THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL DIVISION
MISC. APPLICATION NO. 003 OF 2020
(Arising from CAD/ARB/NO. 48 of 2018)

NAWA MULTI-SERVICES LIMITED ..... APPLICANT

VERSUS

KIRANGI ENTERPRISES LTD ..... RESPONDENT

BEFORE: HON. JUSTICE JEANNE RWAKAKOOKO

RULING

Introduction

This application was brought by Chamber Summons under Section 34(2) of the Arbitration and Conciliation Act, Cap 4, Rules 7 & 13 of the Arbitration Rules for the following orders:

1. That the arbitral award that was delivered by the arbitrator Mr. David S. Kaggwa on the 13th December, 2019 be set aside.
2. Costs be provided for.

Background

The Applicant and Respondent entered into an agreement/contract on 19th April, 2017 for the printing, binding and delivery of health assorted Health Management Information System (HMIS) books and file folders in line with samples approved by National Medical Stores (NMS). A dispute arose between the parties and the matter was referred to arbitration by the Respondent vide CAD/ARB/No. 48 of 2018 at the Centre for Arbitration and Dispute Resolution (CADRE). A single arbitrator heard the case, and ordered the Applicant to pay the Respondent a sum of Ugx. 183,083,348/= as the balance on the contractual sum. The Applicant contests this award. The Applicant contends that it only owes the Respondent Ugx. 48,000,000/= and is willing to clear this only if this honorable court sets aside the arbitral award.

The Respondent claims that the application is brought out of time, and in fact the Applicant had lodged a notice of appeal against the arbitral award. Also that the matter is no a fishing expedition and only intends to prevent the Respondent from enjoying the fruits of its litigation.

Representation

At the hearing, the Applicant was represented by Kawuzi Peter. The Respondent and its counsel were both absent because counsel in personal conduct of the matter was engaged in the Court of Appeal for election petitions at the same time.

Court directed parties to filed written submissions per set timelines. Counsel Kawuzi for the Applicant was directed to write to the Respondent informing his counsel of these directions, and furnish a copy of the letter to the court and the Applicant's lawyers did so.

However, neither party filed written submissions. The set timelines for filing submissions have since passed. This court shall therefore rely only on the pleadings/affidavits filed.

Issues for Determination

1. Whether the application is time barred.
2. Whether the arbitral award in CAD/ARB/NO. 48 of 2018 dated 21st November, 2019 should be set aside.

Resolution

Issue One: Whether the application is time barred.

The Respondent stated in paragraph 6(i) of the affidavit in reply that the Applicant's time within which to apply for setting aside the arbitral award passed, and so the Respondent filed a notice of registration of the arbitral award on 13th March, 2020. The Respondent claims that by then it had not been served with this application and were only served on 17th March, 2021. See paragraph 6(k) of the affidavit in reply. This raises the preliminary question whether this application is time barred.

Section 34(1) & (3) of the Arbitration and Conciliation Act provide:

> (1) Recourse to the court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3).
>
> (3) An application for setting aside the arbitral award may not be made after one month has elapsed from the date on which the party making that application had received the arbitral award, or if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral award. (Underlined for emphasis.)

Section 34(3) of the Arbitration and Conciliation Act above requires that an application to set aside an arbitral award must be made within a month from the date on which the party making the application received the award. Part of Annexure A to the affidavit in support of the application is a consent by both parties' lawyers. They consented to have the arbitral award be delivered to both parties on 13th December, 2019 at 10am at the Commercial Court building.

By this document, and in the absence of evidence to the contrary, 13th December, 2019 is taken as the date upon which the Applicant received the arbitral award. This application was filed in this court on 13th January, 2020. This was on the last permissible day under Section 34(3) of the Arbitration and Conciliation Act.

Therefore, I find that the application is not time barred. Issue one is answered in the negative.

Issue Two: Whether the arbitral award in CAD/ARB/NO. 48 of 2018 dated 21st November, 2019 should be set aside.

The Applicant has three reasons as to why it seeks that the above mentioned arbitral award is set aside. These per the application are that:

1. That the arbitrator erred in law and fact by delivering the award based on issues that were not framed at the commencement of the hearing.
2. The arbitrator erred in law and fact when he ordered the Applicant to pay the Respondent Ugx. 183,083,348/= as the balance on the contract sum.
3. That the arbitration erred in law and fact when he held that the contract between the Applicant and the Respondent was not on a pre-financing basis hence causing a miscarriage of justice.

The Respondent claims that both sides led evidence to prove their cases and the arbitrator rightfully found that the Respondent never waived the initial agreement, and consequently that the Applicant was in breach of the initial agreement and awarded the Respondent Ugx. 183,083,348/= as the balance on the contractual sum. See paragraph 6(e) of the affidavit in reply.

Section 34(2) of the Arbitration and Conciliation Act provides:

> (2) An arbitral award may be set aside by the court only if—
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> (a) the party making the application furnishes proof that—
>
> (i) a party to the arbitration agreement was under some incapacity;

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, if there is no indication of that law, the law of Uganda;

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was unable to present his or her case;

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration; except that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside;

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate, or in the absence of an agreement, was not in accordance with this Act;

(vi) the arbitral award was procured by corruption, fraud or undue means or there was evident partiality or corruption in one or more of the arbitrators; or

(vii) the arbitral award is not in accordance with the Act;

(b) the court finds that—

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law of Uganda; or

(ii) the award is in conflict with the public policy of Uganda. (Underlined for emphasis.)

