THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION No. 1567 OF 2022

(Arising from Miscellaneous Cause No. 0017 of 2021)

1. MSS XSABO POWER LTD }
2. BRYAN XSABO STRATEGY CONSULTANTS (U) LTD } ……
APPLICANTS
3. MOLA SOLAR SYSTEMS (U) LTD }
4. CONSICARA GLOBAL INVESTORS LTD }
5. DR DAVID ALOBO }

VERSUS

GREAT LAKES ENERGY COMPANY NV …… RESPONDENT

Before: Hon Justice Stephen Mubiru.

RULING

a. Background.

The applicants and the respondent entered into an investment and ancillary agreements for a power project in Uganda. By those agreements, the 2nd and 3rd applicants as the original shareholders of the 1st applicant, entered into a shareholders' agreement, a memorandum of understanding and an investment agreement in which the respondent as a lender, would become a shareholder in the project company upon paying for the shares so allotted to it. The respondent expended monies into the project and became a shareholder in the project company. The respondent was tasked to look for engineers to construct the solar power station at Kabulasoke, Gomba District, during which process a dispute arose when the 2nd and 3rd applicants accused the respondent of having inflated the cost of the engineering and construction component, to a tune of around US $ 6,000,000 without the knowledge of the project company, fellow shareholders and promoters of the project company. The applicants then rescinded the investment agreement on basis of which the respondent had become a shareholder in the project company and also revoked the allotment of shares to the respondent.

Pursuant to the arbitration clause in the investment agreement, the respondent commenced arbitral proceedings at the London Chamber of International Arbitration. The respondent also filed Miscellaneous Cause No. 17 of 2021 at the Commercial Division of the High Court of Uganda, seeking interim protective measures pending conclusion of the arbitral proceedings.

On 16th August, 2021 this Court issued an order of interim measures of protection restraining the applicants and / or their respective agents, either by themselves or through their authorised officers and agents, from accessing and utilizing funds remitted by the Uganda Electricity Transmission Company Limited (UETCL) into any bank account of the 1st applicant including but not limited to the shillings account No. 01063626448460 and the US dollar account No. 02063616455284, both in the name of the 1st applicant, MSS Xsabo Power Limited, held at DFCU Bank Limited, Acacia Avenue (Mall) Branch, Kololo without the consent of the applicant, until final determination of London Chamber of International Arbitration Consolidated Arbitration No. 204602 at the London Court of International Arbitration.

Subsequently the applicants filed *Misc. Application No. 1069 of 2022, MSS Xsabo Power Limited and 4 others v. Great Lakes Energy Company NV*, seeking a variation of that order given in Miscellaneous Cause No.17 of 2021 on 16th August, 2021 to enable the applicants withdraw a sum of £ 59,649 from the frozen bank accounts of the 1st applicant to meet venue hire and mediation fees at the London Chamber of International Arbitration. The Court having found that there was no relevant or sufficient change in circumstances or the operational costs of the applicants, there were no facts justifying a variation of the order. For that reason the application failed and was on 26th September, 2022 accordingly dismissed with costs to the respondent.

5. The application.

This application by Notice of motion is made under the provisions of section 33 of *The Judicature Act,* sections.76 and 98 of *The Civil Procedure Act*, Order 44 Rules 1, 2, 3 and 4; and Order 52 rules1, 2 and 3 of *The Civil Procedure Rules*. The applicants seek leave to appeal the dismissal of the application for variation of the order of interim measures of protection. It is the applicants' case that this court misdirected itself when it failed to take into account the fact that

despite the respondent having paid the fees in full, the sum had become a debt payable to the respondent as per the order of the London Chamber of International Arbitration, which money the applicants do not have due to the monthly cap of US $ 60000. The Court further misdirected itself when it ruled that payment of that debt would not be in the best interests of the 1st applicant yet any expenditure of a company should be for its own good. The applicants further seek to contest the Courts findings that; - there is no reason as to why the 1st applicant should shoulder the burden of the debt which is joint and not joint and several; that the application had been overtaken by events since the current respondent had paid the fee for and on behalf of the current applicants and arbitration was going on; that M/s MSS Xsabo Power Limited will not be prejudiced by whatever happens at the London Court of International Arbitration since it is just a nominal respondent which should not foot the entire debt on behalf of all the other debtors.

