

UGANDA / JUDGMENT

Zhonghao Overseas Construction Engineering Co. Limited v Attorney General and Others (Miscellaneous Application 1955 of 2023) [2023] UGCommC 125 (29 November 2023)

[2023] UGCommC 125

COURT

Commercial Court of Uganda

BEFORE

Kahigi Asiimwe, J

CASE / FILE NUMBER

Miscellaneous Application 1955 of 2023

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THE RTPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT I(AMPALA
(CoMMERCIAL DMSION) MISCELLANEOUS APPLICATION NO. 1955 OF 2023
ARISING OUT OF HIGH COURT NO. 533 OF 2021

ZHONGHAO OVERSEAS

CONSTRUCTTON ENGINEERING CO. LTD: :::::::::::::::::::::::APPLICANT VERSUS

- 1. ATTORNEYGENIRAL
- 2. TIJE SECRBTARY TO TREASURY/TREASURY OFFICER ACCOUNTS MINISTRY OF FINANCE
PLANNING AND ECONOMIC DEVELOPMENT
- 3. THE PER]UANENT SECRETARY MINISTRY OF HEALTH
- 4. THE ACCOUNTING OFFICER MINISTRY OF
HEALTH:: :::::::::::::::::: :: :: :::::::::: :: : :::::::::::RESPONDENTS

Before Hon. Lady Justice Patricia Kahigi Asiimwe Ruling

Introduction

- The Applicant filed this application by chambers summons under Order 23 Rules 1 and 10 of the Civil Procedure Rules and Sections 34 6(1) and 7 1(2\ of the Arbitration and Conciliation Act, Cap.4, Rule 13 of the Arbitration Rules, Section 21 of the Government Proceedings Act, Cap 77, Rule 16 of the Government Proceedings (Civil Procedure Rules) SI 77-1 and S.6(1) and (2) of the Evidence (Bankers Book) Act Cap 7 and Article 126(21) (el ot the Constitution. I
- The Applicant prayed for the following orders: 2
- a) That the court appoints an arbitrator/adjudicator.
- b) Interim measures of protection be issued against the Respondents/a mandatory injunction doth issue compelling the Respondents to pay the Applicants what was ordered in respect of Certificates (IPC) No. 6 of USD 56,178.20, in respect of Certificates (IPC) No. 7 of USD 259,649.67, in respect of retention payment of USD 279,644.26, in the Judgment on admission entered in High Court Civil Suit No. 553 of 2021 before Her Worship Juliet. H. Hatanga.
- c) Temporary Injunction restraining the Respondents from making any further payments to the new contractor on the site.
- d) Interim measures of protection be issued against the Respondent restraining them from interfering with the Applicant/judgment creditor's Rights.
- e) A declaration that the Applicants/Judgment creditor is entitled to payment of what was ordered in the Judgment on admission issued in H. C. C. S No. 553 of 2021.
- f) The Respondents appear in this court and show cause why they should not pay to the Applicant what was ordered in H. C. C. S No. 553 of 2021.
- g) The \$2^{nd}\$, \$3^{rd}\$, and \$4^{th}\$ Respondents be summoned to the High Court for defying the Orders in the Judgment on admission issued in H. C. C. S No. 553 of 2021.
- h) An order for the Applicant to be paid exemplary/aggravated and General Damages for contempt of court.
- i) Attachment of the money held in various accounts in Vote 014 held by the Secretary to the Treasury/ treasury officer Accounts Ministry of Finance Planning and Economic Development be attached by an order nisi to clear the date.
- j) A writ of a prerogative of Mandamus be issued against the Respondent to compel the Attorney General and the Treasury Officer Accounts to carry out the statutory duty to pay the Applicant what was ordered in the Judgment on admission issued in H. C. C. S No. 553 of 2021.

- k) The quantity surveyor and Project Coordinator Ministry of Health calculates the payments mentioned in items

³,4,5,6,7,8, in the letter dated 1 5th September 2021 verified by the Permanent secretary.

