THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
(CIVIL DIVISION)
MISCELLANEOUS CAUSE NO. 0037 OF 2023
(ARISING FROM CAD/ARB/14/2021)

UGANDA CIVIL AVIATION AUTHORITY:::::::::::::::::::::: APPLICANT
VERSUS

CENTRAL PLUMBING WORKS (U) LIMITED::::::::::::::::RESPONDENT

BEFORE: HON JUSTICE SSEKAANA MUSA

RULING

This is an application brought under Article 126(2)(e) of the Constitution, Section 14 (1) and 33 of the Judicature Act, Section 98 of the Civil Procedure Act, Sections 34(2)(a)(v) and 34(3) of the Arbitration and Conciliation Act Cap 4 and Orders 51 rule 6 and Order 52 rule 1 &3 of the Civil Procedure Rules for the following;

1. An order to enlarge time to the applicant to file an Application to set aside the arbitral award vide CAD/ARB/14/2021 and costs of the application be provided for.

The grounds upon which this application is based are set out in the notice of motion and also the affidavit in support of Mr. Mathew Ngugo (Principal Legal Officer) which are briefly set out herein;

1. On the 12th day of August 2013 the applicant contracted the respondent to construct Extra Water Reservoirs at the Entebbe International Airport in a construction work Agreement vide CAA/WRKS/12-13/00043 at a contractual sum of UGX 835,000,000 VAT inclusive with a delivery period of 90 days.

2. A dispute arose between the parties arising from the agreement wherefore the respondent filed a claim before an Arbitration tribunal on the 2nd day December 2021.

3. Pursuant to the arbitration, the arbitral tribunal entered an arbitral award in favour of the respondent on the 25th day of November 2022. The applicant was dissatisfied with dissatisfied with the arbitral award.

4. The applicant intended to file an application to set aside the arbitral award vide CAD/ARB/14/2021. On the 5th day of December 2022, the applicant instructed its counsel to file an application to set aside the arbitral award.

5. The applicant's counsel acted negligently when they did not file an application to set aside the arbitral award as required by law.

6. Immediately after realizing the delay by their counsel, the applicants instructed *Ssemambo and Ssemambo Advocates* to file the said application to set aside the arbitral award.

7. The said application to set aside the arbitral award has high chances of success as it seeks to challenge the competence and composition of the arbitral tribunal which was not in accordance with the agreement executed between the parties.

The respondent in their affidavit deposed by *Gurjeet Singh Ghataurhae (Managing Director)* gave a detailed background to the dispute and contended that the applicant had a month from the date of the award to apply to set aside which was not done and thus time cannot be extended by the court as it is set by statute.

The applicant was represented by *Ssemambo Rashid and Lukwago David* while the respondent was represented by *Mukasa Albert.*

The parties made written submissions which I have considered in this ruling.

Whether this honourable court has the jurisdiction to entertain an application to enlarge time to file an application to set aside the arbitral award vide CAD/ARB/14/2021?

The applicant's counsel submitted that this court has jurisdiction to enlarge the time that is set under the Arbitration and Conciliation Act of 30 days. It was the applicant's case that the provision setting the limitation is couched in discretionary terms as opposed to mandatory terms through the use of the words 'may not be made after one month has elapsed'.

The applicant further buttressed his argument on section 96 of the Civil Procedure Act which provides for enlargement of time which is fixed. Since the high court has power to hear the application to set aside an arbitral award then it can as well extend the time within which the application can be made depending on the circumstances of the case. Counsel cited the case of ***Nairobi City County v Kenya Commercial Bank Ltd (Miscellaneous Application E 174 of 2021) [2022] KEHC 73 (KLR)*** which observed that;
"As already alluded to, section 35(3) sets the timeline within which a party may apply to set aside an award. Although the section does not state that the court may enlarge time within which to file such an application, whether or not to extend time is a matter within the discretion of the court which must however be exercised judicially, taking into account the circumstances of each case."

The applicant's counsel further argued that the composition of the arbitral tribunal was not made in accordance with the agreement executed between the parties to the agreement. In effect they tried and purported to make variations to the agreement or amend the same without the express involvement of the Solicitor General in contravention of Article 119 of the Constitution of Uganda, The Constitution (Exemption of Particular

Instruments from Attorney General's Legal Advice) Instrument, 1999 and the Guidelines & Execution of Government Instruments.

