THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: 1. HON. LADY JUSTICE A.E.N. MPAGI-BAHIGEINE, JA
2. HON. MR JUSTICE A. TWINOMUJUNI, JA
3. HON. MR JUSTICE S.B.K. KAVUMA, JA

CIVIL APPEAL NO. 02 OF 2008

(Appeal form the decision of Honourable Lady Justice M. S. Arach-Amoko in High Court Miscellaneous Application No. 417 0f 2001 Consolidated with Arbitration Cause No. 4 of 2001 arising out of High Court Civil Suit No. 1255 of 1998 made on the 30th of September 2003 in the Commercial Division of the High Court at Kampala.)

1. NATIONAL SOCIAL SECURITY FUND
2. W.H. SSENTOOGO T/A SSENTOOGO & PARTNERS::::::: APPELLANTS

VERSUS

ALCON INTERNATIONAL LIMITED:::::::::::::::::::::::::::: RESPONDENT

THE JUDGEMENT OF HON. A.E.N. MPAGI-BAHIGEINE, JA

The genesis of this appeal is the decision of the High Court, Commercial Division (Arach – Amoko J) dated 30th September 2003 wherein the learned judge made the following orders, namely:

1. That a temporary injunction should not be issued against the respondents/defendants to restrain them from interfering with the applicant/plaintiff's property and from committing further breach of contract.

2. That the main suit be stayed and the matter be referred to arbitration.

3. That the parties agree on an independent arbitrator within 14 days from the date hereof i.e 14/06/99.

4. That if the parties fail to agree to an Independent arbitrator, the applicant shall refer the matter to the Chairman of the East African Institute of Architects to appoint an Arbitrator in accordance with Clause 36 of the contract.

This order was dated 14th June 1999.

The background facts were as follows. On 21st July 1994, the respondent, Alcon International Limited entered into a contract with National Social Security Fund (NSSF) the 1st appellant to erect and complete a partially constructed structure on Plot No. I Pilkington Road, Kampala for the said NSSF.

Work commenced and W.H. Ssentoogo t/a Ssentoogo and Partners hereinafter the 2nd appellant was contracted as the architect of the project.

The contract kept on being varied from time to time leading to a supplementary agreement on 8th June 1996. (Annex. *'B'*.)

Due to the extensive variations and changes, the 1st appellant on 21st November 1997 granted an extension of the time to the respondent to complete the project by 31st May 1998.

On various dates, to wit 11-12-97, 28-1-98 and 30-4-98 respectively the 1st appellant wrote to the respondent purporting to give notice of termination under Clause 25(1) of the contract, citing defaults allegedly committed by the respondent which the latter denied. The incessant disputes between the parties culminated in the termination of the contract on 15th May 1998 by the 1st appellant .

On 30th November 1998, the respondent filed HCCS No. 1255 of 1998 against the appellants jointly for wrongful termination of the contract.

By para 11 of its further amended plaint, the respondent accused the 1st appellant of failure to utilize the remedy of arbitration pursuant to clause 36 of the parties' contract.

The respondent stated that as a result of the 1st appellant's failure to accept the request for arbitration within the stipulated time, the respondent wrote to the East African Institute of Architects at Nairobi, Kenya to intervene. It later transpired that the said institute was dormant and no action was ever taken.

The respondent pleaded collusion and fraud to its prejudice. Various orders were sought including a declaration that the termination of the contract and breach of the co-financing agreement were wrongful, null and void, special and general damages.

Subsequently the respondent applied, by way of Chamber Summons, for a temporary injunction restraining the appellants from committing any further breach of the contract and injury under the contract, by awarding or executing the contract to another contractor. It was sought to maintain the status quo at the site so as to allow the respondent or its other authorized agents to make an inventory, to value and measure the work done and to value all the various properties belonging to the respondent.

In her ruling dated 14th June 1999, the learned judge made the aforementioned orders, appealed.

By way of reminder the Judge refused to grant the temporary injunction sought but instead stayed the suit and ordered that the matters in conflict between the parties be referred to arbitration. The Appellants protested the order and filed a notice of Appeal. The appeal was never prosecuted up to this day.

Consequently the appellants refused to concur to the appointment of an Arbitrator. The respondent referred the matter to the President of the East African Institute of Architects (EAIA). The President of EAIA appointed the Arbitrator. The respondent filed its claim, the appellants filed a defence and the respondent made a reply thereto and Arbitration proceedings commenced. As a result, on 20th September 2001 the appellants filed Miscellaneous Application No. 417/2001

seeking removal of the arbitrator on grounds of bias. The appellants later on 15th November 2001 filed another Application, Arbitration Cause No. 4 of 2001 to set aside the Arbitral Award on grounds that there were errors of law on the face of the record, that the Arbitrator misconducted himself and that therefore the Arbitration was improperly procured. Both applications were dismissed on 30-09-2003. The appellants then filed this Appeal, on the following grounds:

1. ***The learned Judge erred in law and fact in not holding that she had erred in law in staying the suit and in referring the matter to Arbitration.***

2. ***The learned Judge erred in law and fact in not holding that the arbitration had been improperly procured.***

3. ***The learned Judge erred in law and in fact when she applied the following principle to the case before her:***

> *" The Courts are given wide powers under section 12 to set aside an arbitral award. Generally speaking, however, the Courts will be slow to interfere with an award in arbitration having regard to the fact that the parties to the dispute have chosen this method of settling their dispute and have agreed to be bound by the arbitrator's decision …."*

4. ***The learned Judge erred in law and in fact in holding that the appellants had by conduct waived their right to rely on the arbitrator's failure to extend time within which to make his award.***

5. ***The learned Judge erred in law in holding that an award filed out of time is not invalid.***

6. ***The learned Judge erred in law and in fact in holding that the applicants had only themselves to blame when they sat on their right of appeal against her order referring the matter to arbitration.***

7. ***In relation to the appointment of Mr. Katatumba acting as President, the learned Judge erred in law and in fact in holding that:***

> *" In the absence of any evidence to the contrary, the arbitration was properly procured and the appointment of the arbitrator was valid."*

8. ***The learned Judge erred in law and fact in holding that the arbitrator did not misconduct himself.***

9. ***The learned Judge erred in law in holding that there was no error of law on the face of the record.***

10. ***The learned Judge erred in law and in fact in holding that:***

> *" The arbitrator dealt with all the issues framed and ruled on each and every one of them."*

11. ***The learned judge erred in law and in fact in finding that:***

> *" The respondents/now applicants refused to agree with the arbitrator's term and did not comply with the arbitral order for directions for payment of a deposit on account of the costs, expenses, disbursements; which refusal was intended to frustrate and impede the arbitration and was an act of prevention of which the respondents/applicants now, can take no advantage."*

12. ***The learned judge erred in law in holding that:***

> *" There was no private agreement with the claimant about the arbitrator's fees. The claimant complied with the arbitral directions for depositing money."*

13. The learned judge erred in law in holding that:

> *" The allegation that the claimant obtained and sustained the contract through bribery was an averment without particulars to which the claimant could not reasonably be expected to respond; and was in any event unsubstantiated."*

14. The learned judge erred in finding that the arbitrator was wrong when he allowed and decided upon pleadings which were different from those in the stayed suit.

Dr. J.B. Byamugisha appearing with George Kabugo Esq. represented the appellants while the respondents were represented by M/s Enos Tumusiime, Dusman Kabega and Ronald Oine.

Dr. J. B. Byamugisha, treated grounds ***1, 4 and 6*** of the Appeal together arguing that the learned Judge erred in law in refusing to grant the injunction prayed for but instead stayed the suit referring the matter to Arbitration. He pointed out that the application was for a temporary injunction and that there was no prayer for stay of the suit nor a reference of the matter to arbitration.

