

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)
MISC. APPLICATION NO. 157 OF 2023
(Arising out of High Court Miscellaneous Application No. 156 of 2023)
(Arising out of High Court Miscellaneous Cause No. 037 of 2023)
(ARISING FROM CAD/ARB/14/2021)

UGANDA CIVIL AVIATION AUTHORITY ::::::::::::::::::::::::::::::::::: APPLICANT
VERSUS
CENTRAL PULUMBING WORKS (U) LIMITED::::::::::::::::::::::::::::::::: RESPONDENTS

BEFORE: HON. JUSTICE SSEKAANA MUSA

RULING

This was an application brought under Section 36 of the Arbitration and Conciliation Act, Section 98 of the Civil Procedure Act Cap 71, S.33 of the Judicature Act Cap.13, Order 22 rule 26 and 89 CPR, for orders for stay of execution against the respondent in respect of the arbitral award in CAD/ARB/14/2021 until the final disposal of the application to set aside the said arbitral award filed in this honourable court.

The parties had a dispute arising out of the construction agreement and the arbitral tribunal entered an arbitral award in favour of the respondent on 25th November 2022 which the applicant seeks to set aside.

The respondent has already filed and served the applicant with a bill of costs and they seek to enforce the said arbitral award and have written and called the applicant inviting them over a pre-taxation conference in furtherance of their attempt to execute against the arbitral award.

The applicant contends that the 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 and was contrary to the law. The procedure followed in appointing the arbitral tribunal Chairperson flouted well laid down legal provisions.

The respondent contended that the application is incompetent, misconceived and an abuse of court process, which intended to forestall the process of the respondents from recovering the fruits of the arbitral award. The application for setting aside filed by the applicant has no likelihood of success.

Whether the applicant has shown sufficient cause for the grant of an order for stay of execution against the respondent in respect of the arbitral award in CAD/ARB/14/2021

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

Determination

The applicant submitted that application sets out the grounds upon which an application can be granted citing several cases which laid down the principles upon which a stay of execution will be granted as follows:

1. Applicant must establish that his appeal has likelihood of success; or a prima facie case of his right of appeal.
2. That the applicant will suffer irreparable damage or that the appeal will be rendered nugatory if a stay is not granted.
3. If 1-2 above have not been established, court must consider where the balance of convenience lies.

The supreme court further added thus; another principle is that the applicant must also establish that the application was instituted without delay. ***Hon. Theodore Ssekikubo & Others v The Attorney General of Uganda Constitutional Application No. 06 of 2013.***

The courts have further expanded the conditions for the grant of an order of stay to include; a serious and eminent threat of execution of the decree or order and if the application is not granted the appeal would be rendered nugatory.

The respondent in opposition submitted that the application has been brought belatedly almost six months and that the applicant has availed or made a deposit of security for due performance as required under Order 43 of the Civil Procedure rules.

The respondent contends that this application is a ploy hatched to defeat the interests of the respondent from enjoying the fruits of the award and as such the balance of convenience tips in favour of the respondent since they are the successful party in the arbitral proceedings.

Analysis.

Sections 33 of the Judicature Act Cap 13, 98 of the Civil Procedure Act Cap 71, and Order 43 rule 4(2), provides for stay of execution by high court in case sufficient cause is shown.

Order 43 rules 4(3) provides for grounds of an application for stay of execution. That the court must be satisfied—

(a) that substantial loss may result to the party applying for stay of execution unless the order is made;

(b) that the application has been made without unreasonable delay; and

(c) that security has been given by the applicant for the due performance of the decree or order as may ultimately be binding upon him or her.

The most often cited authority in application of this type is ***Lawrence Musiitwa Kyazze - vs - Eunice Busingye, Civil Application No. 18 of 1990***, in which the Supreme 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.

However, it is done under the provisions of section 98 of the Civil Procedure Act Cap 71 and also reflected in Order 43 rule 4(2) CPR as was stated in the case of **Francis Micah vs Nuwa Walakira [1992-93] HCB 88**

- a) That substantial loss may result to the applicant unless the order is made.

In the case in ***Tropical Commodities Suppliers Ltd and Ors vs International Credit Bank Ltd (in Liquidation) (2004) EA 331***, “.....substantial loss does not represent any particular amount or size for it cannot be quantified by any mathematical formulae. It refers to any loss, great or small that is of real worth or value as distinguished from loss without a value or that which is merely nominal.....”

Similarly, in ***Kisawuzi vs Dan Oundo Malingu HCMA 467/2013***

“.....Substantial loss cannot mean ordinary loss or the decretal sum or costs which must be settled by the losing party but something more vague and general assertion of substantial loss in the event a stay order is granted.....”

In the present case, the applicant is challenging an arbitral award which goes to the root of the matter and the effect of the court finding that the tribunal was irregularly or illegally constituted the entire award will be set aside and the award (money) if satisfied or paid would have to be returned to the applicant. The purpose of the stay is to preserve the status quo and avoid any possible irreparable loss or injury to either of the parties.

The policy of the court is that in exceptional circumstances it should exercise judicial discretion such that a pending matter or suit is not rendered nugatory, a stay of execution should be granted irrespective of whether or not it is a monetary claim or decree. It is the discretion of the court to grant or refuse a stay of execution but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. ***Cotecna Inspection SA v Hems Group Trading Limited Court of Appeal Civil Application No. 303 of 2000 (CAK)***

The applicant is a public body and it is not questionable that it cannot fail to satisfy the award once the court pronounces itself on the matter. This would mean there is no need to insist on depositing security for due performance. The court is equally not satisfied that the respondent as an arbitral award-holder/winner will be able to refund the awarded sums when the award is set aside. Similarly, the respondent has not made any undertaking to refund the money once the award is set aside. The position is not that in a decree for payment of money, for example, the only thing that would render the success of an appeal nugatory is the inability of the other side to refund the decretal sum if it has been paid over to it.

This court in exercise of its discretion due to the peculiar circumstances of the case grants a stay of execution in order to enable the court hear the application to set aside the arbitral award.

The costs shall be in the cause.

I so Order

Ssekaana Musa

JUDGE

8th September 2023