

The Republic of Uganda  
In The High Court of Uganda at Kampala  
Commercial Division  
Miscellaneous Cause No. 37 Of 2020

[Application for A Mandatory Interim Measure of Protection Under the  
Arbitration and Conciliation Act Cap 4]

Guangdong Hao He Engineering  
and Construction Company (U) Limited :::::::::::::::::::::::::::::::::: Applicant

Versus

1. Britam Insurance Co. (U) Ltd
2. Capital Shoppers Limited :::::::::::::::::::::::::::::::::: Respondents

RULING

BEFORE: HON. JUSTICE DR. HENRY PETER ADONYO

**1. Background:**

The application was brought under section 6 of the Arbitration and Conciliation Act, Cap. 4 and Rule 13 of the Arbitration Rules, First Schedule to the Arbitration and Conciliation Act Cap. 4, section 33 of the Judicature Act Cap. 12 and section 98 of the Civil Procedure Act, Cap. 71 for two orders, namely;

- a) A mandatory interim measure of protection issues, by way of a mandatory temporary injunction, restraining the 1<sup>st</sup> Respondent from effecting payment to the 2<sup>nd</sup> Respondent's agents, servants, employees and anyone acting under the 2<sup>nd</sup> Respondent's authority from receiving payment or enforcing the said demands or calls on (i) The Advance Payment Bond No. 900/120/1/ 000072/2018/11 and (ii) The Performance Bond No. 900/120/ 1/000073/2018/11 issued by Britam Insurance company (Uganda) Limited for the benefit of the 2<sup>nd</sup> Respondent in relation to the Project for



Construction of the Proposed Kampala Marriot Hotel & Marriot Executive Apartments, on Plot 2646, Block 15 Ggaba Road, Nsambya, Kampala District for Capital Shoppers's Limited pending the determination of the institutional arbitration proceedings Reference No. 25627/ DDA filed by the Applicant against the Respondent with the International Chamber of Commerce Arbitration Rules (ICC Rules) under the Contract for the above mentioned project.

- b) Costs of this application be provided for.

## **2. Grounds:**

The grounds of the application as expounded further in the affidavit deposed by one Jiang Ming, stated to be the Applicant's Managing Director briefly are that;

- a) The Applicant and 2<sup>nd</sup> Respondent entered into a contract on the 1<sup>st</sup> day of November 2018 pursuant to which the 2<sup>nd</sup> Respondent contracted the applicant to undertake works on the project for the Construction of the proposed Kampala Marriot Hotel & Marriot Executive Apartments on Plot 2646, Block 15 Ggaba Road Nsambya, Kampala District.
- b) During the execution of the works the applicant and the 2<sup>nd</sup> respondent through the project manager had several meetings and correspondences relating to the execution of works and the Applicant always acted in response to the instructions given by the Respondent. Several payment certificates were certified and payments were made.
- c) To the Applicant's surprise and disappointment on 4<sup>th</sup> June 2020 the Applicant received a letter from the Respondent notifying them of the decision to terminate the contract.
- d) On 18<sup>th</sup> June 2020 the Applicant wrote to the Respondent protesting the termination.
- e) On 8<sup>th</sup> July 2020, the 2<sup>nd</sup> Respondent wrote to the 1<sup>st</sup> Respondent demanding for payment of the Advance Payment Bond No.



900/120/1/000072/2018/11 and the Performance Bond No. 900/120/ 1/000073/2018/11 and that both the Advance Payment and Performance Bonds are 'Conditional' Bonds whose payments are subject to the Underlying Contract of Works.

- f) The conduct of the Respondent in arbitrarily terminating the contract with the Applicant was illegal, unlawful and a breach of the contract and the Applicant has already commenced arbitration proceedings in accordance with the contract so as to get redress for the unethical, illegal and unlawful actions of the 1<sup>st</sup> Respondent.

