IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

COMMERCIAL DIVISION

Reportable
Miscellaneous Cause No. 066 of 2023

In the matter between

PEARL MARINA ESTATES LIMITED **APPLICANT**

And

ROKO CONSTRUCTION LIMITED **RESPONDENT**

Heard: 28 August, 2023.
Delivered: 16 October, 2023.

Alternative dispute resolution *- Arbitration - any Court 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 - the remedies in respect of setting aside an arbitral award are to be availed within a rigid time line - the event that triggers the running of time is receipt of the award sought to be set aside. For delivery of the arbitral award to be effective, it has to be actually received by the party, and there should be such proof on the Arbitrator's record - Registration of the arbitral award does no convert it into a decree of the Court so as to render the rules of civil procedure directly applicable to it, save for enforcement. Registration only has the effect of recognizing the arbitral award as binding and rendering it "enforceable as a decree of the court" - Independence and impartiality constitute the core of arbitrator integrity - 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 - 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 - Courts will be slow to conclude that an unfavourable procedural decision is indicative of bias against a party - 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 - Ex-parte*

awards - When the other party refuses to participate, the Tribunal may render an ex parte award once satisfied that the non-participating party has no acceptable excuse for its non-participation, and after recording in writing all procedural steps and efforts to include that party in the proceedings - a party who though repeatedly written to, does not appear before the arbitrator and allows the proceedings to go ahead ex parte, cannot later claim not to have been given an opportunity of being heard - A party cannot wilfully absent itself from a hearing and then cry foul that the rules of natural justice were not followed - An arbitrator is bound to make and publish his award within the time mutually agreed to by the parties, unless the parties consented to further enlargement of time -

Statutes *- statutory interpretation - where a statute prescribes a time limit within which to perform an act, the rules made thereunder cannot extend that time limit - computation of time - when the period prescribed is a calendar month running from any arbitrary date, the period of one month would expire upon the day in the succeeding month corresponding to the date upon which the period starts.*

RULING

STEPHEN MUBIRU, J.

Introduction:

[1] On or about 1st April, 2019 the applicant signed a contract with the respondent by which the respondent undertook to execute the design and construction of "Bella Vista Villas" comprising 240 apartments for a sum of US $ 8,498,797 with a scheduled completion date of 30th September 2021. Subsequently, on 1st August 2021, the contract was varied, increasing the respondent's scope of work with an additional 120 Units for US $ 3,828,645.49 with the completion date revised to 18th December 2021. The total contract price for the works (360 Units) inclusive of the revised scope stood at US $ 12,327,342.48 inclusive of VAT. The respondent was obliged to and duly obtained both an advance payment guarantee No. P/210/7001/2019/000009 in the sun of US $ 569,595.04 and a performance guarantee No. P/210/7001/2019/000012 in the sun of US $ 1,232,732.48.

[2] The applicant then made an advance payment of US $ 849,869.70 equivalent of 10% of the original contract price. The said advance payment was recoverable on

a *pro rata* basis from the interim payment certificates raised by the respondent. The applicant subsequently was dissatisfied with the respondent's execution of the works and thus terminated the contract on 20th April 2021 with the works carried out at that time valued at 23% of the total works. The termination letter spelt out the grounds of termination. By the date of termination of the contract, the applicant had paid US $ 1,824,533 to the respondent. On its part the respondent attributed the case of the delayed execution to the fact that the applicant had not paid the certificates on time as and when they fell due, and had not paid the last two at all.

[3] Both parties subsequently entered into a Mutual Release and Settlement Agreement dated 5th May, 2021 where they agreed, *inter alia*, to jointly conduct an audit of the works carried out by the respondent as well as the goods and materials on site to determine the amount owed to the respondent. The final accounts showed that instead it was the respondent who owed the applicant a sum of US $ 929,084. The parties then agreed upon the following mode of recovery of that amount; - i) the amount was to be paid in twelve (12) equal monthly instalments from 30th June 2021 until payment in full; in the event that the payments were not made for three (3) consecutive months, the applicant would be entitled to recover the amounts owing from any money payable to the respondent from M/s Cascadia Development (their sister Company in Kenya); in the event of failure of all the above, the applicant would be entitled to make a call on the Advance Payment Guarantee and the Performance Guarantee.

