THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
ARBITRATION CAUSE NO. 003 OF 2007

[ARISING FROM ORIGINAL CADER ARBITRATION NO. 007 2005]

1. **KATAMBA PHILLIP**
2. **MUKIIBI CHARLES** **::::::::::::::::::::: OBJECTORS**
3. **DR. KATENDE CHARLES**
4. **MRS KATENDE SYLVIA**

VERSUS

MAGALA RONALD **::::::::::::::::::::::::::::RESPONDENT**

BEFORE: HON. LADY JUSTICE IRENE MULYAGONJA KAKOOZA

RULING

The objectors were the respondents in Arbitration Cause No. 7 of 2005 at the Centre for Arbitration and Dispute Resolution (CADER), which went in favour of the respondent. They objected to the registration of the award that was entered against them by Mr. Ambrose Tishekwa Rukundo on 28/08/2006. The objectors commenced this proceeding by lodging a notice of objection to the filing or registration of the award under rule 7 (1) of the Arbitration Rules.

The background to the award was that the parties hereto were partners in the business of running a school called Entebbe Central (Academy) School. They executed a partnership deed in February 1999 setting out the terms on which the business was to be managed. The partnership run into trouble because the objectors were implicated in financial mismanagement of the school. Because the partnership deed provided that questions in connection with the partnership or the deed would be referred to a practicing advocate as a single arbitrator, the respondent here applied to CADER for the appointment of an arbitrator because the objectors refused to cooperate with him in the appointment of one. As a result, by an order of the Registrar of CADER issued on 30/01/2006, Mr. Tishekwa was appointed as

the arbitrator. However, the process of arbitration became protracted because according to Mr. Tishekwa, the objectors continued to be recalcitrant or uncooperative. In spite of that the arbitrator finally issued his award as follows:

i) The applicant (Mr. Magala Ronald) is hereby appointed the managing partner of M/s Entebbe Central School or any of its affiliate entities.

ii) As managing partner, the applicant shall always follow the stipulations of managing a partnership as enshrined in the Partnership Act Cap 114 to avoid any further possibility of conflict in the school's management of its funds.

iii) A special meeting shall be called and convened immediately in the convenience of the Applicant at Entebbe Central School's premises to announce and put into immediate effect this award.

iv) After the applicant (Mr. Magala Ronald) has taken officer as the managing partner of M/s Entebbe Central School, he shall cause to be audited all school books of accounts in consultation with other partners; and the gravity of financial mismanagement shall be ascertained and the culprits involved shall be made to refund the said firm's funds or execution shall levy (sic) to recover the said sum from the culprits.

v) The respondents are still indebted to the tune of UGX 350,000/= (in words) to CADER as fees for arbitration. CADER shall be at liberty to recover the sum and the costs thereof from respondents.

vi) I make no award as to compensation since books of account(s) of Entebbe Central School or its affiliate entity were not audited to assess the financial loss. The respondents failed the audit. The audit shall be conducted after the new managing partner has taken office as indicated above.

vii) I award costs of this arbitration to the applicant.

The respondent did not register the award in court immediately, but on 13/06/2007, the award was filed in this court and notice of filing or registration was issued by the registrar. It was served upon the objectors and an affidavit of service deposed by the respondent on 14/06/2007 was filed in court stating that the notice was served on M/s Kaweesa & Co. Advocates, counsel for objectors in the arbitration. On 6/09/2007, M/s Kaweesa & Co. filed a notice of objection to filing the award in court stating one ground, that at the time the award was made, the arbitrator did not have the jurisdiction to do so for his mandate had expired on

30/03/2006. There was no separate document stating the objections and it is not evident from the record that the notice of objection to filing the award was served on the respondent.