It is contended further that Court misdirected itself when it did not address its mind to the fact that the respondent had been declared fraudulent by the London Chamber of International Arbitration when it pocketed a secret profit to the detriment of M/s MSS Xsabo Power Limited. A fraudulent shareholder would prejudice the project company and as such the court came to the wrong conclusion when it held that the 1st applicant would not be prejudiced by whoever becomes its shareholder, even if it be the current respondent. It is on that account that the applicants on 29th September, 2022 lodged a notice of appeal and a letter requesting for a certified copy of proceedings, whose validation they now seek.

c. <u>Submissions of counsel for the applicant</u>.

M/s Makada and Partners, Advocates and Solicitors, on behalf of the applicants submitted that although the applicants have already filed a notice of appeal and a letter requesting for a certified copy of proceedings, they do not have an automatic right of appeal, hence this application. The intended grounds of appeal have merit, are likely to succeed and it is in the best inters of justice that the application be granted.

d. <u>Submissions of counsel for the respondent</u>.

M/s Kashillingi, Rugaba and Associates, Advocates & Tax Consultants on behalf of the applicant submitted that the application has no merit and ought to be dismissed.

e. The decision.

There is no inherent, inferred or assumed right of appeal (see *Mohamed Kalisa v. Gladys Nyangire Karumu and two others, S. C. Civil Reference No. 139 of 2013*). The right of appeal is a creature of statute and must be given expressly by statute (see *Hamam Singh Bhogal T/a Hamam Singh & Co. v. Jadva Karsan (1953) 20 EACA 17*; *Baku Raphael v. Attorney General S.C Civil Appeal No. 1 of 2005* and *Attorney General v. Shah (No. 4) [1971] EA 50*).

Article 134 (2) of *The Constitution of the Republic of Uganda, 1995* provides that appeals lie to the Court of Appeal from such decisions of the High Court as may be prescribed by law. On the other hand, section 10 of *The Judicature Act* states that appeals lie to the Court of Appeal from decisions of the High Court prescribed by *The Constitution*, that Act or any other law. In contrast, according for section 66 of *The Civil procedure Act*, unless otherwise expressly provided in the Act, an appeal lies from the decrees or any part of the decrees and from the orders of the High Court to the Court of Appeal. The implication is that all decrees or any part of such decrees and orders of the High Court are appealable to the Court of Appeal, unless otherwise expressly excluded by *The Civil procedure Act*. In general therefore, parties to traditional litigation broadly have the option to appeal any decision made by the High Court. That right to appeal can only be denied, limited or restricted by express statutory provision.

In general terms, most final orders of the High Court are appealable without the requirement of seeking permission from the High Court or the Court of Appeal. There are certain restrictions though that arise in specific circumstances, depending on the issue that has been decided by the Court, where the litigants require permission to appeal the decision. While appeals of interlocutory decisions are generally not permitted, there are some exceptions under section 76 of *The Civil Procedure Act* and Order 44 rule 1 (2) of *The Civil Procedure Rules* which specify the orders that are appealable as of right and proceed to provide that an appeal does not lie from any other order, except with leave of the court making the order, or of the court to which an appeal

would lie if leave were given. Applications for leave to appeal should in the first instance be made to the court making the order sought to be appealed from. The requirement of leave is intended as a check to unnecessary or frivolous appeals (see *Lane v. Esdaile (1891) A.C. 210 at 212* and *Ex parte Stevenson (1892) 1 Q.B. 609)* and this is as pronounced just as much in arbitral processes.

Arbitration is often chosen by parties to a commercial transaction because it is cheaper and allows parties to pick a decision-maker that has experience in the subject matter of the dispute, which can often be highly technical. Parties want, and expect, arbitral decisions to be final. Arbitration would serve no purpose if the losing party could simply run off to court to re-litigate the matter. Therefore in relation to arbitral proceedings, the orders appealable as of right are; an order superseding an arbitration where the award has not been completed within the period allowed by the court; an order on an award stated in the form of a special case; an order modifying or correcting an award; an order staying or refusing to stay a suit where there is an agreement to refer to arbitration; an order filing or refusing to file an award in an arbitration without the intervention of the court (see section 76 (1) (a) – (e) of the Act) "and except as otherwise expressly provided in [the] Act or by any law for the time being in force, from no other orders."

The implication is that whereas section 66 of *The Civil procedure Act* creates a general right of appeal from all orders or any parts of the orders of the High Court to the Court of Appeal, which right can only be denied, limited or restricted by express statutory provision, with regard to arbitral proceedings that right is expressly limited by section 76 (1) (a) – (e) of the Act. This is because after specifying the appealable orders, that provision goes on to state that "except as otherwise expressly provided in [the] Act or by any law for the time being in force, [no appeal lies] from [any] other orders." All appeals from other orders made before, during or after the arbitration, for purposes related to the arbitration, are thus expressly forbidden, unless specifically allowed by *The Civil procedure Act*, *The Arbitration and Conciliation Act* or by any other law for the time being in force. There ought to be a provision specifically allowing such appeals.

