

UGANDA / JUDGMENT

Motor Centre (EA) Ltd v Ssemberege (Miscellaneous Application No. 766 of 2015) [2016] UGCommC 3 (12 January 2016)

[2016] UGCommC 3

COURT

Commercial Court of Uganda

CASE / FILE NUMBER

Miscellaneous Application No. 766 of 2015

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THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION NO 766 OF 2015

(ARISING OUT OF HCCS NO 0369 OF 2011)

THE MOTORCENTRE (E. A) LTD}..... APPLICANT

VS

ABDALLAH KIIZA SSEMBEREGE}..... RESPONDENT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

The Applicant filed this application under the provisions of order 46 rules 1 (a) (b), 2, and Order 52 rules 1 and 2 of the Civil Procedure Rules as well as section 98 of the Civil Procedure Act and all enabling provisions of the law for the judgment and decree passed in HCCS 0369 of 2011 to be set aside. Secondly it is for the judgment to be reviewed and provision to be made for costs.

The grounds of the application are contained in the notice of motion as well as in the affidavit of Barbara Kembabazi the Sales Administrator of the Applicant. The grounds in the notice of motion are that the judgment was based on the FELBright reconciliation report which in its self contained misleading findings and omissions of payment made by the Applicant to the Respondent and KAAK & Sons the co - suppliers. Secondly that the final tally figure is less than Uganda shillings 6,056,000/= other than the judgment figure of Uganda shillings 47,710,000/=. Thirdly the interest awarded is unconscionable and in the circumstances it was not necessary to make such an order. Fourthly the Respondents claim is tainted with fraud. Lastly that it is just

and equitable that the application is allowed.

In the further grounds contained in the affidavit of Barbara Kembabazi, the Sales Administrator of the Applicant, she avers that she read the reports of Messieurs Nagenda & Company Associate Accountants (Uganda) and that of Messieurs Angelo & Company Certified Accountants.

She believes that the FELBright & Company reconciliation is riddled with misleading conclusions and fatal omissions which rendered it unsafe and it inevitably led the court to reach a wrong conclusion. The report failed to state precisely whether the cash sales were of Uganda shillings 43,944,000/= or of Uganda shillings 40,406,000/=. The report acknowledged that the evidence of cash sales did not relate to the differences in reconciliation and of the total verified cash sales. In the same report, cash sales amounting to Uganda shillings 25,076,000/= could be traced to the Applicant. Furthermore the report did not separate the cash loan payments made to Messieurs KAAK & Sons from the credit line of the Respondent in its transactions with the Applicant. She further believes that the Respondents cash sales where a creation/pigment of the Respondents auditors imagination in a bid to balance off payments of Uganda shillings 43,944,000/=. The report wrongly assigned the Applicants payments to the Respondent amounting to the tune of Uganda shillings 40,406,000/= to KAAK & Sons as cash sales. The assignment was at great odds with the Respondent's position that the Applicant does not owe any monies to Messieurs KAAK & Sons. The report wrongly dropped a payment of Uganda shillings 1,635,000/= and Uganda shillings 100,000/= which payments, the Respondent acknowledged having received in cash. The report erroneously dropped payments of Uganda shillings 3,000,000/= which was acknowledged by the Respondent, in spite of a Stanbic bank account statement transaction confirming it. She concludes that the Respondents claim is tainted with fraudulent claims which were buttressed by his auditors. Had they mentioned omissions been avoided, this honourable court would have arrived at a different conclusion from the one that was arrived at. In the premises she deposes that what she stated above discloses mistakes and other vital evidence that was not brought to the attention of the court.

In reply the Respondent Mr Abdallah Kizza deposes that he read and understood the affidavit in support of the application. His reply is that FELBright & Company during its proceedings called on all the parties and their auditors to make a reconciliation of the two audit reports and came to their final conclusions after taking into consideration all the evidence that was availed to them. His deposition makes reference to pages 16 to 20 of the report where the auditors whose report is being challenged in this court and it included an analysis of the contentious payment of Uganda shillings 40,406,000/= which was included in the report of the Applicants auditors and later accepted by his auditor. They further made an analysis of the Uganda shillings 43,944,000/= which had earlier been presented by his auditors. At page 6 the report clearly stated that the main issue of contention was the disputed payment of Uganda shillings 40,406,000/= as on account as indicated in the Applicant's audit report and all these payments were fully analysed in the report and the auditors came to the right conclusion.

