THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS CAUSE No. 0022 OF 2021

5 **(Arising from an Arbitration Award dated 5th April, 2021)**

ROKO CONSTRUCTION LIMITED …………………………………… APPLICANT

VERSUS

KOBUSINGYE JANET ……………………………………………… RESPONDENT

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Before: Hon Justice Stephen Mubiru.

RULING

a. Background.

15 During or around October, 2014 the applicant executed a contract with the respondent in respect of the first phase of construction of the proposed Barracks Lane Service Apartments in Nsambya (Mestil Hotel) at the contract price of US $ 6,150,000. During or around April, 2015 the parties agreed to commence execution of the second phase of the project, albeit without signing a formal contract. The parties subsequently, during the month of February, 2016, executed a contract in the 20 sum of US $ 933,979 in respect of carpentry and joinery work on the same project. Upon the completion of the contracts, a dispute arose between the parties regarding the sums due. The applicant claimed that having diligently executed the works it was entitled to a sum of US $ 481,590.58 while the respondent claimed the applicant had breached the contract and was liable to the respondent in special and general damages for that breach whose amount exceeded that 25 claimed by the applicant. The parties having failed to settle the dispute amicably, a single arbitrator was on 22nd January, 2020 appointed for the parties by the Institute of Architects. On 4th March, 2020 the applicant filed a claim of US $ 481,590.58. The respondent in turn on 20th March, 2020 filed a counterclaim in the sum of US $ 2,185,318.15. After hearing the parties, the arbitrator rendered her award on 5th April, 2021 by which she dismissed the applicant's claim in toto and 30 awarded the respondent; US $ 492,264.19 as liquidated damages, US $ 103,103.09 as the costs of rectification, US $ 1,000,000 as general damages, and the costs of the arbitration.

b. The application.

The application is made under the provisions of section 34 (1) and (2) (a) (vi), (vii), and (b) (ii) of *The Arbitration and Conciliation Act,* Section 33 of *The Judicature Act* and Regulation 13 of *The*
5 *Arbitration Rules* (1st Schedule to the Act). The applicant seeks an order setting aside the arbitral award on grounds that; (i) the amount awarded in respect of "rectification of defects" contravenes section 28 (5) and 30 (7) of *The Arbitration and Conciliation Act* in so far as it is inconsistent with clauses 15 (2) and 30 (7) of the contracts; (ii) the award in respect of general damages contravenes section 28 (1), (3) and (5) of *The Arbitration and Conciliation Act*. The damages awarded were
10 remote and contrary to public policy; (iii) in making the award, the arbitrator erroneously relied on observations she made during a site visit intended to contextualise the dispute; and by doing so, the arbitrator exhibited partiality.

c. Affidavit in reply
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In the respondent's affidavit in reply, it is contended that it was contractually agreed between the parties that an award by an arbitrator would be final and binding on the parties. By seeking a re-evaluation of the merits of the award, the applicant has presented a disguised appeal. It is only intended to delay the enforcement of the arbitral award. In arriving at the appropriate quantum to
20 award for rectification of defects as well as liquidated damages, the arbitrator considered all relevant matters including the terms of the contract, the pleadings, evidence, the relevant practices in the construction industry and submissions of counsel. The arbitrator relied on evidence before her and only corroborated it by observations made during the site visit. The arbitrator acted impartially throughout the proceedings. The application lacks merit and ought to be dismissed.
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d. Affidavit in rejoinder;

In its affidavit in rejoinder, the applicant averred that the arbitrator completely ignored the applicant's submissions and made her determinations based only on the respondent's submissions,
30 thus denying the applicant the right to a fair hearing. In determining issue relating to the final certificates, the arbitrator did not take into account the terms of the contracts. The award or genera

damages was not guided by the relevant principles of the law and the practices of the construction industry. Corroborating the evidence with her own site inspection report was an act of partiality on the art of the arbitrator.

5e. Submissions of counsel for the applicant.

M/s ALP Advocates on behalf of the applicant submitted that the proceedings were marred by evident partiality. At the pre-hearing meeting, the arbitrator with the consent of the parties undertook to make a site visit for purposes of understanding the context within which the dispute
10 arose. To the parties' surprise, the arbitrator made findings in that process which she relied upon when making the award. The appellant was never given an opportunity to respond to the findings and observation during the hearing yet they formed the basis of an adverse decision against it. Under the contract, final certificates were agreed to be conclusive evidence in arbitral proceedings. It was erroneous of the arbitrator to have opened and re-evaluated work under the final certificates,
15 which was inconsistent with the terms of the contract and thus in contravention of section 28 (5) of the Act. By opening, reviewing and revising the final certificates, the arbitrator effectively vetoed the role of the Project Manager under the contract. The dispute did not involve the sum certified by the architect and hence it was erroneous of the arbitrator to have made a deduction for defects from that amount. By acting in manifest disregard of the contract, she acted without
20 jurisdiction. She misconstrued the relevant provisions of the contract and thereby erroneously made an award of damages. By doing so she exceeded the limits of her jurisdiction. She totally ignored evidence and submissions regarding the applicant's justifications for delay. Having awarded liquidated damages, the arbitrator erred in awarding general damages.

25f. Submissions of counsel for the respondents.

M/s MAGNA Advocates on behalf of the respondent submitted that the application is a disguised appeal. All submissions by the appellant regarding findings of fact made by the arbitrator should be disregarded. The applicant has not proved that there is something radically or viciously wrong
30 with the award. A mistake of law or fact by the arbitrator is not a ground for setting aside an award. There is no factual basis to support the submission of the arbitrator's alleged partiality. The

evidence of mismatching tiled was given by three witnesses of the respondent and corroborated by observations made during the site visit. It was an observation the arbitrator made in passing. The arbitrator provided lawful justifications for all the awards she made. Where an arbitrator gives reasons for the decision, the court cannot examine their reasonableness.