[4] It had been agreed between the parties that any disputes between them arising in performance of the contract were to be referred to arbitration. When these differences arose between them, they duly appointed an arbitrator, referred the dispute to and arbitrator appointed by the Centre for Arbitration and Dispute Resolution (CADER) in Kampala. On 31st May, 2022 the applicant appeared with its Counsel, but the Arbitrator was not in office; he was in Mukono and on being called on phone he undertook to communicate another date to the parties. On the 23rd August 2022, the applicant upon receiving a hearing notice appeared again

together with its Counsel at the CADER offices for the arbitration pre-hearing but the arbitrator was absent. The applicant received no further communication about the arbitration meetings.

[5] Both counsel in personal conduct of the arbitration, happened to thereafter meet as opposite counsel during Court proceedings in Miscellaneous Application No. 193 of 2023 arising out of Civil Suit No. 112 of 2023 before the Commercial Court Division. During those proceedings, Counsel for the respondent informed his counterpart and Court that the arbitration proceedings between the two parties has abated due to expiry of time. Despite that communication, Counsel for the respondent appeared before the Arbitrator on the 23rd April 2023 without notifying the applicant, and was allowed by the Arbitrator to proceed *ex-parte*. The respondent obtained an award it its favour and on 19th May, 2023 by which the Tribunal made the following findings and orders;

1) Neither the claimant nor the respondent breached the contract signed on the 1st April, 2019 and the Addendum dated 1st August, 2019.
2) The performance of the contract and its addendum was interfered with by the outbreak of Covid19 in March, 2020 which led to H.E the President of Uganda to· lockdown all movements and operations save for essential service providers only hence frustrating the performance of the contract which act was a force majeure.
3) The parties voluntarily signed a termination and settlement agreement dated 5th May, 2021 which stipulated the modalities of how the compromise and settlement would be done leading to discharge of obligations of each party to the other.
4) The respondent did not answer the claimant's claim nor adduce any evidence leading the Tribunal to believe the evidence of the claimant that it was the respondent who breached the mutual release and settlement agreement.
5) Since the mutual release and settlement agreement was not fulfilled, the obligation of each party against the other still remains outstanding and therefore the respondent is not right to cash the performance guarantee vide P/210/2019/000012 worth US $ 1,232,732.48 and advance payment guarantee vide P/210/7001/2019/000009 worth US $ 569,595.04.
6) The respondent is estopped to cash the performance guarantee and the advance payment guarantee until an audit is done to determine the liabilities and obligations of each party to each other.

7) The respondent is ordered to pay the claimant special damages of UG shs 795,468,242.2 as proved by the claimant.
8) The respondent is ordered to pay interest on special damages of 12% per annum from date of filing the claim till realization in full.
9) The claimant is awarded costs of the claim.

[6] The respondent then filed Miscellaneous Application No. 0046 of 2023 whereupon on 25th May, 2023 the arbitral award made on 19th May, 2023 was registered for recognition for purposes of enforcement as a decree of this court. It was duly registers on 11th July, 2023. The applicant now seeks to have the award set aside by reason of the fact that; the applicant was incapacitated from attending the arbitral proceedings, the award was procured by evident partiality of the arbitrator, the award is contrary to public policy and it contains errors apparent on the face of the record, the award was procured through fraudulent means, and that the award was made contrary to the provisions of *The Arbitration and Conciliation Act* in so far as there was no agreement on procedure and the parties were not given equal treatment during the proceedings.

The application.

[7] The application by Chamber summons is made under the provisions of section 98 of *The Civil Procedure Act*; section 34 of *The Arbitration and Conciliation Act* and Regulation 13 of *The Arbitration Rules.* The applicant seeks an order setting aside the arbitral award handed down by the single arbitrator on 19th May, 2023 in a Centre for Arbitration and Dispute Resolution managed arbitration number CAD/ARB/No. 4 of 2022, between the parties.