Learned counsel submitted that ***Section 17*** of the ***Arbitration Act (Cap 55) Laws of Uganda 1964 Revision*** provides for stay of the suit by Court. However, this order can only be made anytime after appearance but before filing a written statement or taking any other step in the proceedings. He argued that in this case it was too late for the Judge to refer the matter to arbitration, after all the two defences had already been filed, the application to amend the plaint

had been made, heard and the reply thereto had been filed. The court was at the stage of disposing of the application for a temporary injunction. Furthermore, the parties had not yet been given the opportunity of making any submissions on the reference to arbitration.

Dr. Byamugisha asserted that arbitration could not even be ordered by court under ***Order 47(1)*** of the ***Civil Procedure Rules*** which requires that all the parties interested must agree that the matter in difference between them be referred to arbitration. There was no such agreement between the parties. The Judge therefore erred in law when she stayed the suit and referred the matter to arbitration under the circumstances.

He cited ***Anthony Walton (1970), Russell on the Law of Arbitration (18th Edn, Stevens & Sons Limited, P. 211, para 5)*** to the effect that a case brought before court can be referred to arbitration on the agreement of both parties upon which court will exercise its inherent jurisdiction.

Dr. Byamugisha stated that the learned judge ought to have complied with the express provisions of ***Order 47*** instead of invoking the inherent powers of the court which was erroneous. Inherent powers cannot be invoked where there is an express provision of the law. He cited ***Article 126*** of the ***Constitution*** to the effect that courts must first and foremost apply the law even under the unlimited jurisdiction of the High Court encapsulated in ***Article 139(1)*** of the ***Constitution*** and ***section 14(2)*** of the ***Judicature Act***. Thus, the inherent jurisdiction was ousted by an express provision of the law, he argued. In his view, the staying of the suit and ordering arbitration were without jurisdiction.

Learned counsel further contended that the learned judge erred in law and in fact in holding that the appellants had by conduct waived their right to rely on the arbitrator's failure to extend time within which to make his award. ***Rule 3*** of the ***First Schedule*** to the ***Arbitration Act*** permits the Arbitrators themselves to enlarge time for making the award before it expires, by any writing signed by them. The arbitrator did not do so in this case. He pointed out that it is a law, which does not permit waiver by either the arbitrator or the parties. In his view, that is why ***section 10*** of the ***Act*** provides that the time for making the award may, from time to time, be enlarged by order of the court, whether the time for making an award has expired or not. He submitted that

noncompliance with that law was not a mere irregularity. Its breach attracted sanctions, and the court must have complied with the section by setting aside the arbitral award. He asserted that the appellants had no duty to point out to the arbitrator at any stage that he was acting out side the law. They had already informed the arbitrator that his acting as arbitrator was contrary to the law, and that certainly an arbitrator must know and comply with the law under which he acts otherwise his award would be set aside.

He argued that there cannot be estoppel against a provision of the law and that the appellants had not waived their rights to challenge the decision of the Judge because they had applied for the record of proceedings which were not availed them in due time.

End of grounds ***1, 4 and 6***.

Submitting on ground No. 2, learned counsel relied on ***section 12*** of the ***Arbitration Act*** which provides that where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the court may set aside the award. He stated that for the reasons argued under ground 1, the award had been improperly procured. It could have only been rightly procured if the arbitration had been ordered in accordance with the law. He concluded that an arbitrator's award cannot confer jurisdiction on the High Court to appoint him nor can it confirm his appointment if it was invalid as was in the instant case in the first place. Furthermore, even if the appellants had failed to appeal through any fault of their own, there was nothing to stop them from raising the matter of illegal appointment of an arbitrator under ***section 12*** of the ***Act***. He reiterated that in this case, no record of proceedings was availed the appellants to enable them institute the appeal. Consequently, the learned judge erred in law and in fact in not holding that the arbitration had been improperly procured.

Regarding ground 3, learned counsel argued that although arbitration had been provided for, the respondent (plaintiff) decided to file a suit directly to court without reference to arbitration. It was after the appellants (defendants) had raised the defence that the suit was premature and filed in breach of the contract that the court went to the plaintiff's aid by staying the suit and referring the matter to arbitration. The defendants contested the judge's ruling from the beginning and participated in arbitration under protest. It was therefore a miscarriage of justice to say that the

parties chose arbitration to settle their dispute. Referring to his submissions under ground No. 2, learned counsel submitted that the method adopted by court was contrary to law.

Considering ground 5 that the award made out of time is not invalid, learned counsel stated that his submissions on the foregoing grounds answered this ground. He however clarified that both ***rule 3*** of the ***First Schedule*** and ***section 10*** of the ***Arbitration Act*** provide that an award must be made in time, whether originally set or as subsequently enlarged. In this case there was no enlargement of time by the arbitrator, there was no application to court for enlargement of time and in the end no enlargement had been made by the court before the arbitrator made and subsequently filed the award. Consequently, after making the award and particularly after filing it in court, the arbitrator became functus officio. He could not apply for extension of time. In counsel's view, the award, which was made several years after the arbitration had commenced should be set aside and that therefore the learned Judge erred in law in holding that an award filed out of time is not invalid.

Ground 6 was covered above with grounds 1 and 4.

Turning to ground 7, Dr. Byamugisha contended that Mr. Katatumba was not acting as the chairman of the East African Architects Association (EAIA) when he appointed the arbitrator. Once evidence was produced by Mr. Ssentoogo that Mr. Katatumba was not the chairman, the onus was on those who sought to show that the arbitrator had been properly appointed by the chairman as required by court order and under clause 36 of the contract. The appointment was thus invalid and the arbitral award should be set aside for having been improperly procured. The learned Judge erred in law and in fact by holding that, in the absence of any evidence to the contrary, the appointment of the arbitrator was valid and the arbitration was properly procured.

As regards ground 8 concerning misconduct, it was contended that, the learned Judge erred in law and fact in holding that the arbitrator did not misconduct himself. Learned counsel submitted that:

a) ***The arbitrator insisted on conducting the proceedings inspite of objections to the proceedings.*** Arbitration is a contractual arrangement. If one of the parties objects to the jurisdiction of the arbitrator, especially on the grounds already submitted above, the arbitrator

should not act. An application for his removal, even if not filed, does not bar his award from being challenged after it has been made.

(b) The arbitrator's requirement that each side should deposit US $ 5,000 and taking that amount from the respondent in the face of objections from the appellants was wrong. The arbitrator after accepting the appointment, first sent the parties a Fee Agreement/Arbitrator's Term, contained at page 90 to 91 of the record. It provided under clause 2 thereof that the arbitrator shall proceed with the arbitration ex parte upon failure of either party, without notice or good cause, to comply with any order, direction or attendance notice. In Dr. Byamugisha's view, no party agreed to those terms and he wrote a letter stating that the appellants were not signing it for reasons they had given and that the arbitrator continuously made orders for directions although the appellant had refused to pay the deposit of US $ 5000.

Dr. Byamugisha further stated that the appellants did not pay the money because it was not agreed. The arbitrator could not legally charge it in the absence of specific agreement by both parties. He cited ***K. S. Norjal A/S vs. Hyundai Heavy Industries Co. Ltd. [1991] 3 ALL ER 211*** at ***220*** in support of his contention. He pointed out that in the instant case the arbitrator accepted the appointment without negotiating the fee, but after he entered the arbitration he asked the parties for a deposit of US $ 5000, which one party refused to pay. ***Section 9*** of the ***Act*** made the payment of the fees and charges to the arbitrator due only after his making and signing the award and giving notice thereof to the parties, and not before then. The Judge therefore made an error in ignoring this section and relying on ***article 41*** of the ***UNCITRAL Arbitration Rules***, which clearly did not govern the instant arbitration.