### **3. Affidavits:**

Mr. Jiang Ming, the Managing Director of the Applicant deposed an affidavit in support of the application wherein he averred that the 2<sup>nd</sup> Respondent, despite being of aware of the applicant's dispute of the termination of the contract, wrote to the 1<sup>st</sup> Respondent demanding for payments under the Advance Payment Bond No. 900/120/1/000072/2018/11 and Performance Bond No. 900/120/1/000073/2018/11 amounting to United States Dollars One Million Four Hundred and One thousand Six Hundred Ninety-One and Twenty Seven Cents (USD 1,401,691.27) and United States Dollars One Million Thirty-One Thousand and Twenty Cents Twenty Four (USD 1,031,020.24) respectively. That, the 1<sup>st</sup> Respondent has also gone ahead to carry out an assessment of the 2<sup>nd</sup> Respondent's claim even when the Applicant wrote and informed the 1<sup>st</sup> Applicant's officials that it was challenging the termination for being unlawful through arbitration. According to Mr. Ming's affidavit, the actions of the 2<sup>nd</sup> Respondent in terminating the contract are unlawful and illegal and calling for payments under the performance bonds is in breach of the contract.

Ms. Doreen Nakubulwa, the Claims Manager of the 1<sup>st</sup> Respondent swore an affidavit in reply. She deposed that the 1<sup>st</sup> Respondent received a demand for the payment of the advance payment bond and performance bond regarding the alleged breach of contract on the part of applicant and termination of the said contract, and when the 1<sup>st</sup> Respondent inquired from the applicant, it denied the

2<sup>nd</sup> Respondent's allegations. According to the affidavit, the 1<sup>st</sup> Respondent, caused an investigation into the claim of breach of contract and termination as a standard mode of procedure in insurance practice, and is well aware that the dispute between the Applicant and Respondent is now before the International Chamber of Commerce Arbitration. That, the performance and advance bonds issued by the 1<sup>st</sup> Respondent are conditional in nature and can only be paid on actual proof of default or breach through an arbitration award or court judgment and that the liability of the Applicant in relation to payment of the bonds is yet to be decided and in the circumstances, it is important to offer protection for insurance bond payments pending resolution of the disputes.

Mr. Ponsiano Ngabirano, the Managing Director of the 2<sup>nd</sup> Respondent swore an affidavit in reply to the application. Mr. Ngabirano deposed that the Applicant and 1<sup>st</sup> Respondent are bound by the Construction Contract and the advance payment guarantee as the outstanding amount under the loan advanced to the Applicant. That the 2<sup>nd</sup> Respondent also furnished sufficient proof to the 1<sup>st</sup> Respondent for payment of the performance bond and as such the application is incompetent and has no basis in law. That, the arbitration file at the Secretariat of the International Court of Arbitration has been closed since the 2<sup>nd</sup> Respondent's lawyers have never been notified by the Secretariat of the Applicant's request for arbitration.

**4. Submissions:**

**a. Applicant's submissions:**

Counsel for the Applicant raised two issues for the courts determination including;

- i. Whether the advance payment and performance bond guarantees issued by the 1<sup>st</sup> Respondent to the 2<sup>nd</sup> Respondent in favor of the Applicant were conditional or on-demand/ non-conditional bonds/ guarantees?
- ii. Whether the Applicant is entitled to the remedies prayed for?



Counsel for the applicant relied on section 6 of the Arbitration and Conciliation Act, Cap. 4 which provides as follows;

**6. Interim measures by the court.**

**(1) A party to an arbitration agreement may apply to the court, before or during arbitral proceedings, for an interim measure of protection, and the court may grant that measure.**

**(2) Where a party applies to the court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.**

These provisions allows a party to arbitration to apply for an interim measure of protection with the said provisions expounded by the cases of **John Sekaziga and Another vs Church Commissioners Holding Miscellaneous Cause No. 15 of 2013** and **International Investment House Company LLC and Emirates Africa Link for Strategic Alliance (LLC) vs Amos Nzeyi and Others Miscellaneous Cause No. 11 of 2012** which allows a party to apply to court for an interim measure of protection before or during the arbitration proceedings.

On whether the advance payment and performance bonds/ guarantees issued by the 1<sup>st</sup> Respondent to the 2<sup>nd</sup> Respondent were conditional or on-demand (first demand bonds/ guarantees), it was the submission of counsel for the applicant that the bonds in the case before court are conditional in nature and that the court should carefully review the wording of a bond in order to ascertain whether it is unconditional and that from the wording and construction, the advance payment and performance bonds issued by the 1<sup>st</sup> Respondent were intended to be conditional.