[8] It is the applicant's case that the respondent was allowed to proceed *ex-parte* during that arbitration thereby locking out the applicant from the arbitration proceedings, which incapacitated the applicant and prevented it from participation. The applicant contends further that there were never any preliminary meetings between the parties and the Arbitrator to agree on how the arbitration would be conducted, nor an agreement on a venue for the hearings, and the fees payable

to the Arbitrator. As a result, the respondent unilaterally decided to draw and file a statement of claim at CADER. Exclusion of the applicant from the arbitration proceedings is a material irregularity in the conduct of the arbitration which was done to favour the respondent. There were serious procedural irregularities during the arbitration process that deprived the applicant of a fair opportunity to present its case which is against public policy and contrary to the Law. The arbitral award was procured by evident partiality in favour of the respondent.

The affidavit in reply;

[9] In the respondent's affidavit in reply, it is contended that the application is time barred, is overtaken by events as the arbitral award has already been registered by recognized by court. When the matter came up for preliminary hearing, on the 6th July, 2022, the respondent's lawyer appeared while the applicant never appeared despite having been served with the hearing notice. The Arbitrator, therefore issued directions wherein the parties were supposed to file and serve the respective pleadings. The respondent indeed filed and served the applicant with the statement of claim on 27th May, 2022. The applicant never filed its response to the claim and as the respondent waited to be served with a response, the time within which the arbitration was supposed to be concluded expired. The respondent then opted to proceed under the mutual settlement and termination agreement dated the 5th May, 2021 to file a civil suit at the Commercial Division. The applicant raised a preliminary objection to the suit, arguing that it was barred by ongoing arbitration proceedings. Since, the time for arbitration had expired, the respondent's lawyers applied for extension of time and since the applicant did not seem interested in the arbitration by filing their response to the claim yet they were aware, the respondent applied to proceed *ex-parte* which was granted and the hearing conducted thereby leading to the award being challenged herein. The parties consented to proceed at CADER and by the rules applicable thereto and all the documents were always served upon the applicant and acknowledged but the applicant chose to ignore the proceedings for reasons unknown to the

respondent to date. The applicant was at all material time aware of the arbitration but chose to ignore the same even when it was the one who brought them up during the civil proceedings at the commercial court.

Submissions of counsel for the applicant

[10] Counsel for the applicant submitted that the application is grounded on the fact that the applicant was not given an opportunity to present its case. The proceedings indicate that the applicant was not given opportunity to appear before the arbitrator on 6th June, 2023. There were no preliminary meetings as per paragraph 6 of the affidavit in support which is contrary to section 19 (1) of *The Arbitration and Conciliation Act*. The parties never agreed to the fee and the procedure which is contrary to the law. When the Arbitrator fixed tee haring on 26th April, 2023 the respondents wrote a letter requesting to procced *ex-parte*. The arbitrator's mandate was extended by application of counsel for the respondent. It was without the consent of the applicant. The award came to the applicant's notice when the respondent filed for recognition in July, 2023. The application was made in time. The parties were required to choose the rules of procedure and this was not done. Page 2 of the award, 7th paragraph. On 23rd August, 2022 and the matter was fixed 8 months later. On 26th April, 2023 counsel appeared and applied to proceed ex-parte. The Arbitrator exceeded the time. They agreed to shs. 80,000,000/= as the arbitrator's fee. Paragraph 8 and 9 service of 31st May, 2022 the applicant appeared and the arbitrator was not around.

Submissions of Counsel for the respondent;

[11] Counsel for the respondent submitted that the award was served on 19th May, 2023. The award notice was served. The date of notification though is not proved. The applicant was served but ignored. The evidence is attached to the affidavit in reply. Annexure "E" a hearing notice dated 7th June, 2022. The respondent does not know the individual who was served, the date of service was 8th June, 2022.

The time of service 10.14 am. The place where service was effected is not stated on record. Paragraph 8 of the affidavit in support, the applicant acknowledges proceedings prior to the date. The parties were summoned but it is not on record although the applicant acknowledges it. On 31st there is no statement on the rules, in absence the institutional rules apply, the CADER 1998 rules. Article 23 (3) of those rules permits the *ex-parte* process. Directions were given and notification was made to the applicant. Paragraphs 8 and 9 of the affidavit in support acknowledges the notification and Annexure "E" of the affidavit in reply. Page 5 – 6 of the record of proceedings. As regards extension of the period at page 7, the arbitrator can extend the period unilaterally. Sections 19 (1) and (2) 28 (1) and (2) of *The Arbitration and Conciliation Act*, and rule 3 of the CADER Rues. If the proceedings are *ex-parte* then extension of time can be done unilaterally.

