

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION
MISCELLANEOUS CAUSE NO. 078 OF 2022

**IN THE MATTER OF AN APPLICATION FOR AN INTERIM MEASURE OF
PROTECTION AND PRESERVATION UNDER THE ARBITRATION AND
CONCILIATION ACT, CAP. 4**

MULTIPLEX LIMITED :::APPLICANT

VERSUS

**DITACO ULUSLARARASI TICARET VE
MUTEAHHITLIK LIMITED SIRKETI
[Alias DITACO INTERNATIONAL TRADE
AND CONTRACTING LIMITED COMPANY] ::: RESPONDENT**

BEFORE: HON. JUSTICE SSEKAANA

RULING

The applicant filed this matter by way of chamber summons seeking for orders that;

1. The applicant be granted an interim measure of protection and preservation of the status quo by restraining the respondent, its servants, agents, authorised counsel and/ or any 3rd parties from terminating the existing and ongoing joint venture internal agreement dated 18th November, 2020 and/ or the joint venture agreement dated 30th October, 2020 executed between the applicant and the respondent pertaining to the execution and/ or performance of road construction until the hearing and determination of the arbitration between the parties.

2. The applicant be granted an interim measure of protection and preservation to restrain the respondent from issuing termination notices and/ or any other correspondences/ communications that may jeopardise and/ or lead to the termination of the project, to Mbarara City, Ntungamo Municipality, Kabale Municipality, Ministry of Lands, Housing and Urban Development, Guaranty Trust Bank (Uganda) Limited, United Bank of Africa, Uganda Support to Municipal Infrastructure Development Program (USMID), World Bank and/ or any other body/ authority/ institution in Uganda until the hearing and determination of the arbitration between the applicant and the respondent.
3. Provision be made for the costs of this application.

The grounds supporting this application are contained in the affidavit of Mr. Moses Ndege Bbosa, the Managing Director of the applicant attached to the application which briefly state that;

- a) The applicant and respondent executed a joint venture agreement for submission of a bid as a joint venture (Multiplex Limited and Ditaco International Trade and Contracting Joint Venture) on the 30th October, 2020.
- b) On the 18th November, 2020, the applicant and respondent executed the final joint venture internal agreement superseding the joint venture agreement dated 30th October, 2020.
- c) Subsequently, the parties as joint venture parties executed contracts with Ntungamo Municipal Council, Kabale Municipal Council and Mbarara City. In accordance with the prerequisite bidding conditions and clause 2 (d) & (b) of the final joint venture internal agreement dated 18th November, 2020, the applicant solely financed the bid security, performance guarantees, advance payment guarantees, equipment acquisition finance (bank facilities) which are valued at Ugx. 31,698,228,880/= and therefore

expose the applicant to risk of financial loss of the said sum of money in the event that the project is terminated.

- d) In arranging the said facilities, the applicant incurred costs amounting to Ugx. 261,148,394/= and excise duty of Ugx. 39,172,259/=. Additionally, the applicant continues to incur guarantee charges and exercise duty in respect of advance payment guarantees, performance and environment guarantees valued at Ugx. 16,795,778,972/= and attract guarantee charges and exercise duty.
- e) Pursuant to clause 2(g) of the final internal joint venture agreement, the applicant has solely mobilized construction equipment valued at Ugx. 34,856,200,800/= for the implementation of the project. It has also mobilized labour for the execution of the said project and is solely responsible for all payments for the said labour inclusive of all accommodation, feeding and protective gear.
- f) During the performance of the said project, differences arose between the applicant and respondent in respect to the interpretation of the final joint venture internal agreement and the applicant referred the dispute to the Centre of Arbitration and Dispute Resolution vide CAD/ARB/01/2022 on the 12th January, 2022 pursuant to clause 6 of the said agreement. To date the Arbitral tribunal has not been established.
- g) Notwithstanding the pendency of the arbitral proceedings, the respondent has in bad faith written numerous communications to Mbarara City, Ntungamo Municipal Council, Kabale Municipal Council in contravention with clause 2 (c) of the final joint venture internal agreement thereby threatening the continuance and/ or termination of the contracts to the detriment of the applicant and government of Uganda.

