

5

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
MISCELLANEOUS APPLICATION No. 1269 OF 2020
(ARISING FROM ARBITRATION CAUSE No. 11 OF 2020)

10

CHRISTIAN COUNSELLING FELLOWSHIP APPLICANT

VERSUS

IBINONGA CONSTRUCTION & GENERAL MERCHANDISE RESPONDENT

15

BEFORE: HON. LADY JUSTICE SUSAN ABINYO

RULING

Introduction

This application was brought by Chamber Summons under section 12(3) of the Arbitration and Conciliation Act, Cap 4 and Rules 7(1) and 13 of the Arbitration Rules, where the Applicant seeks for orders that:

20

1. The Arbitral award made in CAD/ARB 3 of 2019, be set aside.
2. Costs of the application be provided for.

Facts

This Application is supported by the affidavit of Paul Byoma Byabagambi one of the Applicant's Consultants on the project; the subject of arbitration, deposed in paragraphs 1-13, in which the grounds are summarized as follows: -

25

- i. That the Arbitrator was appointed by the Executive Director of the Centre for Arbitration and Dispute Resolution in contravention of the Arbitration and Conciliation Act.
- ii. That the Respondent as a party to the Arbitration Agreement was under some incapacity, and that the Arbitration Agreement is not valid under the Laws of Uganda.

30

- 5 iii. That the award deals with a dispute not contemplated by or falling within the terms of reference or contains a decision or matters beyond the scope of reference to arbitration.
- iv. That the award was procured by corruption, fraud or undue means, and that there is evident partiality or corruption.
- 10 v. That the award is not in accordance with the Arbitration and Conciliation Act.

The Respondent opposed this application in an affidavit in reply deposed by Lakica Patrick the Proprietor of the Respondent, in paragraphs 1-19, and summarised as below:

- 15 i. That he has been advised by their Advocates M/s Ajjju, Baleese, Bazirake Advocates, which advise he verily believes to be true as follows: -
- ii. That this application is frivolous, vexatious and barred by law, as such it should be dismissed; that the said Paul Byoma Byabagambi has never been a consultant on the project subject to Arbitration, and the appointed
- 20 consultant was Soleco Construction Co. Ltd as seen in a copy of the appointment letter attached, and marked Annexure "A".
- iii. That the Applicant duly participated in the process of appointment of the said Arbitrator, and the whole arbitral proceedings, as such they are estopped from challenging the Arbitrators' appointment.
- 25 iv. That the Applicant has not raised sufficient grounds to set aside the arbitral award; the affidavit of Paul Byoma Byabagambi is argumentative and should be struck out.
- v. That the instant application has been filed out of time, and should be dismissed with costs.

30 Representation

The Applicant was represented by Counsel J.B Byamugisha of M/S J.B Byamugisha Advocates, while the Respondent was represented by Counsel Munyaneza Daniel of M/S Ajjju, Balesse, Bazirake Advocates. Counsel for the parties herein, filed written submissions as directed by the Court.

- 35 Counsel for the Respondent raised three preliminary objections in their submissions, which this Court shall resolve before delving into the merits of the application. The preliminary objections are as follows;

1. That Miscellaneous Application No. 1269 of 2020 arising from Arbitration Cause No. 11 of 2020 is barred by law, having been filed out of time, and
- 40 as such should be dismissed with costs.

- 5 2. That the affidavit in support of Miscellaneous Application No. 1269 of 2020 arising from Arbitration Cause No.11 of 2020, has been sworn by an unauthorized person without the express authority of the Applicant, and as such should be struck off the record.
- 10 3. That the affidavit of Paul Byoma Byabagambi is argumentative, and as such should be struck out.

Determination of the preliminary points of law

No. 1: That Miscellaneous Application No. 1269 of 2020 arising from Arbitration Cause No. 11 of 2020 is barred by law, having been filed out of time, and as such should be dismissed with costs.

- 15 I have considered the submissions of Counsel for the parties herein, and the cases cited to find as follows: -

Following the decision in **Mohammed Mohammed Hamid Vs Roko Construction Ltd, SC Civil Appeal No. 014 of 2015**, which is binding to this Court, cited by Counsel for the Respondent, the Learned Justice of the Supreme Court observed

20 that the Learned Author SS Edgar in Statute Law (7th Edn) Sweet and Maxwell 1971 at pg 225 wrote:

"A schedule is as much as part of the statute and in as much as an enactment as any other part, but if any enactment in a schedule contradicts an earlier clause prevails against the schedule. As a general rule, Forms in schedules are inserted

25 merely as examples and are only to be followed implicitly so far as the circumstances of each case may admit. Consequently, it may sometimes happen that there is a contradiction between the enactment and the form in the schedule. In such a case, it would be quite contrary to the recognized principles upon which Courts of Law construe Acts of Parliament to restrain the operation of

30 an enactment by any reference to the words of a mere form given for convenience sake in the schedule."

