THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO.0051 OF 2011

(Arising from the Ruling and Order of the High Court of Uganda
at Kampala in Civil Application No.731 of 2009
by Hon. Justice Geoffrey Kiryabwire delivered
on 9th March 2011 arising from Arbitration Cause No.5 of 2009)

ROKO CONSTRUCTION LIMITED.....APPELLANT

V E R S U S

MOHAMMED MOHAMMED HAMID.....RESPONDENT

CORAM: **HON. MR. JUSTICE RUBBY AWERI OPIO, JA**
HON. LADY JUSTICE SOLOMY BALUNGI BOSSA, JA
HON. MR. JUSTICE RICHARD BUTEERA, JA

THE JUDGMENT OF COURT:

The background facts:-

The appellant entered into a construction contract with the respondent on 15.07.2005 for the latter to construct a residential house at Plot 43, Windson Close, Kololo, in Kampala City, at an

agreed sum of money of shs1,100,000,000/= (One billion and one hundred million) excluding VAT for the whole contract.

The construction was to be completed by 28th February 2006. According to the appellant a standard building agreement prescribed by the East African Institute of Architects, was executed between the two and, on 20.07.2005, each of them signed the bill of quantities which was part and parcel of the agreement. On the other hand, while the respondent agrees that he signed the bill of quantities, he denied having signed the main building agreement. According to him, the agreement was a different entity from the bill of quantities.

The respondent paid shs.110,000,000 to the appellant after which the appellant commenced work on 1st August 2005 and by 25.01.2006, substantial work was done. The respondent had however, defaulted in payments. Pursuant to the building agreement, the appellant issued to the respondent a notice of intention to suspend the construction. On receipt of that notice, the respondent paid some money to the appellant which resumed the construction. The period of completion of the work was subsequently extended.

The respondent again defaulted in payment and on 16.07.2007, the appellant terminated the contract. On 06.08.2007, the appellant, again pursuant to the building agreement, referred the dispute to arbitration and an arbitrator was proposed.

The respondent was invited to consent to the appointment of the proposed arbitrator within seven (7) days. The respondent did not respond.

On 22.08.2007, the appellant wrote a letter to the President of the East African Institute of Architects [EAIA] requesting that the President appoints an Arbitrator pursuant to the building agreement. The appellant copied that letter to the respondent. Both the President of EALA and the respondent did not respond.

The appellant then applied to the Centre for Arbitration and Dispute Resolution (CADER) for the compulsory appointment of an Arbitrator under section 11(4)(c) of the Arbitration and Conciliation Act and rule 13 of the first schedule to the Arbitration and Conciliation Act. The CADER, after affording an opportunity to the appellant to be heard, determined the application on 04th October, 2007, and

appointed Justice Alfred Karokora, a retired Justice of the Supreme Court, as the arbitrator.

The Arbitrator heard the dispute as Arbitration Cause No. CAD/ARB No.11 of 2007.

Both the appellant and the respondent appeared before the Arbitrator through their advocates. An Arbitral award was delivered on 30.06.2009.

The Arbitrator ordered the respondent to pay shs.584,430,571 to the appellant for the work carried out with interest at 18% p.a; from the date of filing the arbitration till full payment. The respondent was also ordered to pay general damages of shs.100,000,000/= with interest thereto at the rate of 18% p.a from the date of the award till payment in full.

The respondent did not accept the decision of the arbitrator. He instituted High Court Civil Application No.731 of 2009, and moved the High Court, Commercial Division, to set aside the award and to deregister the award.

He contended that there was no concluded arbitration agreement between him and the appellant and, therefore, neither CADER nor the Arbitrator had jurisdiction in the matter.

Justice Kiryabwire, then the Head of Commercial Division of the High Court, heard and allowed the application on 09.03.2011. He set aside the award on the ground that though the parties had executed a building agreement, they had willingly excluded the Arbitration Clause so that the same was not binding on the parties. The learned judge concluded that the Arbitration award was not in accordance with the Arbitration and Conciliation Act because the Arbitrator who made the award had no jurisdiction to do so.

