



intended arbitration proceedings or the repayment in full by the 1<sup>st</sup> Respondent of all amounts due to the Applicant under the loan facilities.

(b) Performing or directing any other action which would prejudice or compromise the Applicants rights as Assignee of their legal interest in the Contract Proceeds.

2. A temporary injunction be issued restraining the 2<sup>nd</sup> Respondent, its servants, agents or any other person acting under its authority from:

(a) Effecting payment of any part of and or all Contract Proceeds due to the 1<sup>st</sup> Respondent under the Contract Agreement for Mechanized Maintenance of selected unpaved roads under framework contracts totalling to 487.2 km Lot 15 2019 procurement Reference No. UNRA/WRKS/2016-17/00018/15 dated February 2019 to any other Bank Account other than to the 1<sup>st</sup> Respondents Account no. 01383655908910 (UGX) and 02383657210703 (USD) held with DFCU Bank Ltd until the final determination of the intended arbitration proceedings or the repayment in full by the 1<sup>st</sup> Respondent of all amounts due to the Applicant under the loan facilities.

(b) Recognizing, complying with, aiding or abetting any instructions from the 1<sup>st</sup> Respondent or any other person claiming under or deriving any authority from the 1<sup>st</sup> Respondent to transfer to any other Bank Account other than to the 1<sup>st</sup> Respondent Bank Accounts no. 01383655908910 (UGX) and 02383657210703 (USD) with DFCU Bank Ltd any money due from time to time to the 1<sup>st</sup> Respondent under the Contract Agreement for Mechanized Maintenance of selected unpaved roads under framework contracts totalling to 487.2 km Lot 15 2019 procurement Reference No. UNRA/WRKS/2016-17/00018/15 dated February 2019 until the determination of the intended arbitration proceedings or the repayment in full by the 1<sup>st</sup> Respondent of all amounts due to the Applicant under the loan facilities.

3. In the alternative a preservation order be issued directing the 2<sup>nd</sup> Respondent to pay all amounts due from time to time from the 2<sup>nd</sup> Respondent to the 1<sup>st</sup> Respondent under the Contract Agreement for Mechanized Maintenance of selected unpaved roads under framework contracts totalling to 487.2 km Lot 15 2019 procurement Reference No. UNRA/WRKS/2016-17/00018/15 dated February 2019 into court for preservation until the determination of the intended arbitration proceedings or the repayment in full by the 1<sup>st</sup> Respondent of all amounts due to the Applicant under the loan facilities.
  
4. An order be issued freezing the following accounts of the 1<sup>st</sup> Respondent.
  - (i) Stanbic Bank Uganda Limited Account No.9030018775653
  - (ii) Centenary Bank Limited Account Number 3100026612
  - (iii) Centenary Bank Limited Account Number 4310300077 until the determination of the intended arbitration proceedings or the repayment in full by the 1<sup>st</sup> Respondent of all amounts due to the Applicant under the loan facilities.

The Application was supported by the affidavit of **Phinellah Nakisibo Sebunya**, the Applicant's Manager Recoveries, who averred as follows;

- (a) The Applicant provided loan financing to the 1<sup>st</sup> Respondent to finance the execution of works on the Contract Agreement for Mechanized Maintenance of selected unpaved roads under framework contracts totalling to 487.2 km Lot 15 2019 procurement Reference No. UNRA/WRKS/2016-17/00018/15 dated February 2019.
  
- (b) That the 1<sup>st</sup> Respondent is currently indebted to the Applicant in the sum of UGX 12,367,378,986 (Uganda Shillings Twelve Billion Three Hundred Sixty-Seven Eight Thousand Nine Hundred Eight-Six Only) being sums due and owing from the 1<sup>st</sup> Respondent to the Applicant under various loan facilities including Certificate Discounting facility limits, Bank Guarantee facility limits, bid bond guarantee facility limits, Finance lease, Contract Financing limits as

at 10<sup>th</sup> October 2022. The 1<sup>st</sup> Respondent has defaulted and is not paying the loans.

