

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASAKA

MISCELLANEOUS APPLICATION NO. 138 OF 2020

(ARISING FROM MISCELLANEOUS APPLICATION NO. 26 OF 2020)

(ARISING FROM ARBITRAL CAUSE NO. 01 OF 2020)

(ARISING FROM ARBITRAL CAUSE NO. 78 OF 2019)

UGANDA NURSES AND MIDWIVES

COUNCILAPPLICANT/RESPONDENT

VERSUS

RAM ENGINEERING (U) LTD RESPONDENT/CLAIMANT

AND

STANBIC BANK LTD GARNISHEE

Before; Hon Lady Justice Victoria Nakintu Nkwanga Katamba

RULING

This application was brought under Section 98 of the Civil Procedure Act, Section 33 of the Judicature Act, Order 9 Rule 27 & Order 52 Rules 1 & 3 of the Civil Procedure Rules, Section 34(2) (a) (iii), iv, v, vii and 34 (2)b) of the Arbitration and Conciliation Act Cap. 4; seeking orders that;

- a. The ex parte proceedings, Arbitral Awards, Judgment and decree, certificate of taxation, and subsequent garnishee orders issued in execution of the decree, entered by the Court in Arbitral Cause No. 01 of 2020 and Miscellaneous Application No. 26 of 2020 respectively be set aside;

- b. A permanent injunction doth issue against the Respondents from further deducting monies owing to the Applicant from its account No. 9030005852950 held with the Garnishee in the name of Uganda Nurses and Midwives Council;
- c. The said applications be fixed for hearing on their merits inter parties; and
- d. Costs of this application be provided for.

The grounds of the application as stated in the affidavit of Ilakut Angelah, the Applicant's Assistant Registrar are briefly that;

- 1. On February 13, 2020, Ugx 444,400,000/= was attached from the Applicant's Stanbic Bank A/C No. 903000585950 by the Respondent for allegedly breach of contract of software development project of databases and IT apps;
- 2. The Applicant has never entered into any agreement for software development with the Respondent nor has it entered into an arbitral agreement with the said company;
- 3. The Applicant was never served nor informed of the said suit and it never participated in the arbitration proceedings or court proceedings before the ex parte proceedings, ruling, decree, garnishee orders were rendered;
- 4. The Garnishee did not inform the Applicant upon receipt of the Garnishee order;
- 5. The Applicant has a plausible defence to the said suit and would be condemned unheard if the application is not granted;

In reply, Mugambagye Julius, the Managing Director of the Respondent Company stated in his affidavit that the application lacks merit as execution already issued and was completed. He also stated that the Applicant is a distinct body and is passing off another body though in related names but with different officers and claims of interest in funds were attached that belonged to a different body. That the funds were paid by the Garnishee after satisfying itself and also informing the official signatories of the affected body. He further stated that the work of data bases contracted by the Claimant was duly executed and delivered to the affected body and the application should be dismissed with costs.

In Rejoinder, the Applicant's Acting Registrar stated that the Applicant is the only Uganda Nurses and Midwives Council. She also stated that the Applicants money in Stanbic Bank was irregularly garnished in favor of the Respondent and the garnishee never informed the Applicant prior to attaching the said funds.

Both Parties filed written submissions.

Counsel for the Respondent raised two issues for determination by this court;

1. Whether proceedings in Arbitral Cause No. 78 of 2019., Arbitral Cause No. 1 of 2020 and Miscellaneous Application No. 26 of 2020 are irregular, illegal and an abuse of court process;
2. What remedies are available;

Regarding the Respondent's preliminary objections, Counsel argued that the failure to insert a date in the jurat does not render the affidavit incurably defective as per *Article 126(2) e) of the Constitution*. Counsel also submitted that the Applicant's Acting Registrar is by virtue of *Section 11(1) of the Nurses and Midwives Act Cap 274* the Chief Executive Officer of the Council and head of secretariat and as such, lack of a substantive Registrar does not vitiate the affidavit deposed on behalf of the Council by the Acting Registrar.

As to whether the proceedings were illegal, irregular and an abuse of court process, counsel argued that court cannot sanction an illegality and quoted the case of *Sheikh Hussein Mayanja versus Christopher Kisingiri HCCS No. 0129 of 2010* to that effect. Counsel further argued that garnishee proceedings must be conducted in the manner provided in Order 23 of the Civil Procedure Rules and can only be brought by a decree holder, either before or after oral examination of the judgment debtor. Counsel submitted that the Arbitration and Conciliation Act is clear on the procedure of arbitration proceedings and that the Applicant has never been party to any arbitration proceedings involving the Respondent.

Counsel argued that the learned Deputy Registrar should have adhered to *Section 35(2) of the Arbitration and Conciliation Act* which requires the party relying on an arbitral award to furnish an original duly authenticated arbitral award and the original certified arbitration agreement. Counsel highlighted irregularities in the documents on the court record and illegalities including the absence of any sort of business transaction between the parties and the existence of an arbitral award not delivered by an arbitrator appointed by both parties or any certified copies of the arbitral award, decree or arbitration agreement.