With leave of the High Court, the appellant appealed against the High Court decision to the Court of Appeal which reversed the decision of the High Court. The respondent appealed to the Supreme Court in SCCA No.011 of 2013. The Supreme Court found the Court of Appeal Coram that decided the appeal was not properly constituted in that one of the justices that signed the appeal had not sat on the Coram that heard the appeal. The Supreme Court set aside the orders of the Court of Appeal and returned the matter to the Court of Appeal for the Court to constitute a suitable Coram to

hear and decide the appeal in accordance with the established procedure.

This appeal was therefore heard afresh against the ruling by Justice Geoffrey Kiryabwire of the High Court delivered on 09/03/2011.

The appeal as per the Memorandum of Appeal is on the following grounds:-

1. **That learned judge erred in law and in fact when he held that the building contract was not signed and that therefore the arbitration clause was not executed.**

2. **That learned judge erred in law and infact when he held that Clause 36, the Arbitration Cause, was deleted from the building contract and that Annexture "B" (Bills of Quantities) did not provide for arbitration.**

3. **That learned judge erred in law and infact when he held that the application to set aside the award was not time barred.**

4. **That learned judge erred in law and infact when he ruled that the Preliminary Objection raised by the respondent in the tribunal on non signature of the building contract and raised in the application to set aside the award was not time barred under the law.**

5. **That learned judge erred in law when he ruled that the respondent did not waive its rights under the arbitration process and law.**

6. **That learned judge erred in law when he ruled that the Arbitration Award was not in accordance with the Arbitration Act.**

7. **That learned judge erred in law when he granted costs to the respondent.**

The appellant prayed this Court for orders that:-

1. The decision of the High Court be set aside.
2. The appeal be allowed and the Arbitral Award be upheld.
3. The appellant be paid the costs in arbitration, High Court and the Court of Appeal by the respondent.

Legal representation.

At the hearing of this appeal, Learned Senior Counsel, G.S. Lule appeared together with Learned Counsel, Mr. Peter Allan Musoke for the respondent while Learned Counsel, Mr. Enos Tumusiime appeared for the appellant.

Submissions of counsel for the appellant.

Ground one

Mr. Enos Tummusiime for the appellant submitted that in the proceedings of the Supreme Court of 23rd October 2013, learned counsel for the respondent Mr. G.S. Lule admitted/confessed that the Arbitration Clause of the building contract in issue was not deleted. He contended that since the respondent confessed or concurred that the Arbitration Clause had not been deleted then the foundation or the gist of the decision of the High Court Civil Application No.731/2009 cannot stand.

Ground two:

On whether the application of the respondent in the High Court could stand, counsel contended that the respondent sought to challenge the appointment of the arbitrator on the grounds that there was no arbitration clause in the agreement and the arbitrator

ruled that there was an arbitration clause and that he had jurisdiction.

Grounds 3, 4, and 5.

According to counsel, under S.16(b) of the Arbitration and Conciliation Act, an aggrieved party on a preliminary question may only appeal within 30 days to the High Court.

The respondent in instant case did not appeal within 30 days. He took action after more than 2 years.

The Arbitrator's ruling was on 25/01/2008 and the respondent sought to challenge it in the High Court on 14/01/2010. Counsel for the appellant submitted that the application before the High Court was incompetent and contrary to the provisions of section 16(6) and 34(3) of The Arbitration and Conciliation Act and should never have been entertained by the High Court.

Counsel prayed for the appeal to be allowed and the appellant to be granted costs for this appeal and the applications and appeals in the Courts before.

Submissions of counsel for the respondent

Senior counsel Mr. Lule, for the respondent submitted that the instant appeal was improperly before this Court and was incompetent.

According to counsel, under the provisions of the Civil Procedure Act and the Arbitration Act there is no right of appeal from an order setting aside an Arbitral Award and as no Leave to appeal had been obtained this Court has no jurisdiction to entertain the appeal and it ought to be struck out for being incompetent.

