

THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION NO 754 OF 2016
(ARISING FROM CIVIL SUIT NO 77 OF 2012)

WANZALA ENTERPRISES LIMITED}APPLICANT

VERSUS

BARCLAYS BANK UGANDA LIMITED}RESPONDENT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

The Applicant filed this application under section 26 and 27 of the Judicature Act, Cap 13, section 98 of the Civil Procedure Act Cap 71 and Order 47 rule 5 (1) (b) (ii), 5 (2) of the Civil Procedure Rules and all other enabling laws. For orders that the arbitrator/referee appointed to reconcile in the parties accounts is incapable of acting for reason of conflict of interest or likelihood of bias. Secondly, it is for an order that a new arbitrator/referee is appointed by the court to reconcile the parties' accounts. Thirdly, it is for costs of the application to be provided for.

The grounds of the application are that the parties by consent under section 27 of the judicature act appointed Messieurs Mungereza & Kariisa, Certified Public Accountants to reconcile their accounts. Secondly, at the time of the appointment and in their formal proposal, Messieurs Mungereza & Kariisa, Certified Public Accountants did not disclose to the Applicant that one of the partners Mr Kariisa is a director of the Respondent bank, a fact that the Applicant learnt about subsequently. Thirdly, the Respondent bank has also concealed this fact for reasons only known to it. Fourthly, the Applicant objected to the preparation of the final account on the reconciliation of the parties' accounts and none has been prepared to date. Fifthly, the parties

subsequently attempted to agree on a new auditor to reconcile the accounts, a move that the Respondent bank later declined to follow through. Sixthly, and accordingly a new auditor or to be appointed by the court could reconcile the parties' accounts. Lastly the Applicant avers that it is in the interests of justice that the orders sought in the application are granted.

The application is supported by the affidavit of Kasibbo Joshua, the managing director of the Applicant Company. He deposes that after institution of the Applicant's suit for declaration that the Respondent mismanaged its accounts leading to loss; it became apparent that the core of the dispute related to a disagreement on how much the Applicant ought to have repaid the Respondent pursuant to facilities extended by the Respondent to the Plaintiff.

The parties agreed to trial by a referee under section 27 of the Judicature Act and appointed Messieurs Mungereza & Kariisa, Certified Public Accountants. The said accountants made a proposal to the parties setting out matters that would guide their work. At the time of the appointment added a formal proposal they did not disclose to the Applicant that one of the partners is a director of the Respondent bank. The Respondent also concealed this fact for reasons only known to it. Consequently the deponent deposes that it is clearly a case of conflict of interest or likelihood of bias on the part of Messieurs Mungereza & Kariisa, Certified Public Accountants. After the Applicant's managing director learnt about the directorship of one of the partners, by letter dated 5th October 2015 demanded that the process was halted until the issue was resolved. The best of the Applicant's knowledge, no final audit report has ever been prepared by Messieurs Mungereza & Kariisa, Certified Public Accountants. The Applicant's letter of 5th October, 2015 was not replied to for seven months and on 4th April, 2016 the Applicant's lawyers wrote to the court requesting for trial or other directions. On 12th April, 2016 the parties appeared before the deputy registrar of the court and reviewed the facts agreed to appoint a new firm of auditors namely Messieurs Kisaka & Company Certified Public Accountants. The 4th of May 2016 the court communicated this appointment to the said Kisaka & Company, Certified Public Accountants and the parties subsequently met the auditors with a view to progress in the matter. Following this engagement the Respondent refused or declined to pay the new auditor's fees contending that they had already paid the fees of Messieurs Mungereza & Kariisa, Certified Public Accountants. On 16th June 2016 the parties appeared

before the trial judge and the Respondent backtracked of the agreement before the deputy registrar and contended that the old audit had now been finalised. Finally Joshua Kasibbo deposes that the parties failed to agree on how to progress with the new auditor and the court ought to appoint or referred the case to an independent referee for reconciliation of accounts and that it is in the interest of justice that the application is allowed and the orders sought are granted.

In reply Christine Nshemerirwe Kibirango, the Manager Recoveries of the Respondent bank deposes as follows. The directorship of Mr Joram Kariisa in the Respondent bank was within the knowledge of the Applicant and his lawyers that is the reason why the audit was not conducted by him but by another auditor in the same firm. The Respondent could not have concealed the directorship of Mr Kariisa Joram in the Respondent bank when it was already within the knowledge of the Applicant and his lawyers. Consequently there was no conflict of interest and likelihood of bias as the audit was not being conducted by Mr Kariisa but by another auditor in his firm. She agrees that the Applicant by letter dated 5th October 2015 demanded the auditors to stop any further audit process and that no final audit report had been prepared. On the 4th of May 2016 when the parties appeared before the registrar and agreed to appoint a new auditor, the Respondent unequivocally informed court that they had the issues pertaining to the first audit including fees which needed to be resolved before the second audit could commence. The deputy registrar directed the parties to fix the matter before the trial judge in order to have any outstanding issues resolved. The Respondent made several attempts to secure a date to appear before the trial judge but the efforts were frustrated by a temporary displacement of the court file in the registry and which matter was brought to the attention of the registrar by letter dated 20th of June 2016. Before the Respondent could secure a date to appear before the trial judge, the Applicant wrote to the registrar accusing the Respondent of having failed to pay fees of the new auditor. At this point the parties had neither fully engaged the new audit firm nor signed the contract with them. The Respondent by letter dated 24th of May 2016 replied to the Applicant's letter of the 19th of May 2016. The correct date when the parties appeared before the trial judge was 24th of June 2016 and in their submissions the Respondent stated very clearly that whereas they were agreeable to the second audit and had in fact jointly selected a new auditor, they were of the view that before the second audit commences, the first audit ought to be concluded and the relevant fees settled with the auditors. Following the submission of the parties, the presiding

