Judgment delivered on 23/6/15 by Justice Kakuru,

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL AT KAMPALA

CIVIL APPEAL NO. 87 OF 2011

BABCON UGANDA LTD..APPELLANT

VERSUS

MBALE RESORT HOTEL LTD...............................RESPONDENT

[Appeal from the Decision of the High Court , Commercial Division at Kampala before Honourable Justice Geoffrey Kiryabwire dated 3rd May 2011 in Miscellaneous Civil Application No. 256 Of 2010)

CORAM:

HON. MR. JUSTICE A. NSHIMYE, JA
HON. MR. JUSTICE KENNETH KAKURU, JA
HON. MR. JUSTICE FMS EGONDA-NTENDE, JA

JUDGMENT OF JUSTICE KENNETH KAKURU, JA

I have had the benefit of reading in draft the Judgment of my brother The Hon. Justice Egonda-Ntende, JA.

I agree with him that this appeal ought to be struck out with costs.

However, I am constrained to add as follows;-

The ACA being a restrictive Statute nothing ought to be read into or out of it, especially where, as in Section 34 of the ACA there is no ambiguity. I agree with Justice Egonda-Ntende, JA that ACA is a restrictive statute that limits the intervention of courts in matters that are governed by that Act and ousts the jurisdiction of the courts to entertain disputes that fall under it.

For the reasons already set out in the Judgment of Justice Egonda-Ntende JA, I am of the considered opinion that the ACA as whole and specifically Section 34 limits the intervention of the High Court only to setting aside an award upon the conditions setting out in that section. The High Court in my view has no power to vary or otherwise deal with the award in any way under Section 34 of the ACA.

As far as I could ascertain except under Section 38 there is no other provision at all in ACA or in any other law that provides for variation of an award made under that Act. This appeal does not relate to Section 38

In the case before us the learned trial Judge did in fact vary the award when at P.7 of his judgment he concluded as follows:-

> ***"All in all, the award raises some issues but which to my mind however are not strong enough to set aside the whole of it. Those portions relating to special damages of Shs. 1,272,700,857/= and general damages of Shs. 100,000,000/= are set aside. As this not an appeal, no figures are substituted for them. The rest of award remains intact.***
>
> ***As to costs, I award the Applicant one third of his taxed bill"***

I find that the learned trial Judge varied the award without jurisdiction. Under **Section 34** of ACA the power of the High Court is limited only to setting aside the award, even then, only in the circumstances set out in that section which is already reproduced in the Judgment of Justice Egonda-Ntende JA. I am therefore inclined to hold that the learned trial Judge with all due respect

erred when he invoked **Section 34** of ACA to vary the award and that he did so without jurisdiction.

It may be persuasive to argue that the variation of the award in this case is permissive as it did not go to the root of the issues raised at arbitration. The danger with that approach
is that, the extent of such variation would have no limit. Holding so would be opening the proverbial *"can of worms"*. That interpretation would in the result defeat the purpose of ACA, which is to restrict the intervention of courts in the matter under that Act.

In any event, if the ACA had intended to give the High Court jurisdiction to vary the award, it would have specifically stated so. It does not. Section 34 states as follows;-

> ***34 (1)*** ***"Recourse to the Court against an arbitral award may be made only by an application for setting aside the award......."***

In my view therefore Section 34 cannot be invoked for any other purpose other than setting aside an arbitral award. The legislature clearly did not intend to extend the jurisdiction of the High Court to include variation of an arbitral award. Court cannot by inference grant itself jurisdiction beyond what an Act of Parliament has expressly stated it to be.

My opinion is fortified by the provisions of Section 38 of ACA. It stipulates as follows;-

38. *Questions of law arising in domestic arbitration.*

> ***(I)*** ***Where in the case of arbitration, the parties have agreed that-***

(a) an application by any party may be made to a court to determine any question of law arising in the course of the arbitration; or

(b) an appeal by any party may be made to a court on any question of law arising out of the award,

the application or appeal, as the case may be, may be made to the court.