- 1) The costs of this application are provided for.
- a . J The Application was supported by affidavits of Wang Fei Fei Leo, the Commercial Manager of the Applicant who stated that on 8th February 2016, the parties entered into an agreement for the construction of Staff Houses for selected Health facilities in Kaboong, Kotido, Abim, Moroto, Napak, Amudat and Nakapiriti District.
- The agreed contract price was USD 5,592,885. 18. The Applicant stated that they commenced work fourteen days after the signing of the contract and were to complete the work within eighteen (18) months. He stated that the parties had several meetings and correspondences relating to the execution of the works. However, they received a letter from the Respondents notifying them of the termination of the contract and they wrote back protesting the termination. 4
- The Applicant stated that despite preparing a detailed summary of the works done pursuant to the contract, no payment has been made to the Applicant. The Applicant stated that the redesigned contract has been re-tendered to another contractor. 5
- The Applicant stated that by a letter dated 3'd September 20 18, from the Ministry of Health, the Applicant agreed to resume works however the negotiations were unsuccessful. He stated that on 17th March 2021, a meeting was held at the office of the Permanent Secretar5r of the Ministry of Health where they discussed the final accounts of the Applicant. 6

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- 7. The Applicant stated that the Ministry of Health made a part payment of USD 3,207,380.78. The outstanding amount which remained was USD 4,443,505.25.

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- 8. The Applicant stated that it was able to obtain a judgment on admission in respect of Interim Payment Certificate (IPC) No. 6 of USD 56,178.20, in respect of IPC No. 7 of USD 259,649.67, and in respect of retention payment of USD 279,644.26 entered in High Court Civil Suit No. 553 of 2021 before Her Worship Juliet. H. Hatanga.
- \$\overline{9}\$ He stated that it is in the interest of justice that the Applicant be allowed to attach debts equivalent to IPC No. 6 of USD 56,178.20, IPC No. 7 of USD 259,649.67, and retention payment of USD 279,644.26 by virtue of the judgment on admission entered.

- The Applicant stated that a notice of Adjudication/arbitration 10. has been served upon the Respondents and there is a pending adjudication/ arbitration. The Applicant stated that despite the numerous demands, the Respondents have refused/failed to honor the said demand.
- 11. The Applicant presented a further affidavit of Luwarira Muhammad, an advocate of the High Court working with M/s Semuyaba, Iga & Co. Advocates. He stated that he is aware that the Applicant obtained a judgment of admission in respect of Certificates (IPC) No. 6 of USD 56,178.20, in respect of Certificates (IPC) No. 7 of USD 259,649.67, in respect of retention payment of USD 279,644.26 entered in High Court Civil Suit No. 553 of 2021. He further averred that he is aware that the said judgment amounts have not been satisfied by the Respondent.

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- 72. The 1st Respondent in response submitted an Affidavit in Reply sworn by Dr. Diana Atwine, the Permanent Secretary of the Ministry of Health.
- 13. She stated that she is aware that the Applicant filed Civil Suit No.553 of 2027 for recovery of USD 4,443,505.25 plus interest at a Bank rate of 25-26%o however the Respondent counter claimed for the unredeemed advance payment of USD 660,000 that was paid to the Applicant being 20% of the contract price. She stated that the advance payment was to be paid through percentage deductions from the interim payments certified which monies were never deducted from the Applicant.
- 14. She stated that the Applicant commenced work however they stopped work on the 6th March 2017 due to delayed payments. On 17th July 2017, the Applicant resumed work after being paid USD 1,304,322.18. The Applicant again suspended works again in November 2017 due to lack of funds to clear the outstanding balances of USD 94,243.77. The contract expired for both the contractor and supervisor on 19th December 2017 and no works have been done since then.
- 15. She stated that the Applicant has not made a formal project handover and no final accounts have been done. The final accounts summary of the project was done by a consultant of the Respondent who indicated that the Plaintiff owed the Defendant USD 853,957.
- 16. She stated that she is aware that the Applicant obtained a judgment of admission in respect of Certificates (IPC) No. 6 of USD 56,178.20, in respect of Certificates (IPC) No. 7 of USD 259,649.67, in respect of retention payment of USD 279,644.26 entered in High Court Civil Suit No. 553 of 2021.