judge ruled that the procedure adopted by the parties in appearing for the court and appointing another auditor to commence a second audit was wrong. The trial judge also directed that the first audit should be concluded and the report submitted before the court and then any aggrieved person could then challenge the report. To the best of the Respondent's knowledge following the court appearance of 24th June 2015, the Applicant has not returned to the auditors in accordance with the courts directives requesting for their final report. Instead by letter dated 30th of June 2016 the Applicant wrote to the registrar requesting the registrar to compel the Respondent to pay the new audit fees of the new auditor's. It is evident that in their letter dated 30th of June 2016 the Applicant did not include the directions of the trial judge to the first auditors Messieurs Mungereza & Kariisa and Company Certified Public Accountants.

The Applicant has not requested the auditors for the final report in accordance with the directions of the trial judge issued on 24th June 2016 and the actions of the Applicant are contrary to the directions of the trial judge. In the circumstances, contrary to the allegations of the Applicant, the auditors are not incapable of conducting the audit on the grounds of conflict of interest as alleged by the Applicant.

In further reply to the application Mr Joram Kariisa deposed that he is a partner in the audit firm of Mungereza & Kariisa, Certified Public Accountants instructed by the parties to conduct an audit. The parties instructed his firm to carry out reconciliation of accounts between the parties and the Defendant for the period 1st of July 2008 to 30th of May 2010 according to the copy of the terms of reference dated 23rd of October 2014. Furthermore, the work of reconciliation did not commence until February 2015 since the Applicant/Plaintiff had not paid fees in accordance with the terms of the agreement. Prior to the commencement of the assignment, Mr Kasibo Joshua, a director in the Applicant Company approached him in respect of the reconciliation of accounts between the parties whereupon he informed him that he was a director in the Respondent bank, he could not handle the assignment. Instead he introduced Mr Kasibo to his partners in the firm namely Mr Mungereza and Mr Kwizina. Mr Kasibo did not object to this arrangement and the reconciliation process commenced and proceeded well until a draft report was issued. It is true that the Applicant by letter of 5th of October 2015 demanded that the reconciliation process be halted but it was not true that he got to learn about the directorship of

Mr Joram Kariisa in the Respondent bank subsequent to commencement of the reconciliation. By the response letter dated 30th of June and marked annexure "D" the Applicant stated very clearly that Messieurs Mungereza & Kariisa; Certified Public Accountants asked Mr Kasibo to withdraw their letter citing conflict of interest before the report could be issued. The firm could not proceed with the audit until the Applicant withdrew the letter citing conflict of interest. Following the issuance of the draft report the Applicants lawyers, forwarded to the firm their comments. In October 2015 the Applicant's lawyers served a letter citing conflict of interest because the deponent is a director in the Respondent bank. Mr Kasibo was released from prison and came to the offices of the auditors and requested that they proceed with the reconciliation as the letter dated 5th of October was written without his consent. The audit firm refused to continue until the Applicant's lawyers withdrew their letter citing conflict of interest. Because they did not hear from the Applicants until 29th June 2016 they were invited to court to explain why they had not submitted the final audit report. Accordingly they explained that there was no conflict of interest in the matter and they wrote to the registrar explaining their position.

In rejoinder to the affidavit in reply of Joram Kariisa, Joshua Kasibo admits that he approached Mr Joram Kariisa for a reconciliation of the party's accounts. He went to enquire if they could conduct the reconciliation of accounts and his first point of contact was Mr Mungereza and not Mr Joram Kariisa. Consequently the assertions of Mr Joram Kariisa were strange and obviously false. It was Mr Fulgence Mungereza who referred him to Mr Kwizina Thomas who subsequently prepared the proposal on the part of the firm. Mr Joram Kariisa falsely deposed that he disclosed the fact that he was a director in the Respondent bank on the first point of contact. At no point before the reconciliation started did Mr Joram Kariisa or any other partner or employee of Messieurs Mungereza & Kariisa, certified public accountants disclose to him that Mr Joram Kariisa was a director in the Respondent bank and he never learnt about the fact until much later. It follows that if the fact of Mr Joram Kariisa's directorship had been disclosed, it would have been clearly stated in the formal proposal submitted to the Applicant because it was a critical factor in the partiality of the firm. Finally the Applicant did not initially object to the process because it was not aware of the directorship of Mr Joram Kariisa in the Respondent bank.