(2) On an application or appeal being made to it under subsection (I), the court may, as appropriate-
(a) determine the question of law arising;
(b) confirm, vary or set aside the arbitral award or remit the matter to the arbitral tribunal for reconsideration or, where another arbitral tribunal has been appointed, to that arbitral tribunal for consideration.

(3) Notwithstanding sections 9 and 34, an appeal shall lie to the Court of Appeal against a decision of the court under subsection (2) if –

(a) the parties have so agreed that an appeal shall lie; and

(b) the court grants leave to appeal, or where the court fails to grant leave, the Court of Appeal grants special leave to appeal, and on such appeal the Court of Appeal may exercise any of the powers which the court could have exercised under subsection (2).

(4) An application or appeal under this section shall be made within the time limit and in the manner prescribed by the rules of court applicable, as the case may be, in the court or in the Court of Appeal.

(5) When an arbitral award has been varied on appeal under this section, the award as varied shall have effect as if it were the award of the arbitral tribunal concerned.

This section clearly grants jurisdiction to the High Court to determine a question of law arising in the course of Arbitration where the parties have agreed to refer to it as such question of law for determination. The High Court also has jurisdiction under this section to entertain an appeal on a question of law arising from an arbitral award.

This is the exception to the rule in Sections 9 and 34 that the Court can only set aside an arbitral award and nothing else.

The exception set out in Section 38 extends to the granting of parties the right to appeal to this Court only on a question of law arising from a decision of the High Court under that section. Therefore under Section 38 parties to an arbitral award may appeal to the High Court only on a question of law and they may also appeal from the High Court to this Court on the same matter, *notwithstanding Sections 9 and 34.*

Under Section 38(2) the High Court upon determining the question of law, may confirm , vary or set aside the award, or remit the matter to the tribunal for re consideration or to another tribunal for consideration.

The jurisdiction granted to the High Court while determining a question of law under Section 38 of ACA is therefore far much wider than that under Section 34.

The words used in Section 38 are specific, to wit: "may confirm, vary or set aside" they are clearly absent in Section 34. As already stated above Section 38(3) clearly indicates it is the exception to sections 9 and 34.

It appears clearly to me that the legislature did not intend to grant power to the High Court to vary an arbitral award except as provided for under Section 38.

There is no doubt that the application at the High Court was brought under Section 34 and not Section 38. The learned Judge therefore erred when varied the award under Section 34 which Section does not provide variation of an award. Section 34 does not even provide for the confirmation or remittance, or reconsideration of an award. It provides only for setting aside the award. Under Section 34 the Court may either set aside the award or dismiss the application, nothing more nothing less. In this case the learned Judge having found no reason to set aside the award ought to have dismissed the application as he had no power to vary it in any way.

Ordinarily, this Court would not have jurisdiction to set aside the decision appealed having held that it has no jurisdiction to entertain the appeal itself. However, it is now trite law that an illegality once brought to the attention of the Court overrides everything else including pleadings.

This Court is clothed with jurisdiction to address any illegality at anytime once it is brought to its attention. *See;-* ***Makula International vs Emmanuel Cardinal Nsubuga 1982 [HCB] P.11, Zaabwe vs Orient Bank, Civil Appeal No. 04 of 2006 (SC), Belex Tours and Travel Ltd vs Crane Bank and Another, Court of Appeal Civil Appeal No. 071 of 2009.***

In addition to the above, this court has power under **Rule 2(2)** of the Rules of this Court to set aside Judgments that have been proved to be null and void. A Judgment made without jurisdiction is null and avoid *abnitio.*

It may be argued of course, that the issue, whether the High Court could vary the award or not under ACA was neither canvassed at the hearing of this appeal nor at the court below and as such this court ought not to entertain it. It may also be contended that, the memorandum of appeal did not allude to that issue.

Firstly, the legality of a decision of court is a question of law and need not be pleaded or argued. Secondly this Court has a duty to reappraise the evidence as a first appellate court and to make its own inferences on all issues of law and fact under Rule 30(1) of the Rules of this Court.

Section 11 of the Judicature Act (CAP 13) grants this court the same powers as the court of original jurisdiction. It stipulates as follows;-

11.

