THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HIGH COURT ARBITRATION CAUSE NO. 1 OF 2011

CAD/ ARB NO. 11 OF 2008

(ARISING FROM CIVIL SUIT NO. 489 OF 2006)

FOUNTAIN PUBLISHERS :APPLICANT

VERSUS

1. **HARRIET NANTAMU**
2. **ROSE NALUNGA ::RESPONDENTS**

BEFORE: <u>THE HON. JUSTICE DAVID WANGUTUSI</u>

<u>R U L I N G:</u>

Fountain Publishers the Applicant herein filed this Application against Harriet Nantamu and Rose Nalunga herein after called the Respondents seeking orders that; the award in CAD/ ARB No. 11 of 2008 dated 11th September 2008 be reviewed and costs of the Application.

This Application is grounded on the following;

1. That the Arbitral Proceedings in ***CAD/ARB No. 11 of 2008*** vide Harriet Nantamu, Rose Nalunga versus Fountain Publishers Limited, were commenced as a reference from Civil Suit No. 489 of 2011 on the 16th day of June 2008.
2. That the award in ***CAD/ARB No. 11 of 2008*** was read by the Arbitrator on the 7th day of September 2009 and filed in the High Court Commercial Division on the 3rd day of March 2011.
3. That there is an error apparent on the face of the record since the award was delivered beyond the time specified in the Arbitration and Conciliation Act without the arbitrator extending the time in writing.

The background to this claim as discerned from the pleadings is simple and straight forward. On 8th August 2006 the Respondents filed Civil Suit No. 489 of 2006 against the Applicant for

breach of contract, orders for specific performance, recovery of UGX. 50,000,000/=, general damages, interest and costs of the suit.

In their claim, the Respondents contended that they were co-authors with the Applicant who agreed to publish their books titled primary science text books with teacher's guides for primary 5, 6 and 7. The Respondents alleged that the terms of the agreement between the parties also entitled them to royalties from the sale of the said books. The Respondents further alleged that the Applicant breached the agreement despite having sold a quantity of 96,711 of the said books to government under the centralized purchase system cycle as well as districts and bookshops in different districts under the decentralized system.

On 30th November 2007 the Respondents filed Misc. Application No 821 of 2007 against the Applicant seeking leave to amend their pleadings in Civil Suit No. 489 of 2006 and costs. When Misc. Application No. 821 of 2007 came up for hearing on 20th February 2008 Counsel for the Applicant then Respondent objected to the forum on grounds that the agreement between the parties provided for Arbitration. Having listened to Counsel and observing that the Applicants, the Respondents in this current Application wanted mediation the Learned Judge referred the matter to Med-Arb starting with mediation to be done within 60 days of the Court's ruling, then Arbitration if mediation failed. The parties eventually proceeded for Arbitration wherein the Respondents who were then the Claimants' sued the Applicant then the Respondent was for infringement of their copyright, moral right and breach of contract. On 7th September 2009 the Learned Arbitrator delivered the award allowing the claim. The Respondent now Applicant was ordered to;

a) Pay damages of 40% of the total sales of the suit textbooks sold to Government before 3rd October 2005
b) Pay royalties of 10% to the Claimants for any new suit textbook produced and sold after 3rd October 2005
c) Pay interest of 8% per annum on the amount arising from the infringement starting the date of filing the dispute in CADER till the date of payment in full
d) Pay interest of 8% on the royalties since 3rd October 2005 till payment in full of the amount into any publications, if any and sales by the Respondent since 3rd October 2005
e) Pay Claimants costs incurred during the proceedings as well as the Arbitrator's fees.

It is this arbitral award of 7th September 2009 that the Applicant now seeks Court to review on grounds that there was an error apparent on the face of the record since it was delivered beyond the time specified in the Arbitration and Conciliation Act.