- (c) That by a deed of Assignment dated 6<sup>th</sup> January 2022 between the 1<sup>st</sup> Respondent and the Applicant, the 1<sup>st</sup> Respondent assigned fully to the Applicant all proceeds receivable and which shall become receivable by the 1<sup>st</sup> Respondent from UNRA as a continuing security for the payment of all moneys due and owing under the loan facilities.
- (d) The Applicant is therefore the lawful Assignee of all contract proceeds due to the 1<sup>st</sup> Respondent (the Assignor) from UNRA under the Contract Agreement for Mechanized Maintenance of selected unpaved roads under framework contracts totalling to 487.2 km Lot 15 2019 procurement Reference No. UNRA/WRKS/2016-17/00018/15 dated February 2019.
- (e) It is an express term of the deed of Assignment that all contract proceeds (payment) arising from the 1<sup>st</sup> Respondent contracts with UNRA shall be paid through the 1<sup>st</sup> Respondents Account held with DFCU Bank Limited. The purpose was to ensure that these accounts would be debited to service the loans.
- (f) On 14<sup>th</sup> November 2022, the Assignment was notified to the 2<sup>nd</sup> Respondent who refused to recognize its obligations as a notified party. The 2<sup>nd</sup> Respondent also refused to pay the proceeds of the Contract to the Applicant and instead diverted the proceeds.
- (g) Notwithstanding knowledge of the Assignment and of the Applicants rights as Assignee, the 1<sup>st</sup> Respondent instructed the 2<sup>nd</sup> Respondent to pay the proceeds of the Assigned contracts to other Banks, i.e. First Centenary Bank Ltd, and thereafter, to Stanbic Bank Uganda Limited. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent acting in collusion and in breach of Contract are diverting the contractual proceeds to other accounts held by the 1<sup>st</sup> respondent with other Banks in order to put the contract proceeds out of reach of the Applicant and

to purposely defeat the Applicant's rights as assignee to the payments. The accounts being used are;

- (i) Stanbic Bank Uganda Limited Account No.9030018775653
- (ii) Centenary Bank Limited Account Number 3100026612
- (iii) Centenary Bank Limited Account Number 4310300077

The Applicant as Assignee claims a legal interest in the monies held on these accounts as they constitute the proceeds of the Assignment which were unlawfully diverted. There is however real danger that the amounts will be withdrawn by the 1<sup>st</sup> Respondent and dissipated causing the Applicant as Assignee loss and damage.

(h) The Applicant is aware that there is a payment of UGX 2,700,000,000 which is now being processed by the 2<sup>nd</sup> Respondent to be paid to the 1<sup>st</sup> Respondent through another bank which is not DFCU Bank Ltd contrary to the terms of the deed of Assignment and in violation of the Applicants rights as Assignee. There is imminent danger that this payment will be made to another bank in violation of the deed of assignment occasioning loss to the Applicant.

(i) Owing to the above facts, a dispute under the deed of Assignment has now arisen as to whether the Applicant is entitled to the Contract proceeds due to the 1<sup>st</sup> Respondent from the 2<sup>nd</sup> Respondent, whether the 2<sup>nd</sup> Respondent can lawfully pay the contract proceeds to any other Bank after being notified of the assignment to the Applicant and whether the 1<sup>st</sup> Respondent can lawfully direct the 2<sup>nd</sup> Respondent to make payments to another bank or person in breach of the terms of the deed of assignment which restrict all payments to be made to the Applicant as Assignee. The Applicant has notified the Respondents to refer the dispute to arbitration under the terms of the Arbitration Clause in the Deed of Assignment.

(j) That the 1<sup>st</sup> Respondent does not have any other known properties and/ or assets that would be attached to pay the vast amounts of money to satisfy the judgement/decree. Dissipation and diversion of the contract proceeds in

this unlawful and unjust manner will significantly diminish the Applicant's recovery of the loans due from the 1<sup>st</sup> Respondent.