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g. <u>The decision</u>.

It is a fundamental notion that parties generally commission arbitrators to read their contract and interpret it for them. Arbitrators are thus contractually empowered to provide the parties with a

10 definitive interpretation of their agreement. It follows that parties are bound by an arbitral award and are obliged to abide by and comply with it. The substantive issues which the arbitrator(s) determined cannot be the subject of review by the courts because arbitration, by its nature is final.

An award is not subject to appeal or to any other remedy except those provided for in *The*

15 *Arbitration and Conciliation Act*. By stating that "except as provided in this Act, no court shall intervene in matters governed by this Act," section 9 of *The Arbitration and Conciliation Act* seeks to restrict the court's role in arbitration. The section, clearly in mandatory terms, restricts the jurisdiction of the court to only such matters as are provided for by the Act. The provision epitomises the recognition of the policy of parties' autonomy which underlies the concept of

20 arbitration. Consequently, there are only three categories of measures under the Act which involve courts in arbitration namely; (i) such measures as involve purely procedural steps and which the arbitral tribunal cannot order and/or cannot enforce, e.g. issuing witness summons to a third party or stay of legal proceedings commenced in breach of the arbitration agreement; (ii) measures meant to maintain the *status quo* like granting of interim injunctions or orders for preservation of the

25 subject matter of the arbitration (interim measures of protection); and (iii) such measures as give the award the intended effect by providing means for enforcement of the award or challenging the same (see *Coppee-Lavalin SA/NV v. Ken-Ren Chemicals and Fertilizers Ltd [1994] 2 All ER 465*).

In arbitration, the autonomy of the parties is kept at the highest pedestal. Therefore, any Court

30 adjudicating upon the validity of an arbitral award is not to function as an appellate Court, but merely is to decide upon the legality of the validity of the arbitral award. When a court reviews an

arbitration award, it should not concern itself with the merits of the determination. If the arbitrator has acted within his or her jurisdiction, has not been corrupt and has not denied the parties a fair hearing, then the court should accept his or her reading as the definitive interpretation of the contract even if the court might have read the contract differently. Save for specified circumstances, parties take their arbitrator for better or worse both as to decision of fact and decision of law.

An appeal constitutes an attack on the merits of the award and complains about errors of law or fact, or mixed law and fact, in the content of the award. Section 9 of *The Arbitration and Conciliation Act* in mandatory terms, restricts the jurisdiction of the court to only such matters as are provided for by the Act. The only situation when this court may vary or set aside the arbitral award or remit the matter to the arbitral tribunal for reconsideration on basis of an appeal, is when the parties agree that an appeal will be available to an aggrieved party on questions of law arising out of the award. Although under section 38 of *The Arbitration and Conciliation Act* the parties may agree that an appeal will be available to an aggrieved party on questions of law arising in the course of the arbitration or out of the award, there was no such agreement in the instant case. Consequently the decision of an arbitral tribunal on the substance of the dispute cannot be appealed. An award is final and is not subject to an appeal.

This exceptional control of awards has been long-accepted as an important reason for the success and development of arbitration as an alternative dispute resolution mechanism. For parties, opting-out of court jurisdiction by agreeing to arbitrate is a positive choice. They wish to have their dispute resolved in a different manner to how it might be resolved in the courts. They opt for a neutral decision-maker independent of the courts. Permitting a court to substitute its decision on the merits for that of the tribunal chosen by the parties would undermine those choices. Furthermore, increasing the duration and cost of the arbitration process by permitting an appeal may operate to its detriment.

Therefore arbitral awards can only be challenged on very narrow grounds. Section 34 (2) of *The Arbitration and Conciliation Act* sets out the limited instances where a party can apply to set aside

an arbitral award. The applicant in the instant case has raised three grounds in this application in respect of which the relevant provisions of the Act provide as follows;

> (2) An arbitral award may be set aside by the court only if—
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> 5 (a) the party making the application furnishes proof that—
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> (vi) the arbitral award was procured by corruption, fraud or undue means or there was evident partiality or corruption in one or more of the arbitrators; or
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> (vii) the arbitral award is not in accordance with the Act;
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> 10 (b) the court finds that—
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> (ii) the award is in conflict with the public policy of Uganda.

A setting-aside application is essentially a complaint only about the process followed in making the award. An award can be set aside for not being in accordance with the Act when 15 any of the following occurs, namely; (i) when the appointment of the arbitrator(s) and the arbitration proceedings were not done as per the agreement between the parties as well as the laws selected by the parties; (ii) the applicant was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present his or her case; (iii) the adversarial principle was not respected; (iv) the composition of the 20 arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or failing any such agreement, was not in accordance with the Act; (v) the arbitral tribunal violated its mandate.

Not every violation of the Act will lead to a refusal of enforcement or setting aside of the 25 award. In addition to showing that a violation has taken place, a party seeking to set aside an award must also establish two additional factors: (a) that the violation occurred in connection with the making of the award, i.e., that there is a causal nexus between the violation and the aspect of the award with which the party is aggrieved; and (b) that the violation caused actual or real prejudice to the party. Though it need not show that the prejudice is substantial, the 30 violation must have substance and not be *de minimis*. Although an applicant does not need to show that the outcome of the proceedings would necessarily or even probably have been different, it must show that, had the breach not occurred, the arbitrator might well have reached a different conclusion from that which he or she reached.

