**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT MUKONO**

**MISC.APPLICATION NO.250 OF 2019**

**ARISING FROM MA NO.198/2019**

**ARISING FROM CIVIL APPLICATION NO.197 OF 2019**

**ARISING FROM CVIL APPLICATION NO.007 OF 2019**

**ARISING FROM CAD/ARR NO.47 OF 2018**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW SEEKING ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION AND OTHER REMEDIES**

**GLOBAL INDUSTRIES:::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::: APPLICANT**

**VERSUS**

**TRIDENT INFRATECH LIMITED:::::::::::::::::::::::::::::::::::::::::::::::RESPONDENT**

**06th September 2019**

**BEFORE HON. LADY JUSTICE MARGARET MUTONYI, JUDGE HIGH COURT**

**RULING**

1. This Ruling is in respect of an Application by way of Notice of Motion brought under section 98 of the CPA and 0.52 rules 1, 2 and 3 of the Civil Procedure Rules.

The Application seeks orders of Court to;

1. Lift the ban issued in the Interim Order dated 15th July 2019 and
2. That the Interim Order of stay of execution of the Orders of the arbitration CAD/ARB No.47/2018 do issue pending the determination of the main Application and that costs be in the cause.

The grounds in support of this Application are contained in the Affidavit of Rajiv Sabharwal, the Director of Global Wire Industries, the Applicant but briefly are the following:-

1. That the Applicant filed a substantive Application No.197 of 2019 against the Respondent seeking for stay of Execution of Orders in arbitration CAD/ARB/47 of 2018.
2. The Applicant then filed Misc. Application No.198 of 2019 against the Respondent seeking for interim stay of execution pending hearing and determination of the substantive Application for stay.
3. That upon hearing of the Misc. Application for the two Interim Stay of Executions, Court among other Orders issued a ban against the Applicant blocking its officers from accessing the premises or removing goods from therein.

The Court further ordered private security guards and padlocks to be put on the Applicant’s warehouse premises and that at all these orders would only be lifted upon furnishing security to court.

1. That the Applicant has already deposited security of Ug. Shs.10,000,000/= in court.
2. That the Applicant has surrendered machines within the guarded warehouse premises valued at Ug. Shs.858,200,000/= [Ug. Shs. Eight Hundred Fifty Eight Million, Two Hundred Thousand only), which is sufficient to secure the Respondent’s claim even while in operation in the hands of the Applicant for the next five years.
3. That the raw materials and the finished goods within the warehouse are getting wasted if the ban issued in the Interim Order dated 15th of July 2019 is not lifted, the Applicant will suffer irreparable loss.
4. That by the time the substantive Application is head and determined, the Applicant would have suffered serious loss and damage of the finished goods and the raw materials that are apparently getting wasted in the warehouse.
5. That the said substantive Application fixed has a high probability of success and that the Applicant will suffer greatly if the ban is not lifted.

Lastly that it is in the interest of justice and fairness that the Order of Interim stay of execution and other orders sought be granted.

1. Global Wire Industries, the Applicant was represented by Counsel Bwire Walter while Counsel Dan Busingye represented Trident Infratech Ltd, the Respondent.

They both made oral submissions in support of their respective client’s cases.

Counsel Bwire submitted that the Applicant applied to this court to stay execution following an arbitral award that was issued against it as it was deponed in paragraph 3 of the Affidavit in support.

Instead of court maintaining the status quo, it changed it by issuing a ban as deposed in paragraph 4.

That the Order changed the status quo and has greatly inconvenienced the Applicant.

That it is a sign or form of execution of the Arbitral award as it has attached the Applicants property and put them out of business, for the last two months.

That the Order is causing a substantial loss as deponed in paragraph 8.

Counsel submitted that at the time the Order was issued, the Applicant was operating normally and had finished goods and raw materials.

The Applicant attached Annextures CI and C10 in support and proof of his case.

The employees, he submitted, have been put out of employment and that both parties are out of business. Since none can get in and go out of the premises.