The challenged report clearly stated at page 6 that when he was not in a position to provide some parts, he would sometimes fall back to his brother to supply the parts on cash basis outside the credit management and he would present cash sales in some cases bearing the name of his brother's business Messieurs KAAK & Son Automobiles and the Applicant never interacted with the said Messieurs KAAK & Sons Automobiles as the Applicant only interacted with him. All the dropped alleged payments were fully analysed by the auditors at pages 17 to 19 of the audit report. On the basis of advice from his lawyers, he believes that the award of interest was proper and premised on the principles of law. Secondly that the application is bad in law, an abuse of court process and meant to delay justice and should be dismissed with costs.

I have further considered the affidavit of Barbara Kembabazi which elaborates on the contentions about the propriety of the audit report filed in the rejoinder. I do not need to refer to the said affidavit for the moment because I have to consider points of law raised in the submissions of the Respondents Counsel before I can, if at all, deal with the audit reports. A further affidavit in surjoinder was also filed in reply to the affidavit in rejoinder by the Respondent.

The Applicant is represented by Counsel Stephen Mungoma while the Respondent is represented by Counsel Ali Sebaggala. The Applicant intimated to court that it had issued a cheque of Uganda shillings 6,036,000/= which is the figure both parties consented to pursuant to a joint audit exercise before a reference to independent auditors of contentious matters. The cheque was issued in favour of the Respondent in settlement of the suit. The court was addressed in written submissions by both Counsels.

Ruling

I have carefully considered the written submissions. The first matter to be addressed is the contention of the Respondent's Counsel whether the court can review the findings of a referee. The Respondent's Counsel relied on the provisions of order 46 rules 1 of the Civil Procedure Rules as to whether there was discovery of new and important matters of evidence that was overlooked by the trial court. He contended that the application makes reference to flaws in the FELBright report arising from contentious payments and failure to fix the correct working figure, overlooking double payments etc. However there was nothing in the affidavit and submissions showing that there was the discovery of new and important evidence which after the exercise of due diligence was not within the knowledge of the Applicant. Secondly the Applicant is asking the court to review an award given by an umpire which powers the court does not have under review.

In rejoinder to this submission which is of a preliminary nature the Applicant's Counsel submitted that the conditions for the review of a judgment or order include the discovery of new and important matters of evidence previously overlooked by excusable misfortune. Secondly there has to be mistake or error apparent on the face of the record. Thirdly for any other sufficient reason that is analogous to any of the first two grounds on which a review may be made. He submitted that the Respondent's claim is based on the business transaction carried out between the parties on credit goods supplied by the Respondent and consumed by the Applicant. Both parties did not agree on their respective accounts. The courts directive was to have an

independent audit firm to reconcile the respective accounts. The report was prepared and the court relied on it. It is understandable that the party's lawyers are not professional accountants/ auditors and could not expose the flaws in the final audit report which included dropped payments and double payments as well as fraudulent claims on the part of the Respondent therein. The Respondent did not justify why the dropped payments could only be counted as money received by himself and therefore should have been deducted from his claim. The Umpire failed to do his duty and he reiterated earlier submissions on the point. In the premises he contended that the Applicant's application discloses new and important matters of evidence previously overlooked by excusable misfortune. Secondly the Respondents claim is tainted with fraud, which fraud was established.

I have carefully considered the application and I have come to the conclusion that the Applicant does not object in any way or refer to any error made by the court except in its objection to the award of interest. The court did not do anything other than adopt the award of the referee to whom the reconciliation controversy had been referred after the auditors appointed by the parties failed to agree on certain contentious matters and only agreed that the Plaintiff/ Respondent was entitled to Uganda shillings 6,056,000/=.

In the premises I am in agreement with the Respondent's Counsel on the issue as to whether a court of law can review on the basis of order 46 rules 1 of the Civil Procedure Rules the decision of an arbitrator or referee made pursuant to section 27 of the Judicature Act. The facts of this case are clearly spelt out in the final judgment of the court. Final judgment was delivered on 28 August 2015. For emphasis I will quote the part of the judgment which adopts the award of the referee. In the four page judgment the court accepted the award of the referee and went ahead to determine the remaining issue of damages, interests and costs. The court did not determine any other matter. The judgment of the court is as follows:

"There were several questions referred for trial by the auditors. The Plaintiff's action against the Defendant in the plaint is for Uganda shillings 59,026,000/=, interest at commercial rate from the date of filing the suit until payment in full, general damages and costs of this suit. The elaborate particulars of claim show a claim for alleged transactions for the period 12 February 2009 till 21st of June 2011. The tabulated particulars in figures ran for about 30 pages of typescript. The auditors appointed by the parties are Messieurs Nagenda and Company Certified Public Accountants, appointed by the Defendant and Messieurs Angelo and Company Certified Public Accountants appointed by the Plaintiff. Their terms of reference were to:

1. Conduct a reconciliation of accounts based on the claim in the plaint and for the period reflected in the particulars of claim in paragraph 4 of the plaint.
2. The reconciliation shall establish which party owes money to the other.
3. The Auditors shall file a joint report of the findings.