That notwithstanding, the decision whether to allow appellate access to the courts in arbitral proceedings has always been a balancing act between competing policy considerations. It is often asserted that appeals reduce the speed, finality and confidentiality of arbitration. Parties can also try to use the appeal process simply as leverage for settlement or to delay enforcement of the arbitral award. Whereas there is a need to shield arbitral proceedings from unnecessary Court intervention, there may also be legitimate reasons seeking to appeal High Court decisions. For instance, a manifestly unfair determination by the High Court should not be immune from appellate review. However, when the courts intervene more than they should in the arbitral process, they tend to frustrate the choice the parties made to use arbitration rather than litigation as the means of resolving their dispute. If arbitration is to retain its credibility as an autonomous, party-led process, the courts must strike a balance between, on the one hand, limiting the grounds for review while, on the other, ensuring that truly serious errors arising in the arbitral process can be corrected.

An attempt at striking this balance is seen in *Nyutu Agrovet Limited v. Airtel Networks Kenya Limited;Chartered Institute of Arbitrators-Kenya Branch (Interested Party) [2019] eKLR* where it was explained that the rationale for limiting and clearly defining Court involvement in arbitration is informed by the fact that parties to an arbitration agreement make a conscious decision to exclude court jurisdiction and prefer the finality and expediency of the arbitral process. Thus, arbitration was intended as an alternative way of solving disputes in a manner that is expeditious, efficient and devoid of procedural technicalities. Therefore, parties who resort to arbitration, must know with certainty instances when the jurisdiction of the Courts may be invoked. According to the Act, such instances include, applications for setting aside an award and the recognition and enforcement of arbitral awards amongst other specified grounds. The Supreme Court thus opined and held that there is a right of Appeal from the High Court to the Court of Appeal under section 35 of the Act. However, the Supreme Court was quick to circumscribe the circumstances under which the right of appeal could be exercised, i.e. where it is shown that in setting aside an arbitral award, the High Court went outside the grounds set out in section 35 of the Act. For example, where an award is set aside on Constitutional grounds. The Supreme Court also pointed out that this circumscribed and narrow jurisdiction should also be so

sparingly exercised that only in the clearest of cases should the Court of Appeal assume jurisdiction.

Similarly in *Synergy Industrial Credit Limited v. Cape Holdings Limited (2019) eKLR*, the Supreme Court reiterated that the purpose of section 35 of the Act is to ensure that Courts are able to correct specific errors of law which, if left unchallenged, would lead to a miscarriage of justice. Therefore, in the interest of safeguarding the integrity of the administration of justice and particularly in the absence of an express bar, the Court of Appeal should have residual jurisdiction but only in exceptional and limited circumstances.

That notwithstanding, the reasoning by the Supreme Court of Kenya in both decisions draws heavily from comparative jurisprudence from Canada, the United Kingdom and Singapore. However, the respective arbitration statutes in these jurisdictions specifically provide instances when leave to appeal a decision confirming or setting aside an award may be granted. It is therefore arguable that the Supreme Court, by exercise of judicial craft, proceeded to amend the Act thus stepping into the exclusive domain of the Legislature, a reason for which I find the two decisions unpersuasive on the point now in issue.

Underlying the entire concept of arbitration as an alternative dispute resolution mechanism is the principle of party control and the principle of restricted court intervention. The parties' freedom to contract governs the arbitration process and must be respected. At its core, arbitration is a private and consensual means of dispute resolution. It is private because arbitration operates outside the public court system and is funded by the parties alone. It is consensual because all aspects of an arbitration must be personally agreed by the parties. This means that consensual arbitration is essentially a creature of contract, a contract in which the parties themselves charter a private tribunal for the resolution of their disputes. When the parties choose to resolve their disputes privately outside the public court system, they should be left to that choice and not be subject to court intervention, except as needed to determine validity of the arbitration agreement or to ensure standards of basic procedural fairness for the arbitral process.

Modern arbitration is designed to exist outside the court system. It is for this reason that section 9 of *The Arbitration and Conciliation Act* provides specifically that except as provided in the Act, no court should intervene in matters governed by the Act. Courts have a fourfold role in the arbitral process: to prevent a party who has agreed to arbitrate from pursuing his claim by litigation; to provide judicial assistance to arbitral tribunals and the parties in the course of a reference; to exercise powers of review of arbitral awards in defined conditions; and to provide the necessary machinery for the enforcement of awards. Arbitrating parties should not insist on party control when it benefits them, yet expect the Act or courts to step in and fix problems stemming from poorly prepared arbitration agreements over which the parties themselves exercise control. Restricting court intervention in order to foster arbitration as a private process controlled by its parties, however, means that those parties must be prepared to forego court access except in the most egregious of cases.