Matters came to a head because subsequent to the award, on the 10/07/2009, the arbitrator purported to tax a bill of costs lodged by the respondent in which he awarded shs. 19,780,000/= as costs in his favour in the arbitration. Following that, on 29/01/2010, the respondent took out a warrant to arrest the objectors for failure to pay the costs in the arbitration. The return of the warrant on record shows that M/s Ultimate Court Bailiffs & Auctioneers partially executed the warrant but it was later recalled by the Registrar after complaints were made to the Inspectorate of Courts that the taxation and the resultant execution were irregular. The objectors, who had then instructed fresh counsel, M/s Kibuka Musoke & Co. Advocates, then filed submissions in respect of the objection, on 7/12/2010. A reply was filed on behalf of the respondent on 20/01/2011, and thus this ruling.

In their submissions Kibuka Musoke & Co. Advocates argued that the award was not in compliance with the Arbitration and Conciliation Act (ACA) because it was made more than 60 days, (i.e. 7 months) after the arbitrator entered into the arbitration and contrary to the provisions of s.31 (1) ACA. Further that although s.31 (2) of the Act allows for extension of time within which to make the award such time can only be extended for another 60 days. Counsel for the objectors relied on the provisions of s.14 ACA for the submission that the mandate of an arbitrator should terminate if he/she is unable to perform the functions of his office, or if for any other reason he/she fails to act without undue delay.

It was also submitted for the objectors that the arbitrator did not have the mandate when he taxed the costs due to the respondent as he did on 10/07/2010. That though s.33 ACA provides for corrections and interpretation of awards within 14 days of the award, the taxation and award of costs did not fall within the ambit of that provision. Counsel further contended that the costs of shs. 19.4m awarded were excessive since all the arbitrator did was to appoint the respondent as the managing partner of the firm, a decision which, in their view, was unconstitutional and infringed on the partners' rights to elect whomever they felt was capable of holding that office. Counsel relied on s.31 (9) (a) ACA for the submission that an award of costs should be contained in the arbitral award, or an additional arbitral award, and that in the absence of an award of costs, each party should bear its own costs.

In conclusion, counsel for the objectors submitted that the arbitrator's award of costs to the respondent 4 years after the award was communicated to the parties was illegal; and that on authority of **Makula International v. Cardinal Nsubuga & Another [1982] HCB 11,** the award ought to be set aside with costs to the objectors.

In reply, Ms. Rita Matovu for the respondent first drew the court's attention to the fact that on 7/12/2010 the Deputy Registrar of this court ordered the objectors to deposit security for costs claimed on the arbitration before they could proceed with their objection to registration of the award. She complained that the objectors had not so deposited security and asserted that the objections now before court are an effort to delay the respondent's efforts to enforce the award and to recover the costs due to him. She then went on to respond to the objections as follows below.

With regard to the procedure adopted by the objectors to set aside the award, Ms. Matovu argued that proceedings to do so could only have been brought under the provisions of s. 34 (1) ACA for the grounds stated in sub-sections 2 and 3 thereof. That objection to the award could only be filed after bringing an application to set aside the award under s.34 ACA and a notice of objection to registration of the award, as was filed by the objectors here, was not sufficient to move court to set aside the award. She went on to assert that the notice was especially insufficient because it was never brought to the attention of the respondent. She concluded that the notice was of no consequence and it amounted to trickery and deception on the part of the objectors.

Turning to the issue of the arbitrator's mandate, she submitted that s.14 ACA provides that issues about the mandate of the arbitrator ought to be directed to CADER, but the objectors did not take that route though they were represented by counsel all through the process of arbitration. Further that if the objectors were of the view that the arbitrator had no mandate to make the award they ought to have properly lodged their objections (under rule 7 Arbitration Rules) within the 90 days specified therein and then served them on the respondents. Ms. Matovu further submitted that the bringing of the objections now before court was an effort to appeal against the award. That the proceeding now before court was misconceived because according to s. 9 ACA, the court can only intervene in an arbitral award as is provided for in the Act.

Regarding the taxation of costs in favour of the respondent, Ms. Matovu submitted that though hearing notices for the taxation of the bill of costs were served upon counsel for the objectors, they did not turn up on any of the dates when the respondent's bill was fixed for taxation. She went to submit that although counsel for the objectors submitted that the taxation and award of costs was an additional award that was achieved contrary to the provisions of s.33 ACA, the award of costs could not constitute an additional award under the provisions of s.33 (4) ACA. She prayed that the objections be dismissed with costs and that the execution of the award proceed without any legal impediment.