Alternatively, an award can be set aside if; (1) there is misconduct by the arbitrators, (2) in the award, the arbitrators exceeded their jurisdiction, (3) the award was improperly procured or obtained by fraud, or (4) there is an error on the face of the award. It will be set aside. An award is in conflict with the public policy of Uganda when the content of the award is not just erroneous but actually perverse.

i. <u>Whether there was evident partiality on the part of the arbitrator.</u>

Any tribunal permitted by law to adjudicate disputes and controversies not only must be unbiased but also must avoid even the appearance of bias. One of the most crucial aspects of the arbitrator's role is neutrality. Independence and impartiality constitute the core of arbitrator integrity. The lack of independence may create an imperfect arbitration, but prejudgment renders the process a sham formality, an unnecessary social cost. Upon appointment, an arbitrator has the duty to run a conflict check prior to the commencement of the arbitration and disclose the results to the parties. This enables the parties to make an informed decision as to the arbitrator's partiality, thereby minimising the risk of the award being set aside later on account of the arbitrator evident partiality. Any connection or relationship an arbitrator has with the parties or the subject matter of the dispute that might give rise to an impression of possible bias must be disclosed. Thus, knowledge of a potential conflict triggers either the duty to investigate or the duty to disclose.

Impartiality requires that the arbitrator should not sit in a proceeding in which he or she is interested, or is perceived to be interested financially, personally or otherwise. Partiality encompasses both an arbitrator's explicit bias toward one party and an arbitrator's inferred bias when an arbitrator fails to disclose relevant information to the parties. Evident partiality may be manifested by: (i) "actual partiality or bias;" or (ii) an "appearance of partiality;" or a "reasonable impression of partiality."

Arbitrators are often selected by the parties precisely because of their expertise in the relevant field. Many businessmen desire such a forum so that their dispute may be considered within the context of their own commercial environment. Often arbitrators bring to their position expertise

acquired from past associations with the industry which they now must adjudicate. Arising from their many years of experience in the industry will be many close alliances and friendships. Since arbitrators are inherently part of the business world, and considering that arbitration often involves a trade-off between arbitrator impartiality and expertise on one hand, and the fact that arbitration 5 is voluntary in nature on the other, actual partiality or bias occurs where the arbitrator has a substantial interest in the dispute. In other words, the lesser ethical standard for arbitrators is seen as the result of a trade-off between impartiality and expertise, which parties choose when they feel it is to their benefit.

10 Such interest must be direct, definite, and capable of demonstration rather than remote, uncertain or speculative. It means actual, discernable inclination to favour one party; a predisposition to a particular point of view which might affect the result. This will take the form of personal prior knowledge they may have of the facts of the dispute, or known direct or indirect financial or personal interest in the outcome of the arbitration, including any known existing or past financial, 15 business, professional or personal relationships, any such relationships with their families or household members or their current employers, partners, or professional or business associates. which might reasonably affect impartiality or lack of independence in the eyes of the parties. There should be persuasive evidence of partiality, rather than mere speculation or possibility or a vague appearance of bias. No arbitrator should have links with either side that provide an economic or 20 emotional stake in the outcome of the case.

Arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial. No finding of actual bias will be made where the arbitrator's 25 connection or relationship is too attenuated for any reasonable person to believe the arbitrator acted with partiality towards the applicant during the arbitration in question.

Since it would be unrealistic to expect arbitrators to sever all ties with the business world, it is equally unrealistic to apply the judicial standard of impartiality to arbitrators. In fact to do so might 30 undermine arbitration as an alternative dispute mechanism since it would encourage the appointment of those who have never been actively involved in the field. If arbitrators must be

completely sanitised from all possible external influences on their decisions, only the most naïve or incompetent would be available. Consequently, notions such as "proximity" and "intensity" will be invoked to evaluate allegedly disqualifying links or prejudgment. Because arbitrators are often experts within their respective fields, they have many more potential conflicts of interest than judicial officers. Therefore arbitrators should not be held to the same standards of judicial decorum as that applicable to judicial officers. Consequently the standard of bias disqualification applicable to judicial officers does not establish evident partiality on the part of an arbitrator. In arbitration, both parties make an informed decision about the arbitrator's ability to act as an impartial adjudicator to their dispute.

An appearance of partiality or a reasonable impression of partiality in arbitration occurs where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration. While the approach does not require actual prejudice, it does insist that any appearance of partiality be "reasonable" in order to vacate an arbitration award. This requires an objective assessment in a fact-sensitive, case-by-case inquiry into each dispute with little predictability as to future outcomes, of whether a reasonable person would believe that an arbitrator was partial to a party to the arbitration. The test is whether the circumstances could properly cause a reasonably well-informed person to have a reasonable apprehension of a biased appraisal or judgment by the arbitrator, however unconscious or unintentional it might be. This entails a sufficiently obvious bias that a reasonable person would easily recognise. The applicant must not only provide proof of the improper conduct creating the appearance of partiality of the arbitrator, but also that the improper conduct affected the award that was ultimately decided upon.

In *Re Medicaments and Related Classes of Goods (No 2); Director General of Fair Trading v. Proprietary Association of Great Britain and Proprietary Articles Trade Association [2001] 1 WLR 700*, the court summarised the principles to be derived from this line of cases as follows:

> (1) If a [the arbitrator] is shown to have been influenced by actual bias, his decision must be set aside. (2) Where actual bias has not been established the personal impartiality of the [the arbitrator] is to be presumed. (3) The Court then has to decide whether, on an objective appraisal, the material facts give rise to a legitimate fear that the [the arbitrator] might not have

> been impartial. If they do the decision of the [the arbitrator] must be set aside. (4) The material facts are not limited to those which were apparent to the applicant. They are those which are ascertained upon investigation by the Court. (5) An important consideration in making an objective appraisal of the facts is the desirability that the public should remain confident in the administration of justice.

Significant guidance as to how a court should apply that test has been given in subsequent cases. Such an observer "…always reserves judgment on every point until she has seen and fully understood both sides of the argument… is not unduly sensitive or suspicious ... But … is not complacent either … will take the trouble to inform herself on all matters that are relevant… put whatever she has read or seen into its overall social, political or geographical context… is fair-minded … [and] … will appreciate that the context forms an important part of the material which she must consider before passing judgment" (see *Newcastle United Football Company Ltd v. Football Association Premier League Ltd and Others[2021] EWHC 349 (Comm*). The court must therefore first ascertain all the circumstances which have a bearing on the suggestion that the arbitrator was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the arbitrator was biased.

