THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

COMMERCIAL DIVISION

MISCELLANEOUS APPLICATION NO. 0193 OF 2023

ARISING FROM CIVIL SUIT NO. 0112 OF 2023

ROKO CONSTRUCTION LIMITED :: APPLICANT

VERSUS

PEARL MARINA ESTATES LIMITED :: RESPONDENT

Before Hon. Lady Justice Harriet Grace Magala

Ruling

[1] Background

This is an implication for a temporary injunction restraining the Respondent, its agents, servants, assignees, employees or anyone deriving authority, from breach of contract and or enforcing demands or encashment of the **Performance Guarantee No. P/210/7001/2019/000012 for USD $ 1,232,732.48** and the **Advance Payment Guarantee No. P/210/7001/2019/000009 worth USD $ 569,595.04** until the final determination of the main suit.

The Affidavits in support of and rejoinder to the Application were deposed by Mark Koehler a director of the Applicant. The Affidavit opposing the Application was deposed by Andrew Kasirye, SC a director of the Respondent.

[2] Appearance and Representation

The Applicant was represented by M/s Newmark Advocates and the Respondent was represented by M/s Kasirye, Byaruhanga & Co. Advocates. Parties were given schedules by Court to file their written submissions. The Court has relied on the parties' pleadings and written submissions to determine this matter.

[3] Issues

a) Whether the Applicant should be granted a temporary injunction

b) What other remedies are available to the Parties?

[4] Determination

Whether the Applicant should be granted a temporary injunction

It has been established by the law and the decided cases that, the main purpose for issuance of a temporary injunction order is the maintenance of the *status quo* between the parties pending the disposal of the main suit. The conditions for the grant of an interlocutory injunction are now well settled. First, an applicant must show a *prima facie case* with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience (**see E.A. Industries v. Trufoods, [1972] E.A. 420**). The conditions that have to be fulfilled before court exercises its discretion to grant an interlocutory injunction have been well laid out as the following: -

1. The Applicant has shown a prima facie case with a probability of success;
2. The likelihood of the applicants suffering irreparable damage which would not be adequately compensated by award of damages; and
3. Where in doubt in respect of the above 2 considerations, then the application will be decided on a balance of convenience (**see Fellowes and Son vs Fisher [1976] I QB 122)**.

The above principles have also been enunciated in cases such **American Cyanamid Co v. Ethicon Limited [1975] 15 AC 396**, **Geilla v Cassman Brown Co. Ltd [1973] E.A. 358** and **GAPCO Uganda Limited v. Kaweesa and another H.C. Misc Application No. 259 of 2013.**

An interlocutory injunction is a court order to compel or prevent a party from doing certain acts pending the final determination of the case. It is an equitable remedy which aims to preserve the *status quo* by preventing one party from committing, repeating or continuing a wrongful act prior to the trial. It is an order made at an interim stage during the trial, and is usually issued to maintain the *status quo* until judgment can be made. For that reason, there must be a subsisting suit pending before the court, from which the application is sought, that forms the basis from which the interlocutory application arises (see **In the matter of C. Kasozi Ddamba [1980] HCB 115 and M/S Muwayire Nakana & Co. Advocates v. Departed Asians Property Custodian Board and another [1987] HCB 91)**. It is only then that an application for interlocutory relief can be considered.

The Court must first be satisfied as to the merits of the suit that has been filed against the respondent to ascertain that there is a "serious triable issue". This must be disclosed in the pleadings of the Applicant. The "serious triable issue" must be one with a possibility of success (that is, that there is a reasonable chance that the applicant shall succeed at the trial), not necessarily one that has a probability of success (**see American Cyanamid v. Ethicon [1975] AC 396; [1975] ALL ER 504; Godfrey Sekitoleko and four others v. Seezi Peter Mutabazi and two others, [2001 –2005] HCB 80 and Nsubuga and another v. Mutawe [1974] E.A 487)**. There is no need to be satisfied that a permanent injunction is probable at trial; the court only needs be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried. A serious question is thus any question that is not frivolous or vexatious. The applicant needs to show only a reasonable likelihood of success on the merits. The applicant's burden on this part of the test is relatively low, and in most cases an applicant will be able to show that there is a serious question to be tried. The applicant is required to provide reasonably available evidence to satisfy the court with a sufficient degree of certainty that the applicant is the rights-holder and that his or her rights are being infringed, or that such infringement is imminent. The applicant must show a strong probability that the feared conduct and resulting damage will occur.

