

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[COMMERCIAL DIVISION]
MISCELLANEOUS CAUSE NO. 54 OF 2023
[ARISING OUT OF CAD/ARB/11/2019]

NATIONAL HOUSING AND

CONSTRUCTION COMPANY LIMITED :::::::::::::::APPLICANT

-VERSUS-

AMBITIOUS CONSTRUCTION

COMPANY LIMITED ::::::::::::::: RESPONDENT

Before Hon. Lady Justice Harriet Grace Magala

RULING

[1] Background

The background to this application, as can be discerned from the pleadings on the record is that the Respondent, Ambitious Construction Co. Ltd filed HCCS No. 551 of 2019 against the Applicant, National Housing and Construction Co. Limited. The Applicant filed its Defense and partially admitted that it was indebted to the Respondent to the tune of **USD \$ 1,179,460.37**.

On 6th March 2020, Justice Richard Wejuli entered judgment on admission against the Applicant for the payment to the Respondent of the admitted sum. The Learned Judge ordered that the rest of the dispute be referred to Arbitration in accordance with the terms of their agreement, and that the parties do appoint the arbitrator.



On 11th May 2022, the parties signed a Consent Appointment of Arbitrator. The Arbitrator accepted the appointment and issued directions on the 12th May 2022. On the 26th May 2022, the Arbitrator issued procedural directions and they were signed by Counsel for both parties.

The Arbitrator conducted the hearing of the matter with the participation of both parties, and on 9th May 2023, upon notifying the parties, the Arbitrator signed and delivered the Arbitral Award at the Center for Arbitration and Dispute Resolution (CADER).

The Applicant filed this application seeking to set aside the arbitral award on the 9th June 2023. The Respondent filed an application, MC No. 42 of 2023 for recognition and enforcement of the arbitral award on the 19th May 2023. By consent of both Counsel, MC No. 42 of 2023 for enforcement and recognition of the Award was stayed pending the determination of MC No. 54 of 2023.

[2] The Application

This application was brought under Articles 28 (1) and 44 (c) of the Constitution, section 34 of the Arbitration and Conciliation Act Cap 4 ("ACA") and Rules 7 and 13 of the Arbitration rules for orders that:

- a) The Arbitral Award in CAD/ARB/11/2023 be set aside.
- b) That the Respondent pays the costs of the application.

The grounds of the Application were set out in the affidavit in support of the application deposed by Mr. Emma Wangota, the Company Secretary of the Applicant, but they are briefly that:

- a) The composition of the arbitral tribunal was not in accordance with the agreement of the parties.
- b) The composition of the arbitral tribunal was in violation and (or) contempt of the Orders of this Honourable Court in Miscellaneous Cause 635/2020 which referred the dispute to arbitration.
- c) The arbitral procedure adopted by the arbitral tribunal was not in accordance with the arbitration agreement of the parties.



- d) The arbitral tribunal was beset with a conflict of interest. It made a false statement of impartiality.
- e) The Arbitral award was procured with the misconduct of the arbitral tribunal.
- f) The Arbitral Award is against the public policy of the Republic of Uganda as it includes double awards and (or) double payments to the Respondent and unjustly enriched it.
- g) That the Award violated the principle of *res judicata* as it included matters that had been settled by the Court and by consent and (or) agreement of the parties.
- h) It is in the interest of justice, and it is equitable, that the Court grants the Orders sought.

The Respondent opposed the Application, they filed an Affidavit in Reply deposed by **PRASHANT RAMJI**, the Respondent's Director, stating that:

- a) Under Clause 20.6 of the Contract and in compliance with the Court Order in HCMA No. 635 of 2020, the Applicant and Respondent by Written Consent jointly appointed the Arbitrator.
- b) The Arbitrator accepted the appointment and summoned the parties for a Preliminary Hearing on the 26th May 2022; the parties at the Preliminary Hearing agreed to the validity of the Arbitration Clause, Jurisdiction of the Arbitral Tribunal and CADER was the institution for Arbitration, the governing law was the Laws of Uganda, the Seat was Uganda, the venue was the boardroom of the Applicant and the language as English.
- c) That the arbitral proceedings were conducted in accordance with the agreement of the parties and each of the parties was given equal treatment throughout the arbitration.
- d) That on the 9th May 2023, the Arbitrator delivered the Final Arbitral Award.
- e) That the application and affidavit in support do not raise any grounds for setting aside the Arbitral Award.