- h) There is an eminent threat that the respondent intends to frustrate the continued execution and implementation of the project by continuously and recklessly writing the said various correspondences to the detriment of the applicant given that the respondent has not incurred any costs whatsoever pertaining the implementation of the project as portrayed in the final internal joint venture agreement.
- i) If the respondent is not restrained, there is an imminent threat that the banks shall recall the advance, performance and environment guarantees, the applicant is poised to lose substantial cash inflow, risks having to terminate the subcontractors' agreement exposing it to substantial liabilities and risks being blacklisted by the World Bank, Public Procurement and Disposal Authority and Government of Uganda.
- j) Premised on the above, the applicant has a prima facie case with a strong probability of success at arbitration, shall suffer irreparable injury and the balance of convenience is in its favor as it is solely financing and implementing the project. The applicant therefore stated that it is in the interest of justice that this application is granted.

The respondent filed an affidavit in reply deponed by Cenk Seyhan Dural, a partner and registered director of the respondent opposing this application on grounds that;

- a) These contracts were awarded to a joint venture on reliance to the respondent's specific experience and this fact is recorded in the tender committee decision attached to these contracts. The same decision also records that the applicant has no experience to qualify for tendering these contracts.
- b) According to the joint venture agreement between the parties, the applicant had to do it in the name of the awarded bidder which was Multiplex/ Ditaco Joint Venture. However, it personated the joint venture

by excluding the respondent in violation of the contracts and joint venture agreement and that it now requests this court's assistance to pursue its unlawful acts.

c) The applicant's real intentions are disguised under a request for the so called interim measure subject to arbitration under CAD/ARB/01/2022 of CADER. That there is no pending arbitration and CADER has never conducted arbitration under this file.

d) The respondent prayed that the application for interim measures is rejected with costs.

The applicant was represented by *Mr. Magezi Tom and Mr. Uwera Aretha M* whereas the respondent was represented by *Mr. Bowen Joshua*.

The applicant proposed the following issues for determination by this court.

- 1. Whether the applicant has a right to seek an interim measure of protection under section 6 (1) of the Arbitration & Conciliation Act, Cap. 4 from this Court.*
- 2. What remedies are available to the parties?*

The parties were ordered to file written submissions which was accordingly done by the applicant. The respondent did not file its submissions. Nevertheless, this Court determined the issues raised above on the merits of this case.

DETERMINATION OF ISSUES

Whether the applicant has a right to seek an interim measure of protection under section 6 (1) of the Arbitration & Conciliation Act, Cap. 4 from this Honorable Court.

Counsel for the applicant submitted that the applicant's right to seek an interim measure of protection is founded under section 6 (1) of the Arbitration & Conciliation Act which provides that a party to an arbitration agreement may apply to court before or during arbitral proceedings, for an interim measure of

protection, and the court may grant that measure. Counsel further argued that the applicant has a legal right either at law or equity upon the invasion of the applicant's right by the respondent to seek an interim measure of protection from court. He noted that this position was reaffirmed in *Titus Tayebwa vs Fred Bogere & Anor Civil Appeal No. 3 of 2009*.

In respect of whether there is an arbitration agreement between the parties, counsel noted that it is not in dispute as stipulated under paragraphs 2, 3 and clause 6 of the annexures of the applicant's affidavit that the parties executed joint venture agreements. He also stated that the respondent under paragraph 5 of his affidavit admits to the existence of the joint venture agreements. He therefore relied on the case of *National Social Security Fund & Anor vs Alcon International Ltd Civil Appeal No. 2 of 2008* where court noted that an arbitral clause has an enduring and special effect and courts will also refer a dispute to arbitration where there is an arbitration clause in a contract.