In further rejoinder to the affidavit of Christine Nshemerirwe Kibirango, he reiterated that the fact of directorship of Mr Joram Kariisa in the Respondent bank was never at any point in time before the reconciliation disclosed to him or to the Applicants lawyers. When he learnt about it, he informed his lawyers. Instructions to reconcile the parties account were given to Messieurs Mungereza & Kariisa, certified public accountants and not Mr Thomas Kwizina. Consequently if one partner in the firm is conflicted as is clearly admitted, the whole firm of accountants is definitely conflicted. When the parties appeared before the learned deputy registrar of the court, they agreed to appoint new auditors and held a meeting with the said new auditors. The guidance of the trial judge was that the procedure adopted in disentangling the auditors Messieurs Mungereza & Kariisa certified public accountants did not comply with the Civil Procedure Rules and if the Applicant wished to do so, it should file a formal application, short of which the final report would be submitted to the court. The Applicant immediately proceeded to file the current application.

By agreement of Counsel Paul Rutisya and Joy Faida for the Respondents and Counsel Ahmed Kalule for the Applicant, the court was addressed in written submissions.

After referring to the facts above which have been reproduced from the affidavit evidence, the Applicants Counsel submitted that it is an admitted fact that Mr Kariisa Joram is a director of the Respondent bank. A singular question for determination is whether this means that Messieurs Mungereza & Kariisa, Certified Public Accountants is conflicted or that there is a likelihood of bias on their part. Counsel relied on Black's Law Dictionary, 7th Edition page 295 for the definition of conflict of interest as the real or seemingly incompatibility between the one's private interests and ones public or fiduciary duties. He submitted that it involves using one's position to exploit a professional or official capacity in some way for the personal or corporate benefit. Bias on the other hand is defined by the same dictionary as "inclination; prejudice". He further relied on the case of Uganda versus Patricia Ojangole criminal case number one of 2013 and the anticorruption court where honourable Mr Justice Lawrence Gidudu held that it is both the actual deposition that counts when tracing conflict of interest in a transaction. It is what a reasonable person would conclude while viewing the transaction from distance that counts. It is related to

the rule against bias. The old adage is that justice must not only be done but must be seen to be done apply to conflict of interest.

The Applicant's Counsel relied on several other authorities namely *Common Wealth Bank of Australia versus Smith* (1991) 102 ALR 477; *R versus Bow Street Metropolitan stipendiary Magistrate and others ex parte Pinochet Ugarte (No.2)* (1999) 1 All ER 577; *Juuko vs. Opportunity Uganda Ltd Civil Suit No. 327 of 2012* and *Nilefos Minerals Ltd vs. Abmak Associates HCMA No. 60 of 2014*.

The Applicants Counsel submitted that Mr Kariisa's private duties with the Respondent bank militated against any suggestion of the absence of likelihood of bias on the part of Messieurs Mungereza & Kariisa, Certified Public Accountants. His position is incompetent with his firm's fiduciary duties owed to the Applicant. He submitted that it was difficult for any reasonable person to perceive of impartiality in the reconciliation of the said accounts. What is easier is for a reasonable person to perceive that the Respondent bank is sitting through its own case through Messieurs Mungereza & Kariisa, Certified Public Accountants. The issue of whether the Respondent disclosed the potential conflict of interest is strongly denied and there is nothing in the written proposal to the Applicant or the communication between the Applicant and Counsel and the auditors to this effect. Immediately the Applicant became aware of the likelihood of bias, it objected to any further participation of Messieurs Mungereza & Kariisa Certified Public Accountants in the reconciliation exercise. That is why there is no final audit report before this court and none has been prepared. With reference to HWR Wade and CF Forsyth in *Administrative Law*, 8th edition, the learned authors wrote that:

"The right to object to a disqualified adjudicator may be waived and this may be so even when the disqualification is statutory. The court normally insists that the objection should be taken as soon as the party prejudiced knows the facts which entitle him to object. If after he or his advisors know of the disqualification, they let the proceedings to continue without protest, they are held to have waived their objection and the determination cannot be challenged.

In the premises the Applicant's Counsel submitted that one issue is who may then carry out the reconciliation of accounts? The Applicant prays that the court appoints another auditor to carry out reconciliation of the accounts. Secondly, it is clear from the pleadings and evidence that there is uncontested agreement before the court to appoint Messieurs Kisaka & Company, Certified Public Accountants and the agreement may be confirmed and the reconciliation process continued.

In reply the Respondent's Counsel submitted that whereas instructions were given to Mungereza and Kariisa Certified Public Accountants, it is not true that the entire firm was going to execute the assignment. Upon accepting the instructions, the assignment was given to one Thomson Kwizina who was solely responsible for the reconciliation according to advice to the Applicant's Kasibo Joshua. It is also reflected in the proposed document authored by Mr Kwizina. The Respondent's Counsel submitted that a potential conflict of interest was verbally communicated to the Applicants Mr Kasibo when he went to Mungereza and Kariisa Certified Public Accountants requesting them to handle the reconciliation. In order to deal with the potential conflict, it was agreed that Mr Kwizina would handle the assignment and a Chinese wall would be erected within the firm to prevent information exchange. The Applicants Mr Joshua Kasibo agreed to this arrangement and therefore waived the right to raise a conflict of interest issue. There was therefore no conflict of interest and the apprehension of a likelihood of bias is speculative.