The 1<sup>st</sup> Respondent opposed the Application through two affidavits in reply, sworn by its director **Ssembatya Francis** and by **CPA Rollings Nyesigomwe** who stated that he had audited the 1<sup>st</sup> Respondent's performance of the loan terms. In his affidavit Mr Ssembatya averred that the UNRA contract was an ad-measure framework contract, executed through independent Call off orders, with each call-off order being an independent contract. That arising out of the main framework contract, a total of 13 call-off orders were issued to the 1<sup>st</sup> Respondent of which the Applicant only financed 10 call-off orders vide call off order Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9 and 11 while call off orders Nos. 10, 12 and 13 in the value of UGX. 7,239,001,460/= were financed by other funders including Centenary Bank, upon refusal and withdrawal by the Applicant from providing further contract financing to the 1<sup>st</sup> Respondent. He averred that Centenary Bank and other funders are legally and equitably the rightful beneficiaries of the contract proceeds arising out of the three sided said call-off orders. He further averred that all contract proceeds for certified works arising out of call-off orders 1 - 9 and 11 which were financed by the Applicant were paid by UNRA through DFCU Account No. 01383655908910 in the Applicant Bank, and a sum of UGX 20,314,727,858/= was paid by UNRA through the Applicant as against the certified works under call off orders Nos. 1 - 9 and 11. The deponent relied on an audit report by CPA Rollings Nyesigomwe (attached as Annexure F1 and F2) which was stated to prove that the applicant bank has received a sum of UGX. 20,313,727,858/= from UNRA out of which it recovered all facilities.

He also stated that a sum of UGX. 2,656,907,933/= was withdrawn from the 1<sup>st</sup> Respondent's Account No. 01383655908910 but the same is not applied to any traceable account for the 1<sup>st</sup> Respondent. He thus averred that the audit report further proves that the 1<sup>st</sup> Respondent is not indebted to the applicant as against the UNRA contract, as the Applicant had fully recovered all the facilities issued thereunder. In respect to the REA contract, he stated that the Applicant also prematurely terminated her obligations to REA and that the Applicant's unilateral withdrawal and refusal to renew performance guarantees and Advance

Performance Guarantees resulted into the termination of the REA contract as the Agency could not validly act on expired guarantees. He further averred that the audit report shows that during the period 6/1/2020-6/1/2021 when the alleged facility letter and deed of assignment were in force, the applicant made cumulative recoveries of over UGX. 10,536,430,974/= against disbursements of only UGX. 4,500,000,000/= made during that period, hence the applicant having recovered more than the monies disbursed after the execution of the deed of assignment. He also averred that the 1<sup>st</sup> Respondent is a going concern with adequate resources to pay off all its lawful and just obligations as when they may arise. That the 1<sup>st</sup> respondent is still actively carrying on the business of civil construction works with her receivables beyond and adequate to settle the alleged indebtedness.

In her affidavit in rejoinder, Ms Nakisibo reiterated the assignment and clarified that the Facility letters authorised the Applicant to withdraw financing upon default of repayment. Without leave of Court, the 1<sup>st</sup> Respondent filed an Affidavit in sur-rejoinder after closure of pleadings. This filing contravenes Order 8 rule 18(2) of the Civil Procedure Rules S.I. 71-1 and no justification was provided by the 1<sup>st</sup> Respondent for the same. Accordingly, the Affidavit in sur-rejoinder is struck off the Court record.

### **Representation and hearing**

The Applicant was represented by Mr. William Kasozi and Mr. Timothy Akampurira of M/S AF Mpanga Advocates while the 1<sup>st</sup> Respondent was represented by Mr. Abbas Kawaase of M/S Fides Legal Advocates. The 2<sup>nd</sup> Respondent neither filed a reply nor entered appearance at the hearing. The parties on record filed written submissions as directed by the Court, which I have fully considered.