He submitted that if the Order is not granted, the Applicant will suffer loss, and damage irreparable.

He prayed that the court lifts the ban and set aside the Order to pave way for the Applicant to resume business operations and have an order maintaining the status quo after access is given.

Counsel Dan Busingye in opposition, submitted, that the Affidavit of Ramesh Halai filed on 8th August 2019 opposes the Application.

He submitted that the status quo was that by the time the Applicant came to court, for stay of execution of the award, the Respondent had locked out the Applicant for failure to pay rent for the last 18 months.

That was explained to court by the Director of the Applicant leading to the Interim Order.

It is on that point that the Respondent is only interested in business whereas the Applicant should pay the rent that is due as per the award that is being challenged.

The rent in question is not being disputed by the Applicant. The Respondent would therefore pray that this court be pleased to issue the appropriate security from the Applicant, so that business can go on for both parties, and thereon justice can be seen to be done.

This court is empowered to grant security under section 34 (5) of the Arbitration and Conciliation Act, Rules 7 (1), (12) and (13) which empower court to order for appropriate security if any one challenges the award.

He referred court to the case of **Excel Construction Ltd Versus G.CC Services (U) Ltd Misc. Cause No.156 of 2017 Commercial Division** of the High Court where Justice B. Kainamwa (Rtd) ordered the respondent not later than 30 days from today to deposit in court such security e.g. irrevocable bank guarantee or other security acceptable to the Applicant for the due performance of the entire award.

He also relied on the case of **Dr. Alfred Otieno Odhiambo Versus Medus Prof S-BV** MA No.52 of 2019, Arising from MA 995/2018, Arising from MA 947/2018, Arising from CAD/ARB No.4/2017, Arising from **CAD/ARB No.36/2016.**

Justice Richard Wejuli revised downwards the security for costs that had been set at 240,000 Euros to 160,000 Euros.

He further relied on the authority of **G.M. combined (U) Ltd Versus AK Detergents (U) Ltd.**

**SCCA No.34 of 1995** where the Supreme Court held that **“The amount of security awarded is the discretion of the court which will fix such sum as it thinks just, having regard to all the circumstances of the case. It is not the practice to order security on a full indemnity basis. The more conventional approach is to fix the sum at about two thirds of the estimated party and party costs up to the stage of the proceedings for which security is ordered, but there is no hard and fast rule…”**

He prayed that this being a Landlord-Tenant relationship gone sour, the Respondent is only interested in his rent, prior to 18 months and the subsequent months.

He submitted, what was due now was about 60,000 US Dollars.

He prayed that court be guided to exercise its discretion judiciously to protect all parties.

In rejoinder, Counsel for the Applicant submitted that the status quo was that the Applicant was operating and was never evicted.

That on the issue of security, he agrees it is at the discretion of court and already the Applicant has deposited Ug. Shs.10,000,000/= (Uganda Shillings Ten Million) and relied on the case of **John Baptist Kawanga Versus Namyalo Kevina and Ssemakula Lawrence**. MA No.12/2017 Arising from CS No.51/2012 where Justice Flavia Zeija held the view on Applicant giving security for due performance, **“ that every Application should be handled on its merits and a decision whether or not to order for security for due performance be made according to the circumstances of each particular case”.**

1. **Brief Background**

Before evaluating the Affidavit evidence and the submissions of both Counsel, it is important to bring out the brief facts of this case as court finds the Applications peculiar.

In the year 2018, the Applicant Global Wire Industries Ltd filed Civil Suit No.0057 f 2018 against Trident Infratech Lt Ramesh Halai and Dinesh Halai. The Applicant also filed Miscellaneous Application No.27/18 arising out of the above mentioned Civil Suit.