Counsel submitted that the applicant led uncontroverted evidence that the dispute was referred to Centre for Arbitration and Dispute Resolution as portrayed in 12 of the affidavit in support under a reference to arbitration dated 12th January 2022 and directions issued by the Centre for Arbitration and Dispute Resolution.

In regards to whether the application raises a prima facie case, it was submitted that the Applicant led uncontroverted evidence demonstrating performance of its obligations under the contracts on the execution and/or performance of road construction works. It was stated that there was performance by solely financing the bid security, performance guarantees, advance payment guarantees, equipment acquisition finance (bank facilities) valued at UGX. 31,698,228,880/= in accordance clauses 2(d) and (b) of the joint internal venture agreement dated 18th November and pursuant to contract with Mbarara, Ntugamo and Kabale.

It was also submitted that it solely incurred costs amounting to UGX. 261,148,394/= in arranging facilities, solely mobilization construction equipment,

labour, procured services of subcontractors and incurred continuing charges and exercise duty.

It was further submitted that the respondent in total breach of the joint venture agreements has in bad faith and without justification written numerous communication to Mbarara City, Ntugamo and Kabale Municipal Council threatening the continuance and termination off the contracts to the sole detriment of the applicant and the government of Uganda.

Counsel therefore submitted that the conduct of the respondent demonstrates that the applicant's claim is not frivolous or vexatious and has serious questions to be tried hence a prima facie case with a possibility of success. He relied on the case of *Victor Construction Works Ltd vs UNRA H.M.A No. 601 of 2010*. He thus argued that there are serious issues for determination between the applicant and respondent concerning the performance of the applicant and breaches which can only be tried in the main arbitral proceedings.

In regards to irreparable injury, counsel submitted that it is settled law that it does not mean that there must be physical possibility of repairing the injury but that the injury or damage must be substantial or material one that is, one that cannot be adequately atoned for in damages as stated in *Giella vs Cassman Brown & Co. [1973] E.A 358*.

Counsel stated that if the respondent is not restrained, there is a threat that the applicant shall suffer irreparable injury which cannot be atoned for in damages such as it being blacklisted by World Bank, PPDA and the Government of Uganda. He also stated that the applicant's brand as a leading local contractor built over 36 years shall be irreversibly injured, exposure of unforeseen substantial liabilities arising from litigation and risk of financial exposure resulting from termination of the contracts which may therefore lead to the default of its loan with Uganda Development Bank.

Counsel further submitted that even if court was to award damages as a remedy, the damages would never be sufficient to adequately atone for the injury that the applicant would have suffered owing to the respondent's breach.

On the balance of convenience, counsel submitted that this means the applicant has a greater detriment in comparison with the respondent. He relied on *Kiyimba Kaggwa vs Hajji A.N. Katende [1985] HCB 43* where court noted that the balance of convenience lies more on the one who will suffer more if the offending party is not restrained in the activities complained of.

Counsel stated that it is expressly agreed that the applicant is liable for the execution of the entire contract in the name of Multiplex Ditaco Joint Venture and the applicant assumes all risks and liabilities of the contract. He therefore submitted that the respondent shall not be exposed to any liability whatsoever that may arise from the implementation of the agreements. He further stated that the applicant has solely financed the entire implementation of the contracts.

As such, he submitted that the balance of convenience dictates in favour of the applicant who has more to lose than the respondent. Who shall not suffer any injury if the interim measure of protection is granted.

Analysis

I have carefully considered the application and the grounds thereof. The grounds of this application are that the parties entered into joint venture agreements upon which they were awarded a contract for rehabilitation of the roads in Mbarara city, Ntungamo Municipality and Kabale Municipality. Indeed, the agreement dated 18th November, 2020 between the parties provides for arbitration as a means of dispute resolution in cases of conflict.