Reverting to ***K. S. Norjal A/S vs. Hyundai Heavy Industries Co. Ltd.*** (supra) learned counsel submitted that an arbitrator par excellence is in a quasi-judicial position. He must avoid both the reality and the appearance of bias. By accepting appointment without negotiating remuneration, the arbitrator is entitled to reasonable remuneration for work done. It is incompatible with the arbitrator's status to accept a bargain with only one of the parties. The fact that the arbitrator wrote letters to both parties' counsel demonstrates that it was an error on his part to state that he was entitled to payments even when the parties had not agreed. It was also misconduct for the arbitrator to accept payment from the respondent given the fact that appellants had refused to pay

him. The arbitrator also made private arrangements with the claimants under which the claimants would purchase tea and coffee for the arbitrator which, the arbitrator would take with the claimant's (Respondent's) counsel, representatives and witnesses. The arbitrator thereby committed acts of misconduct.

Regarding ground 9, learned counsel submitted that the learned Judge erred in law in holding that there was no error of law on the face of the record, whereas the arbitrator's awarding of costs of adjournment to the respondent was such an error on the face of the record. To make matters worse, the arbitrator did not state that the second appellant was participating in the proceedings unreasonably and that therefore he could not award him costs. Learned counsel relied on ***section 27(2)*** of the ***Civil Procedure Act*** to the effect that costs of any action, cause or other matter or issue follow the event unless the court or judge otherwise, for good cause, orders. There was no good reason or cause given by the arbitrator for denying the second appellants costs. Thus the Judge erred when she upheld the arbitrator on that point. A party cannot be denied costs because he voluntarily participated in the proceedings if he is in the end successful.

The arbitrator also stated that the second respondent's (now second appellant) liability could not be determined under an arbitration clause in the contract to which the second respondent was not a party. The dispute between the claimant (now respondent) and the second appellant could only be resolve by a court of competent jurisdiction. This did not answer the issue whether Ssentoogo and Partners were proper parties to the arbitration. The arbitrator's holding was erroneous because, even in court, ***Order 6 rule 5*** of the ***Civil Procedure Rules*** provides that the defendant shall raise by his pleadings all matters which show that the action or counterclaim cannot be maintained.

Furthermore ***Order 13 rule 3*** of the ***Civil Procedure Rules*** provides that if the court is of the opinion that the case or any part thereof may be determined on the issue of law only, it shall determine those issues first. The reasons given by the arbitrator for denying Ssentoogo costs are errors on the face of the record. The Judge should not have upheld them, learned counsel submitted.

As regards ground No. 10 that the learned judge erred to hold that the arbitrator dealt with all the issues framed, learned counsel gave the example of the issue of bribery which the arbitrator seemed to brush aside.

Learned counsel submitted that on pages 120 to 121 of the Record of Appeal, from line 38, the arbitrator said that the claimant did not admit allegations of bribery and that as the respondent did not adequately plead or give any particulars of corruption and bribery they disentitled themselves from pursuing it. Yet the second appellant had been asked in cross examination by the claimant's counsel whether the claimant had not given him USD 5,000 as a bribe. The second appellant had denied this and explained that the money was not given to him in person but that it was given as a gift for the wedding of his daughter despite the fact that the second appellant had earlier on admitted receiving the said money. The arbitrator had thus held that the second appellant was bribed by the claimant. He could not turn around and say the appellant could not rely on the allegation. This was an error of law on record as well as misconduct by the arbitrator.

On ground 11, learned counsel submitted that the judge was confirming the attitude taken by the arbitrator when she stated that the respondents (now appellants) refused to agree to the arbitrator's terms and did not comply with the arbitral order for directions for payment of a deposit on account of the costs, expenses and disbursements which refusal was intended to frustrate and impede the arbitration of which the appellants could not take any lawful advantage. This position taken by the learned Judge was an erroneous one in law.

On ground 12, Dr. Byamugisha submitted that the claimant paid money and made 'organizational arrangements' privately with the arbitrator. The arbitrator had no power to make directions for deposits without the agreement of both parties. So, the learned Judge erred in law in holding that there was no private agreement with the claimant about the arbitrator's fees and that the claimant only complied with the arbitral directions for depositing money.

Concerning ground 13, learned counsel argued that it was already shown that the claimant responded to allegations by cross-examining the second appellant that the project architect was procured by bribery. The claimant's counsel had also put it to the second appellant that the

claimant had given USD 20,000 for hiring cars for his daughter's wedding and USD 150, 000 to buy a house in London. Although, the second appellant denied those allegations, it was the claimant which was saying that it gave the money for those purposes. Therefore the learned Judge erred in law in holding that the allegation that the claimant obtained and sustained the contract through bribery was an averment without particulars to which the claimant could not reasonably be expected to respond.

As regards ground 14, that the learned Judge erred in finding that the arbitrator was wrong when he allowed and decided upon the pleadings which were different from those in the stayed suit; learned counsel pointed out that the submissions on grounds 8 and 9 answered this issue.

The appellants therefore prayed that this Court allows this appeal, order the continuance of the proceedings in the High Court, and that costs of the suit be borne by the respondent.

<u>Submissions for the Respondent.</u>

Mr. Enos Tumusiime, learned counsel based his reply on three grounds namely that the appellant contends: (1) errors of law and errors on the face of the record, (2) the arbitration was improperly procured, and (3) the arbitrator misconducted himself.

Concerning errors of law on the face of record, learned counsel referred to the judgment of Justice Arach at pages 315 and 316 of the record of appeal, where the learned Judge states that the decision of an arbitrator, whether a lawyer or a layman, on matters of law and on matters of fact, unless there has been fraud or corruption on the part of the arbitrator or there is some mistake of law appearing on the face of the award, the award cannot be set aside. Counsel relied on the case of ***Mike Harley & Others vs. Overseas International Fisheries Ltd & 2 others, Miscellaneous Application No. 605 of 2001*** to argue that to constitute an error of law and error on the face of records, there must be something radically wrong or viscously wrong in the proceedings. If there is no error on the face of the record, the court cannot tamper with the decision of an arbitrator unless the error or illegality is so grave as to warrant the setting aside of the award.

In counsel's opinion, there was no error on the face of the record to enable the High Court to set aside the arbitral award. Counsel cited ***Charles Rodney Huxley vs. West London Ext. Rly Co. (1889) 14 Ac at p. 26; Sheik vs. Dubat Farah [1959] E.A. 789; and Halsbury laws of England, 3rd Ed. Vol. II, pages 489,*** to support the principle that the High Court or an Appellate court should not interfere with an arbitral award unless there is something radically wrong and viscous on the face of the record.

On the issue of whether Ssentoogo and Partners were parties to the arbitration, learned counsel pointed out that the arbitrator's findings on pages 121 to 124 of the record of appeal contained in lines 23 and 24, page 123, which upheld the appellants' counsel's submission on the issue that the second appellant's liability could not be determined under an Arbitration clause in a contract to which the second appellants were not a party. The arbitrator went into great length in explaining and giving reasons for his decision not to award costs to the second appellant. These reasons were: (i) That the second appellant ought not to have filed a joint defence with the first appellant on the issue in a contract to which the second appellant was not a party; (ii) The second appellant did not present a timely application to be non-suited; (iii) The second appellant did not challenge his joinder in the arbitration; (iv) The second appellant knowingly participated fully in the arbitration; (v) The second appellant admitted making a trip to Europe to coincide with his daughter's wedding that was paid for by the respondent; (vi) The second appellant confessed to receiving a gift of US$ 5,000 from the respondent. Counsel concluded that the second appellant has no locus in the appeal and any issue addressing him should be disregarded and dismissed.

On the ground that the arbitration was improperly procured, learned counsel pointed out that the appellants have only themselves to blame for not prosecuting their appeal against HCCS No. 1255/98 and Misc. App. 542/99. The ruling was delivered on 14th June, 1999 in their counsel's presence. An order was extracted therefrom on the same date. On 23rd June, 1999 the appellants filed a Notice of Appeal and applied for a record of proceedings. The appellants have only themselves to blame because it was not until 1st October, 2003 after the Judge made the ruling on their application to set aside the award that they woke up to look for the record of proceedings of June 1999, more than 4 years later. The appellants were not vigilant because it took over four

years for them to look for the record of proceedings. To make matters worse, the appellants have up to (six years) not bothered to obtain the Record of proceedings in HCCS 1255/95 and Misc. App. 542/99; and they should not blame it on the Registrar. Lastly, the appellants have failed to prosecute the intended appeal in HCCS 1255/99 and Misc. App. 542/99 and are trying to smuggle it in and argue it under the instant appeal (C/A. 2/2004). That should not be allowed. It is therefore the respondent's contention that the arbitration was not improperly procured.