One of the most commonly cited attractions of choosing arbitration over litigation in court is the finality of arbitral awards, which brings with it both certainty and savings in terms of time and expense that may otherwise arise from the threat of multiple layers of appeals. Parties will often agree in their arbitration agreement that the decision of the arbitrator(s) will be final and binding. Arbitration is generally intended to be final and binding, but parties wishing to have the option to appeal an arbitration award should reserve that right expressly in their submission to arbitration.

Under *The Arbitration and Conciliation Act*, there is a right of appeal where the parties have agreed that an appeal by any party may be made to a court on any question of law arising out of the award (see section 38 (1) (b) of the Act). As regards matters of law arising in the course of the arbitration, the parties may only agree to make applications to the court. If the parties want the safety net of appeal protection, they can and should provide so in the arbitration agreement, but only as regards questions of law "arising out of the award," and not questions of law arising in the course of the arbitration. The provision effectively bars non-consensual appeals to the High Court, and limits consensual appeals only to questions of law "arising out of the award" thereby excluding appeals on questions of law arising in the course of the arbitration. Appeals on questions of fact are precluded. In appellate proceedings on questions of law arising out of the award, the High Court may determine the question of law arising, 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. The parties cannot by agreement appeal matters of law arising in the course of the arbitration; they can only agree to make application.

Questions of law arising out of the award involve an incorrect interpretation of the applicable law (whether or not the error appears on the record of the decision) and exclude any questions as to whether: (a) the award or any part of the award was supported by any evidence or any sufficient or substantial evidence; and (b) the arbitral tribunal drew the correct factual inferences from the relevant primary facts. Questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests. While the interpretation of a contract may raise a question of law, it does not follow that all errors in interpretation are properly characterised as errors of law. A more nuanced approach is required to ensure that the identified error is not, in reality, a challenge to factual inferences or sufficiency of evidence.

The Court of Appeal of New Zealand in *Gold and Resource Developments (NZ) v. Doug Hood Ltd [2000] 3 NZLR 318* identified eight factors the courts take into consideration when exercising a discretion to grant leave. The Court emphasised that to give recognition to the principle of "finality" of arbitral awards, the courts ought to take a restrictive approach and consider the following factors: (i) where the question is a one-off point and of little precedent value, the courts would not grant leave unless there are very strong indications of an error. If the question is of precedent value, the lower standard of a strongly arguable case that an error existed would be sufficient. Where conflicting decisions exist on the point in question, this would weigh in favour of granting leave. This first consideration was the most important; (ii) if the question of law under consideration is the very reason for the arbitration, this would weigh against exercising the discretion. Conversely, where the question of law emerged incidentally during the arbitral process, leave would be more readily granted; (iii) where the arbitrators are legally qualified, it would be more difficult to obtain leave to appeal the arbitral decision on a question of law; (iv) where the dispute is of great significance to the parties, this would weigh in

favour of exercising the discretion; (v) where a very substantial amount of money is involved, it might be somewhat easier for the parties to obtain leave; (vi) where the likely amount of delay consequent on granting leave is disproportionate to the significance of the dispute, or if the issue is urgent, the discretion is less likely to be exercised; (vii) if the parties had agreed that the arbitral award would be final, this, while not determinative, would weigh against the exercise of the discretion; and (viii) if the dispute is international and the parties expressly opted into the appeal provisions of the Arbitration Act 1996, Second Schedule, this would weigh in favour of exercising the discretion.

Section 38 (3) of *The Arbitration and Conciliation Act* provides that notwithstanding sections 9 and 34 of the Act, an appeal lies to the Court of Appeal against a decision of the High Court made upon such appeals (on questions of law "arising out of the award"), if; (a) the parties have so agreed that an appeal shall lie; and (b) the High Court grants leave to appeal, or where the High Court fails to grant leave, the Court of Appeal grants special leave to appeal (usually only if it is satisfied that (a) the importance to the parties of the matters at stake in the arbitration justifies an appeal, and determining the point of law may prevent a miscarriage of justice; (b) determination of the question of law at issue will significantly affect the rights of the parties, or is of importance to some class or body of persons of which the applicant is a member. The determination of the appeal should have some impact on the future rights of, or relationship between, the parties. Therefore, if the contract between the parties is at an end, there can be no ongoing future rights of the parties which can be affected; or (c) the point of law is of general or public importance the determination of which has some future or ongoing impact).