Counsel prayed for the court to set aside the arbitral award or declare it null and void, order the Respondents to refund Ugx. 444,400,000/=, issue a restraining order against the Garnishee from further transferring monies from the Applicant's account and costs of the application.

The Respondent did not file written submissions.

Determination of the Application;

The Applicant brought this application to challenge a garnishee order, execution of that order, ex parte arbitration and court proceedings from which the order arose.

The Applicant claims to have been unaware of the proceedings and ultimately the garnishee order and seeks to set aside the arbitral award and garnishee order on grounds that they were irregular, illegal, and an abuse of court process.

Issue one; Whether proceedings in Arbitral Cause No. 78 of 2019, Arbitral Cause No. 1 of 2020 and Miscellaneous Application No. 26 of 2020 are irregular, illegal and an abuse of court process;

It is the Applicant's claim that it never entered into any agreement with the Respondent for software development neither has it ever entered into an arbitral agreement with the Respondent Company. The Applicant also claims to have never been served nor informed of the suit from which the garnishee order ensued.

The Respondent on the other hand contends that the applicant is a distinct body and is passing off as another body though in related names and claims no interest in the funds that were attached. It is further the Respondent's contention that the application is overtaken by events as execution has already been completed.

The Applicant adduced a report of the Auditor General to prove its existence as the only Uganda Nurses and Midwives Council in Uganda.

Section 101 of the Evidence Act places the evidential burden to prove the existence of a fact on the Party alleging that fact. In the instant case, the Applicant has adduced evidence to prove its existence, however, the Respondent who alleges that the Applicant was not the party it entered into the impugned transaction with has not adduced any evidence to prove its assertion.

The Respondent has not adduced evidence of the transaction agreement or evidence of the said body bearing and using the same name as the Applicant. Considering the nature and value of the dispute between the parties, it was prudent for each party to adduce evidence proving their allegations.

Out of court settlements are a recognized mode of settling disputes and courts respect the parties' decision to settle amicably or seek recourse to arbitration as per the terms of their agreement.

Under **Section 9 of the Arbitration and Conciliation Act**, courts are not to intervene in matters under the Act and in **Section 5**, courts are mandated to stay proceedings and refer the matter back to arbitration where the agreement or transaction between the parties provides for such.

The Arbitration Act however provides for setting aside of an arbitral award by the High Court under **Section 34**.

The grounds upon which the court may set aside an arbitral award include proof that;

- a party to the arbitration agreement was under some incapacity;
- the arbitration agreement is not valid under the law to which the parties have subjected it;
- 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;
- the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration;

In the instant case, the Applicant contends that it was never informed or made aware of the arbitration proceedings. The Applicant also alleges that it was never informed of the garnishee proceedings.

Section 18 of the Arbitration and Conciliation Act provides for equal treatment of the Parties before arbitration and requires that both parties be given the opportunity of presenting their cases.

The procedure under *Section 11 of the Arbitration Act* is that Parties shall agree on the arbitrators and where there is one arbitrator, both Parties shall agree on that arbitrator. It is only where the parties do not agree that an arbitrator shall be appointed for them. In the instant case the Applicant was not made aware of the proceedings and as such, the proceedings should not have proceeded without the Applicant's knowledge. Under *Section 24* of the same Act, parties are to be given sufficient notice of any hearing or meeting of the tribunal.

The Applicant attached the impugned arbitral award to the notice of motion and it shows that the award was delivered before the Applicant who did not appear and the proceedings were ex parte.

In the arbitral award, the arbitrator stated that the Respondent/Applicant herein was served and an affidavit of service was on the record but the said affidavit has not been introduced into evidence. It therefore cannot be concluded that the Applicant was notified of the arbitration proceedings and as such, I am convinced that the Applicant was unable to present its case before the arbitrator.

I also find it important to consider the provision of the *Arbitration and Conciliation Act Section 35 (2)* which requires the party relying on an arbitral award or applying for its enforcement to furnish the duly authenticated original arbitral award or a duly certified copy of it; and the original arbitration agreement or a duly certified copy of it.

I have to note that the copy of the arbitral award which was adduced on the record is not certified by the arbitrator and the original or copy of the agreement where the transaction arose has also not been adduced in evidence. The Applicant did not attach a copy of it to the application and neither did the Respondent attach a copy of the agreement and arbitral award to the affidavit in reply. All these matters render the entire proceedings suspect.

In the application for the garnishee order, the Respondent/Applicant therein did not attach the certified copy of the arbitral award to the application as I have observed from the record, and the agreement was also not attached to the application.

My observation from the proceedings is that the Deputy Registrar did not inquire into the agreement as there is no mention of it on the record and yet it was the main transactional document. This was an irregularity that should not have been allowed by the court.

Order 47 Rule 10 of the Civil Procedure Rules mandates the notice of filing of an arbitral award to be served on the Parties and the Arbitration Rules as per the Schedule to the Act

provide under paragraph 7, that upon receipt of such notice of filing and hearing a party objecting to the award shall apply for the award to be set aside and lodge the objection.

In the instant case, the Applicant was never served or notified of the registration of the award and the proceedings. This was an illegality.