On whether the applicant is entitled to the remedies sought, counsel submitted that this application is governed by the same principles that govern the grant of a temporary injunction. Counsel cited ***Victor Construction Works Ltd vs Uganda National Roads Authority MA No. 601 of 2010*** and ***Robert Kavuma vs Hotel International Ltd Supreme Court Civil Appeal No. 8 of 1990*** which lay out principles for the grant of a temporary injunction. Counsel submitted that the applicant's claim at the arbitration raises serious issues and also that if the said injunction is not issued by the court, the applicant will suffer irreparable injury and inconvenience.

**b. 1<sup>st</sup> Respondent's submissions:**

It was argued for the 1<sup>st</sup> Respondent that a demand bond is an independent banking guarantee raises an obligation to pay the full amount of the bond. Furthermore, that, the bonds issued in the present case were for the purposes of covering applicant's obligations and by their wording, the bonds were interlinked conditional on the terms of the underlying contract.

It was also argued that the intention of the bonds was to create secondary liability of the guarantor, and that since the binds are conditional, the 2<sup>nd</sup> Respondent must prove that the applicant did not meet its obligations as stipulated in the underlying contract. that, the bonds are not independent and allegations of non-performance do not suffice as proof of breach contract.

**c. 2<sup>nd</sup> Respondent's submissions:**

The 2<sup>nd</sup> Respondent raised two preliminary objections including that the application for a mandatory temporary injunction is incompetent. The second preliminary objection raised by counsel was that the Applicant is neither privy to nor a beneficiary to the contracts of guarantee and can therefore not sue it. Lastly, that the pending arbitration alluded to has abated.

On the first preliminary objection, counsel submitted that a mandatory injunction is positive and restorative and seeks to alter or restore the status quo



yet, in the present case, the applicant does not seek to restore anything or to reverse the status quo. Furthermore, that an order that restrains the respondents is contradictory in nature. It was also submitted that as per **Interfreight Forwarders (U) Limited and East Africa Development Bank SCCA No. 22 of 1992, and Mitanda vs URA MA No. 1424 of 2017**, the applicant originally prayed for a mandatory temporary injunction and should not seek to change that prayer.

On privity of contract, that the advance payment bonds and performance bond are contracts between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents while the applicant is a third party to the contract. Counsel cited section 65 of the Contracts Act which provides that a contract may be enforced by a third party where it expressly provides so and also where a term of the contract confers a benefit on that person. He pointed out that the advance payment bonds and performance bonds do not confer any third party rights or other benefits on the applicant.

In relation to the third preliminary objection, that is, that the pending arbitration has abated, counsel submitted that the applicant failed to pay the filing fees as required under article 4 (4) (b) of ICC Rules. Additionally, that, the 2<sup>nd</sup> Respondent has not received any notification from the Secretariat of the International Chamber of Commerce in relation to the applicant's request for arbitration. That, this is confirmed by the applicant's affidavit in rejoinder where it is admitted that the arbitration file closed but that the applicant can reintroduce the same claims. Counsel's contentions were that it would be improper for the court to exercise its discretion to issue interim measures of protection yet the arbitration file abated and that doing so would be an abuse of court process.

In its submissions in rejoinder, Counsel for the applicant submitted that there is no confusion as to the nature of interim measure sought since both section 6 (1) of the Arbitration Act, Cap. 4 and article 28 of the ICC Rules refer to an interim

measure as appropriate and 2<sup>nd</sup> respondent's submissions on the nomenclature of the relief sought are not relevant to the discussion.

Regarding the submissions of the 2<sup>nd</sup> respondent that the arbitration has abated, the applicant argued that the letter from the ICC Secretariat dated 4<sup>th</sup> September 2020 does not deprive the applicant of the use of the arbitration agreement while section 6 (1) of the Arbitration Act, Cap. 4 allows a party to an arbitration agreement to apply to court for an interim measure of protection.

