

UGANDA / JUDGMENT

Excel Construction Ltd v GCC Services (U) Ltd (Miscellaneous Cause No. 156 of 2017) [2017] UGCommC 250 (6 September 2017)

[2017] UGCommC 250

COURT

Commercial Court of Uganda

CASE / FILE NUMBER

Miscellaneous Cause No. 156 of 2017

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THE REUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL DIVISION]

Misc. Cause No. 156 of 2017

[Arising Out Of CAD/ARB CLAIM No. 34 of 2015 *& Misc. Appl No. 25 Of 2017]*

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

VERSUS

GCC SERVICES (U) LIMITED ::::::::::::::::::::::::::::::::::: RESPONENT

BEFORE: HON. MR. JUSTICE B. KAINAMURA

RULING

The applicant brought this application under the provision of **Section 34(5)** of the **Arbitration and Conciliation Act Cap.4, Rules 7(1), 12 and 13** of the **Arbitration Rules**.

The application seeks orders of the court directing the respondent to furnish security for performance of the arbitral award and costs made by Mr. Paul Ngotha, Arbitrator in CAD/ARB CLAIM No.34 of 2015 before Miscellaneous Application No. 23 of 2017 is heard and determined by the court. I have accordingly decided to dispose of this application first before handling the main application.

Secondary an order that the respondent pay the costs of the application.

The application is supported by the affidavit of Mr. Rajesh Dewani, the Director of Operations of the applicant. On the other hand, the respondent opposed the application and filed an affidavit in reply sworn by Aggrey Ashaba.

The grounds of the application are;

1. Following a contractual dispute between the applicant and the respondent, the parties subjected the dispute to an Arbitrator Mr. Paul Ngotho appointed by CADER and neither party disputed his independence or jurisdiction. After an inter-parties and exhaustive hearing the arbitrator made an award in favour of the applicant in CAD/ARB Claim No. 34 of 2015.
2. The total value of the award as at the time it was made excluding costs and interest that has accumulated to date amounts in total to a sum of USD 506,225.
3. The respondent has made an application to this honorable court seeking to set aside the award Vide Misc. Application No. 23 of 2017.
4. The application has no merit and is merely a disguised appeal and it's a tactic to delay the rightful payment to the applicant.
5. The respondent is a subsidiary of a foreign company which owns and controls its operations and finances.
6. The respondent has no known investments, assets and property within the jurisdiction of the court.
7. There is a danger that if the main application is dismissed, the applicant will not be able to recover the sums in the award.
8. It is just and equitable that the respondent be ordered to furnish security for the performance of the award as sought by the applicant in this application.

The brief background of the case;

The respondent subcontracted the applicant to undertake works on two workers base camps belonging to Tullow Oils Uganda Operations Pty, Ltd, a company licensed to undertake oil and gas operations in Uganda. The applicant commenced execution of the subcontract works on the basis of bills of quantities while the parties continued to negotiate a formal sub-contract agreement. A dispute arose between the parties and it was subjected to an arbitrator under the terms of the subcontract.

On 8th April 2017, the arbitrator made an award in favour of the applicant. The respondent made an application to set aside the award under section 34 of the Arbitration and Conciliation Act hence this application.

Applicant's submissions.

The applicant made the application under **Section 34(5) of the Arbitration and Conciliation Act, Cap 4** which vests the court with jurisdiction and discretion to order the respondent who is applying to set aside an arbitral award to deposit security for the performance of the award.

Counsel for the applicant submitted that the law gives court discretion to order a party applying to set aside any arbitral award to provide appropriate security. Counsel further submitted that the law does not set out specific conditions for making the order neither does the law specify the nature and extent of the security that is sufficient in the circumstances; that is all left to the discretion of the court.

Counsel further submitted that the arbitrator made a reasoned award. That while the respondent is a company registered in Uganda, it is a subsidiary of a foreign company and it has no known property and assets in Uganda that can be attached to satisfy the award in the event the application to set it aside fails.

Respondent's submissions.

The respondents submitted that the application for security for due performance of the award is speculative and should be dismissed with costs.

With respect to the claim that the respondent does not have any known assets in Uganda, Counsel submitted that by the time the applicant entered into the subcontract with the respondent, the respondent was a recently established subsidiary of a foreign company with no physical assets in Uganda and that despite it being a subsidiary of a foreign company it paid up the undisputed invoices totaling to USD 2,5053430 for the work done by the applicant.

Counsel for the respondent further argued that the circumstances under which the court ordered for security for due performance of the award in ***Jubilee insurance co of Uganda Vs SDV Transami Ltd*** cited by the applicant do not exist in this application. That in that case court granted the application on the ground that there had been substantial delay. But in the present case, court has already ordered the parties to file written submissions and has already set the date for the ruling.

Ruling

Section 34 (5) of the Arbitration and Conciliation Act states;

“If an application for the setting aside or suspension of an arbitral award has been made to the court, the court may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the arbitral award, order the other party to provide the appropriate security”.

Rule 12 of the Arbitration Rules provides;-

“Where a party who has been ordered by an award to pay a sum of money or hand over movable property lodges objections to the award, any other party interested to the award may apply to the court for an order directing the objector to give security for the enforcement of the award and of any cost that may be ordered in the objection proceedings and the court may therefore order security to be given in like manner as though the objector were appealing against a decree”.