Ground one of the Applicant's application is based on Section 34(2)(a)(iv) above. There is however nothing in the affidavit in support of the application to show evidence on this ground. The affidavit in support is mostly a recollection of the background to the dispute that was referred to arbitration. I shall therefore turn to the arbitral award and judgment of the arbitrator that is Annexure A to the affidavit in support, clause 5 of the agreement between the parties, and the record of proceedings of arbitration marked C1 to the affidavit in reply.

Clause 5 of the agreement states:

> "5. DISPUTE SETTLEMENT
>
> It is further agreed that any controversy, claims and or dispute arising out of and or relating to any part of the whole of this Agreement or breach thereof and which is not settled between the signatories themselves, shall be settled and binding by and through mediation as a course of first instance, failure of which the matter shall be referred to the Arbitration."

The scope of the above provision is general, and it permits for all disputes arising out of the agreement dated 19th August, 2017 marked Annexure A to the affidavit in reply to be referred to arbitration upon failure to mediate. The parties failed to mediate and then referred the dispute to arbitration.

Both parties at scheduling agreed upon two questions to guide the arbitration. That is: (i) whether the Respondent is liable to pay a sum of Ugx. 203,516,160/= which is outstanding to the claimant, and (ii) what remedies are available to the parties. See page 5 of the arbitral award. However, during submissions, counsel for the Applicant (then Respondent) posed new questions thus: Did the breach of the contract by the claimant (now Respondent) disentitle it from receipt of the alleged Ugx. 203,516,160/=, and if yes was a new arrangement for a consideration of Ugx. 148,000,000/= agreed upon by the parties in final and full settlement of the Respondent's (now Applicant) account? See page 13 of the arbitral award. The arbitrator rightly dismissed these new questions raised by the Respondent (Applicant now) and stuck to the issues raised at scheduling.

The Applicant raises facts in paragraphs 6-9 of the affidavit in support to give background to this question. That upon a dispute arising between the parties for the alleged breach by the Applicant by non-payment of Ugx. 203,516,160/= the parties arrived at a new arrangement. That they both waived the earlier on agreed contract sum and a new sum of Ugx. 148,000,000/= was reached of which the Applicant paid Ugx. 100,000,000/=. Therefore, that the Applicant only acknowledges a debt of Ugx. 48,000,000/= and not the Ugx. 183,083,348/= that the arbitrator awarded to the Respondent. It was alleged at the arbitration hearing that the waiver originated from the Respondent's failure to pre-finance the contract.

I find that the arbitral award did not deal with a dispute not contemplated or falling within the terms of reference or beyond the scope of reference to arbitration. The final award rightly covered the issues agreed upon by the parties at scheduling before hearing of witness testimony.

I should point out that when assessing whether the arbitral award should be set aside, this court does not sit as an appellate court. The Applicant couched its grounds and supported the same in a manner that invited this court to exercise the powers of a first appellate court. That is to re-evaluate the evidence on record. The law in Section 34 of the Arbitration and Conciliation Act is clear that setting aside of an arbitral award is not an appellate process.

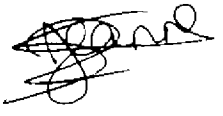
The Applicant in grounds 2 & 3 of the application seeks for this court to be judge over the evidence in this case at arbitration. In **Simbamanyo Estates Ltd –v- Seyani Brothers Company (U) Ltd, MIsc. Application No. 555 of 2002,** it was held that "When a Court is called upon to decide objections raised by a party against an arbitration award, the Jurisdiction of the Court is limited, as expressly indicated in the Act, and it has no jurisdiction to sit in appeal and examine the award on merits."

Justice Stella Arach-Amoko, J (as she then was) quoted ***Law Relating to Arbitration & Conciliation by P.C. Markanda,*** in that same case thus:

> "The Arbitrator is the final arbitrator of disputes between the parties and the award is not open to challenge on the grounds that the Arbitrator has drawn his own conclusions or has failed to appreciate the facts. Where reasons have been given by the arbitrator in making the award, the Court cannot examine the reasonableness of the reasons. If the parties have selected their forum, the deciding forum selected must be conceded the power of appraisement of the evidence."

I agree and I am bound by this decision. See also **Chevron Kenya Limited & Anor –v- Daqare Transporters Limited, Misc. Application No. 490 of 2008.** Section 34 of the Arbitration and Conciliation Act only calls for an arbitral award to be set aside in line with the grounds spelt out in Section 34(2) above. Section 34(1) of the Arbitration and Conciliation Act is clear that recourse to the court against an arbitral award shall only be made by an application to set aside the award. The law does not anticipate appeal of an arbitral award to the High Court except for cases where parties agree under Section 38(1) of the Arbitration and Conciliation Act. The parties in this case have entered no such agreement under Section 38. Therefore, grounds 2 & 3 in the application are dismissed for they seek to dress this court with powers of an appellate court which it is not.

The Applicant has not proved any of the grounds for setting aside an arbitral award under Section 34(2) of the Arbitration and Conciliation Act. Issue two is answered in the negative.



Conclusion:

This application is therefore dismissed with costs to the Respondent.

I so order.

Jeanne Rwakakooko
JUDGE
21/06/2022

This Ruling was delivered on this 28th day of June, 2022