### **Determination**

It is not disputed that the Applicant provided loan financing to the 1<sup>st</sup> Respondent for the execution of works on the 1<sup>st</sup> Respondent's contracts with the 2<sup>nd</sup> Respondent and with the Rural Electrification Agency (REA). Further that the Applicant and 1<sup>st</sup> Respondent executed a Deed of Assignment whereby 1<sup>st</sup> Respondent assigned all its contract earnings from the 2<sup>nd</sup> Respondent to the Applicant until full repayment of the debt. Clause 11 of the Deed binds the said

parties to settle all disputes arising from the performance of the Deed through arbitration. From the affidavits on record it is clear that there is a dispute between the Applicant and 1<sup>st</sup> Respondent as to whether the Applicant is entitled to the Contract proceeds due to the 1<sup>st</sup> Respondent from the 2<sup>nd</sup> Respondent, whether the 2<sup>nd</sup> Respondent can lawfully pay the contract proceeds to any other Bank after being notified of the assignment to the Applicant, and whether the 1<sup>st</sup> Respondent can lawfully direct the 2<sup>nd</sup> Respondent to make payments to another bank or person in breach of the terms of the deed of assignment which restrict all payments to be made to the Applicant as Assignee.

Counsel for the Applicant and 1<sup>st</sup> Respondent confirmed to this court when they appeared in respect of a related matter *vide* **MA-1033-2023; Rocktrust Contractors (U) Ltd V DFCU Bank Limited**, that an arbitrator had been appointed to resolve the parties' dispute over the Deed Assignment.

Under Section 6(1) of the Arbitration and Conciliation Act Cap 4) this court has the discretion to issue interim measures protecting the status quo of a dispute before or during arbitration. The Applicant has brought this application seeking that Court should issue interim measures of protection that provide temporary relief aimed at protecting its rights as an Assignee of contract proceeds pending the determination of arbitration. In an application of this nature, the court will generally have regard to the nature and strength of the applicant's case, the existence of an imminent risk of irreparable loss and the course of action favoured on a balance of convenience. (See **AC Yafeng Construction Limited v The Registered Trustees of Living Word Assembly Church & Anor, High Court Miscellaneous Application No. 0001 of 2021.**)

*(a) The nature and strength of the Applicant's case*

The final findings on the merits of the parties' cases will be made by the arbitrator. At this stage, it is sufficient if this Court is satisfied that the Applicant has a strong case to be presented to the arbitrator which is likely to succeed. The 1<sup>st</sup> Respondent has not disputed the Facility letters, and it confirmed receipt of funding from the Applicant for 10 of its 13 call-off orders, although it asserted that all the credit was repaid with interest.



However the official loan account statements adduced by the Applicant show that the 1<sup>st</sup> Respondent is still in debt. Whereas the 1<sup>st</sup> Respondent adduced payment certificates, these are only evidence of approval of payment and not evidence of actual payment. The 1<sup>st</sup> Respondent did not produce its own loan account statements indicating full repayment. While I cannot conclusively determine the authenticity of CPA Nyesigomwe's audit report which was relied on by the Respondent, I note from Section 2 thereof that he did not have the opportunity to review the official loan account statements. This raises some doubt as to the accuracy of his findings. I am therefore satisfied that the Applicant has a strong case to be presented to the arbitrator. Based on the available documents, there is a real likelihood that the 1<sup>st</sup> Respondent remains indebted to the Applicant to some extent.

*(b) Imminent risk of irreparable loss*

An interim order of protection is only available where compensatory damages would be inadequate. Irreparable damage, injury or loss has been defined as '*loss that cannot be compensated with money*' (See **Kiyimba Kaggwa E.L.T. v Haji Abdu Nasser Katende [1985] HCB 43**). In the present case, the 1<sup>st</sup> Respondent stated that it is unable to obtain any more financing from a bank due to its negative credit status in the Credit Reference Bureau. Without alternative financing, it can no longer work any contract. Indeed, there is no proof before the Court that the 1<sup>st</sup> Respondent has worked or is working the two contracts from Adjumani District and Darvich Company (U) Ltd.

Furthermore Annexure A14 to the affidavit in reply shows that many of the 1<sup>st</sup> Respondent's assets are mortgaged to Centenary Bank, which jeopardizes the Applicant's recovery through alternative means other than the assigned contract proceeds. To evade its apparent indebtedness, the 1<sup>st</sup> Respondent unilaterally diverted payment of the assigned contract proceeds away from its account held with the Applicant. For these reasons, I am not convinced that the 1<sup>st</sup> Respondent is a going concern with adequate resources to settle the obligations that may arise from the arbitration. If this Court does not preserve the continuing security in the assigned contract proceeds, it is likely that the arbitral award may be rendered

moot. Any additional award in damages for that loss to the Applicant would equally be moot.