Several questions fall for determination of this court from the submissions above as follows:

i) Whether the procedure adopted by the objectors in bringing these proceeding was proper;

ii) Whether the arbitrator still had the mandate to make the award on the 28/8/2009; if not,

iii) Whether the award was illegal;

iv) Whether the arbitrator had the mandate to tax and award costs in the arbitration as he did, or at all, on the 10/07/2009.

v) Whether the award ought to be set aside.

With regard to the procedure adopted by the objectors, s.34 (1) ACA provides that 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) thereof. The grounds upon which an award may be set aside are then set down in detail in sub-sections 2 and 3.

In **Simbamanyo Estates Ltd v. Seyani Brothers Co. (U) Ltd, M/A No. 555 of 2002**, this court held that applications for setting aside arbitral awards are regulated by s.34 of the ACA and the law is settled. When court is called upon to decided objections raised by a party against an arbitral award, the jurisdiction of the court is limited as expressly indicated in the Act. Further that the court has no jurisdiction to sit in appeal and examine the award on its merits.

S.34 (3) of the Act provides that an application to set aside an arbitral award cannot be made after the lapse of one month from the date on which the party making the application received

the arbitral award. The only exception to the one month rule is where a request has been made for correction, interpretation or an additional award under s. 33 ACA. In such cases an application to set aside the award may be brought within a period of one month from the date that the request is disposed of.

Now, rule 7 (1) of the Arbitration Rules seems to waive the limited period of one month when it provides that

> "Any party who objects to an award filed or registered in the court may, within ninety days after notice of the filing of the award has been served upon that party, apply for the award to be set aside and lodge his or her objections to it, together with necessary copies and fees for serving them upon the other parties interested."

Counsel for the objectors argued that after the making of the award, it is permissible for any party to raise the issue of termination of the mandate of the arbitrator under rule 7 (1) and s. 34 (2) (a) (vii) because rule 7(1) employs the expression *"may apply."* For the respondent, Ms. Matovu argued that it is not open for a party to bring objections to the award except if they are grounded in s. 34 (2) and (3) ACA. She went on to submit that objections under rule 7 can only be lodged after an application to set aside an award is made within 30 days of receipt of the award. At this point, it becomes necessary to attempt a harmonisation of the provisions of s.34 ACA and rule 7 of the Arbitration Rules thereunder, if at all that is possible.

The perceived contradiction between s.34 (1) ACA and rule 7 of the Arbitration Rules was observed by Egonda-Ntende, J. in **Kilembe Mines Ltd. v. B. M. Steel Ltd. M/C 002 of 2005,** but it was not necessary to resolve it for purposes of determining that dispute. The judge only mentioned it in passing that it appeared to him that here we have a situation where the rules and the principal legislation are at variance over the same subject. In this case, the success or failure of the objections here turns on resolving the variance.

The question was considered in substance by Arach Amoko, J. (as she then was) in **Uganda Lottery Ltd. v. Attorney General, M/C 627 of 2008**. The learned judge ruled that there was indeed a contradiction between the two provisions as follows:-

"The main Act is clear and unambiguous. At the end of the proceedings, an award is given by the arbitrator. If a party is unhappy with the outcome, it shall file an application to set aside the award within 30 days on the grounds set out in the Act (See. S. 34 ACA). Where the 30 days have expired or an application to set aside an award has been refused, then the award shall be enforced in the same manner as if it were a decree of the court, subject to section 35 of the Act. The Rules provide for 90 days and both counsel for the applicant and respondent have acknowledged that this is indeed in conflict with the 30 days provided for by the Act. As Mr. Tumusingize rightly pointed out, and I had occasion to cross check the provisions of the old Arbitration Act and rules he cited, it appears this is a result of cutting and pasting the provisions of the old rules onto the new rules without ensuring that there was no conflict between them and the ACA. It has therefore led to this confusion and in the absence of any ambiguity in the Act, the Act prevails over the rules.
…"