[3] Representation and appearance

The Applicant was represented by Mr. John Musiime of M/s Kyagaba & Otatiina Advocates while the Respondent was represented by Mr. David Kaggwa of M/s



Kaggwa and Kaggwa Advocates. The parties were issued with directions for filing written submissions which they did. The Respondent raised a preliminary objection that the Application was filed out of time, I will consider the preliminary objection first. Based on the pleadings and the submissions on record, the issues for determination are that:

[4] Issues

1. Whether the Application was filed out of time.
2. Whether the Applicant has raised grounds for setting aside the Arbitral Award.
3. What other remedies are available to the parties?

[5] Resolution

5.1 Issue No. 1: Whether the Application was filed out of time.

The Respondent raised a preliminary objection that the Application was filed out of time. The Respondent submitted that the Arbitral Award was rendered on the 9th May 2023. That the Applicant filed this Application on 9th June 2023, that May has 31 days, that the 30 days within which to file the Application expired on the 7th June 2023. That this Court therefore cannot entertain this Application since it was filed out of time and is therefore barred by Statute.

The Applicant submitted that the Application was filed within time. That the Arbitration and Conciliation Act provides that an application for setting aside an arbitral award shall be made within a month from the date of the applicant receiving the award. That a month means a month reckoned according to the Gregorian calendar.

Learned Counsel for the Applicant relied on S. 2 (qq) of the Interpretation Act Cap 3. That Order 51 of the Civil Procedure Rules SI 71-1 provides that a month means a calendar month. O. 51 Rule 8 provides that days are reckoned exclusive of the first day but inclusive of the last day.

The Applicant submitted that according to section 34 (3) of the ACA, the time is reckoned not from the date of the signature of the award but from the date on



which the applicant in fact received the award. That the Applicant only received the final award on 10 May 2023. That the ACA does not provide for how the 30 days are to be reckoned and that whereas the ACA is an all-inclusive Act, it does not operate in a vacuum or on a legal island. It interacts with other laws; that is why it has cross-references.

That the ACA cannot exclude the Interpretation Act Cap 3, which is only an external aid to the interpretation of all Acts of Parliament including the ACA. That in the absence of guidance in the ACA on how to reckon the 30 days, that the Court should rely on the general Statute in the point i.e. the Interpretation Act Cap 3 and where applicable, the Civil Procedure Act and the Civil Procedure Rules.

Counsel for the Applicant concluded that, given that the applicant received the award on 10 May 2023, a proper reading of the law and counting of 30 days means the last day was 11 June 2023. It is common ground that the applicant filed on 9 June 2023 well within time.

[6] Determination

Sec. 34(3) of the Arbitration and Conciliation Act states that:

“An application for setting aside the arbitral award may not be made after one month has elapsed from the date of on which the party making the application had received the arbitral award, or if a request has been made under section 33, from the date on which that request had been disposed of by the arbitral award.”

It is not in dispute that on 11th May 2022, the parties appointed the Arbitrator by Consent. On the 12th May 2022, the Arbitrator issued directions and stated under Clause 1 that, *“the Registry of the Arbitration shall be CADER”*. Part of the heading of the directions spelt out the acronym “CADER” in full as the Centre for Arbitration and Dispute Resolution.

On the 26th May 2022, Counsel for both parties signed Procedural Directions issued by the Arbitrator. They stated among others that pleadings would be filed at CADER and that CADER would issue the invoice for the Arbitrator’s fees. It is not



in dispute that the Arbitral Award was dated and deposited at The Centre for Arbitration and Dispute Resolution (CADER) on the 9th May 2023. The Applicant states that they collected the Award on the 10th May 2023.

Kiryabwire J (as he then was), in **Fountain Publishers Limited v. Harriet Nantamu and Rose Nalunga, MA No. 135 of 2011** stated that:

*“It would appear to me from a reading of the affidavits in support and against the Motion that the award was read by the arbitrator on the 7th September 2009 and filed with CADER on the same day but was not physically given to the parties because of an issue of payment. This was not resolved until on or about the 3rd March 2011 when the award was also filed in this Court. To my mind receiving an award like receiving a Judgment is on the day the Judgment is read and signed. I respectfully do not agree that it is on the day that the award is physically given or is available to a party. That in this case would have been the 7th September 2009. The Application was filed in Court on the 3rd March 2011 which is provided for under Rule 2 of the Arbitration Rule (first schedule to the ACA). The Court of Appeal decision **in Roko Construction Ltd Appeal** (supra), their Lordships made it clear that the Rules are Subject to the provisions in the main Act.*