*(c) Balance of convenience*

The court must ensure that it takes the course of action that results in a lower risk of injustice if the decision to grant the interim measures is incorrect. In this case, there is a high likelihood that the 1<sup>st</sup> Respondent is still indebted to the Applicant and the arbitral award may be rendered moot if the assigned proceeds are not preserved. The 1<sup>st</sup> Respondent's business operations, which rely heavily on credit financing, seem to have grinded to a halt due to its current inability to access credit. Save for the mortgaged assets, there is no proof of any other unencumbered assets owned by the 1<sup>st</sup> Respondent.

In case the Applicant is successful in the arbitration, its most realistic recourse for recovery remains the 1<sup>st</sup> Respondent's unrecovered earnings from the 2<sup>nd</sup> Respondent, which were secured in the Deed of Assignment for purposes of settling the principal amounts and accrued interest over the loans. Therefore, there is a high risk of occasioning an injustice if this Court does not protect this security pending the arbitration.

**Reliefs**

The Applicant has satisfied the considerations necessary for the issuance of interim measures of protection pending arbitration and the Application is accordingly allowed. Having carefully considered the reliefs sought in the Application, I make the following orders:

- a) A temporary injunction is issued restraining the 1<sup>st</sup> Respondent, its servants, agents or any other person acting under its direction or authority from:
  - i. Diverting to any other Bank/Bank Account, issuing instructions to the 2<sup>nd</sup> Respondent to change bank accounts on which the Contract proceeds should be paid, receiving any money constituting Contract proceeds under the Contract Agreement for Mechanized Maintenance of selected unpaved roads under framework contracts totalling to

487.2 km Lot 15 2019 procurement Reference No. UNRA/WRKS/2016-17/00018/15 dated February 2019 to any other Bank Account other than to the 1<sup>st</sup> Respondents Account No. 01383655908910 (UGX) and 02383657210703 (USD) held with DFCU Bank Ltd until the final determination of the intended arbitration proceedings or the repayment in full by the 1<sup>st</sup> Respondent of all amounts due to the Applicant under the loan facilities.

ii. Performing or directing any other action which would prejudice or compromise the Applicants rights as Assignee of their legal interest in the Contract Proceeds.


b) A temporary injunction is issued restraining the 2<sup>nd</sup> Respondent, its servants, agents or any other person acting under its authority from:

i. Effecting payment of any part of and / or all Contract Proceeds due to the 1<sup>st</sup> Respondent under the Contract Agreement for Mechanized Maintenance of selected unpaved roads under framework contracts totalling to 487.2 km Lot 15 2019 procurement Reference No. UNRA/WRKS/2016-17/00018/15 dated February 2019 to any other Bank Account other than to the 1<sup>st</sup> Respondents Account no. 01383655908910 (UGX) and 02383657210703 (USD) held with DFCU Bank Ltd until the final determination of the intended arbitration proceedings or the repayment in full by the 1<sup>st</sup> Respondent of all amounts due to the Applicant under the loan facilities.

ii. Recognizing, complying with, aiding or abetting any instructions from the 1<sup>st</sup> Respondent or any other person claiming under or deriving any authority from the 1<sup>st</sup> Respondent to transfer to any other Bank Account other than to the 1<sup>st</sup> Respondent Bank Accounts no. 01383655908910 (UGX) and 02383657210703 (USD) with DFCU Bank Ltd any money due from time to time to the 1<sup>st</sup> Respondent under the Contract Agreement for Mechanized Maintenance of selected

unpaved roads under framework contracts totalling to 487.2 km Lot 15 2019 procurement Reference No. UNRA/WRKS/2016-17/00018/15 dated February 2019 until the determination of the intended arbitration proceedings or the repayment in full by the 1<sup>st</sup> Respondent of all amounts due to the Applicant under the loan facilities.

c) The costs of this application shall abide by the outcome of the arbitration.



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**Patricia Mutesi**

**JUDGE**

**(30/10/2023)**