I entirely agree with the decision of Justice Arach Amoko. Unlike the ACA, the repealed Arbitration Act (Chapter 55 Laws of Uganda, 1964 Edition) had no provision within it for setting aside arbitral awards. Instead, s.9 (2) thereof required an interested party to move the arbitrator or umpire to file the award in court. The award was filed under rule 2 of the Arbitration Rules, SI 55-1. And unlike the position in s. 34 ACA which lays down the grounds for setting aside an award, the only grounds for setting aside the award in the repealed Act were contained in s.12 thereof. It was there provided that the award could be set aside where an arbitrator or umpire had misconducted himself, or where the award had been improperly procured.

No procedure for setting aside was laid down in the repealed Act itself. The repealed Arbitration Rules, provided for the procedure for challenging awards in rule 7 thereof, and it provided as follows:-

"7. Any party objecting to an award filed under section 9 (2) of the Act may, within eight weeks after notice of the filing thereof has been served upon the party so objecting, apply for the award to be remitted or set aside, as the case may be, and lodge his objections thereto, together with necessary copies and fees for serving the same upon the other parties interested. The parties on

whom such objections are served may within fourteen days of the date of service thereof lodge cross objections which shall be served on the original objector."

Under the repealed Act, the time for challenging the award began to run on the filing of the award in court for registration, not from the date on which the party making the application received the arbitral award, as is the case in s.34 (3) ACA. But spite of the fact that the ACA has its own mechanisms for challenging arbitral awards, the draftspersons reproduced rule 7 above in the Arbitration Rules under the ACA word for word, save for omitting the reference to s.9 (2) of the repealed Act and enlarging the period within which objections could be lodged from eight weeks to 90 days. They also went on to include other provisions from the repealed Rules relating to challenging awards which are already contained in the main body of the ACA. These include rule 8 which requires the setting down of the objections to the award for hearing as a suit where the objector would take the place of a plaintiff and the other parties that of defendants; and rule 11 which provides that:

> "An application to enforce an award as a decree of court under section 35 of the Act shall not be made, if no objections to the award are lodged, until the expiration of ninety days after notice of the filing or registering of the award has been served upon the party against whom the award is to be enforced, and if objections are lodged, until the objections have been dealt with by the court."

Rule 8 of the Arbitration Rules has no bearing on the ACA because the Act does not provide for objections to awards but for applications for setting them aside in s.34. Rule 11, on the other hand, contradicts the provisions of s.36 ACA which provides that absent an application for setting aside an award under s.34, or in the event of such application having been refused, an arbitral award shall be enforced in the same manner as if it were a decree of the court.

The provisions of rule 7 Arbitration Rules are clearly a relic of the past. They definitely cannot apply any more for they fly in the face of the provisions of s.34 ACA. I therefore could not agree with the proposition that the provisions of rule 7 of the Arbitration Rules empower a party to raise the grounds provided for in s.34 after the period of 30 days has expired because they are then precluded from doing so by expiry of time. Limitation has set

in, and in this case there is no room for enlargement of time because it is not provided for by the statute.

I am also of the view that the provisions of s. 34 ACA are quite comprehensive in as far as the substance of the grounds for setting aside arbitral awards go. The procedure for applications under the Act is set down in rule 13 of the Rules, which provides that all applications for the appointment or challenge of arbitrators, and all other applications under the Act, other than those directed by the rules to be made otherwise, shall be made by way of chamber summons supported by affidavit. That then means that an application under s. 34 ACA to set aside an award for the reasons stated in that provision has got to be brought by chamber summons supported by an affidavit.

I therefore find that the objectors could not raise an the objection that the award was contrary to law under s. 34 (2) (a) (vi) because the time within which to do that had long expired when they lodged their objection. While the award was received on 28/08/2006, the notice objecting to the award was filed on 6/09/2007, more than one year later.