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t7. She stated that the Respondent disputes the interest on delayed payment totaling to USD 157,685.49, the cost during the first and second period of work suspension due to delayed payment, the cost of USD 469,783.25 claimed for materials that remained on site, and the cost of USD 50,000 importation of materials from China.

Representation:

18. The Applicant was represented by Semuyaba, Iga & Co. Advocates. The Respondents were represented by the Attorney General's Chambers. Both parties filed written submissions.

Submissions:

Applicant's submissions

19. Counsel for the Applicant submitted that Section 6 of the Arbitration and Conciliation Act, Cap.4 provides for the interim reliefs that are available to parties that have a valid arbitration contract. Counsel referred to clauses 15 and 9.2 of the main contract 2004. Counsel submitted that the principles to be considered are the ones for the grant of temporary injunctions and cited the case of Kiyimba- Kagwa Versus Haji Nassar Katende (1988) HCB 43.

Respondent's submissions

20. The 1st Respondent opposed the application and submitted that the parties executed a contract dated 8th February 2016 that provided for arbitration to be in accordance with the Arbitration and Conciliation Act. They stated that this would by default leave them with CADER however they stated that they are aware that CADER has no governing council. They cited the case of CADER & Jimmy Mayanja versus Attorney General, Constitutional Petition No. 11 of 2011.
- 21. With respect to a prayer for an interim injunctive measure stopping the Respondent from paying the new contractor. The Respondent quoted the case of Kiyimba- Kagwa Versus Haji Nassar Katende (1988) HCB 43 and stated that it is not enough for the Applicant to show that they have a prima facie case, they also must satisfy court that they will suffer irreparable injury that cannot be compensated for by damages, The Respondent stated that the injury that the Applicant will face can be compensated by damages.
- 22. The Respondent submitted that the balance of convenience is in favour of the Applicant since the Respondent will be more inconvenienced if the injunction is granted and the contractors are stopped from completing the works. They submitted that failure to pay the contractor will prejudice the Respondent.

- rla With respect to the prayer for an order of mandamus to issue against the Respondent to pay the Applicant the outstanding monies. Counsel submitted that the Respondent stated that the Plaintiff owes it USD 660,000 being the advance payment that was made to the Applicant. The monies to be paid to the Applicant would have to be offset from the monies of retention payment. Counsel submitted that a dispute still exists.
- 24. In respect to the prayer that a garnishee Order Nisi be issued against the Respondents, Counsel submitted that Section 19(4) of the Government Proceedings Act bars the execution or attachment of any such money or costs. They further cited Rule 16(1) of the Civil Proceedings (Civil Procedure) Rules which states that no order of attachment of the principal rules shall have an effect in respect of any money due or accruing or alleged to be accruing from the Government.

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Issues

- 25. The issues are as follows:
- Whether the court should appoint an arbitrator/adjudicator I.
- Whether the Applicant is entitled to an interim protective $\mathbf{H}$. order compelling the Respondents to stop payment of the new contractor
- $\mathbf{III}$. Whether a writ of a prerogative of Mandamus should be issued against the Respondent to compel the Attorney General and the Treasury Officer Accounts to carry out the statutory duty to pay the Applicant what was ordered in the Judgment on admission issued in H. C. C. S No. 553 of 2021
- Whether the 2^{nd} , 3^{rd} , and 4^{th} Respondents should be IV. summoned to the High Court for defying the Orders on admission issued in H. C. C. S No. 553 of 2021
- $\mathbf{V}$. Whether the Respondents should appear in this court and show cause why they should not pay to the Applicant what was ordered in H. C. C. S No. 553 of 2021
- VI. Whether the Applicant is entitled to exemplary/aggravated and general damages for contempt of court
- Whether an order of attachment of the money held in VII. various accounts in Vote 014 held by the Secretary to the Treasury/ treasury officer Accounts Ministry of Finance Planning and Economic Development can be issued