The decision.

[12] Any Court 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 (see *Simbamanyo Estates Ltd v. Seyani Brothers Co. (U) Ltd, C. A. Miscellaneous Application No. 555 of 2002*). 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.

[13] One of the fundamental objectives of arbitration is to provide a final, binding resolution of the parties' dispute. Essential to achieving this objective is the preclusive effect of arbitral awards: if parties are not bound by the results of the awards made against them, either dismissing or upholding their claims or declaring their conduct wrongful or lawful, then those awards do not achieve their intended purpose and are of limited practical value. Once the parties decide to have their

dispute adjudicated upon by way of arbitration, they are in fact saying that they do not wish to avail themselves of the Courts save in the limited circumstances provided by the law. Therefore, save for specified circumstances, parties take their arbitrator for better or worse both as to decision of fact and decision of law. Recourse to the court against an arbitral award may be made only by an application for setting aside the award under section 34 (2) and (3) of *The Arbitration and Conciliation Act* which provide as follows;

(2) An arbitral award may be set aside by the court only if—

(a) The party making the application furnishes proof that—

(i) A party to the arbitration agreement was under some incapacity;

(ii) The arbitration agreement is not valid under the law to which the parties have subjected it or, if there is no indication of that law, the law of Uganda;

(iii) The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was unable to present his or her case;

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration; except that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside;

(v) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate, or in the absence of an agreement, was not in accordance with this Act;

(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

(vii) The arbitral award is not in accordance with the Act;

(b) The court finds that—

(i) The subject matter of the dispute is not capable of settlement by arbitration under the law of Uganda; or

(ii) The award is in conflict with the public policy of Uganda.

[14] The grounds for setting aside an award are exhaustive, and the court hearing an application to set aside an award, has no power to investigate the merits of the dispute or to review any decision of fact, and exceptionally save for fundamental principles or basic notions of the law, any decision of law made by the tribunal. The objections raised by the applicant fall under section 34 (2) (a) (iii), (vi), (vii) and (b) (ii); to wit; - the applicant was not given proper notice of the arbitral proceedings and was thus unable to present his or her case, the arbitral award was procured by fraud and there was evident partiality on the part of the arbitrator, the arbitral award is not in accordance with the Act, and that it is in conflict with the public policy of Uganda.

i. Whether the application is time barred

[15] According to section 34 (3) of *The Arbitration and Conciliation Act* an application for setting aside the arbitral award may not be made after one month has elapsed "from the date on which the party making that application had received the arbitral award" or where an application is made within fourteen days of the receipt of the award for its correction, interpretation or delivery of an additional award, then within one month from the date on which that request had been disposed of by the arbitral Tribunal. An application filed outside this period is liable for dismissal (see *Fountain Publishers v. Harriet Nantamu and another Arbitration Cause No. 1 of 2011*). The date on which the signed award is provided to the parties is thus a crucial date in arbitration proceedings under the Act as it was from that date that the period of limitation for applying to set it aside under section 34 will commence. The word "party" in this section means party to the arbitration proceedings and does not include an agent of the party as well.

[16] Rule 11 of *The Arbitration Rules* (First Schedule to the Act) provides that an application to enforce an award as a decree of court under section 35 of the Act is not to be made, if no objections to the award are lodged, until the expiration of ninety days after notice of the filing or registering of the award has been served

upon the party against whom the award is to be enforced,and if objections are lodged, until the objections have been dealt with by the court. On the other hand, Rule 7 (1) of *The Arbitration Rules* allows the lodgement of "objections to it" to be made within "ninety days" after notice of the filing of the award has been "served upon that party." An award takes effect upon its grant. Its execution has no effect on whether it is binding or not. Registration only allows for execution.

[17] The latter rule confers upon any party who objects to an award filed or registered in the court, within ninety (90) days after notice of the filing of the award has been served upon that party, the right to apply for the award to be set aside and lodge his or her objections to it, together with necessary copies and fees for serving them upon the other parties interested. Where the time for making objections against the arbitral award has expired, or those objections having been made, it they are refused, the award is enforced in the same manner as if it were a decree of the court.