The *audi alteram partem* rule means that all parties to the process of arbitration must be aware of all evidence that is used by the arbitrator in making a decision. The authorities suggest that when outside evidence not available to the public is relied upon without the parties having notice thereof, the decision will be invalid. Tribunals may rely upon outside evidence, but the parties must be notified that the board is doing so, in order that they may have an opportunity to correct any inaccuracies. Whoever is to adjudicate must not hear evidence or receive representations from one side behind the back of the other (see *Kanda v. Government of the Federation of Malaya [1962] A.C. 322, at 337*). Disclosure of evidence is essential to the fairness of the proceedings.

An arbitrator is not entitled to continue privately to obtain evidence between the end of a hearing and the reaching of decision without notifying the parties thereafter of the advice or information received, so as to give the parties an opportunity of having a further hearing if need be, or, at any rate, commenting on the information and making their submissions thereon (see *R. v. Deputy*

Industrial Injuries Commissioner, Exp. Jones [1962] 2 Q.B. 677). Failure to place all evidence on the record, and to provide parties with an opportunity to address such evidence, may invalidate a decision. At a minimum, any supplemental information obtained outside the material submitted in evidence which is relied upon must be of a public nature or of a kind that was readily available to
5 the parties prior to the hearing. If the parties are notified and choose not to controvert the outside evidence, they will be precluded from later attacking the decision on that basis.

Where a party complains that an arbitrator deprived it of a reasonable and fair opportunity to be heard on an issue which the arbitrator has incorporated as a link in its chain of reasoning, that party
10 must show that a reasonable party could not have foreseen that the arbitrator would incorporate that issue. That test will be satisfied, for example, where the arbitrator's incorporation of that issue in its chain of reasoning is a dramatic departure from the parties' submissions. Axiomatically, it is not a breach of natural justice for the arbitrator simply to make an error in its award.

15 Courts will be slow to conclude that an unfavourable procedural decision is indicative of bias against a party. Where a party complains that an arbitrator deprived it of a reasonable and fair opportunity to be heard because of the manner in which the arbitrator exercised a discretion in its procedural management of the arbitration, the proper approach a court should take is to ask itself if what the arbitrator did (or decided not to do) falls within the range of what a reasonable and fair-
20 minded arbitrator in those circumstances might have done. This test is a fact-sensitive inquiry to be applied from the arbitrator's perspective. Not every procedural decision made by an arbitrator involves the right to a fair hearing and not every procedural irregularity by an arbitrator will be a breach of the right to a fair hearing; on the contrary, most will not. Courts are generally alive to the distinction between a merely unwelcome procedural decisions and a violation of the right to a
25 fair hearing. Courts are respectful of arbitrators' procedural discretion and step in to police their exercise only when a true threat to the integrity of the process is detected. It must be demonstrated that impugned procedural decision denied the applicant the benefit of arguments or evidence that had a real as opposed to a fanciful chance of making a difference to the arbitrator's deliberations.

30 The right to a fair hearing is a protection from egregious and injudicious conduct by an arbitrator. It is not intended to protect a party from its own failures and strategic choices, nor to confer an

entitlement to have every aspect of the procedure determined according to its preference. It is therefore not a breach of natural justice if a party was deprived of a reasonable opportunity to present its case by its own conduct and not by any conduct of the arbitrator.

5 It is not a breach of natural justice, in itself, for an arbitrator to fail to refer every issue which he or she incorporates as a link in his or her chain of reasoning to the parties for submission. It is not a breach of natural justice for a an arbitrator to adopt an issue as a link in its chain of reasoning even if the parties did not plead or include that issue in a formal list of issues, provided that the issue surfaced in the course of the arbitration and was known to all the parties. Similarly, It is not 10 a breach of natural justice for a an arbitrator to adopt an issue as a link in its chain of reasoning if the parties did not raise or contemplate that issue, provided that the issue is reasonably connected to the issues which the parties did raise and contemplate and if the party aggrieved had a reasonable opportunity to address all of the essential building blocks for the arbitrator's conclusion on that issue. It is not a breach of natural justice if a party fails to present evidence or submissions to an 15 arbitrator on an issue which is a link in the arbitrator's chain of reasoning, either because the party fails to appreciate that the issue is before the arbitrator through mistake or misunderstanding or because the party makes a conscious tactical choice not to engage the opposing party on that issue.

Just like visits to the *locus in quo* by a judicial officer during trials by courts, a site inspection by 20 an arbitrator is not for the purpose of gathering evidence which such an arbitrator uses in interpreting the dispute before him or her, but is rather a means of considering, weighing and assessing the evidence before him or her. Although an arbitrator may draw upon knowledge and understanding acquired from observations made during a site inspection, this must be applied to the evidence which has been adduced before him or her. Such observations may be used to 25 augment the evidence presented as part of a formal record, but must not form the entire basis of the decision. There is nothing in the facts of the case to suggest improper motive in adverting to the observations.

An illustration of these principles is contained in the case of *R. v. Schiff*, *Ex parte Trustees of* 30 *Ottawa Civic Hospital [1970] 1 O.R. 752; [1970] 3 O.R. 476; 13 D.L.R. (3d) 304 (C.A.)* where a very informal hearing was held in connection with a hospital labour dispute. No *viva voce* evidence

was adduced and the proceedings were non-adversarial. The written briefs submitted by the parties were comprehensive and far reaching. The board based its award not only upon materials submitted by the parties, but also upon further data it had obtained concerning terms in other collective agreements in the province. It also took into account the Consumer Price Index for the city in which the hospital was located. The parties were not given an opportunity to inspect this extraneous public material or to comment on it. The Court, however, accepted the hospital's argument that the hearing was of such a nature that the parties consented to and invited the board to obtain and examine its own material, data and information. The Court observed that the board had expressed its intention to the parties to seek information of its own volition, and that the material was "from publicly known government sources, and entirely supplemental in its nature and kind to the very material the parties themselves supplied to the board."