Concerning the contention that the learned Judge erred in law in not holding that she had erred in law in staying the suit and in referring the matter to arbitration, learned counsel argued that the appellants are barred from raising and arguing this ground of appeal. This ground is the thrust of the notice of appeal against HCCS No. 1255/98 and Misc. App. 542/99. The appellants did not bother to prosecute that appeal six (6) years after filing the notice of appeal.

In HCCS 1255/95 and Misc. App. 542/99, the learned Judge stayed the suit and referred it to arbitration but denied the respondent (plaintiff) an injunction. As a result of the denial of that injunction, the appellants have basked in the glory of the judge's order and have fully enjoyed the benefits of the order and denied the respondent all its equipment, machinery, materials, that the arbitrator found to be worth U$ 7 m. and gave away the contract to another contractor. The appellants have enjoyed the benefits of the Judge's decision and should be estopped from raising this ground of appeal. Learned counsel relied on **Prasum Roy vs. Calcutta Metropolitan Dev**. ***[1988] LRC (Comm)* at *p. 567,570 and 571*** where it was held that '*a party shall not be allowed to blow hot and cold simultaneously.'*

The respondent had before filing the suit (HCCS 1255/98) and Misc. App. 542/99, requested the appellants to submit to arbitration and they declined whereas, the appellants in HCCS 1255/99 had contended in their defence that the matter should have been referred to arbitration. The Judge did not therefore err to order a reference to arbitration where the respondent had prayed for, '*any further orders that the court may deem fit'* which gave the judge a discretion to make that order. Misc. App. 542/99 was based on ***Section 101*** of the ***(old) Civil Procedure Act (now S. 98 of the CPA)***. The Judge correctly exercised the court's inherent powers and ordered the matter to be referred to arbitration as provided by the Constitution of the Republic of Uganda, ***the Judicature***

Act, Cap. 13 and **Yugasta Construction vs. CMB Arb.** ***Cause No. 1/1990 at p. 7*** where submission to arbitration was made after reference by the High Court.

Furthermore, in 1994 when the first Appellant and the respondent entered into the contract, they agreed to submit to arbitration as a means of resolving disputes. Counsel cited ***Rashid Moledina vs. Hoima Ginners Ltd [1967] EA 645*** at ***647***, ***Construction Engineers & Builders Ltd vs. Sugar Dev. Corp (1985) 596 at pp. 603 and 607***; ***Homes and Overseas Insurance Co. Ltd vs. Mentor Insurance Co. (UK) Ltd (INLIQ) para 74 at page 78*** and ***Shell (U) Ltd vs. Agip (U) Ltd C/A 49/95*** as authorities for the principle that parties are bound by clauses in their contract that arbitration shall be the forum for resolving their disputes.

The appellants have only themselves to blame because it was not until 1st October, 2003 after the Judge made the ruling on their application to set aside the award that they woke up to look for the records of proceedings. The appellants were not vigilant because it took them over four years to look for the record of proceedings. To make matters worse, the appellants have, up to six years, now not bothered to obtain the record of proceeding in HCCS 1255/95 and Misc. App. 542/99; and they should not blame it on the Registrar. Lastly, the appellants having failed to prosecute the intended appeal in HCCS 1255/99 and Misc. App. 542/99, it is the respondent's contention that the arbitration was not improperly procured.

Mr. Tumusiime submitted that there was no evidence that the court made a referral order without the consent of the parties concerned. Therefore, there was no error by the judge.

On the ground that the learned Judge erred in law in staying the suit and referring the matter to arbitration, Mr. Tumusiime submitted that the issue has already been addressed under grounds 1 and 2 above. He, however contended that the High Court has inherent powers under ***section 98 (formerly s. 101)*** of the ***Civil Procedure Act*** to stay a suit and refer it to arbitration, especially where the parties have chosen arbitration as a forum for settling disputes. The first appellant and respondent expressly agreed on arbitration as per clause 36 of the contract as a forum through which to resolve their dispute. Therefore, the learned Judge did not error in law in staying the suit and referring the matter to Arbitration.

On the appellant's contention that the award was made out of time and must be set aside, Mr. Tumusiime submitted that throughout the arbitral process from the commencement to the time of the award, the appellants never raised the issue of time limit for the arbitral proceedings. As the arbitral tribunal's order for direction reveals, the Appellants were responsible for several prolonged adjournments which were mainly responsible for the delays in the arbitral process. All the hearing dates were fixed by consent of both parties. For the sake of accuracy, from 30/11/99 when the arbitral proceedings started to 29th March 2001 when the award was made, it was precisely one (1) year and four (4) months and not several years as the appellants allege. Hence, although the award was made out of time, it cannot be set aside because all the proceedings done out of time were made with the agreement of the parties. The appellants only raised the issue of time when applying to the High Court to have the arbitral award set aside.

Learned counsel stated that it is trite that a party to arbitration cannot be allowed to lie by or act in an indecisive manner to obtain the benefit of an award if it is in his favour and then, if the award is unfavourable, seek to set it aside. In support of this assertion, he cited the following authorities; ***Suleiman Versi Ltd vs. Lakhani & Co. [1957] EA. P. 491*** at ***p. 493***; ***Russell On Arbitration-18th Edn, p. 182;*** *and* ***Prasum Roy vs. Calcutta Metropolitan Dev. [1999] LRC (Comm) 570*** at ***p. 571***. In his view, the appellants waived their rights to challenge the arbitral proceedings and are estopped from raising it as a ground of this appeal. He also contended that the appellants were neither **prejudiced nor** inconvenienced in any way by the lengthy arbitral process. On the contrary, it was the appellants who denied the respondent his equipment, machinery, materials and payment during the lengthy of the arbitral process.

On the issue that the learned Judge erred in law and in fact in holding that the applicants had only themselves to blame when they sat on their right of appeal against her order referring the matter to arbitration, counsel stated that his reply to ground no. 2 above satisfied this ground of appeal.

On the issue that Mr. Katatumba was not the chairman of the EAIA and that the arbitrator was improperly appointed, the respondent contended that the arbitrator was properly appointed. The contract is a standard building contract model that provides for the procedure for appointing an

arbitrator and the appointing authority is the chairman or vice chairman of EAIA. The contract was being supervised by the appellant. Throughout the proceedings, the appellants never challenged the authority of the head of the EAIA to appoint an arbitrator under clause 36 of the contract. The second appellant, an architect, never informed the tribunal who the head of EAIA was and he chose to keep quite when asked. Further, the appellants were not prejudiced, disadvantaged or deprived of their rights under the contract by the president of EAIA making the appointment. The Judge correctly dealt with the issue of the difference between the *'president'* and *'chairman'* and correctly stated that there was no difference between those terms but that it was incumbent on the appellants to prove that when Mr. Katatumba made the appointment he was not acting as the president of EAIA. What is important is that Mr. Katatumba was heading the EAIA at the time he made the appointment. The institute used the term *'President'* instead of Chairman. Since there was no proof to the contrary, the arbitrator's appointment was valid and properly procured.

On the ground that the learned Judge erred in law and in fact in holding that the arbitrator did not misconduct himself, Mr. Tumusiime in replying to grounds 8 (a) and (b), pointed out that under ***rule 10(2)*** of ***Cap. 55*** an arbitrator against whom improper conduct is alleged by an objector to an award shall be served with a copy of the objection of the person alleging such misconduct. This rule is mandatory. The case of ***Total (U) Ltd vs. Buramba General Agencies Ltd Arb. App. 3/93***, lays down the same principle. This ground of appeal must fail because of the appellants' failure to serve the arbitrator with a copy of their objection. However, without prejudice to the foregoing arguments, learned counsel replied to ground 8 of the appeal, (which is that Arbitrator insisted on conducting the proceedings inspite of the objection to the proceedings) as follows.

