant refereed the dispute to adjudication. The adjudication proceedings are underway. The 1st respondent on 9th May 2017 invoked clause 59. 4 of the General Conditions of the Contract and

terminated the contract. The 1st respondent offered the contract for the rehabilitation of the said road to another contractor and has applied for clearance and/ or approval from the 2nd respondent. The applicant has thus brought the application to restrain the 2nd respondent from clearing/ approving the contract the 1st respondent intends to enter into with another contractor.

5 The applicant's application for a temporary injunction is supported by the affidavits of Mr. Maheswara, the Managing Director of the applicant.

The 1st respondent opposed the application on grounds that the application does not disclose deserving grounds for grant of temporary order of injunction. The grounds for opposing the application are in the affidavit of Joan Kyomugisha the Ag Head Contracts and Claims
10 department of the 1st respondent.

The 2nd respondent in an affidavit in response deposed by Richard Adrole a Senior State Attorney contended that the 2nd respondent is a nominal respondent. That the 2nd respondent is only technically connected to this matter in dispute and is being used as a vehicle by the applicant in the resolution of the issues in dispute but there is no responsibility, no fault and no
15 right of recovery against the 2nd respondent in the pending arbitration. The 2nd respondent therefore contended that he is unable to make arguments for or against the present application.

Issues

1. Whether the applicant has a *prima facie* case with a likelihood of success.
2. Whether the applicant might suffer irreparable injury which not adequately be
20 compensated by an award of damage
3. Whether the balance of convenience is in favour of the applicant or respondents
4. Relief to the parties.

Ruling

The law on granting of temporary injunctions in Uganda was well settled in the case of *E.L.T*
25 *Kiyimba Kaggwa Vs Haji Abdu Nasser Katende [1985] HCB 43* where **Odoki J** (as he then was) laid down the rules for granting a temporary Injunction; thus:-

1. *The granting of a temporary injunction is an exercise of judicial discretion and the purpose of granting it is to preserve the matters in the status quo until the question to be investigated in the main suit is finally disposed of.*

2. *The conditions for the grant of the interlocutory injunction are;*

- 5 i. *Firstly that, the applicant must show a prima facie case with a probability of success.*
- ii. *Secondly, such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.*
- 10 iii. *Thirdly if the Court is in doubt, it would decide an application on the balance of convenience.*

Issue One: Whether the applicant has a prima facie case like success.

With regard to whether there has been established a prima facie case with a probability of success, the Court must be satisfied that the claim is not frivolous or vexatious and that there is
15 a serious question to be tried. (*See American Cynamide Vs Ethicon [1975] ALL ER 504*).

The purpose of the order for temporary injunction is primarily to preserve the *status quo* of the subject matter of the dispute pending the final determination of the case, and the order is granted in order to prevent the ends of justice from being defeated. See: ***Daniel Mukwaya Vs Administrator General, H.C.C.S No. 630 of 1993; Erisa Rainbow Musoke Vs Ahamada
20 Kezala [1987] HCB 81.***

The gist of the applicant's case on this issue is that the applicant was in breach of the terms of the contract while the applicant fully discharged all its obligations under the contract. That the applicant at all material times diligently executed it's duties under the contract and there are no reasons whatsoever to cause the 1st respondent to terminate the contract. The applicant
25 highlighted the several breaches of the contract by the 1st respondent.

It was the 1st respondents reply that the claim before the adjudicator is baseless, frivolous and vexatious and intended to delay activities of the 1st respondent because the Adjudicator does not have jurisdiction over the claim. The jurisdiction of the adjudicator can be established from the four corners of the contract document and specifically clause 24.1 of the contract. Counsel for the 1st respondent further submitted that the adjudicator has no jurisdiction to handle the claim before it. Accordingly, the claim is without merit and does not have a likelihood of success.

The applicant has highlighted several issues to show that the respondent constantly breached the contract while the applicant executed his part, albeit, the 1st respondent went ahead and terminated the contract. The 1st respondent's case is that the adjudicator has no jurisdiction and cannot even order the claims of the applicant.