With regard to the definition by the Applicant of a conflict of interest, it has to be a real or seemingly incompatibility. Something 'seeming' is apparent but not real. The alleged conflict of interest was only a potential one but not a real one. The word 'potential' is defined as 'existing in possibility but not in act' according to Black's Law Dictionary, Sixth Edition. In defining a conflict of interest, the same edition distinguishes between an actual and potential conflict of interest. The actual conflict could have materialised if only Mr Kariisa had personally handled the assignment. However, Messieurs Mungereza & Kariisa certified public accountants prudently handled this potential conflict.

Regarding the authorities' of Uganda vs. Patricia Ojangole (Supra), the decision is not binding in this court. Secondly, the circumstances in that case are significantly distinguishable from those

in the present case. In the former case Messieurs Ligomarc & Company Advocates was the repository of information or report that formed the basis of prosecution of the accused. The same firm purported to provide her legal defence. There was a clear case of conflict of interest. In the present case Mr Kariisa is only a non-executive director in the Respondent bank and is not involved in the daily management of the bank's affairs.

The decision of Commonwealth Bank of Australia versus Smith (supra) is instructive on the Respondent's argument. The relevant excerpt from the quotation provided by the Applicant was that the fiduciary must avoid, without informed consent, placing him in a position of conflict between duty and personal interests. A simple interpretation of the excerpt is that but for the situation of conflict, Mr Kariisa foreseeing a potential conflict of interest informed Mr Joshua Kasibo of his position in the bank and Mr Joshua Kasibo consented to the arrangement. In the final analysis a reasonable person being fully apprised of the facts would not by necessary implication perceive a likelihood of bias in favour of the Respondent bank. Accordingly the Applicant's arguments regarding conflict of interest ought to be dismissed. The Pinochet Case relied on by the Applicants Counsel is similarly distinguishable. It is to the effect that the mere fact that the party has the relevant interest in the subject matter means that he is disqualified without any investigation into whether there would be a likelihood or suspicion of bias. The mere fact of his interest is sufficient to disqualify him unless he has made sufficient disclosure of the interest. The Respondents Counsel submitted that sufficient disclosure was made by Mr Kariisa to the Applicant's Mr Kasibo. Therefore Messieurs Mungereza & Kariisa Certified Public Accountants cannot be automatically disqualified in light of the Chinese wall agreed upon.

Furthermore the Respondents Counsel submitted that the decision in Juuko versus opportunity Uganda limited is not binding on this court. Secondly the facts are sufficiently distinct from those of the present case. In the former case the apprehension of bias attributable to the role of DW1 in investigations and subsequent hearing was reasonable.

The Respondent's Counsel submitted without prejudice that the Applicants sole purpose in bringing the application is to frustrate the reconciliation process especially in light of the fact that the draft audit report indicated that the Applicant owed the Respondent bank several million

shillings. Such a move would only prevent the Applicant from paying the outstanding fees due to Messieurs Mungereza & Kariisa Certified Public Accountants.

Secondly, the Respondent concedes that a reasonable apprehension of a likelihood of bias in the circumstances warrant being upheld. Given the seriousness of such allegations, they must be properly substantiated so that indeed a likelihood of bias is apparent. The claim that they learnt only of Mr Kariisa's directorship in the Respondent bank much later was suspect and ought to be questioned by this court.

Furthermore it is the Respondents submission that had the Applicant established this fact much later as alleged, the Applicant would have had the confidence to disclose in detail the circumstances under which this fact was ascertained. In the absence of such evidence, the Applicants blanket allegations invite the question why the court should believe the Applicant's version or the version of Mr Kariisa.

The Respondent's Counsel maintained that there was no conflict of interest but only a potential one and was sufficiently communicated to the Applicant. This was the view asserted by the Respondent before his Lordship on 24th June, 2016 and is the view maintained by Messieurs Mungereza & Kariisa, Certified Public Accountants in their letter dated 30th of June 2016. Furthermore there are directions of the trial judge issued on 24th June, 2016 and on the basis of Order 47 rule 3 (2) of the Civil Procedure Rules directing that the audit must be completed and any dissatisfied party would be allowed to formally challenge the report. Under that rule once a dispute is submitted to an arbitrator, the court has no jurisdiction to entertain the matter.

Following the court appearance, if the Applicant had a good intention, they ought to have written to Messieurs Mungereza & Kariisa Certified Public Accountants informing them of the directions of the court requesting for the final report. Messieurs Mungereza & Kariisa, certified public accountants did not hear from the Applicant until 29th of June 2016 when they appeared jointly before the registrar and in the absence of the Respondent.

In rejoinder the Applicants Counsel submitted that the allegation that Mr Joram Kariisa notified the Applicant's director Mr Joshua Kasibo of his directorship in the Respondent bank is strongly denied. If the disclosure had been made, given the reputation that the Respondent thinks about

this firm of auditors, there is absolutely no reason why the same was not repeated in the formal proposal to the parties. Secondly how could it be said that the Applicant is a victim and decided to waive objecting on the possibility of conflict of interest? Why was the waiver never decoded in writing? Why was everything else in writing apart from this arguably most critical component? Why did the Respondent require an undertaking of waiver recorded down? Clearly, this assertion is empty as it has been presented. It doesn't appeal to the widest possible stretch of common sense.

The Applicants Counsel further submitted that the word "Chinese wall" was defined by the House of Lords in *Prince Jefri Bolkiah versus KPMG (a firm)*, 1999 to mean in the physical separation of various departments in order to select them from each other. Particularly Lord Millett opined that: "an effective Chinese wall needs to be an established as part of the organisational structure of the firm, not created ad hoc and depends on the acceptance of evidence sworn for the purposes by members of staff engaged on the relevant work".