Counsel for the applicant submitted that the applicant intends to lodge a *de novo* application with the ICC Secretariat and that there is no need for an active arbitration case lodges as long as there is an existing arbitration clause or agreement.

#### **5. Resolution:**

I have duly considered the Applicants pleadings, the Respondents pleadings, the affidavit evidence filed in support and opposition and the submissions of learned counsels. I have additionally considered the authorities submitted in support of the arguments.

This application is primarily made under **sections 5 and 6 of the Arbitration and Conciliation Act** and **rule 13 of the Arbitration Rules**. The specific remedy that the Applicant seeks is provided for under section 6 of the Arbitration and Conciliation Act cap 4 laws of Uganda which provides as follows:

#### **Section 6 of The Arbitration and Conciliation Act**

**"Interim measures by the court.**

***A party to an arbitration agreement may apply to the court, before or during arbitral proceedings, for an interim measure of protection, and the court may grant that measure.***

***Where a party applies to the court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter***



***relevant to the application, the court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application."***

The provision under section 6 (1) quoted above allows a party to apply for an interim measure of protection before or during arbitration proceedings. It further gives the court discretionary power whether to grant that measure or not. Both parties relied on authorities giving the principles which guide courts in the exercise of discretionary powers to grant temporary injunctions.

Section 6 subsection 1 of the Arbitration and Conciliation Act uses the phrase "interim measure of protection". The phrase "interim measure of protection" is wider than the word "injunction". This is because the term "interim measure of protection" is also qualified by section 6 subsection 2 of the Arbitration and Conciliation Act envisages an application for an injunction or other interim orders/measures of protection other than injunctions sought by any of the parties to an arbitration clause and which may be granted by the court.

Interim measures of protection may include remedies such as provision of security for costs. An interim measure of protection includes an application for an interim injunction.

The Applicants seek a temporary injunction restraining the Respondents, their servants, agents or otherwise from enforcing, effecting or otherwise implementing.

In its submissions, counsel for the 2<sup>nd</sup> Respondent raised three preliminary objections which I will consider now. The first preliminary objection raised by counsel is that a mandatory injunction is positive and restorative and seeks to alter or restore the status quo yet, in the present case, the applicant does not seek to restore anything or to reverse the status quo.

The nature of the status quo to be preserved was explained in **Byaruhanga & 2 Others vs Kabagahya Miscellaneous Application No. 564 of 2016** which position I find relevant; it was noted by the said court as follows;

***“On whether there is a status quo to be preserved, the legal position is that the status quo is not about who owns the suit property but the actual affairs on the suit premises. The status quo does not have to be upset first, otherwise the grant of a temporary injunction would be overtaken by events, in which case it should not be granted. The subject matter of a temporary injunction is the preservation of the existing state of affairs pending litigation. It is aimed at protecting property from being wasted, damaged, alienated, sold, removed, or disposed off, regardless of the litigant’s rights of claims to such property. Court’s duty is only to preserve the existing situation pending the disposal of the substantive suit. In exercising this duty, court does not determine the legal rights to property but merely preserves it in its actual condition until legal title or ownership can be established or declared. “***

The status quo required to be preserved in this application is the current state of affairs, that is, the Advance Payment Bond No. 900/120/1/000072/ 2018/11 and (ii) The Performance Bond No. 900/120/1/000073/2018/11 issued by Britam Insurance Company (Uganda) Limited for the benefit of the 2<sup>nd</sup> Respondent in relation to the construction project which are yet to be paid out to the 2<sup>nd</sup> Respondent.

This is the status quo that this application seeks to be preserved. As proposed by counsel for the applicant the principles governing the grant of a mandatory temporary injunction as against the temporary injunction are similar meaning that there would be no need to discuss further the type of injunction or interim measure issued at this point. I would agree with this position for indeed the conditions precedent for such orders are similar as a temporary, or preliminary,



injunction is an court order issued to a party that requires him to either act or refrain from taking certain action until after a trial on a disputed matter can be held and interim reliefs in an arbitration matters under section 6 of the Arbitration and Conciliation Act provides that a court may grant various interim measures of protection including orders for securing the amount in dispute, preservation of property, interim injunctions and so forth as may appear to the court to be just and convenient which reliefs are clearly similar to ordinary suits reliefs.