That being the case, it is not clear how the parties came to file written submissions regarding the objection to registration of the award, as they did, because by the time they did so on 7/12/2010, they had not yet filed any application to have the award set aside as is required by law. I would then come to the conclusion that the proceeding was not only out of time but also incompetent. I would then dismiss it without much ado. However, the objectors also raised an objection regarding the manner in which the arbitrator taxed a bill of costs for the respondent and awarded over shs. 19m for which execution was in progress when the submissions were filed to dispose of the objections. I will therefore, give the objectors the benefit of doubt and dispose of both questions raised and then come to my decision.

The main objection to the award was that it was not in compliance with the Act in that it was made after the period of two months provided for in s.31(1) of the Act had expired. s.31 (2) provides as follows:-

> "(1) The arbitrators shall make their award in writing within two 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."

Counsel for the objectors argued that in her ruling wherein she appointed the arbitrator, the Registrar emphasized the 60 day rule. At page 6 of her ruling, the Registrar stated as follows:-

> *"Another factor that CADER puts into consideration is the availability of the nominated arbitrator to handle the matters expeditiously. This is based on the 60 day rule that is imposed by section 31 (1) ACA. Under that section, arbitration proceedings are supposed to be concluded within 60 days from the commencement date."*

It will be noted that the learned registrar did not by her pronouncement above enter upon an interpretation of s.31 (1) ACA. She stated one of the limbs of the provision leaving out the important or essential limb which relates to the enlargement of time within which the arbitrator can make the award. The arbitrator has the power under s.31(1) ACA to enlarge time by any writing signed by him or her, and may make the award on or before any later day to which such time has been enlarged; after the expiry of the 60 days provided for therein.

It appears to me that the time so enlarged is not limited to 2 or 4 months as counsel for the objectors would have this court believe. The provision gives the arbitrator the discretion by the use of the term *"**may**"*, and that discretion may be exercised **from "*time to time*".** Black's Law Dictionary (9th Ed.) defines *"discretion"* to mean cautious discernment, prudence, and individual choice. In **The Republic v. Minister for Agriculture, Ex parte W'Njuguna & Others, [2006] 1 EA 356**. Ojwang, J. ruled that the correct perception of a discretion donated by law is that such discretion is only duly exercised when it is guided by transparent, regular, reliable and just criteria. Thus discretion necessarily involves latitude of individual choice according to the particular circumstances. And any decision arrived at by the exercise of any discretion that is granted to a judicial or quasi judicial body, such as the arbitrator was, cannot be set aside unless it is shown that the person in whom that discretion is vested exercised it contrary to law or accepted principles (**Mbogo v. Shah [1968] 1 EA 93**). In this case s.18 ACA provides for equal treatment of the parties as follows,

> "Every party shall be treated with equality, and each party shall be given reasonable opportunity for presenting his or her case."

In his award, the arbitrator explained that on the 14/02/2006, he was called upon to file the terms of reference and he did so. That from the onset the respondents were very uncooperative and despite several communications to them and to their advocate, both by telephone and in writing, they remained evasive and refused to endorse the terms of reference. The arbitrator said that he had to persuade the advocate to convince his clients to cooperate and they finally did. They filed a reply to the statement of claim.

The arbitrator went on to report that the process finally took off but the timetable that had been filed with CADER was not adhered to. That hearings failed on 20/02/06, 17/03/06, and on the latter date the arbitrator ruled that if respondents failed to appear again, he would dispose of the matter *ex-parte*. After that counsel for the objectors, as well as the objectors, appeared before him and 2 hearings were conducted *inter partes*. This resulted in the appointment of a firm of Auditors to audit the books of the partnership but the audit failed because the objectors would not provide the books. Several orders were issued against the objectors in the process of the arbitration which they refused to comply with and the arbitrator was forced to enlarge time under s.31(1) ACA for the purpose of meeting the ends of justice.