The Court was in agreement with the Learned Author, and held that Rule 7 (1) cannot prevail over section 34(3) of the Arbitration and Conciliation Act.

I have looked at the award dated 21st September, 2020, marked Annexure "D" to the affidavit in support of the Chamber Summons, and in particular the last

35 sentence which reads:

"This ruling super cedes the ruling delivered on the 27th of August, 2020."

5 Unfortunately, the ruling which was delivered on 27th August, 2020 was not attached for ease of reference by this Court.

I am unable to agree with the submission of Counsel for the Applicant that the second award was illegal, and of no effect because the Arbitrator indicated that the ruling super cedes the ruling delivered on the 27th of August, 2020, without
10 making the uncorrected errors.

For reasons above, I find that this application to set aside the award made on 21st September, 2020, contravenes section 34(3) of the Arbitration and Conciliation Act (hereinafter referred to as the "Act"), since it was filed on 30th December, 2020, after the period of 30 days prescribed by the Act, had lapsed from the date
15 of the award.

This Court therefore, finds that this application is incurably defective. **(See Makula International Ltd Vs H.E Cardinal Nsubuga and Anor, Civil Appeal No. 4 of 1981)**, cited with approval in Mohammed's case above.

No.2: That the affidavit in support of Miscellaneous Application No. 1269 of 2020 arising from Arbitration Cause No.11 of 2020, has been sworn by an unauthorized person without the express authority of the Applicant, and as such should be struck off the record.
20

Order 3 Rule 1 of the Civil Procedure Rules, SI 71-1 provides as follows: -

"1. Appearances, etc. may be in person, by recognized agent or advocate

25 "Any application to or appearance or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his or her recognized agent, or by an advocate duly appointed to act on his or her behalf; except that any such appearance
30 shall, if the court so directs, be made by the party in person."

In the instant case, the affidavit in support of this application has been deposed by Paul Byoma Byabagambi, and under paragraph 1 thereof, his credentials and role as one of the Applicant's consultants are stated, without mention of any express authorisation by the Applicant Company.

35

5 The well-established principle is that an affidavit is defective by reason of being sworn on behalf of another, without showing that the deponent had the authority of the other. (**See the case of Makerere University Vs St. Mark Education Institute & Others, HCCS No. 378 of 1993**)

10 I am fully persuaded by the decision in **Masaka Tea Estates Ltd Vs Samalia (Kiganja) Tea Estate Ltd & Anor HCMA 505 of 2004 (arising from HCCS No. 539 of 2001)**, cited by Counsel for the Respondent, on the proposition of the law that for an action to be brought by a company and in the name of a company, a resolution must be filed authorizing such action.

15 In the given circumstances of this case, I find that the affidavit deposed by Paul Byoma Byabagambi as one of the consultants in the Applicant Company, was without any express authority of the Applicant Company, and contravenes Rule 1 of Order 3 of the Civil Procedure Rules SI 71-1.

For reasons above, the affidavit in support of this application deposed by Paul Byoma Byabagambi is hereby struck out.

20 No.3: That the affidavit of Paul Byoma Byabagambi is argumentative, and as such should be struck out.

Order 19 Rule 3 of the Civil Procedure Rules SI 71-1 provides that:

"3. Matters to which affidavits shall be confined

25 (1) Affidavits shall be confined to such facts as the deponent is of his or her own knowledge to prove, except on interlocutory applications, on which statements of his or her belief may be admitted, provided that the grounds thereof are stated.

30 (2) The costs of every affidavit which shall unnecessarily set fourth matters of hearsay or argumentative matter or copies of or extracts from documents shall, unless the court otherwise directs, be paid by the party filing the affidavit."

35 I have looked at paragraphs 6, 7, 8 and 9 of the affidavit in support of the application, which are alleged by the Respondent to be argumentative, and find that the said paragraphs are prolix, and argumentative; the deponent simply argues the case, and does not state precisely the evidence to be relied upon in support of the application.

5 In the result, I find that the said paragraphs 6, 7, 8, and 9 of the affidavit in support of this application are non-compliant with the Law, as provided under Order 19 Rule 3 of the Civil Procedure Rules SI 71-1 above.

10 I am fortified in my finding above, by the Supreme Court decision in **Male H. Mabirizi K Kiwanuka Vs The Attorney General, Misc. Applic. No. 7 of 2018(Arising from Constitutional Appeal No. 2 of 2018)**, where the Court struck out the affidavit of the Applicant, which was prolix, and non-compliant with the provision of Order 19 Rule 3 of the Civil Procedure Rules.

15 This Court having found the three preliminary points of law above in the affirmative, and consequently struck out the affidavit of the Applicant in support of this application, further finds that this application is incompetent without an affidavit in support thereto.

Accordingly, this application is dismissed with no order as to costs.

Dated, signed and delivered electronically this 11th day of January, 2023.

20


SUSAN ABINYO
JUDGE
11/01/2023

25

30