[18] The perceived contradiction between section 34 (1) of *The Arbitration and Conciliation Act* and Rule 7 of *The Arbitration Rules* was observed in *Kilembe Mines Ltd. v. B. M. Steel Ltd. H. C. Miscellaneous Cause No. 002 of 2005*, but it was not necessary to resolve it for purposes of determining that dispute. The judge only mentioned it in passing that it appeared to him that here we have a situation where the rules and the principal legislation are at variance over the same subject. However, in *Mohammed Mohammed Hamid v. Roko Construction Ltd, S. C. Civil Appeal No. 014 of 2015* the period of time prescribed by this rule was found to be inconsistent with section 34 (3) of *The Arbitration and Conciliation Act,* and presumably by inference, void to the extent of that inconsistence.

[19] In *Uganda Lottery Ltd. v. Attorney General, H. C. Miscellaneous Cause No 627 of 2008* it was held that the Act prevails over the rules. That conclusion was cited with approval in *Katamba Phillip and three others v. Magala Ronald, H. C. Arbitration Cause No. 003 of 2007.* The Act does not provide for objections to

awards but for applications for setting them aside. “The provisions of rule 7 of the Arbitration Rules [do not] empower a party to raise the grounds provided for in s.34 after the period of 30 days has expired because they are then precluded from doing so by expiry of time. Limitation has set in, and in this case, there is no room for enlargement of time because it is not provided for by the statute.” Where a statute prescribes a time limit within which to perform an act, the rules made thereunder cannot extend that time limit. I am therefore persuaded to find that the operative period is one (1) month from the date on which the party making the application “received the arbitral award,” rather than ninety (90) days “after notice of the filing of the award” has been served upon that party.

[20] Accordingly, the remedies in respect of setting aside an arbitral award are to be availed within a rigid time line. The question arises, whether the said limitation period starts from the date of the award or the date of receipt of the award by the lawyer or from the date of receipt of the award by the party. The general principle is that the arbitral tribunal has the obligation to deliver a signed copy of the award to the parties to the arbitration agreement and not to their advocates (see *Union of India v. Tecco Trichy Engineers & Contractors, (2005) 4 SCC 239* and *Benarsi Krishna Committee v. Karmyogi Shelters Pvt. Ltd., (2012) 9 SCC 496*). The effective date is that on which the parties receive a copy rather than that on which it is signed. For example, in *Dakshin Haryana Bijli Vitran Nigam Ltd. v. M/s Navigant Technologies Pvt. Ltd (2021) SCC OnLine SC 157*, although the majority award was pronounced on 27.04.2018, a signed copy of the award and the dissenting opinion were provided to the parties only on 19.05.2018. Accordingly, the Court held that the period of limitation for filing of application under Section 34 had to be reckoned from 19.05.2018.

[21] In *Fountain Publishers v. Harriet Nantamu and another H. C. Miscellaneous Application No. 135 of 2011*, an award was delivered on 7th September 2009 and filed with CADER on the same day but was not physically given to the parties because of the issue of payment. The parties applied to set it aside and an

objection was raised on ground hat the application was time barred. Court held that it was a nullity and dismissed the application. Court stated that; “to my mind receiving an award like receiving a judgment, is on the day the judgment is read and signed. I respectfully do not agree that it is on the day that the award is physically given or is available to a party.” That position was followed with approval in *Roofclad Ltd v. Salzgitter Mannesmann International, H. C. Miscellaneous Cause No. 7 of 2015* where it was held that receiving an award should be construed to be the day it was delivered and not necessarily on the day the parties were physically given or availed the award. These decisions were delivered without reference to the relevant provisions of the Act and without any citation of authority. They are in effect *per incuriam*.

[22] I find myself unable to follow those decisions, most especially since they are not binding on this Court, and were also made *per incuriam* in so far as they did not take into account the scheme of the Act. Considering that delivery of a copy of the award has the effect of conferring certain rights on the party, such as triggering the time period for applying for correction or interpretation of the award or for filing an application to annul the award, as also bringing to an end the right to exercise those rights on expiry of the prescribed period of limitation which would be calculated from that date, the delivery of the signed copy of the award by the tribunal and the receipt thereof by each party constitutes an important stage in arbitration proceedings. The delivery of an arbitral award is not a mere formality, it is a matter of substance. The delivery to be effective and in consonance with the legislative scheme of *The Arbitration and Conciliation Act* must be made to a person who has direct knowledge of the arbitral proceedings and who would be the best person to understand and appreciate the arbitral award being connected with the dispute at hand.