In the instance case, the Applicant on 3rd February 2023 filed High Court Civil Suit No. 0112 of 2023 in which the Applicant seeks the following declarations:

a) that the Defendant is in breach of the construction contract dated the 1st day of April, 2019 and the addendum dated the 1st day of August 2019;
b) that the Defendant is in breach of the mutual termination and settlement agreement dated the 5th day of May, 2021;
c) that the Defendant is liable for fraud in attempting to cash the performance guarantee vide P/210/2019/000012 worth USD $1,232,732.48 & Advance Payment Guarantee vide P/210/7001/2019/000009 worth USD $ 569,595.04;
d) that the Plaintiff performed the contract dated 1st day of April, 2019 and the addendum dated the 1st day of August 2019 according to the terms therein;
e) a permanent injunction restraining the Defendant from further breach of contract or and cashing the performance guarantee vide

P/210/2019/000012 worth USD $ 1,232,732.48 & Advance Payment Guarantee vide P/210/7001/2019/000009 worth USD $ 569,595.04;

f) that the claimant fully utilized the advance payment guarantee, order compelling the Defendant to issue a certificate of partial takeover of the contractual premises;
g) that the final account/audit made by the Defendant is unilateral, unconscionable, illegal & unenforceable for contravening the right to fair hearing as well as being in breach of the contract & mutual termination and settlement agreement; and
h) In the alternative, without prejudice to the foregoing, a declaration that the contract was affected by force majeure and thus the Plaintiff not liable for any breach, the contract was frustrated and thus parties discharged from the obligations thereunder.

The above suit (HCCS 112 of 2023) notwithstanding, the Respondent brought it to the attention of court and submitted evidence to the effect that the Applicant commenced arbitration proceedings against the Respondent and the same were not yet concluded. This was information that the Court could not ignore. The Applicant commenced arbitration proceedings and filed its statement of claim with the Center for Arbitration and Dispute Resolution (hereinafter referred to as CADER) on the 27th July 2022 under reference number ***CAD/ARB/No.04 of 2022: Roko Construction Limited – versus – Pearl Marina Estates Limited.*** The statement of claim before CADER and or the declarations sought are the same, word for word as those contained in the HCCS No.0112 of 2023. Section 5(1)(a) and (2) of the Arbitration and Conciliation Act on stay of legal proceedings states that:

> *" **5. Stay of legal proceedings***
> *(1) A judge or magistrate before whom proceedings are being brought in a matter which is the subject of an arbitration agreement shall, if a party so applies after the filing of a statement of defence and*
> *both parties having been given a hearing, refer the matter back to the arbitration unless he or she*
> *finds—*
> *(a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or …*

(2) Notwithstanding that an application has been brought under subsection (1) and the matter is pending before the court, arbitral proceedings may be commenced or continued and an arbitral award may be made".

The rights of parties to resolve their disputes by arbitration must be upheld and supported by the courts. Section 9 of the Arbitration and Conciliation Act is very clear on the extent to which court must intervene in matters governed by the Act (see the case of **One Solutions Limited –vs – Eastern and Southern African Management Institute High Court Misc. Cause No. 33 of 2015)**. There are exceptions to which the Court may interfere with matters governed by the Arbitration and Conciliation Act (see section 34 of the Act).