The learned Ag. Chief Magistrate Juliet Hatanga made an Order dated 23rd July 2018 to the effect that **“Civil Suit No.57 of 2018 and Misc. Application No.27 of 2018 be referred for Arbitration in line with clause x of the Tenancy Agreement between the parties and in line with section 5 of the Arbitration and conciliation Act CAP 4”.**

The Respondent Trident Infratech Ltd through its Lawyers Muhumuza Kiiza Advocates and Legal Consultants went ahead and opened arbitration proceedings vide CAD/ARB No.47/2018 against the Applicants Global Wire Industries Ltd.

The chamber summons were dated 27th September 2018 supported by Ramesh Halai the Director of the Respondent Company.

The Agreement that was attached to the Affidavit between the Applicant and Respondent on 1st July 2017 indeed had clause X which was in the following words;

**“Any dispute arising in connection with this Agreement, which cannot be solved amicably within (30) days after receipt by one party’s request, shall be referred to an Arbitrator appointed by both parties in accordance with Arbitration and conciliation Act CAP 4 and if the dispute is not resolved, then the matter shall be referred to court of competent jurisdiction.**

**The place of arbitration shall be Kampala, Uganda and the language to be used shall be English.**

**The arbitral award shall be reasoned and in writing, each party shall initially bear their own costs of arbitration and shall share the costs of the arbitrator.**

**The arbitrator may allocate or apportion costs between the parties”.**

The Agreement was signed by both parties, and the Applicant, Global Wire Industries Ltd signed this Agreement through its director Rajiv Sabharwal who is not disputing the Agreement.

The parties went ahead and signed a Party undertaking where in whatever they agreed on in their first Meeting that was held on 20th February 2019 with the Arbitrator was reduced into writing.

This undertaking was duly signed by Messrs Muhumuza Kiiza Advocates and Legal Consultants for the claimant and M/S Songoni and Co. Advocates for the Respondent. Under the undertaking, they put the time table of proceedings before the arbitrator.

The parties also filed a Joint scheduling memorandum on 18th March 2019 and the arbitrator proceeded with the arbitration to determine whether there was a breach of the Tenancy Agreement by either the claimant or the Respondent and what remedies were available to the parties.

The arbitrator eventually made an award that was reasoned and in writing as per the Tenancy Agreement Clause X dated 24th June 2019. The arbitrator was Fred Businge Kiiza.

**The claimant/Respondent was awarded;**

1. USD 44,240 in rent arrears as at 30th March 2019.
2. Ug. Shs.34,516.18/= (Thirty Four Thousand Five Hundred and Sixteen Eighteen Cents) in outstanding electricity bills as at 11th September 2017.
3. A total of Ug. Shs.1,021,316/= (Uganda Shillings One Million, Twenty One Thousand, Three Hundred Sixteen) as outstanding water bills as at 20th August 2018.
4. Interest on items (1) and (3) above at the rate of 12% per annum from the date of filing the claim until payment in full.
5. A total of USD 20,000 (Twenty Thousand US Dollars) as reasonable in the circumstances to help the claimant carry out reasonable and necessary repairs.
6. The Respondent vacates the suit premises within 2 (weeks from the date of the award).
7. The counter claim is hereby dismissed.
8. Each party shall bear its own costs of the Arbitration…”

Being dissatisfied with the award, the Applicant filed a Notice of Motion under sections 36, 33 of the Judicature Act CAP 13 and section 98 of the Civil Procedure Act, 0.46 rules 2, of the CPR, and Rules 6, 7, 8 of the Judicature (Judicial Review) Rules No.11 of 2009 seeking for Judicial reliefs of Certiorari, mandamus, Prohibition Vide Civil Application No.07/2019, which has attracted a plethora of other Applications including, this one.

**It is apparent that the Applicant by executing the Agreement dated 1st July 2017, signing the party undertaking under CAD/ARB No.47 of 2018 and participating in the proceedings in CADER fully submitted to the arbitration process.**

**The dispute between the two parties is therefore governed or regulated by the provisions of the Arbitration and conciliation Act CA.4, Laws of Uganda.**

What does the law provide for instances where a party is not satisfied with the award?