In an affidavit in support of the Application deponed by Assumpta Kemigisha Sebunya an Advocate of the High Court of Uganda practicing with Byenkya, Kihika & Co. Advocates the Applicant avers that the Arbitrator was required to enlarge the time for delivering the award by way of notice to the parties which was not done. In paragraphs 7 and 8 of her affidavit in support of the Application she deponed;

> "7. *That based on the training as lawyer, I also know that the arbitrator was required to enlarge the time for delivering the award by a notice in writing to the parties. I am however aware that no such notice for enlargement of time was ever made and communicated to the parties in writing by the arbitrator.*
>
> *8. That the time of delivery of the award, which was one year and four months after the arbitral proceedings were commenced, reflects an error on the face of the record in light of the fact that the appointed arbitrator was supposed to deliver the award within a period of two months."*

In reply to this claim, the Respondent contended that the Application was brought under Order 46 of the Civil Procedure rules which law is not applicable to arbitral awards. That Court does not have the jurisdiction to review the award because the same had been passed by the Arbitral Tribunal. The Respondent further contended that intervention by court could only be made in proceedings to set aside the award under section 34 of the Arbitration and Conciliation Act.

Section 9 of the Act limits the intervention of the Court in arbitration matters. The Act clearly stipulates when Court can intervene in such matters . Court can intervene in arbitral matters in three instances namely; under section 5 of the Act which speaks of stay of legal proceedings when a matter is referred to arbitration. Secondly under section 34 which provides for setting aside of an arbitral award and lastly under section 36 which regulates enforcement of arbitral awards.

In this case, the Applicant refers to the Arbitrator's delay in delivering the award as the error apparent on the face of the record.

It is a settled position of the law that the expression "mistake or error apparent on the face of record" refers to an evident error which does not require extraneous matter to show its incorrectness. It is an error so manifest and clear that no court would permit such an error to remain on the record. It may be an error of law, but law must be definite and capable of ascertainment; ***Attorney General & O'rs vs. Boniface Byanyima HCMA No. 1789 of 2000***, ***Levi Outa vs. Uganda Transport Company [1995] HCB 340.***

This implies that an error apparent on the face of the record can mostly be traced in ***speaking orders*** of the court that is those which enunciate the reasons in law on which a decision is made. In addition, the decision must flow from the error for one to say there is an apparent error on the face of the record.

While an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, it must be left to be determined judicially on the facts of each case. When a court does not apply the provisions of an enactment which on the face of it would apply to a case, the same would be a mistake or error apparent on the face of the record. But a mere error of law is not a ground for review. Only a manifest error would be ground for review; ***Sir Dinshan Fardunji Mulla; The Code of Civil procedure Part VIII*** **pgs 1146 -1147 8th Edn**.

In my view the need for time limits for delivering judgments is not just to avoid delay but also to prevent miscarriage of justice. Because the pronouncement of judgment is part of the justice dispensation system, it has to be done without delay. A trial judge should examine the arguments by both parties, carry out research and write the judgment within the prescribed time if any. By speedy delivery of judgments the court's accessibility and effectiveness is enhanced.

Section 31 of the Arbitration and Conciliation Act provides for form and content of an arbitral award. It also provides for the time within which an arbitral award should be delivered. It states;

> *"(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."*

The above provision implies that an Arbitrator should make the award within a prescribed time of two months. Section 31 subsection 2 also provides for extension of time in these words;

> "*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."*

While delay in delivering an arbitral award is cannot be termed as a speaking order on which reasons in law are made that result into decision making, delay in delivering an arbitral award in some instances may be a ground for setting aside the award.

In ***Peak Chemical Corporation Inc vs National Aluminium O.P.M No. 160 of 2005*** the Court observed that delay had not been specified as one of the grounds for setting aside an arbitral award. An examination of the reasons of the delay and its consequences would be imperative because where delay is occasioned by mischief or with intent to drag proceedings or where the delay is for no plausible circumstance, it can vitiate the award; ***Union of India vs Niko Resources Ltd O.P.M No. 192 of 2010.***

The foregoing means that in order for a delay to be a sufficient ground for setting aside an award the party intending to set aside the award should establish the consequences of the delay and its effects on the award and whether the party seeking to set aside the award has acquiesced in the delay and waived his rights to challenge the award.