Resolution

<u>Issue I:</u> Whether the court can appoint an arbitrator/adjudicator

\$26.\$ The Applicant prayed that this court appoints an adjudicator/arbitrator. It should however be noted that this court referred the matter for arbitration and not adjudication.

- This court notes that clause 25.4 of the General Conditions of 27. Contract dated 8th February 2016 provides for arbitration to be conducted in line with the Arbitration and Conciliation Act 2000. The arbitration clause reads "Any arbitration shall be conducted in accordance with the Arbitration and Conciliation Act 2000 or such other formal mechanism specified in the SCC and in the Place shown in the SCC".
- Under the Special Conditions Contract clause reference GCC 28. 25.4 provides that "The arbitration shall be conducted in accordance with the Arbitration and Conciliation Act 2000 of Uganda. Arbitration shall take place at Kampala". Since the Parties intended to have its arbitration governed by the Arbitration and Conciliation Act 2000, and was silent on which arbitrator, it follows that The Centre for Arbitration and Dispute Resolution (CADER) would be the centre to appoint an arbitrator in the exercise of its mandate under Section 68 of the of Arbitration and Conciliation Act, Cap.4
- In the case of TMA Architects and Urban Designers (U) Ltd 29. & Ano. Versus Prome Consultants (Miscellaneous Cause 80 of 2023) Mubiru J held that "Arbitration is a creature of contract and courts must rigorously enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes and the rules under which that arbitration will be conducted."
- 30. In the present case, the parties are faced with a dilemma. The Respondent submitted that CADER which is supposed to appoint an arbitrator has no governing council to effect the appointment. Counsel referred to the case of International **Development Consultants Ltd Versus Jimmy Muyanja** and others Misc. 133 of 2018 where it was held that the power

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vested in CADER were exercisable by the Governing Council of CADER and not by the Executive Director.

- 31. In the case of Ambitious Construction Company Limited versus Uganda National Cultural Centre Miscellaneous Application No. 44L of 2020, the Applicant filed the application requesting the court to appoint an arbitrator. The parties in the said case were faced with the same dilemma that CADER which was the appointing authority for the arbitrator had no governing council at the time the matter was handled. Court went ahead to appoint an Arbitration Centre to handle the arbitration.
- 32 In order to give effect to the intention of the parties to settle their dispute through arbitration and in the interest of ensuring that there are no delays in the process of appointing an arbitrator, this court appoints the International Centre of Arbitration & Mediation in Kampala (ICAMEK) as the arbitration centre. ICAMEK shall assign a suitable Arbitrator to handle the dispute.

Issue II: Whether the Applicant is entitled to an interim protective order compelling the Respondents to stop payment of the new contractor

33. Under Section 6(1) of the Arbitration and Conciliation Act, Cap 4, a party to an arbitration agreement may apply to the court, before or during arbitral proceedings, for an interim measure of protection, and the court may grant that measure. The provision also gives the court discretionary powers on whether or not to issue an order of interim measure of protection or not. See: John Sekaziga & Another versus Church Commissioners Holding Misc. Cause No. 15 of 2013 and International Investment House Company LLC & Emirates fr-

Africa Link for Strategic Alliance(LLC) versus Amos Nzeyi and Others Misc. Cause No. 11 of 2012