[23] For delivery of the arbitral award to be effective, it has to be actually received by the party, and there should be such proof on the Arbitrator’s record. In *JSC Ispat Pvt Limited v. HDB Financial Services Ltd (2018) SCC Online Bom 538*, the Court

went to the extent of calling for the records of the arbitrator and examined if the signed copies of the award were sent to the parties to the Arbitration agreement. Since there was no sufficient proof for any such delivery to the parties available in the file of the arbitrator regarding the sending of the signed copies of the award, it condoned the delay in filing the application for purposes of the equivalent of section 34 of *The Arbitration and Conciliation Act*.

[23] The event that triggers the running of time is receipt of the award sought to be set aside. The complete award includes the reasons for the decision. Only if the person affected is in possession of the complete decision can he estimate the litigation risk involved in the proceeding for setting aside. If he receives the reasons for the decision at a delay after having been notified of the operative part, he is only able to review his chances of succeeding at that later point in time, with the consequence that only then can he be expected to commence proceedings for setting aside.

[24] Receipt of the award for the purposes of section 34 of *The Arbitration and Conciliation Act* means that the decision must have come into the sphere of control of the party concerned. Section 8 of the Act gives some guide on the preferred mode of communication of information during arbitral proceedings. It states that any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address. If none of those places can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last known place of business, habitual residence or mailing address by registered mail or by any other means which provides a record of the attempt to deliver it.

[25] The communication is deemed to have been received on the day it is so delivered. The effective date therefore is not the date of the decision but rather the date of communication (see *Ganesh Benzoplast Limited v. Union of India and others,*

(2020) 09 BOM CK 0001). Service of the award on the parties is critical, irrespective of the terminology used: delivery, transmission, communication, notification. The period of limitation of one month commences from the date on which the award sought to be set aside is actually communicated and not from the date of decision of the Tribunal.

[25] Section 2 (qq) of *The Interpretation Act* defines a month to mean "a month reckoned according to the Gregorian calendar." The Gregorian calendar is a solar calendar with 12 months of 28–31 days each. As a result, depending on the months, it may mean 28 days or 29 days or 30 days or 31 days. If the month is April, June, September or November, the period comprising the month will be 30 days; if the month is January, March, May, July, August, October or December, the month will comprise of 31 days; but if the month is February, the period will be 29 days or 28 days depending upon whether it is a leap year or not.

[26] To clear this ambiguity Courts have held that when the period prescribed is a calendar month running from any arbitrary date, the period of one month would expire upon the day in the succeeding month corresponding to the date upon which the period starts (see *Freeman v. Read (1863), 4 B. & S. 174; 122 E.R. 425; Migotti v. Colvill (1879), 4 C.P.D. 233; C. A. Stewart & Co. v. Phs. van Ommeren (London), Ltd., [1918] 2 K.B. 560*; *Dodds v. Walker [1981] 1 WLR 1027, [1981] 2 All ER 609* and *Cheleta Coffee Plantations, Ltd v. Eric Mehlsen [1966] 1 EA 203*). The period begins on the numeric day in the specified calendar month and ends on the same numeric day of the following calendar month. Computation starts on the day following the day on which the relevant event occurred, and the period expires in the relevant subsequent month on the day which has the same number as the day on which the said event occurred, provided that if the relevant subsequent month has no day with the same number, the period expires on the last day of that month.

[27] In the instant case, the award is dated 19th May, 2023. Counsel for the applicant acknowledges the respondent having received it on the same day. He contends,

but without offering proof, that it was served on counsel for the applicant on the same day and that therefore this application is time barred. It is averred in the respondent's supplementary affidavit that the applicant was aware at all material times because the application for enforcement was first fixed and cause listed for 20th June, 2023 and notice thereof was duly served upon the applicant. Counsel for the applicant refutes this and contends that the applicant only became aware of the award after being served with notice of the application for registration sometime around 11th July, 2023. This application was filed on 31th July, 2023. Counsel for the applicant therefore contends that this application is not time barred.