Section 34 provides for an Application for setting aside arbitration award as follows:

Section 34 **“Application for setting aside arbitral award”.**

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).**
2. **An arbitral award may be set aside by the Court only if (a) the party making the Application furnishes proof that;**
3. **A party to the arbitration Agreement was under some incapacity.**
4. **The arbitration Agreement is not valid under the law to which the parties have subjected it or, if there is no indication of the law, the law of Uganda.**
5. **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.**
6. **The arbitral award deals with a dispute net contemplated by or not falling within the terms 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 paid of the arbitral award which contains decisions on matters not referred to arbitration may be set aside.**
7. **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.**
8. **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**
9. **The arbitral award is not in accordance with the Act (b) the court finds that:-**
10. **The subject matter of the dispute is not capable of settlement by arbitration under the law of Uganda; or**
11. **The award is in conflict with the Public Policy of Uganda.**

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”.

It is important to note that Arbitration is created by contract and depends upon the free choice of the parties for the resolution of their disputes by a particular process or an expert/arbitrator rather than the submission to the prevailing judicial system in resolving disputes.

This free chance however is not completely free of involvement with the Courts of law in the country if the awards are not paid promptly by the losing party or one party is dissatisfied with the award.

The procedure of resorting to the Courts of law is well land under the Arbitration and Conciliation Act and Rules. Sections 34 (supra) 35, 36 and 38 are very specific.

**Section 35 of the ACA provides that;**

1. **“Arbitral award shall be recognized as binding and upon Application in writing to the Court (emphasis mine) shall be enforced subject to this section.**
2. **Unless the Court otherwise Orders the party relying on an arbitral award or applying for its enforcement shall furnish;**
3. **The duly authenticated original arbitral award or a duly certified copy of it and**
4. **The original arbitration Agreement or a duly certified copy of it”.**

The import of section 35 of the ACA is to allow the parties, to an arbitration cause to bring it to the attention of court particularly the successful party who wishes to have it enforced.

Section 36 provides for enforcement as follows:

“**Where the time for making an Application to set aside the arbitral award under section 34 has expired, r 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”.**

The successful claimant should therefore apply to court for the execution of the award and in this case, to the execution and Bailiffs Division of the High Court.

This is where all Applications//Orders pertaining to depositing security for costs/and or stay of execution should be heard and made.

Perusal of the pleadings in all the Applications arising from the Arbitration Cause in contention do not show anywhere that the Respondent followed this process.

It is apparent that the Respondent followed the crude method of using his own means of execution by forcing the Applicant out of the rented premises with the help of Police without following the provisions of the law on enforcement under the ACA.

No wonder, the learned Deputy Registrar who seemed to be ignorant of the law made Orders that are akin to a draw in a football match by ordering both sides to put padlocks and keep the security of the place changing the status quo completely.

The status quo prevailing must be looked at within the context of the law before a formal execution of the award. Status quo was therefore as at the time of the award.

Needless to mention, the misapprehension of the law by the parties and their Counsel and the learned Deputy Registrar has wasted a lot of time for the parties and court and as a result attracted a plethora of a Applications turning the would be expeditious dispute resolution process into a very protracted trial which in my view deserves direction and guidance from this honourable court being a Court of record, not from the perspective of having unlimited jurisdiction, because its jurisdiction is limited within the context of the Arbitration and conciliation Act Section 9.

**In my humble view, once the parties in their contract executed on 1st July 2017 agreed to have their disputes resolved by Arbitration, both of them must follows the law and rules there under that govern arbitration proceedings right from the** **manifestation of a dispute, and through-out the whole dispute resolution process under the Arbitration and Conciliation Act CAP 4.**

The Applicant and his Counsel were the first to act in breach when the matter was first filed before the Chief Magistrate’s Court, Mukono.

The Respondent followed by not following the process of enforcement of the award after it was granted abandoning the provisions of the law on enforcing an execution. And now the Applicant and his Counsel again through the many Applications before court.

Both parties are estopped from avoiding the well laid down procedures under the ACA.