The regime of appellate relief under *The Arbitration and Conciliation Act*, upon a first appeal to the High Court, requires an agreement by the parties that an appeal lies on matters of law only "arising out of the award." An appeal from a decision of the High Court to the Court of Appeal requires both an agreement by the parties that an appeal shall lie on matters of law only "arising out of the award," coupled with the grant of leave to appeal by either the High Court or the Court of Appeal. In the instant case, it has not been shown by the applicants that there exists an agreement by the parties that an appeal shall lie to the Court of Appeal. In any event, the matters sought to be appealed do not arise from an award nor from determination of a question of law

arising in the course of the arbitration, which maters are addressed by way an agreement by the parties "to apply to the court" rather than by appeal to the court, but have instead arisen from orders made in judicial assistance to the parties in the course of the reference to arbitration.

There are two main goals to commercial arbitration: efficiency and finality. The purpose is to ensure that a matter is brought to final resolution, without the need for lengthy court proceedings and appeals. Therefore save for section 76 (1) (a) – (e) of *The Civil Procedure Act* which provides for appealable orders, *The Arbitration and Conciliation Act* is a self-contained code. By virtue of section 9 of *The Arbitration and Conciliation Act*, it is clearly intended that challenges to the process of arbitration, and orders made by the High Court for the preservation of that process and the arbitral awards themselves, must be made under the Act. To determine whether an order regarding an interim measure of protection can be appealed Court must look at two key sources: the arbitration agreement itself, and *The Arbitration and Conciliation Act*. The Act significantly limits the ability to appeal arbitration awards. A party can only appeal arbitration decisions if they mutually allow as much in the contract. The courts uphold these agreements. If the parties have not decided in their contract that there will be an appeal on any issue, then there can be no appeal.

Under Section 6 of *The Arbitration and Conciliation Act*, the court has wide discretionary powers to grant interim measures of protection as may appear to the court to be just and convenient, including for preservation, interim custody or sale of goods which are the subject matter of arbitration, for securing the amount in dispute, interim injunction, appointment of a receiver, etc. The length of an interim measure is generally set to cover the duration of the proceedings before the Arbitral Tribunal, or for a shorter period. If a party believes the order was granted improperly or that it is no longer needed, or that the protection is too broad or too burdensome, the remedy is to file a motion asking the court to vacate, vary or review, but not to appeal the order.

Both *The Civil Procedure Act* and *The Arbitration and Conciliation Act* deliberately circumscribe the situations in which a party may appeal, as of right and with leave. In this way, the underlying policy of *The Arbitration and Conciliation Act* is enforced; parties are bound by

the procedure and outcome of the arbitral process to which they agreed. Outside the provisions of section 76 (1) (a) – (e) of *The Civil Procedure Act*, the only appeal route to the courts, as far as arbitration proceedings are concerned, is by agreement of the parties on matters of law only arising out of the award. The scheme of appeals is designed to prevent the appellate aspect of the litigation process from impeding the expeditious disposition of an arbitration. Neither *The Civil Procedure Act* nor *The Arbitration and Conciliation Act* envisages nor allows for appeals, whether direct or with leave, from decisions made by the High Court in respect of questions of fact, questions of law, or mixed law and fact arising in the course of the arbitration, nor those made in judicial assistance to the parties in the course of the reference, such as those relating to the grant or denial of interim / provisional measures of protection. Appeals may be considered only when the parties agreed that an appeal shall lie on matters of law only arising out of the award.

In commercial arbitration, consistent with the international practice, there is no general right of appeal unless the parties agree that it should be incorporated. This position reflects the overarching principle of party autonomy so that the parties are free to choose. Broad appellate rights undermine the spirit of *The Arbitration and Conciliation Act*. By virtue of section 38 (1) (b) and (3) of the Act, the High Court may only grant leave for an appeal if by their submission to arbitration, the parties agreed that an appeal shall lie on matters of law only arising out of the award, and it considers that determination of the question of law concerned could substantially affect the rights of one or more of the parties. The Court has no jurisdiction over the parties or the dispute other than that afforded by reason of its being the supervisory court for the arbitration. If the parties do not expressly provide for appeal rights in their arbitration agreement, they cannot expect that courts will intervene. Courts are mandated by statute to intervene in very narrow circumstances, which do not arise in this application. It is for those reasons that the application fails and it is hereby accordingly dismissed with costs to the respondent.

Delivered electronically this 12th day of December, 2022 ……**Stephen Mubiru**……..

Stephen Mubiru
Judge,
12th December, 2022.