4. Any disputed documents would be included to indicate two case scenarios. The first case scenario will give the account if the disputed documents are taken into account. The second case scenario would give the accounts if the disputed documents are not taken into account.
5. The disputed documents would be identified in an appendix or annexure.
6. The audit would be carried out within a period of one month and a report shall be filed in court.

The auditors filed a partial reconciliation report of the accounts of the parties to this suit but disagreed on some matters. They both arrived at a figure of Uganda shillings 6,056,000/= as owing to the Plaintiff and this amount was recognised by the court as due to the Plaintiff in the ruling dated 26th June 2015.

The auditors however failed to agree on the rest of the reconciliation and a third Auditor was appointed to complete the job.

Messrs FELBRIGHT & CO Certified Public Accountants were appointed by the Registrar and reconciled the various reports of Angelo and Co. Certified Public Accountants and Nagenda & Co. Certified Public Accountants. Their report is dated 21st of August 2015 and filed on court record the same day.

The report is an award under section 27 (c) of the Judicature Act and is enforceable as a judgment of this court. The court recognises the award. In accordance with the reconciliation of Messrs Fulbright & Co. Certified Public Accountants, the Plaintiff is entitled to payment of Uganda shillings 47,710,000/= by the Defendant.

What remains is the determination of the claim for damages, interest and costs.”

The judgment speaks for itself. There is no challenge to the reference which is the decision of this court for the registrar to refer the contentious matters for determination by an independent auditor. The registrar appointed the auditor and the court recognised the award as an award under section 27 (c) of the Judicature Act which is enforceable as a judgment of this court. In this application the Applicant wants the court to review the award. Do I have jurisdiction to review an award under Order 46 rule 1 of the Civil Procedure Rules? The wording of Order 46 rule 1 (a) and (b) is very explicit about which order can be reviewed by a judge. It has to be a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or a decree or order from which no appeal is allowed. Under Order 46 rule 2 of the Civil Procedure Rules, an application for review of a decree or order of the court, shall be made only to the judge who passed the decree or made the order sought to be reviewed. The quotation of the judgment I have made above indicate that the court only decided the question of damages, interests and costs. The court only recognised the award of the auditor to whom a dispute between joint auditors had been referred for arbitration. I cannot review what I never decided.

I have duly considered the grounds for setting aside an award made pursuant to a reference under section 27 (c) of the Judicature Act in **HCCS NO 342 OF 2009 E. Kajumba Muganga t/a St. Catherine Clinic vs. Microcare Health Clinic**, in a judgment dated 7th Oct 2015, where I considered the grounds for setting aside an award of a referee and this is what I said:

“Similarly grounds for setting aside an award made pursuant to a reference by the court under section 27 (c) of the Judicature Act are provided for under Order 47 rule 15 of the Civil Procedure Rules. Rule 15 provides that no award shall be set aside except on one of the grounds stipulated there under namely: corruption or misconduct of the arbitrator or umpire; either party having been found guilty of fraudulent concealment of any matter which he or she ought to have disclosed, or of wilfully misleading or deceiving the arbitrator or umpire; or the award having been made after the issue of an order by the court superseding the arbitration and proceedings with the suit or after the expiration of the period allowed by the court, or being otherwise invalid.

Section 27 (c) of the Judicature Act provides that where in any cause or matter, other than in a criminal proceeding the question in dispute consists wholly or partly of accounts, the High Court may, at any time, order the whole cause or matter or any question of fact arising in it to be tried before a special referee or arbitrator agreed to by the parties or before an official referee or an officer of the High Court. In this case the parties had appointed their own auditors who were supposed to come up with a joint audit report concerning the accounts of the parties. The auditors reached a stalemate when they could not agree on certain reconciliations issue affecting a substantial part of the Plaintiff's claim. The court appointed a special referee to reconcile the grounds of contention which remained pending after the joint audit exercise ended only with a partial reconciliation report. Such references are governed by Order 47 of the Civil Procedure Rules. Specifically a reference when made results into an award under Order 47 rule 10 of the Civil Procedure Rules which award shall be filed in court and notice of the filing given to the parties. There may be grounds for the court to modify or correct and the award in circumstances specified under Order 47 rule 12 of the Civil Procedure Rules. The court may modify or correct an award by order where it appears that part of the award is upon a matter not referred to arbitration and that part can be separated from the other part which does not affect the decision on the matter referred. Secondly the court can modify or correct and an award where the award is imperfect in form or contains any obvious error which can be amended without affecting the decision. Lastly the court can modify if it contains a clerical mistake, or error resulting from an accidental slip or omission. The court may also remit the award or any matter referred to arbitration for reconsideration by the same referee, arbitrator or umpire upon such terms as the court thinks fit. This is provided for by rule 14 Order 47 CPR. The power to refer the matter or remit back to the arbitrator or referee arises where an objection is made to the legality of the award which is apparent upon the face of it. Finally the grounds for setting aside an award can be advanced and I have already made reference to it as under Order 47 rule 15 of the Civil Procedure Rules.