I do agree with counsel for the applicant that section 6 (1) of the Arbitration and Conciliation Act provides for the right to seek an interim measure or protection. It provides as follows:

"6. Interim measures by the court.

(1) *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."*

This provision also gives the court discretionary powers whether to issue an order of interim measure of protection or not. See: *John Sekaziga & Anor vs Church Commissioners Holding Misc. Cause No. 15 of 2013* and *International Investment House Company LLC & Emirates Africa Link for Strategic Alliance (LLC) vs Amos Nzeyi and Others Misc. Cause No. 11 of 2012*

This Court in the case *Guangdong Hao He Engineering & Construction Company (U) Ltd vs Britam Insurance Co (U) Ltd & Anor (Miscellaneous Cause 37 of 2020* noted that the phrase "interim measure of protection" as used under section 6 (1) is wider than the word "injunction" because it is also qualified by subsection 2 which envisages an application for an injunction or other interim orders/measures of protection other than injunctions sought by any of the parties to an arbitration clause which may be granted by the court. Thus, an interim measure of protection should be taken to mean any lawful order that may be made in the interim to protect a party to an arbitration agreement pending arbitration proceedings. Such orders may include interim temporary injunctions, attachment before arbitration, deposit of security etc.

However, it is important to note the scope of the interference by this court in the arbitration proceedings under the Arbitration and Conciliation Act. **Section 9 of the Act** limits inference by the court in matters governed by the Act except as enabled by it. As such, the principles applied by the courts in the grant of a temporary injunction should be sparingly applied in order to enable the arbitral tribunal exercise its jurisdiction without being restricted by a court order.

Because the interim measure of protection is a remedy granted pending arbitral proceedings it should be possible that an interim order made by this court enables the arbitral tribunal to further deal with the matter inclusive of matters of

an interlocutory nature pending the final award. An order may be made simply to prevent the intended arbitral proceedings from being rendered nugatory.

The Applicant seeks an interim measure of protection and preservation of the status quo by the restraining the respondent and its agents from terminating the ongoing joint venture agreements executed between the parties and also communicating to the World Bank in violation of the Joint Venture Agreement or attempting to halt the applicant's operation of the Joint Venture accounts held at Giant Trust Bank and United Bank of Africa which may result in a threat for the banks to recall the advance guarantees, Performance guarantees and Environment guarantees valued at UG. 16,795,778,972/=.

It suffices to note that the principles governing the grant of the orders sought herein by the applicant are indeed similar to those for the grant of a temporary or interim injunction and a court order issued to a party that requires him to either act or refrain from taking certain action until after a trial on a disputed matter can be held. The right of the applicant to be protected has to be weighed against the corresponding need for the respondent to be also protected against injury resulting to them having been prevented from exercising their own legal right if the uncertainty were resolved in their favour at the final determination.

The status quo required to be preserved in this application is the current state of affairs, that is, the performance of the joint venture agreements between the parties dated 18th November, 2020 and 30th October, 2020 respectively in relation to the construction project which are yet to be performed.

It has been established by this court overtime that the grounds which must be proved before an injunction is granted as stated in **Kiyimba Kaggwa vs. Hajji Abdul Nasser Katende [1985] HCB page 43** include;

- a) The applicant must show a prima facie case with a probability of success.
- b) The applicant will suffer irreparable injury which would not adequately be compensated for in damages.

c) If the court is in doubt, it would decide an application on a balance of convenience.

It is also important to note that the purpose of an application for interlocutory injunction is to keep parties in an action in status quo, in which they were before the judgment or act complained of. The applicant for interim injunction is not at that stage required to make out a prima facie case before he can be granted an interlocutory injunction. An interlocutory injunction is directed to ensure that a particular act or acts do not take place or continue to take place pending the final determination by the court of the rights of the parties.