He stated that the arbitrator did not insist on conducting the proceedings because it was his duty once appointed to conduct the proceedings - See ***H. K. Saharay on Arbitration and Conciliation*** at p. 130. He submitted that the appellants objections were mere meaningless threats as they had rights under ***S. 14*** of ***Cp. 55*** to apply to court for the removal of the arbitrator but chose not to exercise that option. By the time they filed Misc. App. No. 417 of 2005 long after the award was made, it was already too late to remove the arbitrator. Arbitration is a contractual arrangement and no body can remove an arbitrator unless by court order.

On the issue that the arbitrator's requirement that each side should deposit US$ 5, 000 and that taking the amount from the respondent amounted to misconduct, Mr. Tumusiime submitted that the arbitrator read out the terms of his appointment including his remuneration to both parties at the meeting and all their counsel were present. The respondent agreed to the terms of the remuneration, signed the terms and paid the deposits. The appellants' refusal to pay was not because the deposit fee was excessive but they refused to pay as a strategy to frustrate the arbitral process. Although the appellants did not sign the agreement, the respondent signed it and the appellant on the other hand acted on it. According to **Credit Finance Corp. vs. Ali Mwakisanga *[1959]* EA 79,** per Windham JA an agreement signed by one party and acted on by the other party is a binding agreement. This agreement was not private as it was read, consented to and signed by the respondent in the presence of the appellants and their counsel. Thus, the appellants are bound by terms of the arbitrator's appointment agreement.

Regarding the appellants' contention that the arbitrator should not have demanded a commitment fee and should not have received half of it from the respondent, counsel submitted that there are three ways in which the arbitrator's fees are determined, namely; (a) the arbitrator fixes his own fees; or (b) the fees are fixed with the agreement of both parties to the dispute; and (c) the fees are taxed in court by the Taxing Master. Therefore, there was nothing improper in the arbitrator fixing his fees under the law. Counsel argued that ***section 9*** of ***Arbitration Act (Cap 55)*** which was relied on by the appellants' counsel does not prohibit any payment to an arbitrator before the award is made. The appellants wrongly relied on the authority of ***K/S Norjarl A/S vs. Hyundai Industries Co. Ltd (AUE.R) 211.*** This authority does not prohibit the arbitrator from making requests to both parties to pay him deposits before making the award. Thus, in the instant case, the arbitrator rightly requested the parties to pay the deposits. Mr. Tumusiime also submitted that the issue of the tea break was exhaustively reviewed and decided by the learned judge to the effect that the tea room was open to all the parties and their advocates but the appellants chose not to partake it. This according to the Judge, cannot be a ground for setting aside an arbitral award.

Concerning the ground that the learned Judge erred in law and in fact in holding that the arbitrator dealt with all the issues framed and ruled on each and every one of them, counsel submitted that the tribunal did not err in law and in fact in stating that particulars of fraud, misrepresentation, breach of trust or where similar conduct is alleged, must be specifically pleaded. This is in line with ***Order 6 rule 2*** of the ***CPR, S.I. 71-1***. Furthermore, neither the arbitrator nor the Judge ever found or ruled that the second appellant took a bribe from the respondent. The second appellant vehemently denied taking a bribe. He only confessed to the fact that a gift of US$ 5,000 was given for the wedding of his daughter. The Arbitrator ruled that the second appellant being an architect had violated ***S. 32(2)*** of the ***Architect Registration Act*** and ***section 6*** of the ***Code of Professional Ethics for Architects*** which forbid architects from receiving a gift from contractors. There was therefore no error of law on the face of the record and the arbitrator did not misconduct himself.

As regards the appellants' contention that the learned Judge erred in law and in fact in finding that the appellant's refusal to agree to the arbitrator's terms denied the appellants lawful advantage, the respondent contended that the learned Judge didn't error in law and in fact for reasons advanced in the respondent's reply in ground 8 above.

On the ground that the learned Judge erred in law and in fact in holding that there was no private agreement with the claimant about the arbitrator's fees, Mr. Tumusiime stated the Judge found that there was no private agreement, *'Organizational arrangement'* between the arbitrator and the respondent. The appellants did not adduce any evidence to prove this point. There was thus no such agreement. All the arbitral directions were given in the tribunal and all letters were copied to both parties including fee notes. Therefore, the learned Judge did not error in law and in fact on this issue.

Finally, counsel for the respondent prayed this Court to rule that the second appellant is not party to this appeal. He also prayed that this appeal be dismissed with costs.

In reply to Mr. Tumusiime's submission, Dr. Byamugisha submitted that the second appellant was a party to the suit in the High Court which was stayed and referred to arbitration. Learned counsel reiterated that the judge was wrong in referring the case to arbitration. The appellants were participating in the arbitration under protest. On the issue of extension of time for

arbitration, he submitted that the appellants had no duty to inform the arbitrator to extend time because it was within his duty to extend or not to extend time. On the issue of failure to appeal against the Judge's decision to refer the matter to arbitration, he stated that the appellants did not sit on their rights because they were involved in the arbitration. He also reiterated his prayer that this Court allows the appeal, order the continuance of the proceedings in the High Court, and that costs of the suit be borne by the respondent.

Findings

The learned judge ruled in Misc. Application No. 0542/99 (paragraph 2 of page 6 to 7):

> ***"…If this injunction is granted, it will interfere with the contract of Roko Construction, 3rd party and the 1st Respondent will face another suit by Roko Construction. On the other hand, if the injunction is not granted, the applicant will suffer some inconvenience, which in my view can be taken care of under Clause 25 of the contract signed between the two parties which provide for the rights of the Contractor in case of termination by the employer. Most importantly, the parties have a right to arbitration in case of any dispute or difference between the parties during the progress of the works. Clause 36 of the contract, provides that such disputes or difference shall be referred to an arbitrator to be agreed on by the parties within 14 days of notice, failing which, an arbitrator shall be appointed by the chairman or vice chairman of the East African Institute of Architects, who may delegate such appointment to be made by the chairman or vice chairman of the local (national) Society of Architects- in this case the Uganda Institute of Architects. Finally, according to Kakooza's affidavit, the status quo has changed and there is therefore no status quo to be maintained by any injunction order. In the circumstances, and for the reasons stated hereinabove, the orders sought in 1, 2, 3 and 5 are not granted. Instead the application is partially allowed and the order sought under 4, namely, any other or further orders that the court may deem fit, is granted and it is further ordered that in the interest of justice, and for the speed disposal of this matter:- (1) The main suit be stayed and the matter be referred arbitration. (2) The parties agree on an independent arbitrator within 14 days from the date hereof. (3) Failure of which the applicants***

shall refer the matter to the chairman of the East African Institute of Architects to appoint an arbitrator in accordance with clause 36 of the contract."

The above order is the crux of the appeal.

It is also important to note the provisions of ***Order 43 rule 1(1) Civil Procedure Rules (old)*** (O 47 r 1(1) new) 1which provides thus:

"(1) Where in any suit all parties interested who are not under disability agree that any matter in difference between them in such suit shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to court for an order of reference.

The import of this rule is that the court can only refer a matter to arbitration upon written application by one of the parties and the court then has power to make an order of reference after the consent of all the parties to the case before it. In the instant case, none of the parties applied for the matter to be referred to arbitration as per ***Order 43 rule 1 (1)*** of the ***old Civil Procedure Rules***. The Judge relied on the prayer *"any other or further orders that the court may deem fit,"* to stay the main suit and referred matter to arbitration. She made this order of reference at the time of hearing an application for an order of interlocutory injunction, when the main suit was set for hearing but before judgment. I do consider that the time was opportune for the court to make such an order.