No corruption or misconduct of the arbitrator or umpire has been alleged instead fraud of the Plaintiff has been alleged in the application. There is no allegation of fraudulent concealment of any matter which ought to have been disclosed for the making of a wilfully misleading or deceiving matter to the arbitrators or umpire. In the premises I find that there are no grounds for considering the Applicants application by this court and in this application as far as the award of the referee is concerned. The very reason why the matter was referred to referees is because it was referred for the benefit of the expertise of another profession to have it resolved. In the premises I cannot consider the merits of the matters argued in the reference which matters still relate to reconciliation of accounts. In the best case scenario for the Applicant, the issue has to be referred back to the same arbitrator on any of the grounds provided for under Order 47 rule 14 of the Civil Procedure Rules.

Finally the question is whether I have jurisdiction to consider whether there is an illegality apparent on the face of the award under Order 47 rule 14 of the Civil Procedure Rules. This is because the wrong procedure was used by moving under order 46 which deals with the reviews of the decrees or orders of this court and not the award of a referee, arbitrator or umpire to whom a reference of particular matter or cause has been made. It is alleged that the Respondent's claim is tainted with fraud. The parties have dwelt at length in the arguments of whether there was fraud and therefore illegality. The allegations are inter alia to whether there were double payments and whether certain payments had already been made. It is alleged that there are misleading findings and omissions. These are still matters of reconciliation of accounts.

Before concluding the matter I make reference to the award of interest by this court which has being attacked. In this case interest was awarded in lieu of an award of general damages on the basis that they serve the same purpose of **restitutio in integrum**. General damages were not awarded separately.

Award of reasonable interest on a principal amount is at the discretion of the court under section 26 of the Civil Procedure Act. Where the interest awarded is manifestly excessive, it is not a ground for review but that of appeal.

Secondly there is no new and important piece of evidence which has been advanced as would affect the exercise of the discretionary powers of the court to award interest to a successful litigant.

Last but not least there is no error apparent on the face of the record as far as an award of interest is concerned. That notwithstanding, if the award of the referee re-considered, it has the potential of affecting the quantum of award of interest.

The Respondent alleged double payments been reflected in the final award. Secondly it is alleged that the referee was aware of the fraud but refused to point out that the Respondents claim is not valid or truthful.

This suit went through a protracted process of Auditor's reconciliation efforts and has hit snags on the basis of reconciliation efforts of the accounts of the parties for over one year. Initially the parties were unrepresented. Subsequent representation by Counsel came about after the final judgment of this court and specifically in this application.

Doing the best I can, and to avoid a multiplicity of proceedings, the allegation of fraudulent claims such as double payments as against the Respondent and omissions by the auditors will be reconsidered by the referee under Order 47 rule 14 of the Civil Procedure Rules.

The referee shall decide whether the award should be modified or not on the basis of the allegations contained in the affidavits attached to the application and that in the reply thereof. The referee may consider the submissions on the reconciliation matters as well. The referee shall render a decision within one month from the date of the remittance of this issue for reconciliation.

The allegations contained in the notice of motion together with the numerous affidavits in support and in opposition are hereby remitted back for decision of Messieurs FELBright & Certified Public Accountants.

The costs of this application shall abide the outcome of the reconsideration of the award.

The judgment of the court as recognises the previous award is set aside and the court will recognise whatever decision is reached by the referee pursuant to reconsideration of the award and the order of interest by the court will be applied on that amount.

Ruling delivered on 12 January 2016 in open court

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Sebagala Ali Counsel for the Respondent

Respondent is in court

Counsel Senkumba Denis holding brief for Stephen Mungoma Counsel for the Applicant

Barbara Kembabazi Administrative officer of Applicant in court

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

12 January 2016

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