My humble opinion on seeking remedies under Judicial review like in the instant case would frustrate the basic purpose of arbitration to resolve disputes expeditiously and to avoid the expense and delay of extended court proceedings.

In my view involvement of Courts of Law in arbitration proceedings should only be in respect of ascertaining the fairness and propriety of the proceedings as stipulated under sections 34 (1) and 2 and section 36 and 38 of the ACA.

Section 38 provides for questions of law arising in domestic arbitration as follows:-

**38 (1) “wherein the case of arbitration, the parties have agreed that:**

1. **An application by any party be made to a court to determine any question of law arising in the cause of the arbitration or**
2. **An Appeal by any party may be made to a court on any question of law arising out of the award, the Application or Appeal as the case may be made to the court and court remains High Court under section 2 of interpretation”.**

Perusal of the files before this Court has not revealed any questions of law that have been agreed upon by both parties for Court’s determination.

In a strange move by the Centre for Arbitration and Dispute Resolution (CADER) to counter Civil Revision Application No.007 of 2019, erroneously filed in Mukono High Court, they also filed MA No.197/2019 expressing an interest to defend Civil Revision Application No.007/2019 and moving Court to grant Orders that questions be framed and referred to the Constitutional Court for determination. Court finds this move very absurd.

In my humble opinion all this is a consequence of misapprehension of the law pertaining to arbitration by the parties involved and this court is not about to engage in mental gymnastics on issues that are filed erroneously before this court.

My opinion is premised on section 9 of the Arbitration and conciliation Act which provides that **“Except as provided in this Act, no Court shall interfere in the matters governed by this Act”.**

Justice Egonda Ntende JA in the case of **Babcon Uganda Ltd Vs Mbale Resort Hotel Ltd CA No.87/2011** while considering the provision of section 9, posed a question which he answered in the affirmative.

**“Does section 9 of the ACA oust the jurisdiction of Courts, except as provided by the ACA in respect of matters that are now governed by the ACA?**

**Justice Egonda Ntende JA went ahead to hold that, 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 made available to the parties to solve their disputes and to that extent oust the jurisdiction of the courts to entertain such a dispute”.**

This Court is bound by the decision of the Court of Appeal which is very clear. Section 9 of the ACA outs the general unlimited jurisdiction of the High Court in arbitration matters.

This Court also considered the Arbitration Rules. Rule 2 and 3 provide as follows:

**Rule 2. “An award may be filed or registered in the Court by a party with the Registrar of the High Court or in the District Registry of the High Court within the local limits of which the arbitration has been held.**

**Rule 3 “An ward on being filed or registered shall be given its serial number in the civil list and all subsequent proceedings in connection with it shall be similarly numbered”**

The Tenancy Agreement was very clear in the Arbitration clause X. Arbitration was to be held from Kampala District and the Court within the Local limits of arbitration in this case is the Commercial Division of the High Court.

The Award should have been registered with the Commercial Division and all proceedings connected thereto filed in that court.

I doubt if this was done by any of the parties.

Having said the above, was the Application before the Deputy Registrar Her Worship Cissy Mudhasi competent?

Are the remedies under the Application for Judicial Review available to the Applicant?

In view of the established principle and interpretation of the law that section 9 of the ACA ousted jurisdiction of the High Court except as provided in the Act, the Applicant abused the legal process while expressing his dissatisfaction with the Arbitral award as he could not Approbate and Reprobate the arbitration process.

The learned Deputy Registrar had no jurisdiction to entertain an Application brought under section 98 of the CPA in respect of an arbitral award as the law specifically provides for the procedure where one is aggrieved and for enforcement.

Secondly, it is trite law that Judicial Review is not concerned with the decision in issue perse but with the decision making process. Judicial Review is concerned with prerogative orders which are basically remedies for the control of the exercise of power by those in Public offices.