The House of Lords found that KPMG had not adequately discharged the burden of proving that no information would flow that would be prejudicial to their former client. The Respondent has not spelt out in any way how the Chinese wall mechanism was applied. In the premises there is a real threat of conflict of interest and not a potential one as alleged by the Respondent and there were no safeguards to insure against it.

Regarding the directions of the trial judge, there were no directions of the judge that were not complied with. Contrary to the contention that any party who wishes to challenge the report could easily do so after it was filed, the report under section 27 of the Judicature Act may not be challenged save on the extremely limited grounds on which a consent judgment or a contract may be challenged. Fortunately, no such report has ever been filed and none has been filed for the reasons explained. The Applicants Counsel further rejoined that on the allegation that the application was brought in bad faith for the reason that the draft report was not in favour of the Applicant, the submission is without basis and is not supported by any evidence on record. This is a submission from the bar and should be disregarded. In any event Counsel contended that a draft report is not a final report and clearly need never have reflected the final findings of the auditors. After stating the issue of conflict of interest, the Applicant's lawyers in the letter of fifth

of October 2015 added comments on the draft report. That could not be the conduct of the person scared of the draft report. Furthermore the Applicant already pleaded the required fees to the auditors and is not indebted to them in anyway. Further payments were to be made after the final report was issued and such report has never been issued.

Lastly the Applicants Counsel rejoined that whereas they agreed that the decision of the High Court was not binding on this court, they are persuasive in so far as they are applicable to the facts and circumstances which are similar.

Ruling

I have carefully considered the Applicant's application and the submissions of the Counsels for and against the application. The primary question in the submissions is whether the Applicant waived its right to object to Mr Joram Kariisa or his audit firm Messieurs Mungereza & Kariisa, Certified Public Accountants. Mr Joram Kariisa is a director of the Respondent bank. The Respondent's Counsel concedes that there could be a potential conflict of interest due to that fact. However the Respondent maintains that the Applicant was aware of the directorship of Mr Joram Kariisa in the Respondent bank and it was agreed that he would not handle the reconciliation exercise. Accordingly the reconciliation exercise was assigned to Mr Thomas Kwizina. The fact in this regard are contested facts and there was no cross examination on the issue. The application proceeded on the basis of affidavit evidence.

I have carefully considered the facts of the objection. The genesis of the application is an agreement filed on court record on the 10th of October 2014 between the parties in which it was agreed that this suit involves the reconciliation of accounts and related matters and it is preferred that it is referred to an independent auditor under certain terms of reference which are not relevant for dealing with the objection. Particularly clauses 2, 3, 4 and 5 of the agreement provided as follows:

"2. The parties agree to refer the matter herein to Messieurs Mungereza & Kariisa, Certified Public Accountants of Plot 9, Lower Kololo Terrace, Kampala, Uganda.

3. The parties shall fully cooperate with and present their respective cases before the Auditor (s) including all and any documents or other material in support of their cases.
4. The Auditors shall carry out the audit and present a report of their findings to the parties within 30 days from the date of communication of the instructions.
5. The costs of the audit shall be borne by the parties equally."

The agreement was signed by the parties as well as their lawyers. The agreement was signed and filed on court record on 10th October 2014. Secondly attached to the application is a proposal for reconciliation of accounts attached to a forwarding letter dated 15th of October 2014 written on the letterhead of Mungereza & Kariisa. The letterhead indicates that the partners are Fulgence Mungereza, Kariisa – Kasha Joram and Thomson Kwizina. The proposal was signed for and on behalf of the parties. For Barclays bank of Uganda Ltd it was signed on 16th November 2014 while for the Applicant it was signed on 23rd October 2014. One year later on Monday, October 5th, 2015 Messieurs Crane Associated Advocates on behalf of the Applicant wrote that their client had recently learnt that one of the partners Mr Kariisa is a director of the Defendant bank. The information was never brought to their attention at the start of the delicate process involving the bank. They requested the said firm to immediately halt the auditing process until the issue is resolved one way or another. Secondly that if the auditors prepared a final report, their client would not be a party to it and will be considered to have withdrawn from the process as at the date of receipt of the letter. Without prejudice they further went on to make comments on the draft report of the auditors.

On 30th June 2016 Messrs Mungereza & Kariisa Certified Public Accountants wrote to the registrar High Court commercial division indicating that the work did not start until February 2015 because Wanzala Enterprises had not paid their fees in accordance with the terms of engagement. Secondly Mr Joshua Kasibo was in prison and his representative required consulting him on a number of issues. Furthermore, they wrote that prior to the commencement of the assignment Mr Wanzala had approached Mr Kariisa who disclosed to him that since he was a director in Barclays bank, he could not handle the assignment. Mr Kariisa introduced him to the other partners of the firm, Mr Mungereza and Mr Kwizina to handle the assignment.

