

UGANDA / JUDGMENT

# Excel Construction Ltd v GCC Service Ltd (Miscellaneous Application No. 1245 of 2017) [2018] UGCommC 47 (10 May 2018)

[2018] UGCommC 47

## COURT

Commercial Court of Uganda

## CASE / FILE NUMBER

Miscellaneous Application No. 1245 of 2017

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL DIVISION]

MISCELLANEOUS APPLICATION No. 1245 OF 2017

\*[Arising From Misc Application 156 &amp; Misc Cause 23 of 2017 &amp; Cad/Arb Claim No. 34 of 2015]\*

EXCEL CONSTRUCTION LIMITED ::::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

GCC SERVICE LIMITED ::::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: HON. MR. JUSTICE B. KAINAMURA

## RULING

This is an application by Chamber Summons under Section 33 of the Judicature Act 13, Section 98 CPA and Section 34(5) of the Arbitration and Conciliation Act (ACA) seeking orders that;

1. Misc Cause No. 23 of 2015 GCC **\*Services Ltd Vs Excel Construction Ltd\*** be struck out and dismissed for failure to provide security for performance of the Award in CAD/ARB claim No. 34 of 2015.
2. The respondent pays costs of the application.

In support of the application is an affidavit deposed by Rajesh Dewani a Director of operations in the applicant company who in brief stated that;-

1. **\*Both the applicant and the respondent were parties in CAD/ARB claim No. 34 of 2015 where the arbitral tribute delivered an award in favour of the applicant.\***

2. \*The respondent being dissatisfaction with the award filed Misc Cause No. 23 of 2017 seeking the order setting aside the award.\*
3. \*The applicant applied for and court granted orders that the respondent deposits appropriate security for the performance of the award.\*
4. \*The respondent who was ordered to deposit the said security within 30 days from the 6th September 2013 has todate refused and/or neglected to comply with the order.\*
5. \*That is it in interest of justice that the application to set aside the Award be struck out and dismissed.\*

In opposition to the application is an affidavit deponed by Aggrey Ashaba the General Manager of the respondent who briefly stated that;-

1. \*As advised by their Advocate under Section 9 UCA court cannot intervene in matters governed by ACA.\*
2. \*That the orders sought for by the applicant in this application are not provided for under ACA.\*
3. \*That the penalty for failure to deposit the security for due performance of the Award is not loss of the right to be heard on the application.\*

At the hearing of the application Learned Counsel for the applicant submitted that non compliance with the order of the court ordering the respondent to provide security for the performance of the award warrants the dismissal of the application to set aside the award.

Counsel argued that by its conduct the respondent simply refused to comply with the order of court and that the consequences of the failure to comply with the court order rendered the respondent's application pending before court liable to dismissal and it should accordingly be dismissed. Counsel relied on the case of **\*Amrit Goyal Vs Harichand Goyal & 3 ors Civil Application No. 109 of 2004\*** where the Court of Appeal held that;-

**\*"A court order is a court order. It must be obeyed as ordered unless set aside or varied. It is not a mere technicality that can be ignored..... court cannot condone such deliberate contempt of its orders".\***

Counsel further urged that court is vested with sufficient power to intervene where its orders have been disobeyed. Counsel stated that under **Section 34 (5) of ACA** court is empowered to order a party challenging an Award to furnish security for its performance and under **Rule 12 of the Arbitration Rules** the exercise of the court in ordering security shall be upon principles as the court applies in cases where court orders security for performance of Decrees from which appeals have been made. In support of this Counsel cited the case of **\*Jubilee Insurance Co. of Uganda & Anor Vs Transami (Uganda) Ltd HCMA No. 592 of 2006.\*** Counsel pointed out that in case where court orders security for performance of a decree from which appeals have been made and one fails to post the security then **Order 26 r 2 (1) CPR** comes into play and the suit is

dismissed, that likewise in matters under **Section 34(5) of ACA** and **Rule 12 of the Arbitration Rules** the application for an order setting aside an Arbitral Award should be equally struck out and dismissed.

On his part Counsel for the respondent submitted that inability to deposit security for due performance of a decree or an award does not amount to contempt of court. Counsel relied on the case of **\*Wilson Kyambadde Vs Amdhan Khan Misc. Appl No. 714 of 2015\***. Further that the order to furnish security for purpose of the entire award was harsh and contrary to the practice. He relied on the case of **\*Tropical Commodities Supplies Ltd & 2015 Vs International Credit Bank Misc Appl No. 379 of 2003.\*** Still further that the respondent did not appeal the order to deposit security for satisfaction of the entire award because appeals from orders made under ACA are specifically barred by **Section 9 ACA**.