> ***"Court of Appeal to have powers of the court of original jurisdiction.***
>
> ***For the purpose of hearing and determining an appeal, the Court of Appeal shall have all the powers, authority and jurisdiction vested under any written law in the court from the exercise of the original jurisdiction of which the appeal originally emanated."***

In the case of ***Fr. Narcensio Begumisa & others vs Eric Tibebaga (Supreme Court Civil Appeal No. 17 of 2002.*** Mulenga JSC while emphasizing the role of the first appellate court said that:-

> *"It is a well settled principle that on a first appeal, the parties are entitled to obtain from the appeal Court its own decision on issues of fact as well as law." (Emphasis added)*

Unlike at the trial court where parties and court are restricted to the pleadings before them, a first appellate court has a duty to look beyond the memorandum of appeal and the arguments of counsel. It must reappraise the whole evidence and come up with its own inferences on all issues of law and fact. See also;- ***Bogere Moses versus Uganda (Supreme Court Criminal Appeal No. 1 of 1997)***, **Henry Kifamunte Vs Uganda (Supreme Court Criminal Appeal No. 10 of 1997).**

In the result, I would strike out the appeal on account of its being incompetent, and would also set aside the ruling of the High Court *in High Court (Commercial Division) Civil Application No.265 of 2010* and substitute it with an order of dismissal.

I would order that the appellant herein pays one half of the costs at this court and one half of the costs at the High Court.

Dated at **Kampala** this ......23rd......day of ...June...2015.

....

KENNETH KAKURU
JUSTICE OF APPEAL

Judgment delivered on 23/06 by Justice Kakuru

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA
AT KAMPALA

CIVIL APPEAL N0. 87 OF 2011

BETWEEN

BABCON UGANDA LTD ::APPELLANT

VS

MBALE RESORT HOTEL LTD::RESPONDENT.

Coram: **Hon. Justice A.S Nshimye, JA**
Hon. Justice Kenneth Kakuru, JA
Hon. Justice F.M.S Egonda-Ntende, JA

Appeal from the decision of the High Court, Commercial Court Division of Kampala before the Honourable Mr. Justice G. Kiryabwire in Miscellaneous Civil Application N0. 256 of 2010.

JUDGMENT OF JUSTICE A.S NSHIMYE.

I have had the benefit of reading the lead Judgment of my brother Justice Egonda Ntende, in draft. I agree with his reasoning and conclusion. While exercising its powers under S**ection 34 of the Arbitration and Conciliation Act (ACA),** Court may set aside the whole award or use its judicial blade to server with reasons, that part that is objected against. Once either is done, no appeal would lie to this court.

The preliminary objection raised by Mr. Andrew Kasirye would be sustained with the result that it would dispose of the whole appeal.

For the reasons given by our brother Justice Kenneth Kakuru in his judgment, he is of the view that under **Section 34 of the ACA,** the High Court would either set aside the whole award or dismiss the application with no powers to vary the award.

Since in his conclusion he agrees that the appeal is incompetent, it is accordingly struck out with costs.

DATED AT KAMPALA THIS..........23rd..........DAY OF JUNE 2015.

HON. A.S NSHIMYE,
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[Coram: Nshimye, Kakuru & Egonda-Ntende, JJA]

Civil Appeal No. 87 of 2011

BETWEEN

BABCON UGANDA LTD==============================APPELLANT

AND

MBALE RESORT HOTEL LTD========================RESPONDENT

[*Appeal from the decision of the High Court, Commercial Court Division at Kampala before the Honourable Mr Justice G Kiryabwire in Miscellaneous Civil Application No.256 of 2010.*]

JUDGEMENT OF EGONDA-NTENDE, JA

Introduction

1. This is an appeal against a decision of the High Court of Uganda Commercial Court Division, [Kiryabwire, J., as he then was], made under section 34 of the Arbitration and Conciliation Act, hereinafter referred to as the ACA. The parties hereto Ire parties to a building contract for a construction of a hotel project in Mbale. During the execution of the contract the relationship between the parties broke down and the respondent who was the owner of the project expelled the appellant who was the contractor from site and seized some of its plant and equipment.