The test for apparent bias is "whether a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased" (see *Porter and Weeks v. Magill [2002] 2 WLR 37; [2002] 2 AC 357; [2002] 1 All ER 465*). The fact that the observer has to be "fair-minded and informed" is important. The informed observer can be expected to be aware of the legal traditions and culture of this jurisdiction (see *Taylor v. Lawrence [2002] 2 All ER 353 at p.370, para 61*).

The question in this application is whether a fair minded and informed observer, having considered the facts would think there was a real possibility that the arbitrator actually was biased against the applicant because she took into account observations she made during the a site inspection, consented to by both parties, that was intended only to enable the arbitrator understand the context of the dispute. In determining issues of fairness of proceedings, the Court must consider the proceedings as a whole. Of itself, regard to the observations made cannot give rise to a reasonable apprehension, which reasonably well-informed persons could properly have, of a biased appraisal and judgment of the issues to be determined by the arbitrator. Reasonable apprehension of bias is not automatically triggered as a result of such consideration.

Impartiality is usually defined by the absence of prejudice. Having examined the record I do not find any supplemental information obtained during that site inspection that is outside the material

submitted in evidence or that the observations made thereat were of a kind that was not readily available to the parties prior to the hearing. In my view, the fair-minded and appropriately informed observer would conclude that there was no real possibility that the arbitrator was biased in the sense that she had prejudged her decision. She conducted the proceedings fairly and impartially. She heard the evidence called for both parties and considered it in the light of the written arguments submitted by each. In so doing, she favoured neither. I find therefore that considering all the circumstances, a reasonable person would not conclude that the arbitrator was partial to one side. This ground accordingly fails.

ii. <u>Whether the award is contrary to public policy</u>.

Arbitrators must ensure that in the process they do not abandon the public policy element while passing any award. An award passed by an arbitrator which is contrary or opposed to public policy therefore, can be challenged before the Courts and thereby set aside. The realm of public policy includes an award which is patently illegal and contravenes the provisions of Ugandan law. Judicial interference on ground of public policy violation can be used to set aside an arbitral award only when it shocks the conscience of the Court to an extent that it renders the award unenforceable.

According to section 34 (2) (b) (ii) of the Act, a court can set aside an arbitral award if it finds that the award is in conflict with public policy since no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good. Although the court should bow to the interpretation that the arbitrator has rendered, it is also the function of the court to make certain that the enforcement of the arbitral award will not constitute a violation of law. Public resources should not be employed for the execution of awards that are injurious to public morality or interest. Being a mandatory rule that trumps the parties' contractual agreement, an award that is against public policy it is not void, yet it is unenforceable; hence considerations of public policy could prevent a lawful award from yielding results.

Public policy relates to the most basic notions of morality and justice. It manifests the common sense and common conscience of the citizens as a whole; "the felt necessities of the time, the prevalent moral and political theories, intuitions…." (See Oliver Wendell Holmes, Jr., *The*

Common Law (1881) at p. 1). Public policy is "that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed . . . the policy of law or public policy in relation to the administration of the law" (*see Egerton v. Earl of Brownlow [1853] Eng R 885, (1853) 10 ER 359*). Certain acts or contracts are said to be against public policy if they tend to promote breach of the law, of the policy behind a law or tend to harm the state or its citizens (see *Cooke v. Turner (1845) 60 Eng. Rep. 449 at 502*).

Although public policy is a most broad concept incapable of precise definition, an award could be set aside under the Act as being inconsistent with the public policy if it is shown that either it was: (a) inconsistent with the Constitution or other laws of Uganda, whether written or unwritten; or (b) is inimical to the national interest of Uganda or; (c) is contrary to justice and morality. The first category is clear enough. In the second category would be included, without claiming to be exhaustive, include the interests of national defence and security, good diplomatic relations with friendly nations, and the economic prosperity of Uganda. In the third category would be included, again without seeking to be exhaustive, such considerations as whether the award was induced by corruption or fraud or whether it was founded on a contract contrary to public morals (see *Christ For All Nationals v. Apollo Insurance Co. Ltd [2002] 2 EA 366*). In some cases, the public interest in the finality of arbitration awards will outweigh an objection to enforcement on the grounds that the transaction was "tainted" by fraud (see for example *Sinocore International Co Ltd v. RBRG Trading (UK) Ltd [2018] 2 Lloyd's Rep 133*).

Consequently, an award will be considered to be in conflict with public policy if, *inter alia*; (i) the making of the award was induced or affected by fraud or corruption; or (ii) it is in contravention of the fundamental policy of the Constitution or other laws of Uganda; or (iii) it is in conflict with the most basic notions of morality or justice, including acts which would be generally detrimental or harmful to the citizens of the county (the general public), e.g. promotion of unlawful conduct and breach of law. In other words "public policy" covers only fundamental principles that are widely recognised and should underlie any system of law according to the prevailing conceptions in Uganda. The invoked principle of public policy does not need to be universally recognised, as the Courts in Uganda are willing to maintain, and defend if necessary, the fundamental values

strongly embedded in the Ugandan legal tradition, even if such values are not necessarily shared in other (equally important) parts of the world.

Among the principles that can be considered as belonging to public policy within the meaning of
5 section 34 (2) (b) (ii) of the Act, are; the prohibition against abuse of contractual or legal rights, the principle of good faith, the prohibition of expropriation without compensation, the prohibition against discrimination, the principle of proportionality and the protection of minors and other persons incapable of legal acts. An award will be set aside when it is incompatible with public policy not just because of its reasons, but also because of the result to which it gives rise. The
10 generally accepted view though is that the public policy exception must be interpreted narrowly, or else it can be used opportunistically by award debtors as a gateway to review the merits of the award. I have not found in this case any aspect of the award that is contrary to public policy.

iii. Whether the arbitral award is inconsistent with the Act;

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This ground includes submissions made by the applicant that; (i) the arbitrator's decision went beyond what the parties agreed should fall within the scope of the arbitration; (ii) the arbitrator made decisions that are not in accordance with the terms of the contract and did not take into account the usages of the trade applicable to the transaction; and that (iii) having awarded
20 liquidated damages, the arbitrator erred in awarding general damages.