The Respondent further brought it to the attention of Court that the Applicant filed **Miscellaneous Cause No. 0083 of 2021** and **Miscellaneous Application No. 1530 of 2021: Roko Construction Company Limited – vs – Pearl Marina Estates Limited & Anor** before this court. Misc. App. No. 1530 of 2021 was for an interim order and Misc. Cause No. 0083 of 2021 was for a temporary injunction pending the determination of the arbitration proceedings filed under CAD/ARB/No.04 of 2022. Both applications were brought under section 6 of the Arbitration and Conciliation Act and Rule 13 of the Arbitration Rules. The Application for a temporary injunction was dismissed by His Lordship Justice Stephen Mubiru.

The Applicant, in their affidavit in rejoinder at paragraph q stated that:

> "the arbitral proceedings could *not be finalized because the Respondent absconded and dodged the arbitration on various occasions…wherein the arbitrator advised that he could not proceed without both parties and the 60 days within which the arbitration was supposed to be conducted expired".*

Court finds that the above statement made on oath by the Applicant's director was not an accurate representation of the record of proceedings from the Arbitrator which the Applicant attached to their affidavit in rejoinder. According to the proceedings, both parties were absent on the 06-06-2022 because no date had been agreed upon and the matter was adjourned to the 06-07-2022. On the 06-07-2022, only counsel for the Claimant/Applicant was present and the Arbitrator advised that the arbitration would begin by parties filing their respective pleadings. Timelines/directives were given to both parties regarding the filing of their pleadings and a meeting with the Arbitrator was scheduled for 03-08-2022 for a preliminary hearing. On the 25th July 2022, the Claimant wrote to the Arbitrator requesting to file their claim out of time. This communication was

filed in the CADER Registry on the 27th July 2022 and served upon the Respondent on the 28th July 2022. On the 3rd August 2022, both parties were not present and the Arbitrator noted that there was no evidence on the CADER file that the Respondent had been served with the Claim. The Respondent was granted two weeks within which to file their reply and the preliminary meeting with the Arbitrator, the Parties and their counsel was fixed for 23rd August 2022 at 10:00am. The Record further reads that:

> "*Both Counsel and parties are notified that once the Arbitration starts, it has to be completed in a period of two months as per the ACA Act. Any further delay shall be a further cost to the Parties. Matter adjourned to 23-08-2022 at 10:00am at CADER".*

My understanding and /or interpretation of the above excerpt of the Record shows that whereas the Arbitration proceedings had been commenced, the hearing had not commenced and commencement was subject to some preliminary matters being discussed and agreed to by and between the Parties, their counsel and the Arbitrator. Nowhere in the record does it state that the period within which the arbitration was to be conducted had expired and therefore the proceedings were terminated in accordance with section 32 of the Arbitration and Conciliation Act.

In light of the above considerations and observations, I find that this application was an abuse of the court process seeing that the remedy sought had been brought before court vide Misc. Cause No. 0083 of 2021 and the same was dismissed. Further to the above, the claim in HCCS 0112 of 2023 (out of which this application arises) is the same as that in CAD/ARB/No.04 of 2022 whose proceedings have not been concluded. This court, as earlier observed cannot exercise jurisdiction over a matter that is already the subject of arbitration, a process that is binding and valid as between the parties and therefore enforceable. I therefore do not find it necessary in the circumstances to consider the criteria for the grant of a temporary injunction.

Court therefore in exercise of its inherent powers under section 98 of the Civil Procedure Act, sections 17(2) and 33 of the Judicature Act; and section 5(2) of the Arbitration Act makes the following orders:

a) That the arbitral proceedings in **CAD/ARB/No.04 of 2022: *Roko Construction Limited – versus – Pearl Marina Estates Limited*** be continued and an arbitral award made;

b) That this application is dismissed with costs to the Respondent; and
c) That the main suit, HCCS 0112 of 2023 is hereby struck out with costs to the Defendant.

Delivered electronically this 24 day of JULY 2023 and uploaded on ECCMIS.

Harriet Grace MAGALA

Judge

24th July 2023