2. In accordance with their written agreement the dispute was referred to an arbitrator, Retired Justice Alfred Karokora, who heard and made an arbitral award. The respondent was dissatisfied with the arbitral award and sought to set it aside in accordance with section 34 of the ACA. The High Court heard application to set aside the award and partially did so, leaving the rest of the award in force. The appellants dissatisfied with the

ruling of the High Court that partially set aside the award appealed to this court.

Preliminary Point of Law

3. When this appeal was called for hearing Mr Andrew Kasirye, learned counsel for the respondent, raised a preliminary point of law. Notwithstanding this point of law the parties Ire told to argue the appeal including the preliminary point of law so as to save the time of both the parties and court, in event that the preliminary point of law was not dispositive of the whole appeal. I shall deal initially with this point of law.

4. Mr Kasirye submitted that this appeal is incompetent as the appellant did not have a right of appeal in the matter. This matter arises out of a decision of the High Court made under section 34 of the ACA. He referred to section 9 of the ACA which forbids the intervention of the courts in proceedings governed by the ACA except as provided for under the ACA. He submitted that the right of appeal is not automatic and it must be created by statute. He referred to the cases of Shah v Attorney General [1971] EA 60 and Baku Raphael v Attorney General Constitutional Appeal No.1 of 2005 [unreported] in support of this proposition.

5. Dr Byamugisha, learned counsel for the appellants, submitted that this point raised had been settled by the court of appeal decision in the case of Seyani Brothers & CO (U) Ltd v Simba Manyo Estates Ltd Civil Application No. 06 of 2009 [unreported]. The court of appeal held that where a matter is governed by some statutory provision other than the Civil Procedure Act the matter was appealable as of right unless an appeal was barred by statute. Dr Byamugisha further stated that it was on that basis that he made appeals to the Court of Appeal and Supreme Court in the case of National Social Security Fund v Alcon International and Anor; Supreme Court Civil Appeal No.15 of 2009 [unreported].

6. Dr Byamugisha further submitted that where a matter has been the subject of arbitration and it is referred to the High Court under section 34

of the ACA it then becomes governed by the Civil Procedure Act and an appeal lies as of right to the Court of Appeal from a decision of the High Court.

Analysis

7. I shall set out the statutory provisions that have been referred to. Section 9 of the ACA provides,

> 'Extent of Court Intervention
> Except as provided in this Act, no court shall intervene in matters governed by this Act.'

8. Section 34 provides,

> **'Application for setting aside arbitral award**
> (1) Recourse to the court against an arbitral award *may be made only by an application for setting aside the award under subsections (2) and (3).*
> (2) an arbitral award may be set aside by the court only if--
> (a) ......
> (b) ....' [Emphasis is mine.]

9. A similar objection to the current objection was considered in the case of Seyani Brothers & Co (U) Ltd v Simbamanyo Estates Ltd [unreported] and this court came to the conclusion that 'the appeal sought to be struck out is sustainable under section 66 of the Civil Procedure Act.' The Court followed the decisions made in Denis Bireijje v Attorney General Civil Application No.31 of 2005; Pius Niwagaba v Law Development Centre CACA No.18 of 2006; Makula International v His Eminence Cardinal Nsubuga and anor; and Joseph Bayego v the Registrar of Titles CA No.20 of 1994.

10. It may be pertinent at this stage to point out the all the cases referred to in Seyani Brothers & Co (u) Ltd v Simbamanyo (supra) are dealing with statutory provisions that had no relation to the ACA. Denis Bireijje (supra) was a matter dealing with judicial review as was Pius Niwagaba. Makula International (supra) was dealing with the Advocates Act while

Joseph Bayego was dealing with the Registration of Titles Act. The proceedings in question were therefore not proceedings governed by the ACA.

11. Nevertheless the tenor of those decisions was to the effect that if a matter or proceeding arose from some other statutory provision other than the Civil Procedure Act there was a general right of appeal created by section 66 of the Civil Procedure Act unless such appeal was specifically barred by a statutory provision.