Everything went well and a draft report was issued. His representative provided their comments which were addressed in the second draft report. Later in October 2015 the Applicant's lawyers wrote a letter filed in the commercial division informing them that their client had learnt that one of the partners Mr Kariisa is a director in the Defendant bank and demanded the halting of the audit process. Secondly, when he came to the offices from prison, he was informed of the development and later on requested them to continue since the letter was written to the commercial court without his consent. They insisted that for them to continue with the assignment, the letter of the lawyers should be withdrawn in writing. Thereafter they kept quiet until 29th June 2016 when they were invited to the court to explain why they had not issued the report.

I have carefully considered the proceedings in this matter. Arbitrators were appointed by the parties. On 1 July 2014 record of proceedings reveal that there was agreement that the Plaintiffs case was largely a matter of reconciliation of accounts and Counsels agreed that the dispute should be referred to an independent auditor and that they would iron out the remainder of the issues. The court order shows that after discussions of Counsels present it was agreed that they shall appoint auditors in writing and give the terms namely the auditors would reconcile the accounts between the parties for the agreed period and establish: "...

- a. How much money was disbursed under the facilities inclusive of costs under the relevant loan facilities
- b. Terms of repayment
- c. How much was repaid by the Plaintiff over the period
- d. Whether any party of the parties owes the other any money for the relevant period.
- e. The parties tentatively agreed on Messrs Earnest and Young Auditors.
- f. Costs will be shared between the parties and are payable on a 50% and 50% basis by each party.
- g. File a copy of the agreement in court.
- h. Where possible the audit shall be carried out within 30 days from the date of appointment.

This suit will be mentioned on the 26th of August 2014 at 2.30 pm to consider the audit report.”

Subsequently on the 26th August 2014 the suit was mentioned and the record shows that the parties had agreed for an extension of time by 1 ½ months from then to permit the auditors agreed to and subsequently appointed to present their report. By 7th of October 2014 the record shows that there was still no agreement on the terms of reference. The court directed the Counsels to file the terms of reference of the auditors by Friday that week and the outcome of the audit would be reported to court 26th November 2014 at 10.30 am. On the 26th of November 2014 there was no progress and the suit was adjourned to 5th February 2015 for the parties to make progress in the audit exercise. Auditors had been appointed by consent of the parties and the consent was filed on the 10th of Oct 2014. On 5th of February 2015 it was reported that the auditors required more time to complete their report after obtaining the necessary documents from the parties and the matter was adjourned and fixed for mention on 13th April 2015 for a report on the anticipated auditor's report. On 13th April 2015 it was reported that the duly appointed auditors Messieurs Mungereza & Kariisa, Certified Public Accountants required their invoice to be paid. Unfortunately the Defendant had paid while the Plaintiff had not yet paid and the principal officer of the Plaintiff Mr Joshua Kasibo had been convicted of a criminal offence and was in prison. It was reported that was he supposed to serve four years in prison. The court noted that the audit effort had so far been frustrated and the application for adjournment was granted. By 17th June 2015 it was reported that the audit process was ongoing but was not completed. On 3rd September 2015 the Plaintiff's Counsel applied for an adjournment and the record shows that the auditor's report was expected within two weeks. The Plaintiff's Counsel reported that he wanted to present a draft to the director who was in prison. The matter was accordingly adjourned to 5th October 2015. On 5th October 2015 the Plaintiff's Counsel reported that they met the auditors and had made comments on the report and the auditor was in the process of making the final report. However they discovered some unsettling information that one of the partners in the audit firm of Mungereza & Kariisa, Certified Public Accountants is a director in Barclays bank of Uganda Ltd. The Defendant's Counsel objected on the ground that the Plaintiff's knew that one of the partners was a director in the appointed auditors firm. Secondly, that the audit was being conducted by one Kwizina Thomson. The suit was

accordingly fixed for mention 10th December 2015 when the auditors were expected to file their report and share it between the parties. The matter again came on 24th June 2016 after the parties had proceeded before the registrar. It was reported that the auditors had submitted the report to the parties on 21st July 2015 and the Defendant was satisfied with the report and responded to the auditors and requested them to file a final report. Three months after the report was submitted by the auditors the Plaintiff wrote to the auditors alleging that they had not disclosed that one of the partners of the audit firm is a director of the Defendant bank. They made other allegations regarding the date of commencement of reconciliation. In April 2016 the Plaintiff made further complaints to the registrar and requested that the matter is fixed for hearing. The registrar summoned the parties on 19th April 2016 and during these appearances the parties indicated that they had agreed to a second audit and forwarded to the second auditor and the registrar wrote to the auditor informing them of the appointment. The Defendant subsequently raised issues regarding the second audit firm and the issue was raised before me and written below is what I directed:

“Court

There court is not supposed to deal with a matter that has been referred to auditors. Under Order 47 rule 3 (2) of the CPR and section 27 (c) of the Judicature Act. There were some proceedings before the registrar reportedly by consent of the parties. In those circumstances the parties paid for the audit process and there is a question as to what happened to the audit. The auditors are officers of the court and report to court.

The registrar having dealt with the matter informally is required to formalise the process.

Either the parties are applying to set aside an award on grounds mentioned in Order 47 rule 15 or object to their own arbitrator. In either case there has to be a formal process.

In the premises if the parties agreed to another auditor the auditor first appointed should wind up and present their report, even if they have a partial report. For there to be no report as to what has transpired before them is an anomaly not envisaged by the rules. The matter is referred back to the registrar for the auditor first appointed to report to court on what has transpired so far.”