This court is mindful of the fact that its intervention under this ground is limited to errors of law which are apparent on the face of the award (see *Moran v. Lloyd's [1983] 2 All ER 200*; *Tersons Limited v. Stevenage Development Corporation [1963] 3 All ER 863*, and *Gillespie Brothers and*
25 *Company v. Thompsons Brothers and Company [1928] 13 Lloyd LR 519*). The parties constitute the arbitral tribunal as the sole and final judge of the dispute arising between them and they bind themselves as a rule to accept the arbitral award as final and conclusive and thus, the award is not liable to be set aside on the ground that facts/law is erroneous. It is only when an erroneous proposition of law is stated in an award and forms the basis of that award that a court can set aside
30 the award or remit it for reconsideration on the ground of an error of law apparent on the face of the record. The court will now proceed to consider the three limbs of the applicant's argument.

a. <u>The arbitrator's decision went beyond what the parties agreed should fall within the scope of the arbitration</u>.

This first limb of the ground is invoked when the award in question decides issues that do not fall within the ambit of the relevant arbitration clause. It is trite that the power or jurisdiction of an arbitrator is limited by the written consent or agreement of the parties as to the scope of the arbitration as contained in the arbitration clause. Arbitration is a matter of contract, and if the parties have not agreed to arbitrate a particular matter, it may not be submitted to binding arbitration. If an arbitrator decides an issue or questions which are not made arbitrable by the agreement between the parties to the arbitration, the award may be vacated by Court on the grounds that the arbitrator exceeded his or her powers. The court though has powers of preservation of those parts of an award that are within the scope of a tribunal's jurisdiction, if the decisions on matters submitted to arbitration can be separated from those not submitted, when other parts are set aside. In the instant case, Clause 36 if the contract provides as follows;

> 36 (1) Provided always that in case any dispute or difference shall arise between the Employer or the Architect on his behalf and the Contractor, either during the progress or after the completion or abandonment of the works, as to the construction of this agreement or as t any matter or thing of whatsoever nature arising thereunder or in connection therewith (including any matter left by this contract to the discretion of the Architect or withholding by the Architect of any certificate to which the Contractor may claim to be entitled by measurement and valuation mentioned in clause 30 (5) (a) of these conditions) or the rights and liabilities of the parties under clause 25, 26, 33. Or 34 of these conditions, then such dispute or difference shall be and is hereby referred to the arbitration and final decision of the person to be agreed between the parties, or, failing agreement within 14 days after either party has given to the other a written request to concur in the appointment of an Arbitrator, a person to be appointed on the request of ether party by the Chairman or Vice Chairman for the time being of the East African Institute of Architects who will when appropriate delegate such appointment to be made by the Chairman or Vice Chairman of the local (National) Society of Architects.
>
> (2) Such reference, except on article 3 or article 4 of the Articles of Agreement, or on the questions whether or not the issue of an instruction is

empowered by these Conditions, whether or not a certificate has been improperly withheld or is not in accordance with these conditions, or any dispute or difference under clauses 33 and 34 of these Conditions, shall not be opened until after Practical Completion or alleged Practical Completion of the works or termination or alleged termination of the Contractor's employment under this contract, or abandonment of works, unless the written consent of the Employer or the Architect on his behalf and the Contractor.

(3) Subject to the provisions of Clauses 2 (2) and 30 (7) of these Conditions the Arbitrator shall, without prejudice to the generality of his power, have powers to direct such measurements and / or valuations as may in his opinion be desirable in order to determine the rights of the parties and to ascertain and award any sum which ought to have been the subject of or included in any certificate and to open up, review and revise any certificate, opinion or decision, requirement or notice and to determine all matters in dispute which shall be submitted to him in the same manner as if no such certificate, opinion, decision, requirement or notice had been given.

(4) The award of such Arbitrator shall be final and binding on the parties.

Counsel for the applicant's argument is that the arbitrator was not mandated to review or revise any certificate issued by the Architect by way of deduction of US 35,075.15 for outstanding defects. The basic rule is that arbitrators may decide on their own jurisdiction. If the court is called upon to decide the arbitrability or the jurisdiction of the arbitrator over a particular dispute, it should decide that question alone and not the merits of the dispute.

I find that at pages 29 - 32 of the award, the arbitrator presented her analysis of the contract and stated her justifications for the power to make that deduction, based on what she considered to be the relevant provisions of the contract, the evidence before her and the submissions of counsel. I find therefore that all the questions decided and the awards made are within the ambit of the arbitration clause which gave her a wide discretion in so far as it permitted her to "determine the rights of the parties and to ascertain and award any sum which ought to have been the subject of or included in any certificate and to open up, review and revise any certificate, opinion or decision, requirement or notice and to determine all matters in dispute which shall be submitted to him in the same manner as if no such certificate, opinion, decision, requirement or notice had been given."

b. <u>The arbitrator made decisions that are not in accordance with the terms of the contract and did not take into account the usages of the trade applicable to the transaction</u>.

5 With regard to the second limb of this ground, section 28 (5) of *The Arbitration and Conciliation Act* obliges an arbitrator to decide the substance of the dispute in accordance with the terms of the particular contract and shall take into account the usages of the trade applicable to the particular transaction. It is argued by counsel for the applicant that the arbitrator made decisions that are not in accordance with the terms of the contract when she re-opened the final certificates and in the 10 assessment of the liquidated damages. It was further argued that the arbitrator failed to take into account the usages of the trade applicable to the transaction, when assessing deciding the issue of defects rectification.