Be that as it may the parties had an express provision (Clause 36) in their contract by which they recognized and accepted arbitration as means of resolving disputes arising out their contractual relationship. This clause reads:

" 36. (1) Provided always that in case a dispute or difference shall arise between the Employer or the Architect on his behalf and the Contract or either during the progress or after the completion or abandonment of the works, as to the construction of this contract or as to any matter or thing of whatsoever nature arising thereunder or in connection therewith, including any matter or thing left by this Contract to the discretion of the Architect or the withholding by the architect of any certificate to which the Contractor may claim to be entitled to or the

measurement and valuation mentioned in Clause (30)(5)(a) of these conditions or the rights and liabilities of the parties under Clauses 23, 25, 32, 33, 34 of these conditions, then such dispute or reference shall be and is thereby referred to the arbitration and the final decision of the person to be agreed between the parties, or failing agreement within 14 days after either party had given to the other a written request to concur in the appointment of the person to be agreed between the parties, or failing agreement within 14 days the appointment of an arbitrator a person to be appointed on the request of either party by the Chairman or Vice Chairman for the time being of the East African Institute of Architects who, will, then appropriate, delegate such appointment to be made by the Chairman or Chairman of the Local (National) Society of Architects….(4) The award of such arbitrator shall be final and binding on the parties".

It is thus apparent that by incorporating this clause in their contract both the appellants and the respondent, for all intents and purposes recognized arbitration as an effective and efficient means of resolving all the disputes arising out of their building contract. This clause was binding on the parties to that contract. An arbitral clause in a contract has an enduring and special effect, that is, even if parties decide to adopt a different dispute resolution mechanism for a particular dispute that arises under a contract, the arbitration continues in force and is not thereby totally repudiated unless there is a solid reason for doing so. Courts will always refer a dispute to arbitration where there is an arbitration clause in a contract. According to David St. John Sutton in ***Russell on Arbitration, (22nd Ed. Sweet & Maxwell)*** paragraph 2-119, page 80.

> ***"…a party may abandon its right to arbitrate, for example by delay or inaction, or by commencing court proceedings in breach of an arbitration agreement. However, the courts are slow to find such repudiation or abandonment without very clear evidence of an intention to abandon the right to arbitrate together with reliance by the other party to its detriment. Even if the right to arbitrate a particular dispute has been abandoned, that does not necessarily mean that the arbitration agreement itself has been abandoned".***

In fact, the arbitrator in his decision, stated at page 115 of the record of appeal that he did not receive any objection by any party to arbitration. I would not entertain any doubt that the learned judge did not err in law in staying the suit and referring the matter to arbitration.

I would dismiss ground No. 1.

On the second ground of appeal, that the learned Judge erred in law and in fact in not holding that the arbitration had been improperly procured, the appellant gave two reasons why in their view the arbitral award was improperly procured. First, that the arbitration was not ordered according to law and that the arbitrator was not properly appointed. The respondent contended that the arbitration was ordered according to law and that the arbitrator was properly appointed. This has already been answered in the negative under ground one above.

The second reason given by the appellants that the arbitral award was improperly procured was because the arbitrator was improperly appointed. Clause 36 of their building contract (between the 1st appellant and the respondent) provided for the modes of appointment of the arbitrator as indicated above.

The parties failed to appoint an arbitrator by agreement. As a result, the respondent referred the matter to the East African Institute of Architects and the appellant did not oppose the referral. It followed that Mr. Katatumba, sitting as the President of EAIA appointed the arbitrator in 1999. The appellants at that time did not oppose the authority of Mr. Katatumba. It was not until 14th November 2001 when objecting to the award that the appellants stated inter alia that the arbitrator was improperly appointed. It is also at the same time that the appellants raised the issue that Mr. Katatumba was not acting as chairman of EAIA when he appointed that arbitrator.

When the matter of the objection was referred to the learned judge, she ruled that the arbitrator was rightly appointed by Mr. Katatumba in the following words:

> ***" I must point out that the expression 'President' appears to be one used in the circle of Architects- for instance in the arbitration between National Insurance Corporation vs. Arconsult Architects Mr. Stanley Mulumba, appointed Mr. Sam Wako as an arbitrator. Mr. Mulumba wrote the letter of appointment as The***

President of the Uganda Society of Architects"…for the forgoing reasons, I rule that in the absence of any evidence to the contrary, the arbitrator was properly procured and the appointment of the arbitrator was valid".

I would not fault the conclusion for the following reasons. Firstly, the appellants delayed in challenging the appointment of the arbitrator. Since that appointment in 1999 to November 2001 they had all the time to challenge that appointment in court as provided under ***section 6*** of the ***Arbitration Act (Cap. 55).*** According to David St. John Sutton in ***Russell on Arbitration, (22nd Ed. Sweet & Maxwell)*** paragraph 4-076, at page 120, an act or omission of an appointing authority when wrongfully made or made in bad faith can be challenged in a court of law and if a party fails to challenge the appointment of an arbitrator, the arbitrator shall be binding on that party. Secondly, it is trite that he who alleges a fact must prove the existence of that fact. The words president and chairman of the EAIA entail the role of a person who oversees or superintends and is charged with the administration of EAIA. It is noteworthy that the appellants did not adduce any evidence to the effect that Mr. Katatumba did not have the authority as president or chairman of EAIA or that the EAIA does have the title *'president'* in its ranking. Thirdly, the appellants participated in all the arbitral process and dared only to challenge the arbitrator's appointment after he had made the award. This, obviously, smacks of bad faith. It is my view that the learned judge was right in holding that the arbitrator was properly appointed. I would also dismiss ground No. 2.

I would prefer to deal with ground number 8 immediately after answering ground No. 2 in the negative. Dr. Byamugisha's contention is that the learned Judge erred in law and fact in holding that the arbitrator did not misconduct himself. Learned counsel for the respondent's view was to the contrary. ***Section 12*** of the ***Arbitration Act*** provides:

> ***" Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the court may set aside the award".***

It is thus crystal clear that an award would always be set aside on proof that the arbitrator misconducted himself or if the award was improperly procured.

The term misconduct has been assigned a very broad meaning. According to ***Russell on Arbitration, (22nd Ed. Sweet & Maxwell) paragraph 4-16, at page 147*** failure by an arbitrator to act judicially, fairly and impartially amounts to gross misconduct. The arbitrator should keep the dispute confidential; make independent decisions, decide matters according to law; and to decide the dispute in accordance with the legal rights of the parties rather than what the tribunal considers fair and reasonable. The duty of fairness requires the arbitrator to act fairly as well as impartially as between the parties in conducting the arbitral proceedings. The duty of impartiality obliges the arbitrator to adopt a suitable procedure to avoid delay and unwarranted expenses.

Similarly, ***Halsbury's Laws of England (4th edn.) Vol. 2, paragraph 695*** lays down some acts and omissions which amount to misconduct as follows:

> " ***Misconduct has been found to have occurred in the following instances, some of which would also give the court jurisdiction to intervene on other grounds: (1) where the arbitrator or umpire fails to decide all matters which were referred to him; (2) where in his award, the arbitrator or umpire decided matters which have not in fact been included in the agreement of reference (3) where the award is uncertain; (4) where there has been irregularity in the proceedings…(5) where the arbitrator or umpire has acted unfairly and in breach of the rules of natural justice; (6) where the arbitrator or umpire delegates any part of his authority, whether to a stranger or to one of the parties…(7) where the arbitrator accepts the hospitality offered with the intention of influencing his decision or actually influencing it; (8) where the arbitrator or umpire appears to be biased or has an interest in the subject matter of the reference; (9) where the arbitrator or umpire takes a bribe from either party .."***

Be that as it may, not all kinds of misconduct could give rise to setting aside an arbitral award. It is only gross misconduct which gives power to the court to set aside an award. In ***Mehar Singh Bros. Ltd. vs. Ruparel Investment Ltd. [1964] EA 324***, the Supreme Court of Kenya held that denial of fair hearing leads to the setting aside of an arbitral award. Trevelya, J. held at page 334 para *'G'*.