It goes without saying that for there to be a triable issue, there ought to be a pending case awaiting final determination. The 1st respondent submitted that on 26th October, 2017, the High Court in *Miscellaneous Application No.162 of 2017; Uganda National Roads Authority Vs Center For Arbitration & Dispute Resolution and Dott Services Ltd* delivered a ruling squashing the appointment of Mr. Kafuko Ntuuyo as an adjudicator. This therefore means that there is no adjudication at all and therefore no pending case before any tribunal. I am therefore of the considered opinion that there is no triable issue arising anywhere and this ground accordingly fails.

Issue Two: Whether the applicant might suffer irreparable injury which would not adequately be compensated for.

Counsel for the applicant submitted that if the injunction is not granted, it will suffer irreversible financial loss and injury to its reputation. Counsel submitted that the applicant's claim in adjudication will be rendered nugatory and the applicant will be denied a hearing. Counsel highlighted the following as the loss the applicant will suffer;

1. That the 1st respondent will enter into a contract with another contractor and the applicant will lose the contract worth UGX 73,363,489,273/=.
2. the applicant will also lose the financial investment already made under the contract and lose the profit expected there from;

3. The applicant is a reputable contractor in Uganda, Tanzania, South Sudan and India and will lose its reputation, credibility and will not get any new contracts which will cause it to close business.

Counsel for the 1st respondent submitted that the claim before the adjudicator is for breach of contract and the applicant is seeking for damages, interest and costs and yet the adjudicator is barred by section 64 of the Arbitration and Conciliation Act Cap 4 Laws of Uganda 2000 from granting specific performance order and should the applicant be successful, the adjudicator can only award compensation.

In the case of **American Cynamide Co Vs Ethicon [1975] 1ALL E.R. 504. Lord Diplock** stated;

“The governing principle is that the court should first consider whether if the Plaintiff were to succeed at the trial in establishing his right to a Permanent Injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the Defendant’s continuing to do what was sought to be enjoined between the time of the Application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no Interlocutory Injunction should normally be granted...”

Further, in the case of **Kiyimba Kaggwa** (supra) court held that:-

“Irreparable damage does not mean that there must not be physical possibility of repairing injury, but means that the injury must be a substantial or material one, that is, one that cannot be adequately compensated for in damages”

4. The applicant’s case was basically that he will lose over UGX 73,363,489,273/=and a reputation. The said sum is money that can be adequately compensated for and so is the reputation. I am therefore of the opinion that the applicant will not suffer any irreparable damages as all the contemplated damages pointed out by the applicant may well be recovered in the award were it to be successful.

Issue three: Balance of convenience.

It was Counsel for the applicant's submission that while the applicant stand to lose everything, the respondent's lose nothing and so the balance of convenience is in the applicant's favour. Counsel for the submitted the 1st respondent submitted on the other hand that the contract was
5 terminated, following which the applicant demobilized from the site allowing the 1st respondent to take over the site. That presently, the 1st respondent road maintenance team is trying to maintain the road to keep it in a motorable condition until a new contractor is procured.

It is trite law that if the court is in doubt on the above two principles, it will decide the application on the balance of convenience.

10 In the case of **Victoria Construction Works Ltd Vs Uganda National Roads Authority HMA No. 601 of 2010** the Learned Judge while citing the decision in **J. K. Sentongo Vs Shell (U) Ltd [1995] 111 KLR 1**; observed that if the applicant fails to establish a *prima facie* case with likelihood of success, irreparable injury and need to preserve the *status-quo*, then he/she must show that the balance of convenience was in his favour.

15 I agree with Counsel for the 1st respondent, that if the injunction is granted, the procurement will be terminated to an indefinite period considering how notoriously slow litigation is while posing a serious threat to the road users because of the continuous deterioration of the incomplete works and bridges. In my view the balance of convenience is in favour of the 1st respondent.

20 In the result this application is dismissed with costs.

I so order

B. Kaimura
Judge

25 **02.11.2017**