I would thus dismiss the preliminary objection raised on the nature of the temporary injunction for legally the two are similar though specifically mentioned in different provisions of the law.

The other preliminary objection raised is that the applicant is a third party to the advance payment bonds and performance bonds which are separate agreements and so the applicant cannot seek to enforce them because these do not confer any third party rights or other benefits on the applicant.

This is the common law concept of privity of contract where it is a fact that a contract does not confer any rights or obligations on persons who are not party to it.

However, the position of the law in Uganda seems to have developed away from this rigid common law position for under **The Contracts Act, 2010** Section 68 provides for a "Contract of Guarantee" and it defines the same as a ***"A contract to perform a promise or to discharge the liability of a third party in case of default of that third party, which may be oral or written."*** Which seems to be an import of the Indian Contract Act, of 1872 section 126 which provides that ***'the person who gives the guarantee is called the surety, the person in respect of whose default the guarantee is called the 'principal debtor' and the person to whom the guarantee is given is called the 'creditor'.***

Guided by these two provisions of the law, the later which is persuasive, I would firmly conclude that in a contract of guarantee there are three parties, namely, the surety, the principal debtor and creditor.

In its submissions in rejoinder, counsel for the applicant correctly argued that the doctrine of privity is not applicable to the present case and that rather it is the principle of suretyship that this honourable court should take into consideration herein since the two contracts between the include a contract of guarantee and an underlying primary contract.

Additionally, it was argued for the applicant that there were three parties in this instant disputed contract including the guarantor, beneficiary and contractor.

Looking at the attachments to this application, I would fully agree that this the true position in regards to the positions of the parties before me for the insurance company is clearly provided for in the construction works contract making three parties which are Britam Insurance Company (U) Limited (the guarantor), Capital Shoppers Limited (the beneficiary) and Guangdong Hao He Engineering and Construction Company (U) Limited (the contractor).

That being the case the preliminary objection raised which is a reflection of the common law position, in my view, would be inapplicable to the current situation as the subject matter of this application relates unquestionably to advance payment bond and performance bond which are intertwined with the contract for construction works between the applicant and the 2<sup>nd</sup> respondent, the leaving out of the contracts would completely mutilate the main contract.

Arising from the above then I would conclude that applicant would have the right to enforce the bonds for they form part of the contract as a triumvirate.

I now turn to the issue that there is no pending arbitration and as such this application for interim measures by this court would not stand.

Section 6 (1) of the Arbitration and Conciliation Act provides for Interim measures by the court. It provides;



**Section 6 (1) of the Arbitration and Conciliation Act**

**(1) A party to an arbitration agreement may apply to the court, before or during arbitral proceedings, for an interim measure of protection, and the court may grant that measure.**

Additionally, the arbitration clause 20. 6 of the Conditions of Contract between the 2<sup>nd</sup> Respondent, Capital Shoppers Ltd and the applicant Guangdong Hao He Engineering and Construction Co. (U) Ltd provides as follows;

***"If a dispute arises between the parties in connection with or arising out of this Contract or breach thereof and upon which a written notice is issued by one party to the other, the Parties shall attempt to settle such dispute by discussions among their senior management. All disputes occurring during the course of the project and on which a mutually acceptable resolution was not reached shall not, demonstrably, be allowed by the Contractor to impede or hamper the progress of works which shall continue as per schedule and can only be referred to arbitration after the issue of the Taking Over Certificate by the Employer.***

***However, if the dispute is not settled amicably, within forty-two (42) Days of such written notice, (or such further period as the parties may agree) the same shall be settled by international arbitration without resorting to courts. Following points should be noted about the arbitration process;***

***a) The dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce (Rules) and under its auspices,***

**b) The dispute shall be settled by three arbitrators appointed in accordance with the Rules, ...”**

As is clearly established by clause 20 above, the applicant and 2<sup>nd</sup> respondent both agreed to refer any dispute between the parties to arbitration under the jurisdiction of the ICC Secretariat whose rules of procedure are provided for under article 28, article 16 and article 4 (4) of the ICC Rules.