12. Secondly the court in Seyani Brothers case did not refer to section 9 of the ACA and consider its effect on the matters before the court. **The question before us now is whether section 9 in effect bars appeals to this court in respect of matters governed by the ACA?**

13. Dr Byamugisha stated that it was on the basis of the existence of a right of appeal that an appeal was made to the Court of Appeal and Supreme Court in the case of <u>National Social Security Fund v Alcon International and Anor; Supreme Court Civil Appeal No.15 of 2009 [unreported]</u>. In that case one company had won the contract to construct the Workers House. It signed a contract with the client, National Social Security Fund. Another company, that had bided and lost the bid, carried out the construction, without the knowledge of the client. The second company filed an action to recover monies from the client in the High Court of Uganda. Without an application by either party to the suit, or both parties being heard in the matter the court ordered them to submit to arbitration. An application was made to set aside that arbitral award in the High Court. The decision of the High Court was appealed to the Court of Appeal and finally to the Supreme Court.

14. The Supreme Court held that the second company that performed the contract was a stranger to that contract and could not sue upon it. Neither could any arbitral proceedings properly arise on the contract to which the party was a stranger. The Supreme Court further held that trial judge had erred in ordering arbitration in the circumstances of that case, setting aside that order and ordered the trial to proceed in the High Court.

15.I am inclined to the view that the National Social Security Fund case is not helpful to this case as it was established that the proceedings in question were wrongly brought under the ACA. There was no arbitration agreement between the parties in that case and it is therefore distinguishable from the case before us.

16.Does section 9 of the ACA oust the jurisdiction of courts, except as provided by ACA, in respect of matters that are now governed by the ACA? I would think so. A historical background might be useful while answering this question. The old Arbitration Act, Cap 55 of the laws of Uganda 1964 revised edition governed arbitration matters prior to the passing of the ACA. That Act did not have the equivalent of the present section 9 of the ACA.

17.Arbitration was court sůpervised right from the possibility of revoking an arbitration agreement. See Section 3 of the old Act. The court could enlarge the time to make an award. The court could remit the award for re consideration to the arbitrator or it could set aside an award where the arbitrator misconducted himself or where the award was improperly procured. There was power to stay proceedings, vide section 17,where a party to an arbitral agreement applied to the court for a stay before the filing of the written statement of defence, if that party was ready and committed to do all that was required for the proper conduct of the arbitration. Like now under the ACA an award when filed in the High Court was to be the equivalent of a decree.

18.It is clear from the old Act that there was no attempt to circumscribe access to the courts even where a party to an arbitral agreement chose to ignore the arbitral agreement and commence an action in the courts. This was the subject of criticism in a report by the Commission of Inquiry[on Judicial Reform] which was set up under legal no.3 of 1994, chaired by Mr Justice Harold Platt. The final report recommended, inter alia, at page 52 that,

> 'There is need to incorporate into our law international instruments **and introduce radical provisions which will**

give arbitration the important role it plays in other jurisdictions.' [Emphasis is mine.]

19. The final report of the said Commission of Inquiry provided the main impetus for reform of the law relating to arbitration giving rise to the ACA.

20. Under the ACA I note a new and radical approach. Under section 1 the provisions of the ACA Ire to apply to both domestic and international arbitration. Under section 5 of the ACA a judge or magistrate before whom proceedings are brought which are the subject of an arbitration agreement is obliged, where a party to that agreement applies, and after having heard both and or all the parties to refer the matter to arbitration unless the arbitration agreement was null and void, inoperative or incapable of being performed; or if there is really no dispute between the parties with regard to the matters agreed to be referred to arbitration. Section 6 permits court to grant interim measures pending arbitration. Section 9 bars the intervention of courts in matters governed by the ACA except as provided under ACA.

21. Intervention of the courts is permitted under the Act to set aside an award pursuant to section 34 of the ACA. It states in part,

> '(1) Recourse to the court against an arbitral award may be made only by an application for setting aside the award under subsections 2 and 3.
>
> (2) An arbitral award may be set aside by the court only if-
> - (a)..........., (b)..........'