It is very clear from the record that what has transpired was considered an anomaly not envisaged by the rules. There are two relevant statutory provisions which need to be put in context. The audit preceded by consent of the parties and with the blessings of the court with time lines being extended from time to time due to one reason or other. The audit concerned reconciliation of accounts and the matter had proceeded under section 27 (c) of the Judicature Act Cap 13 laws of Uganda which deals with reference of accounts for trial by arbitrators or referees. The said section provides as follows:

“27. Trial by referee or arbitrator

Where in any cause or matter, other than a criminal proceeding—

(a) all the parties interested who are not under disability consent;

(b) ...; or

(c) the question in dispute consists wholly or partly of accounts, the High Court may, at any time, order the whole cause or matter or any question of fact arising in it to be tried before a special referee or arbitrator agreed to by the parties or before an official referee or an officer of the High Court.”

Section 27 envisages a trial by referee or arbitrator. In this case the parties appointed an arbitrator by agreement which was filed on court record. Section 28 of the Judicature Act further provides that an arbitrator shall be deemed to be an officer of the High Court and subject to the rules of the court and shall have such powers and conduct the reference in such manner as the High Court may direct. The rules which deal with the appointment and conduct of proceedings of arbitrator's other than arbitrators appointed in a contract prior to proceedings is Order 47 of the Civil Procedure Rules. Order 47 rule 2 of the Civil Procedure Rules provides that the arbitrator shall be appointed in such manner as may be agreed upon between the parties. Order 47 rule 3 (2) of the Civil Procedure Rules provides that where a matter is referred to arbitration, the court shall not, except in the manner and to the extent provided in the Order, deal with the matter in the suit. This was the rule I referred to and applied on the 24th of June 2016 upon realising that the parties had gone before the registrar and purported to appoint another arbitrator. I must note

that the outcome of every arbitral proceeding is an award. Secondly an award is made by the arbitrator or referee after the matter proceeds by way of a trial of matters of fact. These may even be accompanied by written submissions. Witnesses may be summoned with the aid of the court for the arbitrators or referee to examine. An award shall be filed in court together with any depositions and documents which were proved before the referee or arbitrator (See Order 47 rule 10 of the Civil Procedure Rules).

I have carefully considered the Applicants application which purports to proceed under order 47 rules 5 (1) (b) (ii) and rule 5 (2) of the Civil Procedure Rules. The first portion of the rules namely rule 5 (1) (b) (ii) deals with the power to appoint an arbitrator. It provides that where the arbitrator or umpire refuses or neglects to act or become incapable of acting, any party may serve the other party or the arbitrators, as the case may be, with a written notice to appoint an arbitrator or umpire. The matter before the court is not about the appointment of an arbitrator but rather whether the arbitrator appointed by the parties should not act. In fact there is no refusal to act and the arbitrators acted. They were appointed by consent of the parties. The arbitrators had already acted and the parties had paid them some fees. The only reason given by the arbitrators as to why they have not filed the final award is because the Plaintiff put a caveat that there is a potential conflict of interest because one of the partners of Mungereza & Kariisa, Certified Public Accountants Mr Kariisa Joram is a director of Barclays bank Uganda limited. The arbitrator erroneously refused to issue the report on the ground that the lawyers should first withdraw their objection. The Plaintiff has not moved the court on the ground that the arbitrators have refused or failed to act but want the arbitrators disqualified on the ground of potential conflict of interest.

In the premises the matter erroneously proceeded under Order 47 rule 5 of the Civil Procedure Rules which deals with the appointment of arbitrators. The other provisions deal with the grounds for setting aside an award under Order 47 rule 15 of the Civil Procedure Rules. However no award was filed or made. There was a draft award which the parties commented on and what is remaining is for the arbitrator who issued the final award. The procedure adopted is erroneous.

The only reason why the arbitrators have not issued their final award is contained in the explanation of the arbitrators that the Plaintiff's advocates should withdraw their letter objecting

to Mr Joram Kariisa. Can the court at this stage interfere with the arbitral proceedings? The matter is not adequately dealt with by the rules of procedure under the Civil Procedure Rules or the Judicature Act and we may have to consider the substantive law which deals with arbitrations.

Section 9 of the Arbitration and Conciliation Act Cap 4 laws of Uganda provides as follows:

"Except as provided in this Act, no court shall intervene in matters governed by this Act."

Section 9 of the Arbitration and Conciliation Act reinforces Order 47 rule 3 (2) of the Civil Procedure Rules which provides that:

"Where the matter is referred to arbitration, the court shall not except in the manner and to the extent provided in this Order, deal with the matter in the suit."

Both rules forbid the court from dealing with a referred matter in the suit except as provided for. From the above premises the rules do not apply to the situation before the court which is that an allegation of bias is being made against the auditors who are officers of the court under section 28 of the Judicature Act. On the other hand the Arbitration and Conciliation Act gives the grounds for challenge of an arbitrator and the procedure thereof under sections 12 and 13 thereof which provide as follows:

"12. Grounds for challenge.

(1) When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence.

(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his or her impartiality and independence, or if he or she does not possess qualifications agreed to by the parties.

(3) A party may challenge an arbitrator appointed by him or her, or in whose appointment that party has participated, only for reasons of which he or she becomes aware after the appointment."