An arbitrator cannot act arbitrarily, capriciously or independently of the contract (see *Associated* 15 *Engineering Co. v. Government of Andra Pradesh (1991) 4 SCC 93 (AIR 1992 Sc 232*). It is trite that an arbitrator who acts in manifest disregard of the contract acts without jurisdiction (see *Chevron Kenya Ltd and another v. Daqare Transporters Ltd, H.C. Misc. Application No. 490 of 2008*). The task of an arbitrator is to interpret and enforce a contract, not to make public policy, and where the arbitrator does the latter the arbitration decision may be vacated. Interpretation of 20 the parties' contract by the arbitrator is acceptable; interpolation and rewriting of it is not. When an arbitration award resolving contract claims is not based on the actual provisions of the relevant contract, but rather on an individual arbitrator's personal sense of "justice" and "public policy," it can be successfully challenged, and vacated by the courts.

25 As regards the duty to take into account the usages of the trade applicable to the transaction, the concept of usages is autonomous and comprises practices and rules, which are observed either by the parties in their relation or in the respective branch of activity for a certain period being commonly known. Parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have 30 known and which in their trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned. Such usages should be notorious, certain

and reasonable (see *Cunliffe-Owen v. Teather & Greenwood [1967] 1 WLR 1421 at 1438*). The usage should be well known by people in that trade and they should use it because of its binding effect not because of courtesy or commercial ease. Practices are patterns of conduct which are observable in the business relations between the two parties. These patterns of conduct can only 5 be established as "practices" when they have been carried out over a certain length of time and have resulted in a number of contracts. A previous course of dealing, if repeated a sufficient number of times, between the parties will automatically be used in contractual interpretation unless the parties specifically exclude its application.

10 Usages gain normative force through use by the parties, to be precise the usage is followed because parties feel a "duty" or that they "ought" to do so. Parties are bound by any usage which they have expressly or impliedly made applicable to their contract and by any practices they have established between themselves (see *McCutcheon v. David MacBrayne Ltd [1964] 1 WLR 125*). A usage is applicable when the contract expressly states that it is to be governed by those usages, or where 15 the parties' agreement to such usage is clearly discernible from the contract itself. Usages unknown to either party can never be applicable. The burden of proving that the term has been implied into the contract falls on the party relying on it.

However, trade usages are usually limited to filling in the gaps in the contract and interpreting the 20 contract's terms (see *Hutton v. Warren (1836) 1 M&W 466*). Trade usages are a factor for interpreting the will of the parties where there is ambiguity in the contract. Incorporation by the adjudicator, rather than the parties, of trade usages into a contract is viewed as contrary to the autonomy of the parties. Currently the test applied is that of "business efficacy" which requires the term to be obvious and necessary (see *The Moorcock (1889) 14 PD 64*) in conjunction with that of 25 the "officious bystander" test where the term is so obvious that it does not need to be expressly stated (see *Shirlaw v. Southern Foundries [1939] 2 KB 206*). I have not found in this case evidence of any usage and practice led by the applicant, which was ignored or disregarded by the arbitrator. In any event, I have not found that circumstances existed on the facts of the case which would have required the incorporation of any usage or practice as a term in the contract, on the basis of either 30 the "business efficacy" or "officious bystander" standard.

It is evident upon perusing the award that when she dismissed the applicant's claim in toto and awarded the respondent US $ 492,264.19 as liquidated damages and US $ 103,103.09 as the costs of rectification, the arbitrator relied on her construction of what she considered to be the relevant provisions of the contact. At pages 29 – 44 of the award, she presented her analysis of the contract and stated her justifications for the award and assessment of costs for rectification, based on the relevant provisions of the contract, the evidence before her and the submissions of counsel. The award in respect of liquidated and ascertained damages, at pages 15 – 29 and 39 of the award, she presented her analysis of the contract and stated her justifications for the award, based on the relevant provisions of the contract, the evidence before her and the submissions of counsel.

In analysing and assessing both components of the award, the arbitrator was careful not to ignore, go beyond, or rewrite the contract. That being the case, this Court cannot re-examine and reappraise the evidence which has been considered by the arbitrator, or sit on appeal over conclusions of the arbitrator in this application to set aside the award, for as long as the award is not perverse (see *Chevron Kenya Ltd and another v. Daqare Transporters Ltd, H.C. Misc. Application No. 490 of 2008; Kampala Capital City Authority v. Nalongo Estates Ltd H.C. Misc. Cause No. 31 of 2013; Eastern and North East Frontier Railway Cooperative Bank Ltd. v. B. Guha & Co. AIR 1986 Cal 146; Uttar Pradesh State Electricity Board v. Searsole Chemicals (1995) 2 Arb LR 320; National Electric Supply and Trading Corporation Pvt. Ltd. v. Punjab State AIR 1963 Punj 56* and *DB Shapriya and Co Ltd v. Bish International BV (2) [2003] 2 EA 404*). Court cannot reassess the evidence even if the arbitrator committed error. The Court has no jurisdiction to substitute its own evaluation of conclusions on law/fact. It cannot sit in appeal over the conclusions of the arbitrator and re-examine or reappraise evidence which had been already considered by the arbitrator.

An arbitral award is not open to challenge on ground that the arbitrator reached a wrong conclusion or failed to appreciate facts/evidence. A mistake of fact or law made by the arbitrator in arriving at his or her decision is not a ground for setting aside or remitting an award for further consideration. It may be possible that on the same evidence the court might have arrived at a different conclusion than the one arrived at by the arbitrator but that in its self is no ground for setting aside the award. In the absence of proof of any erroneous proposition of law stated in the

award that forms the basis of the award of US $ 492,264.19 as liquidated damages and US $ 103,103.09 as the costs of rectification, the Court declines to interfere with the arbitrator's findings of fact and law on the two components of the award.