*As to time it is also apparent to me that the ACA of Uganda does not have the same in built extension provisions as in the Indian Act (which none the less has a long period of 3 months compared to the Ugandan one month). The Court had taken a liberal approach to Section 34 of the ACA in light of the conflict with Rule 7 (1) of the Arbitration Rules on the issue of time. **However since the Roko Construction Ltd Appeal (Supra) decision it is clear that the time line of 30 days in Uganda is mandatory and there is no way round it.***

If that period is regarded as too tight for the parties, then the law will have to be amended to reflect something similar to that in India. Until then it is up to the parties on receipt of the award to ensure that they pay the arbitrators fees promptly in order to meet the 30-day rule. Any dispute on fees can be handled subsequently.

Kiryabwire

In this case section 33 of the ACA would not be applicable because it is up to the parties to pay to get the award so as to make the corrections so any application to set aside the arbitral award must meet the time line in section 34 (3) of the ACA. In this case the application in M.A. 135 of 2011 was made about one year and six months after the award was made in the presence of Counsel for the parties. Clearly it was out of time and so is incompetent. I accordingly dismiss this application with costs."

The issue of computation of time was settled by the Supreme Court, when Mwondha, JSC held in **Mohammed Mohammed Hamid v Roko Construction Limited, SCCA No. 14 of 2015** that,

"On the submission of Learned Counsel for the appellant that receipt meant getting hold of the written arbitral award or a duly certified or authenticated copy of the award and that hearing the award pronouncement is not receiving the award.... I am not persuaded by the above submissions because S.34 of Arbitration and Conciliation Act specifically provides for "Application for setting aside arbitral award. S. 34 (1) sub section provides "Recourse to Court against an arbitral award may be only by an application for setting aside the award under subsection 2 and 3. I am fortified by the provisions of section 36 which provides for enforcement and makes it even clearer. It provides "where the time for making an application to set aside the arbitral award under S. 34 has expired, or that application having been made it has been refused, the award shall be enforced in the same manner as if it were a decree of Court."

At the preliminary hearing before the Arbitrator, the parties agreed in their Procedural Directions that CADER would be the registry of the Arbitration. On 5th May 2023, the Arbitrator sent an email to the parties and stated that the Award was ready and would be delivered at CADER on the 9th May 2023.

It is not in dispute that the Arbitrator signed and delivered the Arbitral Award at CADER on the 9th May 2023, that is when the 30 days under Sec. 34 (3) of the Arbitration and Conciliation Act begun to run. It is conceded by Learned Counsel for the Applicant that the Arbitration and Conciliation Act is an all-inclusive Act, and I agree. In interpreting S. 34 of the ACA, this Court cannot rely on the



Gregorian calendar or provisions outside the Arbitration and Conciliation Act. In computing time, this Court will rely on the plain words used in the ACA, which are unambiguous. The Supreme has held that the ACA is a specific law and that the provisions of the Civil Procedure Act and the Rules thereunder do not apply.

The Hon. Lady Justice Mwendha JSC, held in the case of **Babcon Uganda Limited versus Mbale Resort Hotel Limited, SCCA No. 6 of 2016** that:

*“The proceedings are governed by the ACA as a specific law. The above decisions recognised the general right of appeal created by Section 66 of the CPA. The instant case the right of appeal was specifically barred by S. 9 of the ACA which provides for the extent of Courts intervention as follows:- Except as provided in this Act no Court shall intervene in matters governed by this Act. **The appellant could not invoke the general provisions of the CPA when there is a specific law.**”*

It follows therefore, that since the date for the delivery of the Award at CADER was 9th May 2023, the 30 days within which to file the Application for setting aside the Award lapsed on the 8th June 2023. This Application was filed on the 9th June 2023 after the lapse of the mandatory 30 days, it is therefore out of time and barred by S. 34 of the ACA.

Furthermore, Mwonda JSC, held in the case of **Mohammed Mohammed Hamid v Roko** (supra) that,

“It is trite law under the S. 34 (3) of the ACA, 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. Also, section 9 of Arbitration and Conciliation Act prohibits any Court to intervene in matters governed by the Act except as provided by it. It therefore follows that the belated application to set aside the arbitral award in the High Court was incurably defective.”