Section 12 (2) of the Arbitration and Conciliation Act allows an arbitrator to be challenged on justifiable grounds as to his or her impartiality. Section 12 (3) of the Arbitration and Conciliation Act permits a challenge to be made where the objector became aware of the grounds of bias after the appointment of the arbitrator in which they participated. It does not permit the challenge if the objector was aware before the appointment. It is implied that if the Applicant was aware of the directorship of Kariisa Joram before the event of appointment it would have waived its right to object to him. The procedure for objecting is provided for by section 13 of the Arbitration and Conciliation Act and is either by agreement or in the absence of an agreement within 15 days after becoming aware by written statement to the appointing authority. Section 13 provides as follows:

“13. Challenge procedure.

(1) In this section, the parties are free to agree on a procedure for challenging an arbitrator.

(2) If there is no agreement under subsection (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the composition of the appointing authority or after becoming aware of any circumstances referred to in section 12 (2) send a written statement of the reasons for the challenge to the appointing authority; and unless the arbitrator who is being challenged withdraws from his or her office or the other party agrees to the challenge, the appointing authority shall decide on the challenge within a period of thirty days from receipt of a written statement.”

The appointing authority is the institution, body or person appointed by the minister to perform the function of appointing arbitrators and conciliators. In this case the appointment was made under the direction of the court by agreement of the parties to submit the issue of reconciliation to arbitrators. There was an agreement to appoint the auditors to try the issue of reconciliation under section 27 (c) of the Judicature Act. An arbitration agreement as defined by section 2 (d) of the Arbitration and Conciliation Act includes the agreement executed by the parties and filed in court to submit the dispute to auditors. From the facts and circumstances of this suit, the arbitrators cannot be treated like they were merely instructed by the parties but they are officers

of court under section 28 of the Judicature Act if an objection is to be made to them. Under section 2 (c) of the Arbitration and Conciliation Act Cap 4 Laws of Uganda, an “arbitral tribunal”, means a sole arbitrator or a panel of arbitrators, and includes an umpire”. The Act envisages individuals as arbitrators. The parties appointed Mungereza & Kariisa, Certified Public Accountants as their arbitrators. They in turn assigned Thomson Kwizina to handle the assignment. While they are a firm of partners, the arbitration is being handled by Mr. Kwizina and not Kariisa. Furthermore, the reconciliation exercise was completed after the parties submitted their documents and made submissions to Mr. Kwizina. In addition the Plaintiff’s Counsel while expressing misgivings about the directorship of Mr. Kariisa in paragraph (i) of their letter dated 5th of Oct 2016 went ahead and addressed the merits of the report of the auditors in items (ii) – (ix). They wrote that they demanded that the audit process be put on hold. This application was filed by Notice of Motion on the 3rd of August 2016 about 10 months after the letter alleging discovery of grounds of bias. As far as procedure is concerned an objection to arbitrator is made under rule 13 of the Arbitration Rules by way of chamber summons.

The challenge to arbitrator is to be made within 15 days after becoming aware of the information or grounds of the challenge under section 13 (2) of the Arbitration and Conciliation Act. This application was made out of time. In the letter of Mungereza, Kariisa, Certified Public Accountants dated June 2016, they wrote that the matter was assigned to Kwizina and also that the Applicants Director Mr. Joshua Kasibbo was aware of the directorship of the Joram Kariisa. They only demanded that the Plaintiff’s lawyers withdraw their objection.

Section 28 of the Judicature Act provides that an arbitrator or referee is an officer of the High Court and it provides as follows:

“28. Powers of referees and arbitrators.

In all cases of reference to a referee or arbitrator under this Act, the referee or arbitrator shall be deemed to be an officer of the High Court and, subject to rules of court, shall have such powers and conduct the reference in such manner as the High Court may direct.”

While there may be perception of bias, the matter proceeded before another arbitrator and not Mr. Kariisa. The Arbitrators are directed not to involve Mr. Kariisa in the final award the audit having been partially concluded.

In the premises taking into account the belated objection after Mr. Kwizina filed a partial reconciliation report and after the parties commented on the report, having considered the costs of the arbitration which is reported as paid in part, I find that the application has not merit and there are no grounds in the comments of the Plaintiff suggesting that there was bias in the writing of the draft award. I accordingly dismiss the Applicant's application. The auditor assigned shall proceed to file his final award by answering the questions in the terms of reference wherein they were required:

“To carry out a reconciliation of accounts between the Plaintiff and the Defendant with respect to all facilities extended to the Plaintiff between the period 1st July, 2008 and 30th May, 2010 with a view to establish:

1. How much money was disbursed under the relevant facilities inclusive of costs?
2. What were the terms of repayment?
3. How much money was repaid by the Plaintiff to the Defendant?
4. Whether any party owes the other any money and if so, how much?
5. Any other matter related to the above.

The award shall be filed in court and served on the parties within 14 days from the date of this ruling. The costs of this application shall abide the outcome of the main suit.

Ruling delivered in open court on the 19th September 2016

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Counsel Katirima Joan holding brief for Counsel Ahmed Kalule for the Applicant

*Decision of Hon. Mr. Justice Christopher Madrama Izama *~*~?+: maximum728securityx 2016 style*

Joshua Kasibo MD of Applicant in court

Counsel Joy Faida for the Respondent

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

19th September 2016