5 c. Having awarded liquidated damages, the arbitrator erred in awarding general damages.

General damages for breach of contract are assessed by reference to the loss actually suffered and that was foreseeable at the time the contract was entered into. These damages are usually assessed after the event of breach has occurred. Section 61 (1) of *The Contracts Act*, *7 of 2010*, provides
10 that where there is a breach of contract, the party who suffers the breach is entitled to receive from the party who breaches the contract, compensation for any loss or damage caused to him or her. For a loss arising from a breach of contract to be recoverable, it must be such as the party in breach should reasonably have contemplated as not unlikely to result. The precise nature of the loss does not have to be in his or her contemplation, it is sufficient that he or she should have contemplated
15 loss of the same type or kind as that which in fact occurred. There is no need to contemplate the precise concatenation of circumstances which brought it about (see *The Rio Claro [1987] 2 Lloyd's Rep 173*).

The rule of the common law is that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if
20 the contract had been performed (see *Robinson v. Harman (1848) 1 Exch 850 at 855, [1843-60] All ER Rep 383 at 385* and *Kibimba Rice Ltd v. Umar Salim, S.C. Civil Appeal No. 17 of 1992*). Damages are designed to compensate for an established loss and not to provide a gratuitous benefit to the aggrieved party. There is no doubt therefore that wherever it is reasonable for the innocent party to insist upon re-in statement the courts will treat the cost of re-instatement as the measure
25 of damage (see *East Ham BC v. Bernard Sunley & Sons Ltd [1965] 3 All ER 619 at 630, [1966] AC 406 at 434-435*). This does not mean that in every case of breach of contract the claimant can obtain the monetary equivalent of specific performance. It is first necessary to ascertain the loss the claimant has in fact suffered by reason of the breach. If he has suffered no loss, as sometimes happens, he can recover no more than nominal damages. For the object of damages is always to
30 compensate the claimant, not to punish the defendant.

The general principle underlying the award of general damages in contract is that the claimant is entitled to full compensation for his losses; i.e. the principle of "*restitutio in integrum.*" Where a party has sustained a loss by reason of a breach of contract, he or she is, so far as money can do it, to be placed in the same situation with respect to damages, as if the contract had been performed.
5 Damages are not awarded to enrich a claimant far beyond his actual losses nor should the claimant get far less than his actual loss. Therefore, when a claim for damages is made, the claimant is required to provide evidence in support of the claim and to adduce facts upon which the damages could be assessed. Before assessment of damages can be made, the claimant must first furnish evidence to warrant the award of damages. The claimant must also provide facts that
10 would form the basis of assessment of the damages he would be entitled to. Failure to do so would is fatal to a claim for damages.

In a claim for damages for breach of contract, the *locus classicus* on this principle of remoteness is the case of *Hadley v. Baxendale [1854] 9 Ex. 341*. This case supplies two tests for determining which damages are proximate and recoverable and which are too remote and therefore
15 unrecoverable. These tests are:

a. Do the damages arise naturally from the breach? Or
b. Were the damages reasonably contemplated by both parties when they made the contract as being a probable result of the breach?

If the answer to any of these two questions is yes, then damages are proximate; i.e. not too remote
20 and therefore recoverable. General damages are what the law presumes to be the direct, natural or probable consequence that will have resulted from the defendant's breach of contract. They are normally damages at large and can be nominal or substantial depending on the circumstances of each case.

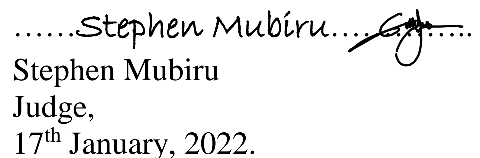
In contrast to this, liquidated damages are a way of pre-estimating the loss that will be suffered,
25 usually as a result of delay, at the time that the contract is entered into. In this sense liquidated damages provide certainty to both parties whose rights and liabilities are now fixed. A valid and mandatory liquidated damages clause' which stipulates a positive amount of liquidated damages will evidence an intention by the parties that general damages cannot be claimed (see). It is

irrelevant that any actual loss suffered by the claimant is greater or less than the rate or amount stipulated in the liquidated damages clause (see *J-Corp Pty Ltd v. Mladenis [2009] WASCA 157 at [35]*). A positive amount of liquidated damages stipulated in the contract is evidence of an intention by the parties to exclude the right to recover general damages for late completion of works.

Clause 22 of the contract specified the amount recoverable as liquidated and ascertained damages by reason of delay. It is on that basis that the arbitrator made an assessment and award of US $ 492,264.19. Then at pages 39 – 40 she erroneously went ahead to take into account other consequences of the delay without evidence to show that they were contemplated at the time of the contract and not incorporated in clause 22, yet the principle is that when the parties agree on an amount recoverable in the liquidated damages clause, it will be construed that they never intended that the principal (or owner) would have the benefit of both liquidated and general damages for the same delay. The award of general damages on top of or in addition to liquidated and ascertained damages is a fundamentally erroneous proposition of law stated in the award such that a serious irregularity has occurred which has caused substantial injustice to the applicant. Since it forms the basis of that part of the award, the court can set aside that component of the award or remit it for reconsideration on the ground of an error of law apparent on the face of the record. Under section 38 (2) (b) of *The Arbitration and Conciliation Act*, the court may, as appropriate, confirm, vary or set aside the arbitral award or remit the matter to the arbitral tribunal for reconsideration.

That being so, this is a proper case in which it is appropriate to set aside only a part of the award and remit it to the arbitrator for re-consideration. The award of of US $ 1,000.000 as general damages is accordingly set aside and remitted to the arbitrator for re-consideration. The application having succeeded only in part, the applicant is awarded half the costs of the application.

Delivered electronically this 17th day of January, 2022



Stephen Mubiru
Judge,
17th January, 2022.