On ground one, counsel for the respondent admitted that they conceded in the Supreme Court Clause 36 of the agreement had not been deleted and that therefore there was an arbitration clause in the agreement.

He submitted that that admission does not make a difference, since the respondent categorically denied ever having signed any one agreement that included an arbitration clause.

According to counsel the appellant and the respondent together only signed the bill of quantities. They agreed to the figure of 1.1. Billion shillings as the total sum for the whole work. They had not agreed on the other facts of the agreement and that is why it was not signed.

Counsel contended that there was no premise for the arbitration and therefore the arbitration tribunal had no jurisdiction as there was no signed agreement containing the arbitration clause. According to counsel there must be a written arbitration agreement signed by the parties for the arbitration tribunal to have jurisdiction.

On the issue of failure by the respondent to apply in time for setting aside the arbitral award within one month counsel submitted that the respondent was never served with the award and time would not start to run before the respondent is served.

Submission in reply.

In reply to the submissions of counsel for the respondent, counsel for the appellant submitted that when he applied for leave to appeal to this Court at the High Court counsel for the respondent did not

oppose the application. Court granted the appellant leave to appeal which distinguishes this appeal from the authorities counsel for the respondent relied upon as there was no leave to appeal in those authorities.

Counsel submitted that this appeal was validly before this Court as it is on all fours with the appeal in **Supreme Court, Civil Appeal No.15 of 2008; National Social Security Fund and another vs Alcon International Ltd,** where the Supreme Court upheld that the appeal could lie from the High Court to the Court of Appeal and then to the Supreme Court in circumstances and facts similar to those of this case. Counsel submitted that in the affidavit in reply replying to the one of Mr. Dragon the Managing Director of Roko, Mr. Muhammed Muhammed Hamid did accept that he signed the bill of quantities annex "B" and he did not deny what Mr. Dragon had sworn referring to the contract on service of the arbitral award. Counsel for the appellant submitted that the award was delivered by retiRed Justice Karokora in the presence of both counsel for the appellant and the respondent, Learned Counsel Mr. Moses Kimuli was then counsel for the respondent in which case the respondent cannot claim not have been aware of the award and the issue of none receipt or not being aware of the award does not arise.

Resolution by Court

This dispute was first heard as an arbitration matter and an arbitration award was given in favour of the appellant. The respondent was dissatisfied. He applied vide Civil Application No.731 of 2009 for the arbitral award to be set aside and deregistered. The arbitral award was set aside. The appellant appealed to this Court against the trial judges ruling and orders. This was therefore a first appeal against the decision of the learned High Court judge.

We find it appropriate to first remind ourselves of our duty as a first appellate Court. We have a duty to re-appraise the evidence and draw inferences of fact. This duty of a first appellate court was elaborately stated by the Supreme Court in the case of **Fr. Narsensio Begumisa and others versus Eric Tibebaga, Supreme Court Civil Appeal No.17/20(22.6.04 at Mengo) from CACA 47/2000 KALR 236** where it held:-

> **"It is a well settled principle that in the first appeal the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal court has to make due allowance for the**

fact it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusion."

We shall therefore re-evaluate the evidence on record, consider the ruling of the learned trial judge, consider the submissions of both counsel and the authorities they have availed to court and all the issues raised in the appeal to come to our own conclusion of the appeal.

Ground one and two of the appeal

At the hearing of this appeal both counsel agreed that at the Supreme Court proceeding it was conceded that the Arbitration Clause of the relevant agreement in contention was not deleted.

We have read the Supreme Court proceedings. It is clear at p10 of the proceeding that learned counsel Mr. Lule conceded that the arbitration clause was not deleted from the agreement. He maintained that position at the hearing of this appeal. The learned trial judge at the High Court had ruled that the arbitration clause had been deleted. The situation now is that there was an arbitration

clause in the agreement and it was not deleted. Ground one was therefore overtaken by events and is declared moot.