The respondent's counsel argued that time set by statute cannot be enlarged as it set by statute to wit Arbitration and Conciliation Act. In the present case section 34(3) cannot be extended as the Act does not provide for extension of time therefore none can be extended by the court as its intervention is limited by section 9 of the Arbitration and Conciliation Act which allows court's intervention in only limited circumstances.

Counsel cited the case of ***Soroti Joint Medical Stores v Sino Africa Medicines and Health Ltd Miscellaneous Application No. 99 of 2013,*** where court held that;

"Even of discretionary language is used, the statute does not make room or give jurisdiction to the High Court for enlargement of time. I agree with the respondent's counsel that the powers of court are limited by section 9 of the Arbitration and Conciliation Act which provides that no court shall intervene in matters governed by the Act. The court can only intervene in a manner provided for by the Act"

Therefore, the court's intervention in this particular instance is in accordance with section 34 of Arbitration and Conciliation Act including the restrictions set therein. See ***Katamba Phillip & Others v Magala Ronald High Court Arbitration Cause No. 003 of 2007***.

The respondent's counsel further contended that in jurisdictions which have adopted the UNCITRAL model law as Uganda have the same position. In Singapore International Commercial Court while dealing with a similar application in ***BXS v BXT [2019] SGHC (1) 10*** court held that:

> *"In matters governed by this law, no court shall intervene except where Article 5 suggests that the provisions of the Model Law (including Article 34(3) which have given force of law in Singapore by S.3 of IAA, were meant to be self-contained. A court should only intervene in arbitration related matters in limited circumstances authorized by the Model Law. It follows*

that the, three- month limitation in Article 34(3)having expired, there can be no scope for me to intervene by extending the time for setting aside the Final Award through invocation of a power (namely, that conferred by paragraph 7 of the First Schedule to the SCJA) which is extraneous to the Model Law. This conclusion on the nature of the time limit in Article 34(3) is conducive to the finality and conclusiveness of the arbitral process…..

Accordingly, I lack power to extend the time for applying to set aside the Final Award. The three months stipulated in Article 34(3) having elapsed, the right to apply to set aside an arbitral award is lost and cannot be revived by resorting to the court's power to extend time under paragraph 7 of the schedule to the SCJA"

Counsel further submitted that the claim of the applicant is frivolous and vexatious since the applicant was involved in the process of choosing an arbitrator and the application stands no chance of success.

Analysis

The jurisdiction of the High Court in arbitration proceedings is set out under section 34 of the Arbitration and Conciliation Act which provides that;

(1) Recourse to the court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3)

(2) …

(3) An application for setting aside the arbitral award <u>may not be made after one month has elapsed</u> from the date on which the party making that application had received the arbitral award, or if the request had been made under section 33, from the date on which that request had been disposed of by the arbitral award.

The UNCITRAL Model Law; Article 34 provides for setting aside as exclusive recourse against arbitral award:

(3). *An application for setting aside an award may not be made after three months have elapsed from the date on which the party making that*

application had received the award or, if a request had been made under Article 33, from the date on which that request had been disposed of by arbitral award.

The other jurisdictions have adopted the same model law with necessary adjustments to suit their circumstances like in India. Under their Section 34 of Arbitration and Conciliation Act it provides;
An application for setting aside the award must be made within three (3) months from the date on which the party making that application had received arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of or by the arbitral tribunal.

However, the period of three (3) months may be extended if the court is satisfied that the applicant was prevented by sufficient cause for making the application within the said period.

The extension of time can be made for a period of thirty (30) days, but not thereafter.

In English Arbitration Act of 1996 provides for challenge of an award or appeal which must be brought within 28 days of the award. The 28 day time limit may be extended. On application to extend time, according to ***Nagusina Naviera v Allied Maritime Inc [2003] 2 CLC 1*** the three most important considerations are:

- *The length of the delay;*
- *Whether, in allowing the time limit to expire and subsequent delay to occur, defaulting party nevertheless acted reasonably in the circumstances; and*
- *Whether the respondent to the application or the arbitrator contributed to the delay.*

See also ***AOOT Kalmneft v Glencore [2001] 1 Lloyd's Rep 128***

The courts or tribunals are enjoined in every determination whether by a court or other authority that affects the rights of a citizen or leads to any

civil consequences to adopt a legal parlance called judicial approach in the matter.