> ***" … The parties could have waived their right to give evidence by so notifying the arbitrators either before or after the Arbitrators got in touch with them but that did not happen. The plaintiffs were not afforded an opportunity to be heard. The evidence sought to be tendered is not admissible and misconduct on the part of the arbitrators has been established. There has been denial of natural justice."***

However Trevelya, J. continued at page 334 in the same case that the arbitrator must be guilty of gross misconduct before his award could be set aside.

Regarding the alleged objections to the proceedings, it is pointed out above that the appellants despite their objection, did not challenge his appointment in court as envisaged by ***section 6*** of ***Cap 55***. Just raising an objection was not sufficient. It must be backed by a solid ground. Therefore, the arbitrator's insistence on conducting the proceedings could not be vitiated as amounting to misconduct without a formal challenge as stipulated under the ***Arbitration Act***.

The next issue to resolve is whether the arbitrator's requirement that each side should deposit US $ 5000 and whether taking that amount from the respondent in the face of objections from the appellants was improper. Dr. Byamugisha's view is that ***section 9*** of ***Cap. 55*** is to the effect that the arbitrator's fees was to be paid after the making of an award. ***Section 9 (1)*** provides:

> ***" When the arbitrators or umpire have made their award, they shall sign it, and shall give notice to the parties of the making and signing thereof, and the amount of fees and charges payable to the arbitrators or umpire in respect of the arbitration and award".***

This section simply means that the arbitrator shall present the award to parties for signing together with the amount of fees and charges for the award. The section does not prohibit the

arbitrator from requesting deposits or advances. It only lays down one way by which the arbitrator can give notice of his fees. Parties and the arbitrator may also fix the fees by agreement. See ***Halsbury's Laws of England, 3rd Edn. Vol 2 paragraph 105*** where it is stated:

> ***" …Parties may agree on the remuneration of the arbitrator or umpire expressly in advance. In the absence of express agreement a lay arbitrator or umpire is ordinarily entitled to a reasonable remuneration. In the absence of a contrary intention in the arbitration agreement the arbitrator or umpire may fix the amount of his remuneration, and may include it in the award."***

Concerning the issue of requesting for deposits before the making of the ward, ***Russell on Arbitration, (22nd Edn.)***, paragraph 4-098 states at page 124:

> ***" It is common practice for arbitration institutions and arbitral tribunals to take steps to secure their fees in advance. This may take the form of seeking deposits and /or commitment fees to cover the loss of business likely to result if the arbitration hearings, sometimes booked to run for a period of several weeks, are postponed because the parties are not ready or cancelled at short notice because the parties settle the dispute. Arbitration such as those run by the ICC commonly require that parties make deposits with the arbitral institution on account of arbitrators' fees and the administrative expenses of the arbitration. Some arbitration rules give the arbitral tribunal the power to make orders securing its fees. As the powers are part of the arbitration agreement, the orders are both lawful and enforceable. The right to a commitment fee is not an implied term of an arbitrator's appointment, and the matter should therefore be dealt with by express agreement at the time of his appointment."***

In view of the foregoing, I hold the view that it was not an act of misconduct on the part of the arbitrator when he requested the appellants and respondent to pay him deposits nor did the receipt of such deposits from the respondent amount to misconduct. The appellants on their own volition chose not to pay the deposit evidenced by their letter dated 13th October, 1999, written

by Dr. Byamugisha addressed to Hon. Justice E. Torgbhor, on the sole ground that it was excessive.

In the ***Norjal*** case each party appointed an arbitrator and the two arbitrators appointed a third arbitrator. The arbitrators did not negotiate their fees until 3 years later after appointment when they fixed 100% of their fees and before the hearing date. The arbitrators negotiated, insisted and maintained a request to both parties for the payment of a commitment fee. It was held at page 220 that:

> ***" ...if the arbitrators wish to insist on the payment of a commitment fee, the proper time to do so is before appointment. They can then decline the appointment if acceptable terms are not forthcoming. After acceptance of appointment parties are, in my judgment, entitled to object to insistence upon any particular fee on the ground that it would constitute a variation of the arbitration agreement, under which the arbitrator would be entitled to reasonable fees, but not without the consent of the parties to any commitment fee".***

However, in the instant case, the arbitrator was appointed by one person/authority, the President of EAIA and on the basis of his terms of appointment, it was not an act of misconduct for him to set his fees as well as asking for deposits thereon. Consequently, the learned judge did not err in law and in fact in holding that the arbitrator did not misconduct himself.

It was further contended by the appellants that the arbitrator was in the habit of making private arrangements with the claimants under which the claimants would purchase tea and coffee for the arbitrator which, the arbitrator would partake with the claimant's (Respondent's) counsel, representatives and witnesses. This was stated to be misconduct for an arbitrator to arrange for his tea and coffee to be paid for by one party whereas the other party was objecting. The respondent argued that the tea room was opened to all the parties and the advocates but the appellants frowned and chose not to partake. For example, when Mr. Kakooza took the tea together with the rest of the people, Dr. Byamugisha reprimanded him warning him never to take the tea again. According to ***Halsbury's Laws of England (4th edn.) Vol. 2*** para. 695, it is act of gross misconduct ***"… where the arbitrator accepts the hospitality offered with the intention of influencing his decision or actually influencing it."*** It has not

been proven by the appellants that the arbitrator's taking tea with the respondent's advocate was meant to influence or actually influenced his decision. The court was told the tea room was public and open to all. The appellants on their own volition deliberately kept away for unknown reasons. They would only have themselves to blame.

It was not shown that this was privately arranged. All the orders made were directly to all the parties and their respective counsel. I therefore disallow this ground of appeal.

Regarding grounds No. 4 and 5 together. The issues here are that the learned judge erred in law and in fact by not holding that an award made out of time is invalid and that the appellants had by conduct waived their right to rely on the arbitrator's failure to extend time within which to make his award. Dr. Byamugisha, learned counsel for the appellants contended that the award in question was not only signed but was also made after the three months period stipulated by rule 3 of the First Schedule to the Act which provides:

> ***"3. the arbitrator shall make their award in writing within three months after entering on the reference, or after having been called on to act by notice in writing from any party to the submission, or on or before any later day to which the arbitrators, by any writing signed by them, may from time to time, enlarge the time for making the award."***

The import of this rule is that an award made outside the period of three months is invalid unless the time is extended by court or by the arbitrator or by the agreement of the parties. In the instant case, the arbitrator entered on record on 30/11/99 and by 2/11/2000 three months had already expired. There is no record that the arbitrator enlarged the time for which to make the award. The appellants' argument is that this court should rule that the award in question was thereby invalid. The respondents on the other hand argued that the appellant acquiesced or waived their rights to challenge the irregularity of making an award out of time.

For the principle of waiver or acquiescence to apply, it must be proven that the party in question had knowledge about the existence of the fact acquiesced in. In ***Mehar Singh Bros. Ltd. vs. Ruparel Investment Ltd.*** (supra) at 335 Trevelya J held:

> ***" It has been argued that the plaintiffs have waived their rights. I do not accept that. Waiver must…be based on knowledge of facts. The only facts to be imputed to the plaintiffs is that the arbitrators had failed to make their award in due time. It cannot be imputed to them that they knew that the award was made out of time. We know that they moved quickly enough when the learned that the award was made."***

Similarly, according to the ***Halsbury's Laws of England (4th edn.) vol. 2 paragraph 695***:

> ***" Waiver of objection. The parties may waive objection to any kind of irregularities in the conduct of a reference. Continuance to take part in the reference knowing of the irregularity may amount either to waiver of the irregularity, or to an implied agreement to the irregular procedure. But the waiver or agreement must be made with the full knowledge of the irregularity."***

It is crystal clear that the appellants knew that the 3 months period for making the award had expired and they chose to remain silent about it as Dr. Byamugisha put it that they were aware the three months had expired, but that they had no moral duty to tell the arbitrator to enlarge time. It was the arbitrator's duty to extend time or not. See ***Halsbury's Laws of England (3rd edn.) vol. 2 page 42*** where it is stated that:

> ***" The parties to an arbitral agreement may by their conduct be precluded from objecting to an award on the ground that it was made out of time, although they have given no express consent to the time for making the award being enlarge".***

In view of the above I would accept the learned judge's view that the appellants had by their conduct acquiesced in the making of an award out of the required time.
Grounds 4 and 5 are both disallowed.