[28] Whereas in *ad hoc* arbitrations the arbitrators themselves will arrange for delivery of the award to the parties, it is the practice in institutional arbitration that the Arbitral Tribunal files the award with the Secretariat, duly signed and dated, in as many original copies as there are parties. It is the duty of the Secretariat, in this case of CADER, to forward the original award to each party, and retain proof of that notification. According to article 32 (6) of *The CADER Arbitration Rules of June, 1998* copies of the award signed by the arbitrators have to be communicated to the parties by the Registrar. Notification should ideally be made to all parties simultaneously, in order to give them equal opportunity to challenge or seek correction or interpretation of the award (rectificative or interpretative additional awards) within time limits which start to run from the same date.

[29] Section 4 of *The Arbitration and Conciliation Act* imposes upon the parties an obligation to immediately object to any procedural error and, if they fail to do so, they forfeit any right to complain against such error at a later stage. As an extension of this principle, a notified party is required to take positive actions against a flawed notification. A party who receives informal communication of delivery or an incomplete award rendered by a tribunal, cannot sit back and twiddle its thumbs in the expectation of formal notification, but rather ought to immediately request formal notification or a complete copy and make every effort

to still comply with the one-month period, otherwise, it risks missing such deadline. In such instances a timely request for formal notification of the award might be considered the triggering event for the one-month post notification period. Under certain circumstances, it is considered a case of exaggerated or excessive formalism if the party although not formally served, obtains knowledge of the content of the award, in a manner that affords that party the ability to identify grounds for seeking its being set aside.

[30] Formalism is an essential feature of all procedural rights. Arbitration cannot exist without formalism; the latter ensures that arbitral proceedings are a strictly regulated duel between the parties subject to the necessary procedural guarantees, in which only authorised combat measures are permitted. The duel takes place in a strictly defined order, and the parties may fight only with the weapons listed in the inventory of the applicable rules. On the other hand, procedural formalism is a characteristic of every legally organised human activity that involves the obligation to comply with specific requirements imposed on individual elements (manifestations) of this activity Procedural formalism implies that parties are obliged to perform all steps in arbitral proceedings in the form imposed and specified by the agreed rules, at a specific place and within a specific time, and to observe a strict, declarative and formal interpretation of procedural law. The formalism is a prerequisite for the rule of law, and the strict application of pre-established rules of procedure is an essential element of procedural justice.

[31] A lack of specific formal rules governing procedural law clearly impedes recourse to judicial protection. That notwithstanding, by reason of article 126 (2) (e) of *The Constitution of the Republic of Uganda, 1995* Courts and Tribunals are prohibited from adopting an approach that is excessively formalistic or excessively flexible, but rather to administer substantive justice. Application of the rules of procedure must avoid both excessive formalism which could undermine the fairness of the process, and excessive flexibility which would result in removing procedural

requirements established by law. Moderate formalism introduces a certain degree of order which facilitates the conduct of procedure, prevents abuses of procedural rights and increases the certainty and foreseeability of rules.

[32] On the other hand, the notion of exaggerated or excessive formalism may refer to a particularly strict interpretation of procedural time limits, procedural rules or rules of evidence, which may lead to the deprivation of fairness in arbitral proceedings. Considering that one of the key purposes of notification of the award is to facilitate the parties' participation in post award processes, procedural requirements may not be invoked in a manner that is routine, mechanical or careless. Pragmatism, flexibility and balance are crucial, and excessive formalism should be avoided. In the sphere of notification of the award, it is unreasonable that the losing party can wait endlessly before filing an application for setting aside, when it knows that an award has been rendered, especially when it is already familiar with the content of the decision.

[33] In the instant case, examination of the Arbitrator's record of proceedings indicates that on 19th May, 2023 the Arbitrator issued an "award notice" addressed to both parties in the following terms; "take notice that the Award in this matter is ready for delivery upon payment of shs. 4,000,000/= award fee payable as follows; shs 2,000,000/= to CADER through its Account and Shs 2,000,000/= to the Arbitrator through his Account." The notice bears the stamp of CADER but is neither signed nor stamped by any of the parties. There is therefore no proof of formal service of the award by CADER upon either party. The question then is whether the applicant otherwise acquired notice of the fact that the award had been delivered, so as to trigger its duty to o take positive actions against a flawed notification, or that it acquired sufficient knowledge of the contents of the award so as to render insistence on formal notification exaggerated or excessive formalism.