Going through the history of this matter it is clear that orders sought in this Application are the same as those that the Applicant tried to procure in Misc. Application No. 135 of 2011. The Applicant should know that the only way an award in Arbitration can be set aside is through the provisions of section 34 of the Arbitration and Conciliation Act. In section 34 of the Arbitration and Conciliation Act court is given the monopoly by section 9 of the Act. Section 9 provides the extent of court intervention in these words;

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

While there are other provisions under which Court can intervene in an Arbitration proceeding, the only provision under which it can set aside an award is under section 34. Indeed the Applicant was aware of this provision in 2011 when she filed Misc. Application 135 of 2011 on the 11th March 2011 to set aside the arbitral award.

The very section 34 provides under subsection 3 the time limit within which to file an Application for setting aside an arbitral award in these words;

> *" (3) 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 that application had received the arbitral award, or if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral award."*

Section 33 of the Act is in respect of correction and interpretation of an arbitral award and or additional award. This Application to set aside the award was filed on 11th March 2011. It is no wonder that on the 13th of May 2013 this Court dismissed that Application because it had been filed one year and six months after the award way beyond the time prescribed in section 34(3) of the Arbitration and Conciliation Act. The Applicant moved to the Court of Appeal on the 14th of May 2013 by filing a notice of Appeal against the decision of the Learned Judge. This Notice of Appeal was also struck out on the 30th of April 2019 under Rule 2(2) of the Judicature (Court of Appeal Rules) Directions S1 13-10. Having struck out the Notice of Appeal, the Court of Appeal also proceeded to strike out CACA No. 205 of 2017 which had abated.

The filing of the present Application on 2nd May 2019 seeking the same orders as the one filed 8 years ago raises questions as to its purpose. In my view the Court should guard against such filings because they amount to abuse of court process.

It is trite that filing of several Applications seeking the same orders amounts to an abuse of court process; ***National Bank of Kenya Ltd vs John Odawa Oluoch Kisumu High Court Civil Case No. 205/1997; [1997]8444 LLR (HCK) (Birech CA on 19 May 2002).*** The filing of an Application in 2011 followed by an appeal which were all struck out based on the failings of the

Applicant and her Advocates and now returning to the High Court for orders she failed to obtain in the Court of Appeal would blatantly undermine the authority of the Court of Appeal and an absolute abuse of the judicial process of the court.

It is inexcusably done in bad faith and immoral because its only interpretation is that the Applicant intended to defeat the courts of justice; ***Theluji Dry Cleaners Ltd vs Muchiri & Others [2002] 2 KLR 764 (Etyang, J on 3 December 2002)***

To say the least it is tantamount to playing lottery with the judicial process and is an abuse of the process of the court; ***Asea Brown Boveri Limited vs Bawazir Glass Works Limited and Another Nairobi (Milimani) High Court Civil Case No. 1619 of 2000 ;[2000] LLR 2852 (CCK); [2001]2 EA 336 (Ringera J on 10 May 2001).***

Where a second Application is filed as a result of the misplacement of an earlier one it may amount to abuse of the process of the court; ***Billy George Ng'ong'ah vs Khan & Associates Kisumu High Court Civil No. 471/1996; [1996] LLR 7574 (HCK) (Birech, CA on 27 December 2000).***

Furthermore litigation must come to an end. Finality of litigation seeks to preserve the interest of society as a whole and ensure that system of justice and operation of the courts are not undermined. Therefore in a situation where a party has obtained judgment in a Court of justice, he/she is by law entitled not to be deprived of that judgment without very solid grounds; ***Brown vs Dean [1910] AC 373, [1909] 2 KB 573, Aluma & 2 Others vs Okuti HCMA No. 12 of 2016.***

The sum total is that an Application tailored to abuse court process cannot stand since it is made in bad faith and intended to defeat justice. For those reasons, this Application is dismissed with costs.

Dated at Kampala this 25th day of September 2019

HON. JUSTICE DAVID WANGUTUSI

JUDGE