22. It appears to us that tenor of the ACA is to limit the intervention of courts in matters that are governed by the ACA. The law has chosen to reinforce freedom of contract and allow the parties or one of the parties enforce an existing arbitration agreement as the only mode available to the parties to solve their dispute, and to that extent oust the jurisdiction of the courts to entertain such a dispute. The words used to achieve this are unambiguous.

23. The Supreme Court has considered the question of ouster of jurisdiction in the case of David Kayondo v The Cooperative Bank Ltd SC Civil Appeal No. 19 of 1991 [unreported] in which Manyindo, DCJ, opined,

> 'Under the Constitution and the Judicature Act the High Court has unlimited jurisdiction over all matters civil or criminal subject to any written law. It is settled law that for a statute to oust the jurisdiction of the court, it must say so expressly. Of course ouster may be inferred from the words of the statute if such inference is irresistible.'

24. Section 9 of the ACA satisfied the foregoing standard. It is very clear in ousting courts' general jurisdiction. It bars the courts from intervening beyond the limited or special jurisdiction permitted under ACA. This, in my view, must extend to an appeal to this court as this would be tantamount to intervention by the Court of Appeal in a proceeding under ACA. Such intervention is barred unless it is authorised by the ACA and it is not so authorised.

25. The ACA authorises the courts to intervene under section 6 of the ACA to provide interim relief; under section 16 (6) to re consider a decision of the arbitral tribunal with regard to whether it has jurisdiction or not and such decision of the court is final and not appealable; under section 34 to set aside an arbitral award only on the grounds set out in section 34(2) and (3) of the ACA; and under section 38 to determine questions of law where the parties agree that an application may be made to a court to determine a question of law or an appeal may be to the court on any question arising out of the award. The only recourse to the Court of Appeal is provided for under section 38 (3) which states,

> 'Notwithstanding sections 9 and 34, an appeal shall lie to the Court of Appeal against a decision of the court under subsection (2) if--
> (a) the parties have so agreed that an appeal shall lie; and
> (b) the court grants leave to appeal, or where the court fails to grant leave, the Court of Appeal grants special leave to appeal, and on such appeal the Court of Appeal may exercise any of the powers which the court could have exercised under subsection (2).

(4) An application or appeal under this section shall be made within the time limit and in the manner prescribed by the rules of the court applicable, as the case may be, in the court or in the Court of Appeal.

(5) Where an arbitral award has been varied on appeal under this section, the award as varied shall have effect as if it were the award of the arbitral tribunal concerned.'

26. It has not been contended that the present appeal is made under section 38 of the ACA and in fact it is not. The legislature was alive to the possibility of an appeal to the Court of Appeal for proceedings under ACA and it provided for appeals to the Court of Appeal only in relation to matters under section 38(2) of ACA. No other right of appeal against a decision of the High Court was created in the ACA. I find that no right of appeal to the Court of Appeal exists under the ACA beyond what is provided under section 38(3) of the ACA.

27. It has been contended that the right of appeal created under section 66 of the Civil Procedure Act extends to decisions made under section 34 of the ACA. This is the decision of this court in Seyani Brothers Co (U) Ltd (supra). That right of appeal appears in my view ousted by the clear and express words of section 9 of the ACA which bars 'courts' [in plural] from intervening in the matters governed by the ACA, except as provided by the ACA. The ACA is a specific piece of legislation governing the resolution of disputes by way of arbitration in cases where the parties have agreed to resolve the disputes between them by arbitration. The Civil Procedure Act is a general Act in relation to civil proceedings.

28. The ACA is a latter piece of legislation from the Civil Procedure Act. The provision of the ACA must take precedence, or rather section 9 of the ACA must take precedence over section 66 of the Civil Procedure Act in relation to matters governed by the ACA. The matter in this appeal is clearly governed by the ACA.

29. In light of the foregoing I am, regretfully, unable to agree with the decision of this court in Seyani Brothers Co (U) Ltd v Simbamanyo Estates Ltd (supra) and find that the appellant has no right of appeal against the decision of the High Court made under section 34 of the ACA.

I uphold the preliminary point of law raised by counsel for the respondents and find this appeal incompetent.