- In the case of **Multiplex Limited Versus Detach Uluslararasi** 34. Ticaret VE Muteahhit Lik Limited Sirketi (Misc. Cause 78 of 2022), it was held that the power to grant interim protective orders should be exercised cautiously and with circumspection since a party is not entitled to this relief as a matter of right or course.
- In Sekaziga & Another versus Church Commissioners 35. Holding Company Ltd (Miscellaneous Cause No. 15 of 2013) and Multiplex Limited versus Ditaco Uluslararasi Ticaret VE Muteahhit Lik Limited Sirketi (Miscellaneous Cause 78) of 2022) It was held that the general grounds of injunctions also apply to the cases of interim protection orders pending arbitration.
- The conditions for the grant of an interlocutory injunction are 36. well settled. First, an Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (see American Cyanamid Co v. Ethicon Limited [1975] AC 396, and GAPCO Uganda Limited V. Kaweesa and another H. C. Misc Application No. 259 of 2013)\$

A prima facie case

37. In the case of Swabri Ali Abubaker Mukungu Versus Kobil Uganda Ltd Miscellaneous Cause No 41 of 2015, Madrama J held that in considering whether there is a prima facie case that

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merits the grant of an interim measure of protection, the question to be considered is whether there is an agreement to submit a dispute to arbitration which is valid and whether a dispute has arisen between the parties.

38. In the Kenyan case of **BABS Security Limited v Geothermal Development Limited** [2014] eKLR it was held that:

A consensus seems to have emerged from the string of judicial authorities cited and which the Court is familiar *with, that, if an injunction is sought as the interim relief* under ... the Arbitration Act, existence of an enforceable *arbitration agreement constitutes a prima facie case.*

39. In this case this court previously determined that there is a valid arbitration clause in the contract entered into between the Applicant and the Government of Uganda represented by the Ministry of Health. There is therefore a prima facie case.

Irreparable injury which would not adequately be compensated by an award of damages

- 40. The question to be answered is if the Respondent is not restrained from paying the new contractor, will the Applicant suffer irreparable loss?
- In the case of *American Cyanamid V Ethicon* [1975] 2 WLR 41. 316, the court held that:

The governing principle is that the court should first *consider whether if the Plaintiff were to succeed at the trial* in establishing his right to a permanent Injunction he would *be adequately compensated by an award of damages for* the loss he would have sustained as a result of the Defendant's continuing to do what was sought to be *enjoined between the time of the Application and the time of*

the trial. If damages in the measure recoverable at common law would be an adequate remedy and the defendant *would be in a financial position to pay them,* \$no\$ *Interlocutory Injunction should normally be granted...*"

- 42. In the case of *Kiyimba Kaggwa Vs. Katende Abdu Nasser (supra)*, the court held that irreparable injury does not mean that there must not be the physical possibility of repairing the injury, but means that the injury must be a substantial or material one, that is, one that cannot adequately be compensated for in damages.
- In the case of *Despina Pontikos* [1975] EA 38, court held that 43. should only be granted with "interlocutory judgments" reluctance and only in very special circumstances." Court also held that "in general a mandatory injunction as a discretionary" relief should not be granted where damages would provide adequate remedy."
- In this case, the Applicant's argument seems to be that the new 44. contractor should not be paid since the Respondents has not fully paid them under the contract in dispute. Court finds that whatever damage that may be suffered by the Applicant from Respondents paying the new contractor can be the compensated in damages and it would be an adequate remedy. The Applicant has not shown proof that the Respondents would not be in a financial position to pay the damages. Therefore, the loss that the Applicant may suffer if an order for

a temporary injunction is not granted is not irreparable.

Balance of convenience

45. In the case Legal Brains Trust (LBT) Ltd V AG Civil **Application No.56 of 2023** Kihika JOA held that:

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...balance of convenience lies more on the one who will suffer more if the Respondent is not restrained in the activities complained of...