Counsel further submitted that the court lacks jurisdiction to entertain the application since **Section 9 of ACA** barres court to intervene in matters governed by ACA. Counsel cited the case of **\*Babcon Ugnada Ltd Vs Mbale Resort Hotel Ltd CA No. 87 of 2011\*** where the Court of Appeal held that **Section 9 ACA** bars courts from exercising jurisdiction beyond the limits or special jurisdiction permitted by the ACA. According to Counsel there is no provision in ACA granting the court jurisdiction to dismiss an application due non payment of security for due performance of an award. Further still that failure to deposit security should not lead to dismissal of the application for setting aside the arbitral award as that would tantamount to violation of the respondent's right to be heard.

In rejoinder Counsel for the applicant submitted that the respondent's submission that the order of court was harsh and unreasonable is a disguised attempt to appeal the order. Further the reliance on the **\*Tropical Commodities\*** case (supra) is a misconception of the **ratio decidendi** of the case as the court in that case did not lay down any particular rule or prescribe any practise or custom to follow in determining the requisite security for costs. As to whether the respondent was in contempt of court, Counsel argued that the case Counsel for the applicant relied on **\*Wilson Kyambadde\*** (supra) is distinguishable because in that case court refused to cite the applicant for contempt of court because the impugned order alleged to have been violated had lapsed which was not the case in **Misc. Appl No. 156 of 2017**. On whether the court lacks jurisdiction, Counsel argued – quite rightly in my view – that **Section 34 (5) ACA** empowers court to order a partly challenging an arbitral award to furnish security for its performance.

I have considered the applicant's application together with the affidavit in support and in opposition as well as the one in rejoinder. Court on 6th September 2017 in **Misc. Appl No. 156 of 2017** having heard all parties ordered the respondent to deposit security for payment of the award to the applicant. The said security was to be deposited not later than 30 years from the date of the ruling.

It is not in doubt that the respondent neglected and/or refused to comply with the court order. The applicant filed this application seeking orders set out in the Chamber Summons requesting court to strike out and dismiss **Misc Cause No. 23 of 2017** for failure to provide the security for performance of the award in **CAD/ARD claim No. 34 of 2015** as ordered by court in **Misc Cause No. 156 of 2017**.

The reasons advanced by the respondent for not complying with the court order are in my view to put it lightly disrespectful and unfortunate. As ably put by the Court of Appeal in **\*Amrit Goyal\*** case (supra);-

**\*“A court order is a court order. It must be obeyed as ordered unless set aside or varied. It is not a mere technicality that can be ignored. If we allowed court orders to be ignored with impunity this would destroy the authority of judicial orders which is the heart of all judicial systems”\***

I cannot agree more.

I would now proceed to determine whether the relief sought by the applicant in this application is legally tenable. The applicant submitted that in event a party fails to provide security as ordered, the court is enjoined to dismiss the party's application. Counsel drew a corollary between **O 26 r 2 (1) CPR** and **Section 34 (5) ACA and Rule 12 of the Arbitration Rules** in particular where the rule provides;-

**\*“..... and the court may thereupon order security to be given in like manner\* *as though the objector was appealing against a decree*\*\*”** (emphasis added).\*

Counsel argued, and i agree, that the implication of **Rule 12** (set out above) is that the exercise of the courts in ordering security shall be upon the same principles as the court applies in cases where court orders security for performance of Decrees from which appeals have been made. (see **\*Jubilee Insurance Co. Of Uganda & Anor Vs Transami (Uganda) Ltd HCMA 592 of 2006\***).

**Order 26 rule 2(1) CPR is clear and unambiguous. It provides;-**

**\*“If the security for costs is not furnished within the time fixed, the court shall make an order dismissing the suit unless the plaintiffs are permitted to withdraw from the suit.”\***

As earlier stated, the respondents failure and/or refused to obey the court order was disrespectful and unfortunate and the necessary consequences as provided under the law should follow.

Accordingly due to the failure by the respondent to comply with the court order set out in **Misc Appl No. 156 of 2017** and provide security for performance of the Arbitral Award in **CAD. ARB claim No. 34 of 2017**, **Misc. Cause No. 23 of 2017** is struck out and dismissed with costs. The respondent will also pay costs of this application.

It is so ordered.

**B. Kainamura**

Judge

10.05.2018

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