This Court is bound by the Supreme Court decisions of **Babcon Uganda Limited versus Mbale Resort Hotel Limited** (supra) and **Mohammed Mohammed Hamid v Roko Construction Co. Limited** (supra). The jurisdiction of the High Court to set

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aside Arbitral Awards under S. 34 can only be exercised if such an application is filed within 30 days and is properly before Court. This Application is not properly before Court and is barred by Law. Section 9 of the ACA provides that, except as provided in this Act, no court shall intervene in matters governed by this Act.

Egonda Ntende JA, held in **Babcon Uganda Limited v. Mbale Resort Hotel Limited, CACA No. 87 of 2011** that:

“It appears to us that tenor of the ACA is to limit the intervention of courts in matters that are governed by the ACA. The law has chosen to reinforce freedom of contract and allow the parties or one of the parties enforce an existing arbitration agreement as the only mode available to the parties solve their dispute, and to that extent oust the jurisdiction of the courts to entertain such a dispute. The words use to achieve this are unambiguous....”

The Learned Justice stated that:

“S. 9 of the ACA satisfied the foregoing standard. It is very clear in ousting courts’ general jurisdiction. It bars the courts from interfering 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 under ACA. Such intervention is barred unless it is authorised by the ACA and it is not so authorised.”

Having found that this Application was filed out of time, this Court is bound by S. 9 of the Arbitration and Conciliation Act and the above decisions of the Court of Appeal and Supreme Court, not to interfere with the Award.

In the result, I hereby uphold the Respondent’s preliminary objection and find that this Application was filed out of time, it is accordingly dismissed with costs. Since the application is incompetent, I will not go any further to resolve issue 2.

[7] Issue 3: What other remedies are available to the parties.

Regarding what remedies are available to the parties, the Respondent submitted that since the 30-day timeline for applying to set aside the award lapsed before



the Applicant filed their application, they prayed that the Application be dismissed and instead, the Court moves under S. 36 of the ACA to recognize and enforce the Award as a Decree of the Court.

Sec. S. 36 of the ACA provides that:

“Where the time for making an application to set aside the arbitral award under section 34 has expired, or that application having been made, it has been refused, the award shall be enforced in the same manner as if it were a decree of the court.”

At the hearing of the Application, it was brought to the attention of Court that the Respondent herein (Ambitious Construction Company Limited) had filed HCMA No. 42 of 2023 against the Applicant herein (National Housing and Construction Company Limited) seeking for enforcement and recognition of the Arbitral Award dated 9th May 2023. This application for enforcement was stayed, pending the determination of the Application for setting aside the Arbitral Award.

A similar application was before Justice Stephen Mubiru in the case of **Aya Investments (U) Limited versus Industrial Development Corporation of South Africa, MC No. 0058 of 2021**, where having dismissed an application for setting aside an arbitral award, the Learned Judge held that:

“.....Section 31 (6) of the Act too provides that the arbitral award shall state the reasons on which it is based unless the parties have agreed that no reasons are to be given, or the award is an arbitral award on agreed terms. Additionally, the award is required to state the date and place of arbitration. The award handed down on 11th September, 2021 by Bruce Collins QC meets these formal requirements.”

The Learned Judge further held that:

“.... On the facts of the present case, the award handed down on 11th September, 2021 put an end to the arbitration and contains a final decision on the issues in dispute between the parties....The respondent’s application



of 16th December, 2021 for the registration of the Award as a decree of this Court met these requirements.”

I have perused the Arbitral award dated 9th May 2023. It is in writing, was signed and dated by the arbitrator. The arbitral award states the reasons upon which it is based, it states the institution that administered the arbitration as Centre for Arbitration and Dispute Resolution (CADER). I am satisfied that this Arbitral Award was delivered at CADER on the 9th May 2023. Since the Arbitral Award satisfies the requirements under Section 31 of the Arbitration and Conciliation Act, I hereby recognize and enforce it as a Decree of this Court.

It is a general rule that costs follow the event unless court shall for good reason order otherwise. Therefore, the Respondent is awarded the costs of this Application, since the arbitral award has been recognized and enforced. No order shall be made as to costs in respect of Miscellaneous Cause No. 42 of 2023.

In conclusion, Court makes the following Orders:

- a) The Application to set aside the arbitral award dated 9th May 2023 vide Miscellaneous Cause No. 54 of 2023, is hereby dismissed with costs to the Respondent; and
- b) The Arbitral Award dated 9th May 2023 is hereby recognized and enforced as a Decree of this Court.

Dated and signed at Kampala this 20th day of December 2023.



Harriet Grace MAGALA

Judge

Delivered electronically on ECCMIS this 20th day of December 2023.