- 46. It was held in the case of GAPCO Uganda Limited Versus. Kaweesa (supra) that "the term balance of convenience literally means that if the risk of doing an injustice is going to make the applicants suffer then probably the balance of convenience is favorable to him/her and the Court would most likely be inclined to grant to him/her the application for a temporary injunction."
- 47. The question then is on which side does the balance of convenience lie?
- 48. In this case, the counsel for the Respondent submitted that the Respondents will be more inconvenienced since the contractors doing the unfinished work will have to be stopped from completing the project.
- 49. Court notes that the contract in question is for the construction of staff houses for health facilities. In Uganda National Bureau of Standards versus Ran Publishers Limited & Another Miscellaneous Application No. 635 of 2019 it was stated that "The Courts should be slow in granting injunction against government projects which are meant for the interest of the public at large as against the private proprietary interest or otherwise for a few individuals."
- 50. Court notes that allowing this Application would result in the project being halted which would not be in the interest of the public. Court also notes that allowing such an application could result in the contractor on site suing the Government for breach of contract. Court therefore finds that the balance of convenience tilts in favour of the Respondents.
- 51. This issue is therefore answered in the negative.

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Whether a writ of a prerogative of Mandamus should be Issue III issued against the Respondent to compel the Attorney General and the Treasury Officer Accounts to carry out the statutory duty to pay the Applicant what was ordered in the Judgment on admission issued in H. C. C. S No. 553 of 2021

- S.37 (1) and (2) of the Judicature Act Cap 13, gives the High Court $\frac{1}{2}$ s 52. Court discretion to grant an order of mandamus in all cases in which it appears to be just and convenient. "The order may be granted unconditionally or on such terms and conditions as the court thinks fit."
- 53. Rule 3 of *The Judicature (Judicial Review) (Amendment) Rules* 2019 Mandamus means a court order issued to compel performance by public officers of statutory duties imposed on them.
- In *Shah Versus Attorney General* [1970] EA 543, it was held 54. that "Mandamus is a prerogative order issued in certain cases" to compel the performance of a duty... Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by an Act of Parliament for the benefit of an individual.
- In *Nabuwati & 2 Others versus The Secretary to the Treasury & Another Misc. Application No. 2613 of 2016*, court stated that in order to obtain a writ of mandamus, the Applicant has to establish the following circumstances:
 - a) A clear legal right and a corresponding duty in the Respondent.
 - b) That some specific act or thing that the law requires that particular officer to do, has been omitted to be done.
 - c) Lack of any alternative.
- 56. In the instant case court finds that the Applicant has shown a legal right to be paid that arises out of the Judgment on admission issued in H. C. C. S No. 553 of 2021.
- 57. Court notes that while the Respondents do not contest the judgment on admission, the Respondents have a counterclaim against the Applicant. The deponent of the affidavit in reply stated that the Respondents have a counter claim against the Applicant of USD. 660,000 arising from the advance payment made.
- 58. Counsel for the Respondent submitted that the monies owed to the Applicant would have to be offset by the monies claimed in the counterclaim. Court notes that the value of the counter claim is higher than the money that is owed under the judgment on admission. Court further notes that the issue of whether or not the Respondent is entitled to the counter claim is one of the issues to be determined under arbitration.
- 59. While it is in the interest of justice that the Applicant is paid the monies due under the judgment on admission, court also notes that the rest of the dispute is yet to be determined. It is therefore important to balance the interests of both parties. In the interest of justice, court finds that it is only fair that the entire dispute is determined before any payments can be made.
- The application for mandamus is therefore denied. 60.

- In light of the finding under issue III, court has not deemed it 61. necessary to address the rest of the issues as the resolution of this issue disposes of the other issues.
- 62. In conclusion, therefore:
- a) The application for interim protection orders is dismissed;
- b) The International Centre of Arbitration & Mediation in Kampala (ICAMEK) is hereby appointed to assign an arbitrator to handle the dispute.
- c) Each party shall bear its costs.

Dated this 29th day of November 2023

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Patricia Kahigi Asiimwe Judge Delivered on ECCMIS

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Prepared on 13 October 2026 · Esheria