It was therefore clear from the award that the arbitrator extended time within which to make the award so that he could hear both parties in the dispute. He was then able to hear both sides of it and make an award within a period of 7 months. I therefore do not agree with the proposition by counsel for the objectors that the provisions of s.31 (2) ACA should have come into operation when the period of 60 days expired after the arbitrator enlarged time within which to make the award, and I will explain.

Section 31 (2) ACA provides as follows:-

> (2) If the arbitrators have allowed their time or extended time to expire without making an award, or have delivered to any party to the submission or to the umpire a notice in writing stating that they cannot agree, the umpire may forthwith enter on the reference in place of the arbitrators.

Counsel for the objectors submitted that the provision above allows the arbitrator to extend time for another 60 days and if that period expires, he/she has to hand over the dispute to an umpire if no award has been made within the extended period of time. I am unable to read it into s.31 (2) that time can only be enlarged for a further 60 days. This is especially because s.31 (1) ACA provides that time may be enlarged from *"time to time."* Rather, I am of the opinion that s.31 (2) ACA only comes into operation when the reference has been made to more than one arbitrator who then fail to make an award in the period of 60 days or any extended period of time. The failure of the arbitrators to make an award within the time that they have enlarged then implies that they are unable to agree and make a consistent joint award. But in a proceeding with a sole arbitrator the provision cannot ever come into operation; one arbitrator cannot fail to come to a decision in a dispute because one cannot disagree with oneself.

I am fortified in coming to my conclusion above because the term *"umpire"* is defined in s.2 (1) (j) ACA to mean *"a third arbitrator appointed by two arbitrators appointed by the parties."* S.31(2) and (3) ACA therefore clearly only apply to references where there are two arbitrators for the purpose of resolving a stalemate. A dispute has got to be determined one way or the other. If the two arbitrators to whom a reference is made make 2 divergent decisions, each in favour of the opposite party, the dispute has not been resolved. Thus the need for an umpire between the 2 to enable them come to a conclusive award.

I was also unable to agree with the proposition by counsel for the objectors that the arbitration should have terminated under s.14 ACA due to the delay in commencement of the process. S.14 ACA provides that the mandate of an arbitrator shall terminate if he/she, according to the parties, is unable to perform the functions of his/her office, or fails to act without undue delay. It may also terminate if she/he withdraws from office or dies.

The objectors complained of a delay of 5 months after the period of 60 days provided for in s.31 (1) expired. But I would not say that the delay complained of amounted to the *"undue delay"* that is referred to in s.14 (1) ACA so as to make subsection (2) thereof to come into force for the reasons following. After he was appointed by CADER on 30/01/2006, the arbitrator took up his mantle on 14/02/06. He prepared and submitted terms of reference to CADER and it was after that that the delay began. The objectors refused to endorse the terms of reference. Further delay was caused by the objectors' recalcitrance in responding to the respondent's statement of claim. More delay was occasioned by their failure to adhere to

the schedule that had been filed with CADER and eventually they attended only 2 out of the 7 hearings that took place.

That in my view cannot be undue delay as would bring the provisions of s.14 ACA into operation. If it had been, then it was the obligation of the objectors to refer any dispute about that back to CADER under s.14 (2) ACA; CADER would then decide whether to terminate the mandate of the arbitrator or not. And according to s.14 (2), the decision of CADER as to whether there was undue delay on the part of the arbitrator or not and the termination or not of the reference would be final.

Finally, in spite of the alleged delay to complete the arbitration, the objectors participated in it by filing a defence to the statement of claim and attending 2 of the hearings, and it was on that basis that the arbitrator made an award in favour of the respondent. I would say that objecting to the award in the circumstances above smacks of bad faith. It confirms that the objectors tried to frustrate the arbitration and having failed to do so, they had to come up with another method of preventing the dispute from being resolved at all.

Counsel for the objectors argued that the failure to object about the arbitrator's inability to perform did not amount to a waiver of the objectors' rights or acquiescence under s.4 of the Act. He went on to state that s.4 ACA only deals with matters raised during the proceedings and not after the award. That thereafter the objectors had a right to raise their objections to the award under rule 7 of the Arbitration Rules.