In an application for interlocutory injunction, the court has to be satisfied that the applicant's case is not frivolous or vexatious and that there is a serious issue or question to be tried. The applicant has unfettered duty to satisfy the court that it is an equitable remedy which is at the discretion of the court to grant. The applicant therefore has an unfettered duty to satisfy the court that in the special circumstance of its case, it is entitled on the facts presented, to the relief.

In considering whether there is a prima facie case that 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. In this application, it is undisputed by the parties that there is joint venture agreement which under its clause 6 provides for arbitration of the disputes between the parties. Indeed, the applicant has since commenced proceedings before the Centre for Arbitration and Dispute Resolution (CADER) vide CAD No. 1 of 2022 which was filed on the 12th January 2022. Secondly the Applicant has a right which it is seeking to enforce to have its dispute resolved through the contracted means of arbitral proceedings.

As such, the applicant in the circumstances submitted that the application raises a prima facie case having performed its obligations under the contracts on the execution and performance of road construction. It further noted that it has

solely financed the bid security, performance guaranteed, equipment acquisition finance in respect of the said project.

The applicant has been threatened by the actions of the respondent which includes termination of the Joint Venture Agreement in a letter dated 1st April 2022. This letter is further supported by further threats of communicating to the World Bank in violation of the Joint venture Agreement. The respondent in violation and breach of the Joint Venture Agreement has attempted to halt the applicant's operation of the Joint Venture accounts held at Giant Trust Bank and United Bank of Africa which mandate if the sole and exclusive role of the applicant.

It is these acts or threatened acts of breach or violations that the applicant seeks to have the respondent restrained from doing in order to preserve the status quo as the arbitral proceedings are concluded or not to be rendered nugatory. The acts of the respondents will equally have effects on third parties who have taken benefit of the joint venture agreement through sub-contracts.

The applicant has showed that there are serious issues to be tried and determined in the arbitral proceedings which directly relate to the violation or intended/threatened breach of the joint venture agreement. The damages which the applicant may suffer like being blacklisted by the World Bank or Public Procurement and Disposal Authority or the Government of Uganda cannot be atoned for in any way or compensated for in damages. The court as the guardian of the rule of law, if all the other relevant consideration can be resolved in favour of the applicant, should grant the applicant the relief of interim measure of protection or temporary injunction.

Furthermore, the applicant's evidence also shows that any intended breach of the agreement or intended action of reporting matters to the World Bank will affect the applicant's sold brand and reputation built over 36 years and shall be irreversibly injured. In addition, the applicant also contended that termination of the Joint Venture Agreement by the respondent will adversely be detrimental to

public interest regarding the immediate benefits that would have arisen from the road construction development and/or loss of employment opportunities for over 300 Ugandans.

The relief of interim measure of protection or temporary injunction like all other reliefs is punitive and therefore should be granted were irreparable injury or loss will occur. The exercise of discretion to grant must be judicially and judiciously done as a way of checking on its dire consequences on the respondent. This is a government project which is for the benefit of the entire public and once the project is stopped the entire country stands to lose. Such a loss will be irreparable and cannot be atoned for by way of damages. The applicant has fulfilled its duty to satisfy this court that the interim measure of protection/temporary injunction ought to be granted in order to preserve the status quo.

The court's power to grant a temporary injunction is extraordinary in nature and it can be exercised cautiously and with circumspection. A party is not entitled to this relief as a matter of right or course. Grant of temporary injunction being equitable remedy, it is in discretion of the court and such discretion must be exercised in favour of the applicant only if the court is satisfied that, unless the respondent is restrained by an order of injunction, irreparable loss or damage will be caused to the applicant. The court grants such relief *ex debito justitiae*, i.e to meet the ends of justice. The court must keep in mind the principles of justice and fair play and should exercise its discretion only if the ends of justice require it. See *Section 64 of the Civil Procedure Act*.

In the result for the reasons stated herein above this application succeeds and the costs shall be in the cause.

I so Order

Ssekaana Musa

Judge

31st May 2023