Ground one of the appeal was argued together with ground two but ground two has slightly a different angle that was raised by counsel for the respondent. Counsel contended for the respondent that the arbitration clause not being deleted does not make a difference since only the bill of quantities was signed and not the whole contract in which the arbitration clause is found.

This issue was argued before Arbitrator. He ruled on it as follows:-

> **"I carefully listened to both counsel on their submissions and concluded that although the contract document (Annexture A) lacks respondent's formal execution of that agreement, the fact that he (respondent) had promised to sign and return the signed contract agreement but instead of sending the signed agreement, he deposited part of the contract money as a result of which the claimant commenced the construction work, he (respondent) would be stopped from denying the existence of the contract agreement."**

I must reiterate what I stated when I was dealing with this preliminary objection when I stated: "I find comfort ..... in adopting the decision of the East African Court of Appeal as it then was in the case of Credit Finance Corp. Ltd. (Supra)... where Windham JA held interalia;

The doctrine whereby part performance will supply the want of formal execution of a contract was laid down in very clear terms by the House of Lords in the case of Brogden vs Metropolitan Rly Co. (1877) 2 App 666.... where a draft of the contract (similar to the draft in this case) in which one of the parties had not signed was held a valid contract binding upon the other party by reason of their having acted upon it, for in the words of Lord Blackburn at page 693, if both parties have acted upon that draft and treated it as binding they will be bound by it."

We have studied the pleadings and the submissions of both counsel.

We have also looked at the findings and conclusions of the Arbitrator on this issue. We find them justified and wholly agree with the Arbitrator. The contract document annexture A was a contract that bound both parties and governed their relationship in the

construction of the house at Plot 43, Windson Close, Kololo. Both parties had acted on it and treated it as binding. This finding disposes of grounds 1 and 2 of the appeal.

Ground 6

Ground 6 of the appeal is related to ground 1 and 2.

Ground 6 is based on the argument that an Arbitration contract has to be written according to the Arbitration Act for the arbitration award to be properly arrived at.

We have already found on grounds 1 and 2 that there was a written and binding contract between the parties, which contract had an Arbitration Clause; consequently the decision on these two grounds also disposes of ground 6 of the appeal which also succeeds.

Ground 3, 4 and 5.

The substance in these grounds of appeal is mainly whether the application of the respondent before the High Court challenging the award of the Arbitrator could stand without a time limitation.

The respondent raised a preliminary objection at the commencement of the Arbitral hearing to the effect that there was no valid written agreement between parties and therefore the

tribunal had no jurisdiction. The Arbitrator ruled that there was a valid Agreement with an Arbitration Clause and the tribunal therefore had jurisdiction. This ruling was made on 25/01/2008. We have looked at section 16(6), 16(7) and 16(8) The Arbitration and Conciliation Act (Cap.4) which are relevant and they provide as below:-

"16 Competence of Arbitral Tribunal to rule on its jurisdiction:

1. .....
2. .....
3. .....
4. .....
5. .....
6. **Where the Arbitral tribunal rules as a preliminary question that it has jurisdiction, any party aggrieved by the ruling may apply to the Court, within 30 days after having received notice of that ruling, to decide the matter.**
7. **The decision of the Court shall be final and shall not be subject to appeal.**
8. **While an application under subsection (6) is pending before the Court, the Arbitral tribunal may continue the Arbitral proceedings and make an Arbitral award."**

The respondent under section 16(6) of the Arbitration and Conciliation Act had up to 24/02/2008 (30 days from the date of the ruling) to apply to Court to challenge the ruling. There is no evidence on record that the respondent exercised his right to apply to Court under s.16(6). The respondent did not make the application to make the challenge.

The Arbitration proceedings proceeded and the Arbitrator delivered the Arbitral award on 30/06/2009 in the presence of both parties. Learned counsel, Mr. Enos Tumusiime, was present for the claimant. Learned counsel, Mr. Moses Kimuli, was present for the respondent.