30. I have read the draft judgment of my brother, Kakuru, JA, in which he proposes to set aside the decision of the High Court on the ground that it amounts to an illegality as it was made without jurisdiction. With respect I differ for the reasons below.

31. I do not think that the matter here is a question of jurisdiction. Jurisdiction is defined by the Advanced Oxford Learner's Dictionary 5th edition, 1995, at page 644, as' the official power to make legal decisions and judgments.....'

32. Words and Phrases legally defined 3rd edition volume 2 at page 497 states,

> 'By 'jurisdiction' is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by statute, charter, or commission under the court is constituted, and may be extended or restricted by similar means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area of over which the jurisdiction extends, or it may partake of both these characteristics. .... Where a court takes it upon itself to exercise a jurisdiction it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.'

33. The words of Diplock L.J, [as he then was] in Oscroft v Benabo [1967] 2 All E R 548 at page 557, are instructive.

> 'Courts (even inferior courts) have "jurisdiction" to be wrong in law; that is why we hear appeals on questions of law and not merely applications for certiorari. A court may lack "jurisdiction" to hear and determine a particular action because of (i) of the composition of the court(for example the bias of the judge), or (ii) the subject matter of the proceedings (for example, title to foreign land), or (iii)

> the parties to the proceedings (for example, diplomatic immunity); or, although having jurisdiction to hear and determine the proceedings, it may lack jurisdiction to make the kind of order made............ A mere error of law, however, made by a county judge or an application of a kind, which he is entitled to entertain between the parties between whom he is entitled to adjudicate, resulting in an order of a kind which he is entitled to make, does not affect his "jurisdiction" to make the order. It is an erroneous determination in point of law from which there may be an appeal if the statute conferring the right of appeal so allows.'

34. The foregoing remarks equally apply to the matter before this court. The High Court has jurisdiction, albeit limited or special jurisdiction, to consider applications made to set aside an arbitral award under section 34 and consider only the matters set out in that section. That was the application before the High Court. The High Court and the trial judge in particular had jurisdiction to try the matter. The High Court had jurisdiction to set aside the arbitral award. The High Court set aside only part of that arbitral award in question. It is this relief that was granted by the trial judge that is being referred to as an illegality.

35. The High Court is authorised in the limited circumstances set out in section 34 of the ACA to set aside an arbitral award. What happened in this instance is that the trial judge did not set aside the whole award. He severed off two items that he found to have offended section 34 of the ACA and set them aside. He left intact the rest of the award. It is this action that is now referred to by my brother as a variation and an illegality. I take it that if you accept the view propounded by my brother one must either set aside the whole award or leave the whole award to stand.

36. At most, if one accepts the argument that it was wrong for the court below to set aside part of the arbitral award because the court is only authorised to set aside the whole award, it would simply be an error in law, a court was 'entitled' to make rather than an absence of jurisdiction to make the order made. It would be an 'error within jurisdiction.'

37. What would the framers of the ACA have said had they encountered the situation we encounter today? Would they not say, *'Of course the judge can set aside the entire arbitral award or those parts that infringe section 34 of the ACA.'* If the High Court has power to set aside the whole, can it not set aside severable items that offend section 34 of the ACA? I think the High Court has the power to do so. This power is derived from the power granted to set aside the award. It makes business sense too to sever where an award is severable rather than setting the whole award aside and sending it back for re hearing when only one or two severable items offend section 34 of the ACA.

38. What the judge would not do is to substitute his own judgment for that of the arbitral tribunal beyond the matters raised in section 34 of the ACA as the judge does not have appellate jurisdiction.

39. The intention of the framers of the ACA was to give business and legal efficacy to arbitral agreements as the prime mode of resolving disputes in cases where arbitral agreements obtain. It makes business sense in my view to hold that the judge under section 34 may set off the whole award or severable parts. That power is limited only to setting aside the whole or part thereof and not to substitute the award with new or revised figures in the award based on the judge's review of the evidence.