The judicial approach in judicial and quasi-judicial determination lies in the fact court or tribunal or any- body exercising judicial powers that affects the rights and obligations of the parties before them must show fidelity to the law. They should not act in an arbitrary, capricious or whimsical manner in disregard to the law. This ensures that the court or tribunal acts *bonafide* and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any by extraneous consideration. An illegality once brought to attention of the court should not be ignored. *Makula International Limited v His Eminence Cardinal Nsubuga & Rev Dr Father Kyeyune CACA No. 4 of 1981*(unreported)

The right to have recourse to court in arbitral proceedings is a substantial right and that right is not liable to be curtailed, by the form in which the right has to be enforced or exercised. The objections for challenging an award are a valuable right of the parties and if they are not filed within time, it takes away the said right to the benefit of the other. It is pertinent to mention here that although the court can look into the issue of re-filling for condoning the delay and is not powerless under those circumstances to reject an application seeking condonation and may decline to condone the delay.

The usual circumstance in which an enactment falls to be construed is where the respective parties contend for a different legal meaning of the enactment in its application to the facts of the case like in the present case. Counsel for the applicant contends that an extension of time is allowed while the respondent asserts that no extension of time can be allowed under strict interpretation of the Arbitration and Conciliation Act.

The court will need to decide the meaning of the provision in question after each party has advanced the construction of the enactment. In ***A-G v HRH***

Prince Ernest Augustus of Hannover [1957] AC 437 at 467, Lord Normand put it in this way:
"The courts are concerned with the practical business of determining a ***lis****, and when the plaintiff puts forward one construction of an enactment and the defendant another, it is the courts business……after informing itself of what I have called the legal and factual context…..to consider in the light of this knowledge whether the enacting words admit of both the rival constructions put forward."*

The provisions of section 34(3) of the Arbitration and Conciliation Act as per the language used is discretionary and thus may be interpreted to be permissive of allowing an extension of time: *An application for setting aside the arbitral award* ***may*** *not be made after one month has elapsed.*

The choice of words in section 34(3) of the Arbitration and Conciliation Act as adopted from UNCITRAL model law is rooted in discretionary terms and this has been seen in the different timelines which different jurisdictions have adopted for the challenge of an arbitral award. The adoption of the UNCITRAL model law by any jurisdiction should not be interpreted to mean it is mandatory. Indeed some jurisdictions have expressly provided for extension of time within which they can challenge an arbitral award and have further capped the time limit with mandatory provisions like; *The extension of time can be made for a period of thirty (30) days,* ***but not thereafter****.*

In my view, any legislation which preferred the time limit for challenging an arbitral award to be mandatory must use mandatory words like *must or shall* or such words that would expressly take away the discretion which drafting of the law seems to permit. I have been further intrigued by Kenyan case of ***Nairobi City County v Kenya Commercial Bank Ltd (Miscellaneous Application E 174 of 2021) [2022] KEHC 73 (KLR)*** which observed that;

> *"As already alluded to, section 35(3) sets the timeline within which a party may apply to set aside an award. Although the section does not state that the court may enlarge time within which to file such an application, whether or*

not to extend time is a matter within the discretion of the court which must however be exercised judicially, taking into account the circumstances of each case."

I entirely agree with the approach of the court in the above case and it is very persuasive to my analysis that indeed it is at the discretion of the court whether or not to extend the time to challenge an arbitral award.

The respondent's argument is simply a general principle of law that time set in a statute shall not be extended without putting the context of the words used in the enactment. The use of the words in a permissive manner should not be made to limit in application or constrain discretion allowed in an enactment. In ***Chilcot v Commissioner for HM Revenue and Customs,*** Sedly LJ said:

'I would add it has been a new experience, for me at least, to listen to an argument that, although the words of the statute are plain and unambiguous, they should be construed as not meaning what they say, without any proposed remedial or alternative construction being put forward….'