They are not aimed at providing a final determination of private rights which is done in normal civil suits. The said Orders are discretionary in nature and court is at liberty to refuse to grant any of them if it thinks fit to do so even depending on the circumstances of the case where there had been clear violation of the principle of natural justice (Ref to case of **Ignatius Loyola Malungu Vs 199 MC No.059/2016).**

Certainly the issue between the parties does not fall under the ambit of judicial Review.

Departure from the provision of the Arbitration and Conciliation Act by both parties and their Counsel has rendered all proceedings before this Court incompetent.

I agree with the authorities cited by both Counsel on the principle but they were quoted out of context as facts before this court are very different. In those cases, Court was dealing with cases brought before it under the provision of the Arbitration and Conciliation Act which is different in the Applications before this Court. The ideal procedure the Applicant ought to have followed is provided for under the Arbitration rules 7 (1) which provides;

**“Any party who objects to an award filed or registered in court may within ninety days after the notice of the filing of the award has been served upon that party, apply for the award to be set aside and lodge his or her objections to it, together with necessary copies and fees for serving them upon the other parties interested”.**

**(2)“The parties on whom the objections are served may within 14 days after the date of service of the objections, lodge cross objections which shall be served on the original objector”.**

As earlier mentioned, the successful party at CADER now Respondent did not follow the provisions of the law by causing the filing or registration of the award with the High Court for purposes of enforcement by seeking for its execution. It is apparent that CADER does not enforce its awards. It is the High Court to enforce the awards as if it is treated as a decree of court.

Had the Respondent Trident Infratech Ltd followed the procedure under ACA, the Applicant global Wire Ltd would have (90) ninety days within which to lodge an Application to have the award set aside if it has grounds that are clearly stipulated under section 34 (2) which has seven (7) grounds (supra).

It is therefore important that after the award, the successful party adheres to the law under the ACA specifically to

1. Have the award certified.
2. Have it registered before the Registry of the High Court within the local limits of the Arbitration and
3. Have it officially served on the party against whom the award was made.

This is important because under section 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 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.

If the party does not comply with the order amicably then enforcement/execution proceedings should follow).

Needless to mention, I find the current provisions under the ACA very unambiguous that even a lay person can easily comprehend the procedure involved in the arbitration process.

I have therefore failed to fathom out the reason behind all these erroneous procedures adopted by both parties inspite of having learned Counsel involvement in the matter right from the Chief Magistrate’s Court until now.

Ramesh Halai in his Affidavit dated 31st July 2019 paragraph 21 stated **“that after the Applicants became aware of the content of the award in arbitration, they started removing their equipment from the 1st Respondent’s premises which equipment constitutes the only known assets of the Applicants”.**

He did not attach any evidence of the official notification and service of the award upon the Applicant.

Further under paragraph 5 of his Affidavit in reply to this Application, he stated;

**“That the 1st Respondent locked up the premises and denied the Applicant access with the supervision of the District Police Commander (DPC) Mukono and LC1 Chairperson Kiwanga until the Applicant pays rent”.**

And in paragraph 6, **“that this Honourable court confirmed the status quo from the parties in MA 198/2019 and maintained it that the Applicant stays away”.**

In essence, Court/Deputy Registrar endorsed an illegal process as locking of the premises with the help of the DPC Mukono was not supported by any warrant from Court.

**Decision of Court**

In conclusion of this matter, I hold that;

1. Both parties have acted in breach of the Arbitration and Conciliation Act CAP 4, Laws of Uganda.
2. The Interim Order issued by the Deputy Registrar dated 15th July 2019 is incompetent, null and void, and is hereby set aside.
3. All Applications filed in this Court between the parties and or any other person(s) arising out of Arbitration Cause No. CAD/ARB/47/2018 are declared incompetent as they were filed in breach of the ACA.
4. The parties are directed to pursue their remedies in accordance with Provisions of the Arbitration and Conciliation Act ACP 4.
5. It follows that the status quo prevailing at the time of the award should be restored.
6. No order is made as to costs.

Dated this **6th** day of **September 2019.**

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Margaret Mutonyi

**RESIDENT JUDGE**