40. The decision of the High Court has been described as an 'illegality' or 'null and void'. An illegality would ordinarily refer to something that is prohibited or contrary to the rules. I would not describe the decision of the High Court as an illegality as in my view it is not prohibited by ACA. On a question of interpretation it is possible that there are differences of opinion as to the full reach of the powers granted to the High Court under section 34 of the ACA. Is the High Court authorised to sever off the award those severable items that offend section 34 and set them aside? I would think it is so authorised, resting on the authority to set aside the whole award, as including the authority to set aside part, and no more.

41. I am unable to agree that the judgment of the High Court is null and void *ab initio*. That assertion has no foundation at all. The High Court had

jurisdiction to hear the application before it. The High Court has powers to set aside the arbitral award. The extent of the powers of the High Court under section 34 of the ACA may be debatable in so far as to whether the court can also set aside only part of rather than the whole arbitral award. That is a debate that would be settled by the court of last resort if there was a right of appeal. However, as noted above, there is no right of appeal against decisions of the High Court under section 34 of the ACA. The decision of the High Court under section 34 of the ACA is final in this regard bringing an end or finality to litigation governed by the ACA.

42. I take comfort in the words of Lord Morris of Borth-Y-Gest in the case of Anisminic Ltd v Foreign Compensation Commission [1969] AC 148 at page 183.

> 'If a tribunal while acting within its jurisdiction makes an error of law which it reveals on the face of its recorded determination, then the court, in the exercise of its supervisory function, may correct the error unless there is some provision preventing a review by a court of law. If a particular issue is left to a tribunal to decide, then even where it is shown (in cases where it is possible to show) that in deciding the issue left to it the tribunal has come to a wrong conclusion, that does not involve that the tribunal has gone outside its jurisdiction. It follows that if any errors of law are made in deciding matters which are left to a tribunal for its decision such errors will be errors within jurisdiction. If issues of law as well as of fact are referred to a tribunal for its determination, then its determination cannot be asserted to be wrong if Parliament has enacted that the determination is not to be called in question in any court of law.'

43. This court has no supervisory jurisdiction over the High Court though it no doubt has the power to set aside judgments and decisions of the High Court that are null and void be it for lack of jurisdiction or some other cause. As this court has no appellate jurisdiction in matters arising from section 34 of the ACA proceedings before the High Court, this Court has no jurisdiction to correct such errors of law, made 'within jurisdiction', if at all, one comes to the conclusion that the court below made an error,

which I do not. Whether this is an advisable state of affairs is not for this court to answer. Nor should a negative answer prompt this court to find a stratagem to intervene. The intention of the legislature was clearly to bring finality as soon as possible to matters governed by the ACA.

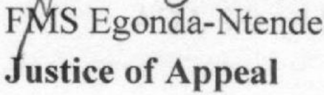
44. This matter did not constitute a ground of appeal. Neither was it canvassed on appeal. The fact that appellant never contended so in the appeal it put forth against that decision of the High Court should be telling. This matter has been raised in the course of writing judgment. Though this may be permissible this court should ordinarily avoid taking decisions on grounds that have not been agitated before the court without hearing the parties. That approach is prohibited by rule 102(c) of the Court of Appeal Rules. See Charles Twagira v Attorney General and others S C Civil Appeal No. 4 of 2007 [unreported]. The lead judgment by Tsekooko, JSC, refers. Failure by the Court of Appeal to comply with this rule is a ground for appeal to the Supreme Court. Secondly this would be contrary to section 9 of the ACA as it amounts to intervention in matters courts have been prohibited from intervening into. Neither should this court take on the responsibility of formulating the case for the parties or any one of them.

45. Lastly if the approach taken by my brother Kakuru, JA., is the correct approach, it would appear necessary, in my view, to make consequential orders, as setting aside the judgment or decision of the court below would leave the application made under section 34 of the ACA still pending in the High Court. This court would, in the circumstances, have had to order the re trial and determination of that application, in accordance with the section 34 of the ACA by the High Court since the earlier determination is said to be null and void. Unfortunately no consequential order is proposed.

Decision

46. I would strike out this appeal with costs.

Signed, dated and delivered this 23rd day of June 2015



FMS Egonda-Ntende

Justice of Appeal