The legal meaning of an enactment is the meaning that conveys the legislative intention. The legislative intention is the meaning attributed to the legislator in respect of the words used. The court's duty is to interpret an Act according to the intent of them who made it. The paramount rule remains that every statute is to be expounded according to its manifest and expressed intention of parliament through the meaning of the words used. See ***A-G for Canada v Hallett & Carey Ltd [1952] AC 427: Maunsell v Olins [1974] 3 WLR 835***

The constitutional power vested in the High Court cannot be fettered by any interpretation which denies it an opportunity to exercise discretion in given circumstances like under the Arbitration and Conciliation Act. Injustice whenever and wherever it takes place has to be struck down an anathema to the rule of law and the provisions of the Constitution.

It is my considered view that in absence of any specific mandatory provision denying the extension of time to challenge an award, the Arbitration and Conciliation Act allows an extension depending on the circumstances of the case before it. The discretion to extend time must be exercised judicially with circumspection to avoid opening the floodgates of defeating the purpose of arbitration proceedings by excessive judicial intervention. The court should bear in mind that the extraordinary jurisdiction of the court is not a panacea for all the maladies which a litigant may suffer from.

The policy of the legislature is to minimize the intervention of the courts in arbitration proceedings and to confine the intervention into an exceptional category of cases stipulated in the legislation. Excessive intervention in arbitral proceedings is liable to render the object and purpose of facilitating arbitration as an effective form of alternate dispute resolution in commercial disputes. The role of the court, when it enters into the arena of commercial disputes must be only to facilitate an efficacious and expeditious determination of disputes.

Whether there is sufficient cause to allow an extension of time?
The applicant's counsel submitted that they failed to file any objections in time because their former counsel did not execute their instructions and thus it was a mistake of counsel. The applicant should not suffer an injustice of being denied an opportunity to have the merits of its application to set aside the arbitral award investigated and decided on.

The failure to file an application to set aside was a dilatory conduct and negligence of counsel which should not be visited on the applicant.

The applicant further submitted that the application to set aside the arbitral award has high chances of success. It seeks to challenge the competence and composition of the arbitral tribunal which was not in accordance with the agreement executed between the parties' agreement of the parties and thereby being in contravention of *Article 119 of the Constitution and The*

Constitution (Exemption of Particular Instruments from Attorney General's Legal Advice) Instrument, 1999 and the Guidelines & Execution of Government Instruments.

The respondent counsel submitted that the applicant was also represented by the applicant's internal Legal Department among others and therefore, the applicant should have challenged the proceedings at the point in time.

It was counsel's view that this application is frivolous and vexatious with the sole intention to frustrate the respondent's from enjoying the fruits of the award and incur unnecessary costs defending this application.

Analysis

The delay in filing an application to set aside an arbitral ward cannot be condoned on sympathetic ground without assigning any reasonable, satisfactory, sufficient and proper reason. The party must explain the delay with cogent evidence. Power to condone the delay in approaching the court has been conferred upon the courts to enable them do substantial justice to the parties by disposing of matters on merits.

The party seeking the condonation of delay is under an obligation to satisfy the court regarding the existence of circumstances justifying sufficient cause which prevented it from filing the application. When a litigant seeks condonation of delay, it is his duty to place all necessary material before the court for explaining the delay and showing sufficient cause. The grounds seeking condonation of delay must be real and artificial, genuine and not concocted. *See Transparent Packers v Arbitrator-cum-Managing Director 2000(2) Arb.L.R 637: M.P Housing Board, Bhopal v Satish Kumar Raizada, 2003 (2) Arb. L.R 553*

The applicant must show sufficient cause or reasonable cause for failing to file an objection within the time stipulated. The expression sufficient cause should be liberally construed in order to advance the cause of justice. The

applicant has explained the delay of about 50 days in filing the application was due to mistake and negligence of counsel. This delay can be condoned upon proof of sufficient cause, which prevented the applicant from making the application.

The applicant raises serious grounds of challenge which go the root of the decision of the arbitral tribunal of jurisdiction which ought to be interrogated in order to avoid an illegality which is affront to the constitution and rule of law.

The jurisdiction to grant an extension of time is an exercise of discretion premised on the peculiar circumstances of each case and the discretionary powers are to be exercised judiciously as was noted in the case of ***Yahaya Kariisa vs Attorney General & Another, S.C.C.A. No.7 of 1994 [1997] HCB 29.***

In the final result and for the reasons stated herein above this application succeeds and each party shall bear its costs.

I so Order

Ssekaana Musa
Judge
27th March 2023