Turning to ground No. 6 of this appeal, Dr. Byamugisha contented that the learned Judge erred in law and in fact in holding that the applicants had only themselves to blame when they sat on their right of appeal against her order referring the matter to arbitration. He further argued that the appellants had not waived their rights to challenge the decision of the Judge but they applied for records of proceedings which were never availed in time.

According to the record, the sequence of events leading to this appeal are as follows. On 14th June, 1999, the ruling in Miscellaneous Application 542/99 was delivered. Dr. Byamugisha, the learned counsel for the appellants filed the notice of appeal as well as requesting for a typed copy of the ruling in the same application (542/99) on 23rd June, 1999. Subsequently on 25th November, 1999 and 1st October, 2003, he again reminded the Deputy registrar of the High Court to avail him the copies. On 1st October, 2003, he again filed another notice of appeal. The Registrar availed him the record of proceedings on 17th December, 2003 and he certified them on 8th January, 2004. The same day he filed the memorandum and record in this Court.

On the other hand, the arbitrator was appointed in 1999 and the arbitral award was filed on 14th November, 2001. On 20th September 2001, the appellants applied to court vide Misc. Application 417/2001 to have the arbitrator removed. The judge overruled the appellants' application to set aside the arbitral award on 30th September, 2003.

Since 14th June, 1999 when the suit was stayed and the matter referred to arbitration, the appellants participated in the arbitral process and only applied to challenge arbitrator's appointment in 2001. They filed a Notice of Appeal and applied for the record of proceedings on 2nd October 2003. It was received on 17th December 2003. It was not until 8th January 2004 that the appellants filed the memorandum of appeal in this Court. I agree with the submissions of Mr. Tumusiime, the learned counsel for the respondents that the appellants have only themselves to blame because it was not until 1st October, 2003 after the Judge's ruling on their application to

set aside the award that they woke up to look for the record of proceedings of June 1999 which exercise took them over four years. They do not appear to have been very vigilant. It took them up to six years to obtain the Record of proceedings in HCCS 1255/95 and Misc. Application 542/99.

This ground is devoid of any merit. It therefore fails.

Considering ground 9 of the memorandum of appeal, Dr. Byamugisha submitted that the learned Judge erred in law in holding that there was no error of law on the face of the record. He stated that the arbitrator adjourned the proceedings with costs to the appellants. This was an error on the face of the record. Mr. Tumusiime argued that appellants bore the costs because they (appellants) were the ones who were asking for the adjournments. S***ection 27(2)*** of the ***Civil Procedure Act***, is very clear on this. All costs of any action, cause or other matter or issue shall follow the event unless the court or judge should for good reason otherwise order. The appellant was the correct person to bear the costs of the adjournments which were always at his behest. I would not fault the arbitrator. This ground therefore fails.

On the issue of whether Ssentoogo and Partners were parties to the arbitration, the arbitrator's findings page 121 to 124 of the record of appeal (lines 23 and 24, at page 123) was that the second respondent's liability could not be determined under the clause in a contract to which the second respondent was not a party. The second appellant knew that he was not a party to the arbitration, yet did not challenge his joinder in the arbitration and knowingly and willingly participated. Most importantly, having confessed to receiving a gift of US$ 5,000 from the respondent, this was further good reason for denying him costs.

I would accept the learned judge's view that there were no errors of law and fact on the face of record so as to warrant any interference with the decision of the arbitrator. According to ***Mike & Others vs. Overseas International Fisheries Ltd & 2 others, Miscellaneous Application No. 605 of 2001***, it was held, *inter alia*, that to constitute an error of law and error on the face of the record there must be something radically wrong or viscously wrong in the proceedings. It was further held that even if there was an error on the face of record the court cannot temper with the

decision of an arbitrator unless the error or illegality is so grave as to warrant the setting aside of the award which is not so in the instant case in my view.
Ground No. 10 would fail.

In view of the foregoing and a perusal of the record indicates that the arbitrator dealt with and ruled on all the issues framed.

Regarding ground No. 11, Dr. Byamugisha submitted that the learned Judge erred in law and in fact in finding that the appellants refused to agree to the arbitrator's terms and did not comply with the arbitral order for directions for payment of a deposit on account of the costs, expenses and disbursements thereby intending to frustrate and impede the arbitration. The appellant's intention can be inferred from the circumstances of the case. First, as stated in Court by Dr. Byamugisha, the appellants took part in the arbitration under protest until its completion. Secondly, in their letter dated 13th October, 1999, addressed to Hon. Justice E. Torghor, the appellants claimed that their main contention for non-payment of fees was that the fees and expenses were excessive. Thirdly, they also said that they would not pay because doing so would validate the arbitral process whereas all terms including payment terms are outside the law. Fourthly, they contended that the arbitrator misconducted himself by requesting for payments of deposits before making the arbitral award. Fifthly, appellants contended that Mr. Katatumba was not acting as chairman of the EAIA when appointing the arbitrator without proof yet the second appellant is a prominent member of the EAIA. The only logical conclusion to be drawn from the foregoing is that the appellants were bent on frustrating the entire arbitral process by such conduct.

On ground No. 13, learned counsel for the appellants contended that the learned Judge erred in law in not holding that the respondents had obtained the contract through bribery. The view of the arbitrator which was upheld by learned trial judge was that this point had not been specifically pleaded. Counsel for the respondents also shared the same view.

Order 6 rule 3 of the ***CPR (S.I. 71-1)*** stipulates that facts constituting particulars of fraud, misrepresentation, breach of trust or similar conduct alleged must be specifically pleaded.

However, it is on record that the second appellant confessed to having received a gift of US$ 5,000 for the wedding of his daughter but vehemently denied taking a bribe. The Arbitrator ruled that the second appellant being an architect had violated ***S. 32(2)*** of the ***Architects Registration Act*** and section 6 of the Code of Professional Ethics for Architects which forbid architects from receiving gifts from contracts. The arbitrator as a result denied costs of arbitration to the second appellants. It is also on record that the second appellant accepted having received a bribe from the respondent but declined to mention who exactly approached and gave him the bribe in question.

This ground was not sufficiently proven. The standard of proof for fraud being higher than in ordinary civil matters, was not discharged.

I would therefore dismiss this appeal with costs to the respondents.

Since my Lords A. Twinomujuni and S.B.K. Kavuma J.JA. both agree this appeal stands dismissed, as afore mentioned.

Dated at Kampala this …25th …. day of ……August... 2009.

……..…….

HON. A.E.N. MPAGI-BAHIGEINE

JUSTICE OF APPEAL

JUDGMENT OF TWINOMUJUNI JA;

I have had the benefit of reading the judgment, in draft, of her Lordship Hon.A.E.N.Mpagi-Bahigeine, JA. I concur and I have nothing useful to add.

Dated at Kampala this …25th ….day of …….August…2009

HON JUSTICE AMOS TWINOMUJUNI
JUSTICE OF APPEAL

JUDGMENT OF S.B.K.KAVUMA, JA

I have had the advantage of reading in draft the judgment prepared by the Honourable Lady Justice A.E.N.Mpagi-Bahigeine, JA.

I agree with that judgment, the reasoning and the orders therein. I have nothing useful to add.

Dated at Kampala this …..25th ….day of ……..August…..2009

Hon Justice S.B.K.Kavuma,
JUSTICE OF APPEAL