It is settled law that Court cannot sanction what is illegal and an illegality once brought to the attention of the Court overrides all questions of pleadings including admissions made thereon (*see Makula International Ltd. versus H. E. Cardinal Nsubuga & Anor (1982) HCB*).

The law requires for the original agreement and arbitral award to be furnished when enforcing an arbitral award and yet this was not done in the instant case. This was not only an irregularity but an illegality.

Regarding the garnishee proceedings, the record of this court for the garnishee application shows that the proceedings were ex parte and that both the garnishee bank and the Respondent/Applicant herein were absent.

Although Garnishee proceedings under *Order 23 of the Civil Procedure Rules* are by ex parte application, service on the garnishee and judgment debtor is mandatory unless court orders otherwise.

Order 23 Rule 3 Civil Procedure Rules provides that, “at least seven days before the day of hearing, the order nisi **shall** be served on the garnishee, and, **unless otherwise ordered**, on the judgment debtor.”

From the record of proceedings, the Deputy Registrar ordered for the decree nisi to be served on the “Parties”. The affidavit of service however, shows that it was only the garnishee bank that was served and not the Applicant and yet the Applicant was also a Party and Court had not ordered against service on it.

For an award that was arising from ex parte proceedings, I find that it would have been prudent for the service of the decree nisi to be made on the judgment debtor/Applicant herein. Non-service prejudiced the Applicant and denied it the opportunity to challenge the execution.

The affidavit of service sworn by Nsubuga shows that the garnishee bank was served with the application for the attachment but the bank did not enter appearance.

Order 23 Rule 3 Civil Procedure Rules is to the effect that, *“If the garnishee does not dispute the debt due or claimed to be due from him or her to the judgment debtor, or, if he or she does not appear upon the day of hearing named in an order nisi, then the court may order execution...”*

In the instant case the garnishee bank did not dispute the debt as a banker-customer relationship is of a debtor and borrower, and the Applicant indeed had monies deposited with the garnishee bank.

Although it is not mandatory under the law for the garnishee bank to appear for garnishee proceedings, the bank has an implied duty of skill and care to its customer to be reasonable in carrying out its operations.

In the case of **Barclays Bank PLC Vs Qincare [1992] All Er 363**, it was held that,

“a reasonable care in executing customers` orders to pay or transfer money is implied. That this duty may sometimes interfere with the duty to honour customers` mandate but a banker who executed an order knowing or suspecting it dishonestly given but ignoring that or acting recklessly in failing to make inquiries is liable for breach of duty.”

I associate myself with the above decision and make addition that the garnishee bank had a duty to act reasonably and with care in observance of its fiduciary and corollary duty to its customer.

Even in ordinary transactions not involving substantial amounts of money, banks take steps to notify the customer of transactions that would naturally arouse suspicion and seek their confirmation before transferring such funds.

A clear perusal of the pleadings would have prima facie informed the bank of how suspect the entire transaction was, and this should have prompted the garnishee bank to notify its customer in exercise of its duty to act with reasonable care, skill and diligence.

In the instant case, the garnishee bank had a duty to its customer to exercise reasonable skill and care, prior to transferring the funds without notifying the Applicant. Failure to inform its customer, the Applicant, was reckless and a breach of the banker-customer fiduciary relationship. The garnishee bank did not notify its customer prior to transferring the funds and it did not question an uncertified arbitral award. I find that the bank acted nonchalantly and consequently, the garnishee bank cannot escape liability.

An affidavit of service sworn by Nalunkuma Edith dated the 4th day of March, 2021 clearly shows that the garnishee bank was served with the instant application on the 15th day of February, 2021 and an acknowledgement of service is attached to the said affidavit. Despite such service, the garnishee bank did not enter appearance or file any response to this application to explain or defend their actions. This further speaks to the bank's negligence in the impugned transaction.

The Respondent contends that the application is overtaken by events as execution was already completed. As already established that there was an illegality and to allow the Respondent to benefit from the illegality would be an abuse of court process.

In the case of *National Social Security Fund & Anor versus Alcon International Ltd. SCCS No.15/2009 Odoki CJ* (as he then was) held that;

“One of the principles of law is that as long as there is an illegality, it can be raised at any time as a Court of law cannot sanction that which is illegal”

The Respondent's contention that execution has already been completed cannot stand as there was an illegality in the process which will not be sanctioned by this court. The allegations raised by the Applicant have been sufficiently proved and therefore, this application succeeds.

This application is therefore allowed on the following orders;

1. The Arbitral proceedings and Arbitral award in Arbitral Cause No. 78 of 2019 are hereby set aside;
2. The Garnishee proceedings, Garnishee order, execution of the Garnishee order and taxation certificate in MA No. 26 of 2020 are hereby set aside;
3. An order restraining the Garnishee Bank from further making transfers to the Respondent from the Applicant's Account is hereby issued;
4. An order for refund of Ugx. 444,400,000/= with interest on the court rate, is hereby issued against the Respondent and the garnishee bank jointly and, or severally;
5. Costs of the application are awarded to the Applicant;

I so order.

Dated at Masaka this 4th day of October, 2021.

Signed;



VICTORIA NAKINTU NKWANGA KATAMBA
JUDGE