

THE REPUBLIC OF UGANDA



IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT DIVISION)

MISCELLANEOUS APPLICATION NO. 665/2020

(ARISING FROM MISCELLANEOUS APPLICATION NO. 947/2018)

(ARISING FROM ARB NO. 4/2017)

AND

(ARISING FROM CAD/ARB NO. 36/2016)

DR. ALFRED OTIENO ODHIAMBO.....APPLICANT

VERSUS

MEDUPROF-S BV.....RESPONDENT

BEFORE: HON. MR JUSTICE RICHARD WABWIRE WEJULI

R U L I N G:

The Application is brought under S.33 of the Judicature Act Cap. 13, S.98 of the Civil Procedure Act Cap. 71, Order 22 Rule 26 and Order 52 rules 1 and 3 of the Civil Procedure Rules SI 71 for orders that the execution of the Ruling/Orders entered against the Applicant in Miscellaneous Application No. 947 of 2018 be stayed until final disposal of the Appeal by the Applicant to the Court of Appeal and for costs of the Application to be provided for.

The application was supported by the affidavit of Dr. Alfred Otieno Odhiambo, the applicant. The respondent filed an affidavit to oppose the application deposed by Willem Van Prooijen, the respondent's managing director.

25 The Applicant is represented by M/s AF Mpanga Advocates while the Respondent is represented by M/s Enoth Mugabi Advocates and Solicitors. The parties addressed court in written submissions.

The grounds of the application as laid out in the application are as follows;

- 30 a. The Applicant being aggrieved by the Ruling of this Honorable Court in Miscellaneous Application No. 947 of 2018 has filed a Notice of Appeal in this Honorable Court and the Court of Appeal.
- b. The appeal raises serious questions of law that warrant consideration by the Honorable Court of Appeal.
- 35 c. Notwithstanding the commencement of an appeal, the Respondent has proceeded to execute the orders granted in Miscellaneous Application No. 947 of 2018 and attach the Applicant's assets in Kenya.
- d. It is just, fair and equitable that the enforcement by the Respondent of the orders made by this Honorable Court in Miscellaneous Application No. 947 of 2018 that are a subject of an appeal, be stayed pending the
40 final determination of the appeal filed by the Applicant to the Court of Appeal.
- e. The appeal shall be rendered nugatory if this application for stay is not granted yet the Applicant is under imminent threat of execution proceedings in Kenya.
- 45 f. The Applicant shall suffer irreparable loss if the execution is not stayed.
- g. The application is brought without inordinate delay.

h. The Applicant is willing to provide such security for due performance of the decree as the court deems fit.

i. It is in the interests of justice that the Orders sought be granted.

50 The respondent opposed this application and raised a preliminary objection to the effect that the Court has no jurisdiction to entertain MA No. 665/2020. In support of the objection the respondent's Counsel submitted that there is no automatic right of Appeal under the Arbitration and Conciliation Act, Cap. 4 and no agreement of the parties to appeal that would have formed the
55 foundation of the jurisdiction of the court.

Decision

Section 38 (1), (2) and (3) of the Arbitration and Conciliation Act, Cap. 4 (ACA, Cap. 4) provides as follows: -

"Section 38.

60 *Questions of law arising in domestic arbitration.*

(1) Where in the case of arbitration, the parties have agreed that—

(a) an application by any party may be made to a court to determine any question of law arising in the course of the arbitration; or

*(b) An appeal by any party may be made to a court on any question of law
65 arising out of the award, the application or appeal, as the case may be, may be made to the court.*

(2) On an application or appeal being made to it under subsection (1), the court may, as appropriate—

(a) determine the question of law arising;

70 (b) Confirm, vary or set aside the arbitral award or remit the matter to the arbitral tribunal for reconsideration or, where another arbitral tribunal has been appointed, to that arbitral tribunal for consideration.

(3) Notwithstanding sections 9 and 34, an appeal shall lie to the Court of Appeal against a decision of the court under subsection (2) if—

75 (a) the parties have so agreed that an appeal shall lie; and

(b) The court grants leave to appeal, or where the court fails to grant leave, the Court of Appeal grants special leave to appeal, and on such appeal the Court of Appeal may exercise any of the powers which the court could have exercised under subsection (2).”

80 The above provisions of the law show that for any question of law to arise in a domestic arbitration as is the case here, there must be an agreement by the parties to the arbitration to the effect that an application or an appeal can be made to a court. It is only after such an agreement that court can grant leave to appeal or special leave to appeal.

85 In this instant case, the applicant stated that being aggrieved by the Ruling in Miscellaneous Application No. 947 of 2018 filed a notice of appeal in this Court and the Court of Appeal. However, no evidence was adduced to show that the parties had agreed to the appeal being commenced. It is an agreement of the parties to appeal that would have formed the foundation of the
90 jurisdiction of the court. Clause 21 of the supply agreement which provides for the jurisdiction of arbitration to be Uganda, does not provide for a right to appeal. If indeed the parties to this agreement found it necessary or wanted an appeal to be included as a remedy, they would have expressly provided for it in their Agreement.