The parties were represented by their counsel at the delivery of the Arbitral award. The parties therefore had notice of the award when it was delivered in the presence of their counsel. The fact of the presence of both counsel or adequacy of their representation was never contested.

Under s.34(3) of the Arbitration and Conciliation Act, an application for setting aside the Arbitral award may not be made after one month has elapsed from the date on which the party making the application received the award. **Civil Application No.731 of 2009**

was filed in court on 14th January 2010 while the Arbitration award was delivered on 30/06/2009 in the presence of both parties.

We find that there was no application to court for extension of time. The application in our view was filed way out of time. It was time barred under s.34(3) of the Arbitration and Conciliation Act and was therefore incompetent. Issue No.3(b) is answered in the affirmative.

The Right of appeal to this Court.

The right of appeal to this Court was raised as an issue at the hearing as it was contended that the appeal was improperly before the Court and it is incompetent.

In the instant case, the appellant sought the leave of the High Court to appeal. The respondent's counsel did not object to that application. The learned High Court judge granted leave to appeal.

We wish to state at the outset that, it is trite law that appellate jurisdiction is a creature of statute.

This Court has had occasion to consider and state the law on its appellate jurisdiction in Civil Application No.31 of 2005: **Denis Bireije versus The Attorney General** when it held:-

"Article 134(2) of the Constitution provides for this court to entertain appeals from the High Court as follows:-

'134(2) An appeal shall lie to the Court of Appeal from decisions of the High Court as may be prescribed by law.'

Section 10 of the Judicature Act provides for the jurisdiction of the Court of Appeal in the following terms:

'10. Jurisdiction of the Court of Appeal. An appeal shall lie to the Court of Appeal from decision of the High Court prescribed by the Constitution, this Act or any other law.'

We appreciate Mr. Matsiko's argument that sections 10 of the Judicature Act and 66 of the Civil Procedure Act create a right of appeal from decisions given by virtue of section 36 of Judicature Act.

In our view, Section 10 of the Judicature Act, means that once any law prescribes that a decision is made by the High Court, then that decision is appellable to this court. Section 36 empowered the High Court, to issue orders of mandamus,

prohitition and certiorari. In our view, those are decisions "prescribed" by law within the meaning of section 10 of the Judicature Act."

The Court went further to state:

"The decree therefore, is appealable to this court as of right, under section 66 of the Civil Procedure Act which provides:-

'66 Appeals from Decrees of High Court.

Unless otherwise expressly provided in this Act, an appeal shall lie from the decrees or any part of the decrees and from the orders of the High Court to the Court of Appeal.'

The Court of Appeal in Makula International Ltd vs His Eminence Cardinal Nsubuga and Another [1982] HCB 11, held that when an order is made by the High Court on a matter brought before it by some statutory provision other than the Civil Procedure Act or Rules, it is appealable as of right, unless the appeal is specifically excluded by law."

Applying the above stated principles to the facts of this case, we find that this appeal is competent before this Court as it appropriately

qualified under provisions of section 66 of the civil procedure Act. It is an order made by the High Court on a matter brought before it under the Arbitration and Conciliation Act. We are further re-enforced in our position by the position taken **in Civil Appeal No.15 of 2009; National Social Security Fund and Another vs. Alcon International Limited,** a case that arose in facts and circumstances that are similar to the instant case. The appeal arose from the High Court to the Court of Appeal and later to the Supreme Court.

Conclusion

We quash the decision of the High Court. The Arbitral award of the Arbitrator in CAD/ARB/NO.11 of 2007 delivered on 30/06/2009 is reinstated.

The appeal succeeds with costs to the appellant in this Court, in the High Court and before the Arbitrator.

Dated this day.....13th.....of .....July.....2015

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Hon. Justice Rubby Aweri Opio

JUSTICE OF APPEAL

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Hon. Justice Richard Buteera

JUSTICE OF APPEAL

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Hon. Lady Justice Solomy B. Bossa

JUSTICE OF APPEAL