THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL DIVISION]

MISCELLANEOUS CAUSE No. 33 of 2015

(Arising From Arbitral Award Serial No. 5 of 2015)

ONE SOLUTIONS LIMITED :: APPLICANT

VERSUS

EASTERN AND SOUTHERN AFRICAN

MANAGEMENT INSTITUTE :: RESPONDENT

BEFORE: HON. MR. JUSTICE B. KAINAMURA

RULING

The applicant brought this application by Chamber Summons under Section 38(1)(b), (2)(a)(b) of the Arbitration and Conciliation Act, Cap 4 seeking orders that; the arbitral award delivered by Mr. Christopher Bwanika dated the 23rd of June 2015 be varied and/ or be set aside and costs of the application be provided for.

The grounds as set in the affidavit in support deponed by Mr. Claude Vendette the Chief Executive Officer of the applicant are that; on the 23rd of June 2015, Mr. Christopher Bwanika delivered an award to the parties party to the arbitration process, the arbitrator made a finding that clause 11 (i) of the Tenancy Agreement was not a condition subsequent and in effect ruled that the contract was capable of being performed by the applicant and was not void, clause 11 (i) of the agreement amounts to a condition subsequent and requires legal interpretation by court to that effect and it is in the interest of justice that this application/be allowed.

Applicant's submissions

Counsel raised the issue ***whether clause 11 (ii) of the Tenancy Agreement amounts to a condition precedent***.

Clause 11 (i) of the Tenancy Agreement is to the effect that;

> *"This agreement will be subject to a technical survey performed by NR Cyber Engineering Team and funding arrangements for the NR Cyber 5 years Business plan PROVIDED that this agreement is endorsed on or before 1st October, the deposit paid by the tenant amounting to USD 7,087 will be forfeited and the landlord will be free to enter fresh agreements in respect of the demised premises."*

Counsel argued that this clause is a condition subsequent as the applicant's failure to secure funding for its 5 year business plan discharged its duty of performance, thus making it binding on the parties. Counsel relied on the case of ***L'' Estrange Vs Gracoub Limited [1934] 2 K.B 394*** where court held that when a document containing contractual terms is signed, then, in the absence of fraud, or misrepresentation the party signing it is bound and it is wholly immaterial whether he has read the document or not. Counsel submitted that the contract between the applicant and respondent was a contingent one as portrayed under ***Section 28 of the Contracts Act 2010*** which provides that such contract shall not be enforced except where and until that event happens and where the event becomes impossible, the contract shall become void. Counsel added that the agreement was contingent upon the applicant securing a technical survey and obtaining funds for its five year business plan.

Respondent's submissions

Relying on ***Section 9 of the Arbitration and Conciliation Act and Babcon Uganda Ltd Vs Mbale Resort Hotel Ltd CACA No. 87 of 2011 (unreported),*** Counsel objected the jurisdiction of this court to hear the appeal submitting that the applicant did not follow the requirement as provided in **Section 38** of the Act that the parties must have agreed for the court to entertain an appeal arising out of an award of the arbitration. Counsel argued that it follows that the appeal is incompetent and should be struck out with costs to the respondent.

Applicant's submissions in reply to the preliminary objection

Counsel argued that ***Section 38 of the Arbitration and Conciliation Act*** provides that an appeal by any party may be made to a court of law on any question of law arising out of the arbitral award. Counsel argued that clause 7 of the tenancy Agreement did not state expressly and in ambiguous terms that the award of the arbitrator shall be final. Counsel added that ***Section 33*** of the ***Judicature Act*** gives the High Court wide powers to grant such remedies in respect of a legal or equitable claim to determine all issues in controversy between parties. Counsel submitted that the arbitration clause did not oust the applicant's right to appeal against the award of the arbitrator on a question of law given the fact that it was silent when it came to the issue as to whether the award of the arbitrator was final or not. Counsel relied on the case of ***London Hospital Vs Jacob (1956) 2 AER 603*** where court held that even where the jurisdiction is expressly excluded, that did not oust the jurisdiction of the court. Counsel thus prayed that the preliminary objection be disregarded and the application determined on its merits.

Ruling

This is an application seeking orders to have the arbitral award delivered by Mr. Christopher Bwanika dated the 23rd of June 2015 varied and/or set aside and costs of the application be provided for. However, Counsel for the respondent raised an objection regarding the jurisdiction of this court in light of the provision of **Section 9** of the **Arbitration** and **Conciliation Act** and the case of ***Babcon Uganda Ltd Vs Mbale Resort Hotel Ltd*** (unreported) (supra). Counsel for the applicant argued that this court has jurisdiction based on **Section 33** of the **Judicature Act**.

Section 9 of the **Arbitration** and **Conciliation Act** provides that;

> *Except as provided in this Act, no court shall intervene in matters governed by this Act."*

The application was brought under **Section 38(i) (b), (2) (a)** of the **Arbitration** and **Conciliation Act.**

> Section 38 (1) whether in the case of arbitration the parties have agreed that;-
>
> *a. .....*
> *b. an appeal by any party may be made to a court on any question of law arising out of the award,*

c. *the application or appeal, as the case may be, may be made to the court* ***(Emphasis added)***

My reading of the above is that the parties to the arbitration must have agreed for an appeal to be made to court.

Based on the above, i am of the opinion that the preliminary objection should be sustained because the application was brought under **Section 38 (1) (b)** which gives the High Court Jurisdiction to entertain matters such as the question of law only if the parties to the arbitration have expressly agreed to do so.

With regard to the question of ouster of jurisdiction, in the case of ***Babcon Uganda Ltd Vs Mbale Resort Hotel Ltd*** (unreported) (supra), court in its judgment quoted the case of ***David Kayondo Vs the Cooperative Bank Ltd SC Civil Appeal No. 19 of 1991*** [unreported] where Mayindo DCJ, opined;

> *"Under the Constitution and the Judicature Act the High Court has unlimited jurisdiction over all matters Civil or Criminal subject to any written law. It is settled law that for a statute to oust the jurisdiction of the court, it may say so expressly. Of course ouster may be inferred from the words of the statute if such inference is irresistible"*

As noted above, **Section 9** of the **Arbitration** and **Conciliation Act** read together with **Section 38** of the Act clearly ousts the jurisdiction of the court expressly except as stated therein. In my view the application under review does not fall within the permitted intervention by court by way of appeal since it is not shown anywhere that the parties had agreed to such intervention.

In the result the preliminary objection is sustained and this application is dismissed with costs.

B. Kainamura

Judge

15.08.2017