95 **Section 9 of the ACA Cap. 4** provides that;

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

The above provision of the law was highlighted in the case of **Babcon Uganda Limited v Mbale Resort Hotel Limited, CA No. 87/2011**, Justice Egonda

100 Ntende held that:

Section 9 of the ACA is very clear in ousting courts' general jurisdiction. It bars the courts from intervening beyond the limited or special jurisdiction permitted under ACA. This, in my view, must extend to an appeal to this court as this would be tantamount to intervention by the Court of Appeal in a proceeding
105 *under ACA. Such intervention is barred unless it is authorized by the ACA and it is not so authorized...The legislature was alive to the possibility of an appeal to the Court of Appeal for proceedings under ACA and it provided for appeals to the court of appeal only in relation to matters under S.38(2) of the ACA. No other right of appeal against a decision of the High Court was created in the ACA. I*
110 *find that no right of appeal to the Court of appeal exists under the ACA beyond what is provided under S.38 (3) of the ACA...The ACA is a latter piece of legislation from the Civil Procedure Act. The provision of the ACA must take precedence, or rather section 9 of the ACA must take precedence over section 66 of the Civil Procedure Act in relation to matters governed by the ACA."*

115 In the case of **Soroti Joint Medical Services Ltd v Sino Africa Medicines Health Ltd, Miscellaneous Application No. 99 of 2013**, Hon. Justice Christopher Madrama Izama [As he then was held that;

120 "...Inasmuch as the court has inherent jurisdiction and it may be argued that the use of the Civil Procedure Rules does not take away that jurisdiction, the use of mandatory language by section 71 of the Arbitration and Conciliation Act should not be ignored. Under section 14 of the Judicature Act, the inherent jurisdiction of the High Court is subject to law. Section 14 (2) provides that:

125 'Subject to the Constitution and this Act, the jurisdiction of the High Court shall be exercised,

a. In conformity with the written law, including any law in force immediately before commencement of this Act; ...'

Section 71 of the Arbitration and Conciliation Act is part of the written law to which the inherent powers of court are subject.

130 All proceedings are commenced under the Arbitration Rules unless and until the rules committee makes rules to replace them."

In my view that the provisions of the ACA Cap.4 are couched in mandatory language and should be interpreted as such. Consequently, I find that the applicant has no right of appeal against the decision of the High Court made

135 under section 34 of the ACA Cap.4.

I find the case of **Goodison Sixty-One School Limited v Symbion Kenya Limited (2017) eKLR** a persuasive authority regarding the Kenya Arbitration Act which is similar to the Ugandan ACA Cap.4. In that case, the court cited Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006 annexed as part 2 to the amended Model Law and held as follows;

"15. Recent amendments to arbitration laws reveal a trend in favor of limiting and clearly defining court involvement in international commercial arbitration.



This is justified in view of the fact that the parties to an arbitration agreement
145 *make a conscious decision to exclude court jurisdiction and prefer the finality*
and expediency of the arbitral process.”

As rightly submitted by the Respondent's Counsel the Model Law envisages court involvement in various issues which include jurisdiction of the arbitral tribunal as indicated in article 16 of the Model Law.

150 Indeed, where Article 165 of the Constitution obliges the courts to promote arbitration, what is urged is the promotion of arbitration within the context of its fundamental principles, without derogation from its core characteristics. Another persuasive case I would wish to rely on is the case of **Kenya Shell Limited v Kobil Petroleum Limited Civil Appeal (Nairobi) No 57 of 2006**

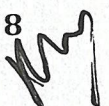
155 where the court held that;

“Arbitration is one of several dispute resolution methods that parties may choose to adopt outside the courts of this country. The parties may either opt for it in the course of litigation under Order XLV of the Civil Procedure Rules or provide for it in contractual obligations, in which event the Arbitration Act, No.

160 *4 1995 (the Act) would apply and the courts take a back seat.”*

The official commentary on Article 5 of the Model Law by the UN Secretary-General is contained in A/CN.9/264 (reproduced in the Yearbook of the United Nations Commission on International Trade Law, 1985, Volume XVI, United Nations publication) p112 provides that the

165 intent of arbitration under the Act is further that the arbitration award is final and binding on the parties, unless the parties agree otherwise (see section 32A). It is further stated that; in the majority of limited occasions where the court is entitled under the Act to intervene in arbitration — through an



application made to court — and to make a decision in respect of such
170 application, by and large the court's decision is generally stated as final and
not subject to appeal.

Therefore, in absence of an Arbitration agreement to appeal, the Applicant
cannot purport to be lodging an appeal against the decision under Section 34
of the ACA Cap.4.

175 It is my considered view therefore that the objection has merit. The applicant
has no automatic right of Appeal to the Court of Appeal. It is subject to the
parties entering an agreement in that respect, which agreement was never
entered in this case.

The preliminary objection is accordingly upheld and premised on this finding,
180 I see no reason to consider the merits of the application.

The costs of this Application are awarded to the Respondents.

Delivered at Kampala this ...^{30th} day of April, 2021.

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RICHARD WEJULI WABWIRE

JUDGE