These rules were cited by the 2<sup>nd</sup> respondent but more importantly pointing out that subsequent to the applicant referring the dispute between itself and the respondents to ICC the arbitration proceedings lapsed for the applicant failed to pay the requisite fees and also failed to follow the procedural safeguards provided by those ICC rules which position is equally admitted by the applicant itself though the applicant argues that there was no need to have existing any arbitration proceedings for a court to issue any interim measure of protection insisting that what is crucial as regards this application was the existence of an arbitration agreement.

This latter position is considered flawed given the fact that both parties herein agrees that the issuance of the interim measure of protection by a court falls within the ambit and is governed by the principles for the grant of a temporary injunction for one of the requirement for its grant is the existence of a suit or in this present case an arbitration proceeding as provided for under Order 41 rule 1 and 2 of the Civil Procedure Rules which governs the grant of a temporary injunction which position has been confirmed by court in **Gapco Uganda Ltd vs Kaweesa and Another MA No. 259 of 2013; Nkabwe Christopher and Another vs Shebba Steven and another Misc. Application No. 1784 OF 2012.**

Therefore, given that in the instant application there is currently no arbitration proceedings pending which fact is likewise admitted by the applicant even though the applicant avers that it intends to file *de novo* such an application and urged this court to take note of the fact that of the existence in the contractual



agreement between the parties an arbitration clause and grant the prayers sought in this application, I would find such procedure to be at variance and contrary to the existing position of law for grant of orders sought as in the present application would not fall within the ambit of the principles required for grant of a temporary injunction as pronounced in **Gapco Uganda Ltd vs Kaweesa and Another MA No. 259 of 2013; Nkabwe Christopher and Another vs Shebba Steven and another Misc. Application No. 1784 OF 2012** since interim measures just like interim orders in ordinary suits must be anchored upon existing proceedings for orders for interim measures to be issued and not be based merely on the existence of a clause in a contract between parties for it to have a foundation given the interpretation by court of section 6 of Arbitration and Conciliation Act, 2000 above which was a restatement of the position of the law on granting of temporary injunctions in Uganda which was well settled in the classic case of **E.L.T Kiyimba Kaggwa Versus Haji Abdu Nasser Katende [1985] HCB 43** where Odoki J (as he then was) laid down the rules for granting a temporary Injunction among which is that the granting of a temporary injunction which is an exercise of judicial discretion must be to preserve the status quo until the question to be investigated in main **SUIT** is finally disposed of.

In this case there is no main suit or arbitral proceedings; only an arbitral clause in a contract between the parties herein meaning that this court would be speculatively acting if it were to grant the orders sought as the exercise of the arbitral clause in the contract between the parties herein has neither commenced nor is pending anywhere before any tribunal.

In the premises I would be hesitant to issue any interim measure of protection in the absence of an existing arbitral proceedings. Invariably this application would fail.



**7. Orders:**

a) The application for a mandatory interim measure of protection issues by way of a mandatory temporary injunction, restraining the 1<sup>st</sup> Respondent from effecting payment to the 2nd Respondent's agents, servants, employees and anyone acting under the 2nd Respondent's authority from receiving payment or enforcing the said demands or calls on (i) The Advance Payment Bond No. 900/120/1/ 000072/2018/11 and (ii) The Performance Bond No. 900/ 120/ 1/000073/2018/11 issued by Britam Insurance company (Uganda) Limited for the benefit of the 2nd Respondent in relation to the Project for Construction of the Proposed Kampala Marriot Hotel & Marriot Executive Apartments, OM Plot 2646, Block 15 Ggaba Road, Nsambya, Kampala District for Capital Shoppers's Limited pending a determination of the institutional arbitration proceedings Reference No. 25627/ DDA filed by the Applicant against the Respondent with the International Chamber of Commerce Arbitration Rules (ICC Rules) under the Contract which proceedings has lapsed and is nonexistent is denied.

b) Costs of this application is awarded to the respondents.

I so order.



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**Dr. Henry Peter Adonyo**

**Judge**

**25<sup>th</sup> January 2021**