THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

[COMMERCIAL COURT]

MISC. APPLICATION No. 131 OF 2018

(Arising from Misc. Appl No. 132 of 2018

And Misc. Appl No. 6007 of 2017

Misc. Cause No. 821 of 2017

(All Arising From Cad/Arb/08/2017)

IN THE MATTER OF THE ARBITRATION AND CONCILLIATION ACT CAP 4

AND IN THE MATTER OF AN APPLICATION TO SET ASIDE AN ARBITRAL AWARD

[Award made by Jaqueline Lule on 14th July 2017]

BSK INTERNATIONAL SCHOOL LTD :::::::::::::::::::::::::::::::: APPLICANT

VERSUS

MICHEAL KATUNGYE :: RESPODENT

BEFORE: HOR. MR. JUSTICE B. KAINAMURA

RULING

This is an application brought by Notice of Motion seeking orders that the execution of the ruling and orders of the High Court in Misc. Appl No. 1007 of 2017 be stayed pending hearing of the appeal; the proceedings of the High Court in Misc. Cause 821 of 2017 ***British International School Kampala Ltd Vs Micheal Katuugye*** be stayed pending the hearing and determination of the appeal and costs be provided for.

The brief facts of the case are that the respondent successfully filled for a claim of the cost of the construction of a swimming pool and for damages. The arbitrator awarded him special and general damages to the tune of UGX 946,419,339/=. The applicant applied to this court to have the award set aside. The respondent applied for security of performance of the award which was awarded. This court ordered the applicant to make a deposit of security for performance of the award in the court within 30 days of the ruling. The applicant has not made any such deposits but seeks leave of this court to stay the proceedings of the execution of the ruling and orders in the Misc. Appl No. 1007 of 2017.

The gist of the applicant's case is that the applicant stands to suffer irreparably because its entire application to set aside the award stands to be dismissed without hearing it on merits. On the other hand, the respondents contended that the applicant will not suffer any irreparable losses because the ruling arises from an application for security for performance of the award.

The respondent further averred that the applicant has no right of appeal against the ruling made under Misc. Application No. 1007 of 2017 because while entertaining the application, the High Court was not exercising original jurisdiction but was simply acting pursuant to a provisions of the Arbitration and Conciliation Act (the Act) in furtherance of a challenge to an arbitral award. Counsel for the respondent relied on the case of ***Babcon Uganda Ltd Vs Mbale Resort Ltd, Civil Appeal No. 6 of 2016*** *w*here court held that;

> "*from the above provisions it is clear that when the High Court is hearing the application under S.34 (I) of ACA it is not in the least or at all exercising original jurisdiction. The original jurisdiction had been exercised by the arbitral tribunal consisting of a sole arbitrator"*.

Counsel for the applicants on the other hand contended that the application they seek to stay did not emanate from the arbitrator but was rather originating in the High court exercising specialised powers vide the Act under Section 34.

Counsel for the respondent further contended that even though the appeal would he held to be as of right, the applicant has not satisfied one of the requirements of staying execution and that is having provided security for payment. In fact, the applicant has not even paid the security as ordered by this court which not only shows contempt of court but is also a disregard of the crucial part of challenging the arbitral award.

Ruling

I have carefully considered the application for stay of execution and stay of proceedings. I have further considered the submissions of learned Counsel. I have also considered some of the authorities relied upon by both Counsel.

In the case of ***Babcon Uganda Ltd Vs Mbale Resort Ltd, Civil Appeal No. 6 of 2016*** court held that;

"*from the above provisions it is clear that when the High Court is hearing the application under S.34 (I) of ACA it is not in the least or at all exercising original jurisdiction. The original jurisdiction had been exercised by the arbitral tribunal consisting of a sole arbitrator"*.

Miscellaneous application No. 1007 of 2017 was brought under section 34 (5) of Arbitration and Conciliation Act which provides that;

> *"If an application for the setting aside or suspension of an arbitral award has been made to a court, the court may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the arbitral award, order the other party to provide appropriate security"*.

It is clear that the section finds its root in section 34(1). It is not a fresh application, but an interlocutory application that arises from section 34 (1) of the Act. The Supreme Court held that when exercising the powers under Section 34(1) the court is not exercising its original jurisdiction for the appeal to be as of right. I am inclined to agree with counsel for the respondent that no interlocutory matter can give greater rights in law than what the main application can offer.

On this point therefore I find that this court was not excising its original jurisdiction in handling Misc. Appl No. 1007 of 2017. The sum total of this is that the appeal is not as of right.

Even though the applicant had a right of appeal, the conditions for stay of execution are clear.

Order 22 r. 26 provides that;

> *"Where a suit is pending in any court against the holder of a decree of the court in the name of the person against whom the decree was passed, the court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided"*.

Further, **O.43 r.4 CPR** provides that when an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing from the decree, the court which passed the decree may on sufficient cause being shown order execution to

be stayed. The applicant has a duty to satisfy either the High Court or the court which passed the decree that sufficient cause exists for the grant of the stay.

It must be shown that:-

1. Substantial loss may result if no order for stay is made under O.43 rr 1 and 2 CPR.
2. The application has been made without unreasonable delay and
3. Security has been given by the applicant for the due performance of the decree or order as may ultimately be binding on the applicant.

It's a condition that before court stays execution, the applicant must give security for due performance. This in my view would still require the applicant to pay necessary security for stay of execution. However, in the instant case, the applicant has failed to pay security which this court ordered him to pay within 30 days after the ruling.

I note that on 12th February 2018 the applicant filed a Notice of Appeal of the ruling in Misc. Appl No. 1007 of 2017 of 9th February 2018. The applicant then on 22nd February 2018 filed an application for an interim order of stay of execution of the above ruling which application was heard and dismissed by the Registrar of this court on 6th March 2018.

Since the 30 days granted by court in Misc. Appl No. 1007 of 2017 within which to deposit the requisite security had lapsed by the time the application was heard and having failed to get an interim stay, then the applicant was clearly in breach of the court order.

In the case of ***Amrit Goyal Vs Harichand Goyal & 3 ors Civil Application No. 109 of 2004*** *where the Court of Appeal held that;-*

> *"A court order is a court order. It must be obeyed as ordered unless set aside or varied. It is not a mere technicality that can be ignored..... court cannot condone such deliberate contempt of its orders".*

Having determined that the applicant has no right of appeal and in light of the decision in **Amirt Goyal** (supra) this application is dismissed with costs.

B. Kainamura

Judge

29.06.2018