While considering the import of the above provisions this court stated;-

“Clearly this court is granted substantive power to order appropriate security pending the disposal of an arbitral proceeding before it if it is applied for by the party that seeks its enforcement under Section 34 (5) of that Act..... This court is seized not only with jurisdiction to order security but the substantive power to do so” (see **Jubilee Insurance Co. of Uganda Vs SDV Transami (Uganda) Ltd HCMA No. 592 of 2006***)*.

It’s my view, and I agree with Counsel for the applicant, that the court may order a party applying to set aside an arbitral award to provide appropriate security pending disposal of the arbitral proceedings before it. The law does not specify the nature and extent of the security and nor does it set out any specific conditions for making the order. The only guidance to court on how to exercise its discretion is found in the last sentence of rule 12 which states;-

“..... to be given in like manner as though the objection were appealing against a decree”.

In the *Jubilee Insurance Co. of Uganda* case (supra) court further had this to say:-

“What is important is that the exercise of the court’s discretion shall be upon the same principles as the court applies in cases where the court orders security for performance of decrees from which appeals have been made”.

The principle’s court applies in cases where court orders security for performance of decree were stated in the Supreme Court decision of ***Dr.* Ahmed Muhammed Kisule Vs Greenland Bank (in liquidation) Civil Appl No. 10 of 2010*** where court stated;-

“The most often cited authority in application of this type is **Lawrence Masitwa Kyazze Vs Eunice Busingye Civil Appl No. 18 of 1990*** in which this court held that “parties asking for a stay” should meet conditions like;*

1. *That substantial loss may result to the applicant unless the order is made.*
2. *That the application has been made without unreasonable delay.*
3. *That the applicant has given security for due performance of the decree or order as may ultimately be binding upon him.*

In his affidavit in support of the application Mr. Rajesh Dewani Director of Operations of the applicant company stated at para 12:-

“That the respondent has no known property investments in Uganda that can be attached to meet the sums in the arbitral award and costs in the event that the application to set aside the award fails and is dismissed”.

In his affidavit in reply Mr. Aggrey Ashaba the General Manager of the respondent stated at para 9;-

“That in further reply to paragraph 12 of the affidavit in support I am advised by the respondent’s advocates ABMAK Associates whose advice I believe to be true that having no known immovable property in Uganda is not a basis for grant of the orders sought in the application”.

In his submission Counsel for the applicant submitted that the present application is analogous to an application for security for costs. I agree. Counsel further relied on the decision on the Supreme Court in ***Bank of Uganda Vs Bank Arabie Espanol Civil Appl No. 20 of 1998*** where court stated:-

“In the instant case the ground of absence of assets within the jurisdiction alone in my view justifies making an order for security for costs and future costs”

The applicant further relied on the decision in ***John Murray (publishers) Ltd & 10 others Vs G. W. Senkindu & Anor HCCS No. 1018 of 1997*** where the High Court in an application for security for costs stated;-

“I think the first consideration in application of this nature is whether the respondent has goods and or Chattles of his in the jurisdiction of this court which are sufficient to answer the possible claim of the other litigant which would be available to execution when the court will order him to give security for costs (see the words of Lord Halsbury in the classic case of ***Apollinaris Company’s Trade Marks [1091] 1 ch.1***)

However the court further stated in the ***John Murray*** case (supra) that it is not in every case in which the plaintiff has no property in the jurisdiction that an order for security for costs is granted. The court stated that if the respondent could demonstrate that there was machinery in place in form of reciprocal enforcement of judgments between Uganda and the County where the respondent has property then an order for security for costs would not arise as;

“..... the evil against which the rule for security for costs sought to guard largely disappeared.”

Counsel for the respondent relied on the case of ***Margaret Kato Vs Joel Kato and Nulu Nalwoga Civil Misc. Appl No. 11 of 2011*** where the Supreme Court held that an application requiring an appellant to deposit security for due performance of the decree because the applicant is not resident in Uganda and has no known assets to attach in event of they to lose the appeal is not sufficient since the respondent sued the applicant when they were living out of the country. My reading of the entire ruling indicates that to arrive at the above holding the court was swayed principally by the fact that the security deposit for due performance of the decree was in respect of damages awarded by the Court of Appeal in an auxiliary order in exercise of its discretionary powers which may well be varied by the Supreme Court. Further if the Supreme Court had wished to depart from the benchmarks it set out in ***Lawrence Musitwa Kyazze*** case (supra) which it followed in the ***Dr. Ahmed Muhammed Kisuule*** (supra) then it would have stated so specifically.

In my view the fact that the respondent has no known assets in Uganda especially so since it's a Uganda registered company is and the fact that should the order for security for performance of the arbitration award be made it will not be prejudicial to the respondent are good enough reasons for the court to deem it proper under **Section 34(5) of the Arbitration and Conciliating Act cap 4**, to order that it provides appropriate security for the performance of the arbitral award in CAD/ARB Claim No. 34 of 2015.

In the result I am satisfied that it is in the interest of justice if an order for the respondent to provide security for payment of the award to the applicant is made. The respondent is ordered 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.

Costs of this application shall be in the cause.

I so order

B. Kainamura

Judge

06.09.2017

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