I have already ruled that rule 7 of the Arbitration Rules is a relic of the past, but a situation that is similar to that in the instant case was discussed by the Court of Appeal in **National Social Security Fund & W. H. Ssentogo T/A Ssentogo & Partners v. Alcon International Ltd.; Court of Appeal C/A No. 2/2008**. The Court, Mpagi-Bahigaine, JA (as she then was) with Twinomujuni and Kavuma, JJA, concurring, ruled that the appellants who knew that the time within which the award had to be made had expired but continued to participate in the proceedings till the award was made, were by their conduct precluded from objecting to the award. The court cited with approval a passage from Halsbury's Laws of England (3rd Ed.) Vol. 2 at page 42 where it is stated that:-

> *"The parties to an arbitration 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 enlarged."

In like vein, if it were true that the award was made after the time provided for by the Act had expired, or that the arbitrator was guilty of undue delay, the objectors would by their conduct be precluded from objecting to the award and s.4 ACA would, without a doubt, apply to the situation. But as it is, I find that the arbitrator had the mandate to extend the time within which to make the award, as is provided for in the ACA. It is therefore not illegal and it cannot be set aside on that ground. It should be enforced without any further legal impediment, if that is reasonably practicable in the circumstances of the partners here.

Going on then to the complaint that the arbitrator's mandate had expired when he purported to tax the respondent's bill of costs, recourse has to be had to s. 31 ACA. S. 31 (9) (a) ACA provides that unless it is otherwise agreed by the parties the costs and expenses of an arbitration, being the legal and other expenses of the parties, the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration, shall be as determined and apportioned by the arbitral tribunal in its award under the same provision, or any additional award under section 33(5) of the Act. And by s.31 (9) (b) it is provided that in the absence of an award or additional award determining and apportioning the costs and expenses of the arbitration, each party shall be responsible for the legal and other expenses of that party and for an equal share of the fees and expenses of the arbitral tribunal and any other expenses relating to the arbitration.

In the instant case, the arbitrator did award the costs of the arbitration to the respondent here within his award. He also ruled that the objectors still had the obligation of paying shs. 350,000/= to CADER being expenses for the arbitration. However, he did not state the amount of costs to be paid by the objectors to the respondent. Since the parties received the award in that form, the arbitrator's mandate expired when he pronounced it. He could not make any further awards in the matter, as he did, because he had not been moved under s. 33 ACA.

What should have happened here is provided for or implied in s.36 ACA. The award should have been enforced as a decree, meaning that advocates' costs ordered against a party in the decree, including the litigant's other disbursements, would be taxed by the Registrar under the Advocates (Remuneration & Taxation of Costs) Rules. I therefore find that the arbitrator

had no mandate to tax the respondent's bill and thus the resultant award of costs was illegal. The costs in the arbitration are therefore not yet due from the objectors because they have never been taxed as is required by law.

Consequently, this court cannot shut its eyes and ignore a blatant illegality brought to its attention, for illegality once brought to the attention of the court overrides all questions of pleadings including admissions thereon. Therefore, under the powers vested in this court by s.98 Civil Procedure Act to make such orders as may be necessary for the ends of justice, or to prevent abuse of the process of the court, the order for costs is hereby set aside. It then becomes unnecessary to decide the question whether the costs awarded were excessive or not. And the question whether the objectors should have deposited security for costs as ordered by the registrar cannot be answered otherwise than in the negative.

In conclusion, I was unable to set aside the award granted in favour of the respondent by Mr. Tishekwa. I was also unable to enter upon a discussion regarding the propriety or otherwise of the merits thereof because this court does not have the mandate to entertain appeals from arbitral awards. Whether the award can be successfully enforced against the objectors, who are unwilling to countenance it because they feel their rights have been infringed, is a question that will be answered when the process of formal execution of the award commences. Since the objectors have partially succeeded in their quest, the respondent shall have only one half of the costs of these proceedings.

Irene Mulyagonja Kakooza
JUDGE
07/07/2011