[34] Attached to the respondent's supplementary affidavit in reply is a cause list and a hearing notice indicating that Miscellaneous Cause No. 46 of 2023 was fixed

for mention on 20th June, 2023. There is no proof of service of that notice upon the respondents or upon counsel. On that day, in the absence of the parties, the application was fixed for hearing on 11th July, 2023, which happens to be the day that the award was eventually duly registered *inter parties* after Court had considered submissions by counsel for both parties. There is no indication on record as to when the respondent was notified of the award prior to 11th July, 2023 when its counsel appeared in Court. Therefore, the earliest proven day on record of notification of the award upon the respondent is 11th July, 2023. Hence it follows that this application for setting aside the award that was filed 31th July, 2023 was filed within one month from the date on which the applicant received the arbitral award.

[35] Registration of the arbitral award does no convert it into a decree of the Court so as to render the rules of civil procedure directly applicable to it, save for enforcement. Registration only has the effect of recognizing the arbitral award as binding and rendering it "enforceable as a decree of the court" (see section 35 (1) of the Act). The arbitral award is not a decree but rather is a document which can be enforced like a court decree. It is implemented as a decree by fiction, and hence, no Court is deemed to have passed the decree. Consequently, an application seeking execution of a domestic award may be presented, only when the time prescribed for the making of an application to set aside the award has lapsed. According to rule 11 of *The Arbitration Rules*, an application to enforce an award as a decree of court should not be made, if no objections to the award are lodged, until the expiration of ninety days after notice of the filing or registering of the award has been served upon the party against whom the award is to be enforced. The arbitral award is this given the status of a court decree after 90 days from the date of service of the award to the parties or immediately after the disposal of the application seeking to set aside the arbitral award, by a competent court.

[36] In the instant case, by Miscellaneous Cause No. 46 of 2023 filed on 25th May,

2023 the respondent sought registration of the award. The proven notification of that application upon the respondent on record occurred on 11th July, 2023, the very day it was registered for enforcement as a decree of the Court. There is no proof of service of notification of the application for registration prior to that date. It follows that rregistration of the award was done before expiry of the one-month period within which an application for setting aside may be preferred, which renders the fact that the application for setting aside the award was filed after its registration, inconsequential to this application. This issue is accordingly answered in the negative; the application is not time barred.

ii. Whether there was evident partiality on the part of the arbitrator.

[37] 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.

[38] 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.

[39] 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.

[40] 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.

[41] Impartiality is usually defined by the absence of prejudice. 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*).

[42] The question for the court is whether the grounds raised, taken together with any other relevant factors, would have led the fair-minded and informed observer, having considered the facts, to conclude that there was in fact a real possibility that the arbitrator was biased. The test has been formulated in terms of the existence of a "real danger of bias." The test was articulated in *R. v. Gough [1993] AC 646* and followed in *Laker Airways Inc v. FLS Aerospace Limited [1999] 2 Lloyds Report 45 at pp.48-49*, to the effect that:

> The Court should ask itself whether, having regard to the relevant circumstances, there was a real danger of bias on the part of the relevant member of the Tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour or disfavour the case of a party to the issue under consideration by him.

[43] Because arbitration is a form of adjudication, albeit a private one, it is important that the final outcome be the result of an impartial process in which all sides have been fully heard. An arbitral tribunal must not only be fair-minded, but also be perceived by the parties as such. For the parties to accept the outcome of an arbitration, even if it runs against them, they must be confident that those who sit in judgement do so fairly and with an open mind.

[44] An arbitrator must not only be impartial but must also avoid the appearance of any inability to be impartial. An arbitrator must avoid all such activities where his or her impartiality might reasonably be questioned. An appearance of inability to be impartial occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the Arbitrator's honesty, integrity, impartiality, temperament, or fitness to serve as Arbitrator over the matter in issue is impaired.

[45] Doubts as to independence or impartiality of an arbitrator are justifiable if they give rise to an apprehension of bias in the eyes of an objective, reasonable observer. Appearance and perception often triumph over substance and reality. Confidence in the propriety of an arbitral award is eroded by improper conduct of an arbitrator,

especially conduct that creates the appearance of any inability to be impartial. Arbitrators must avoid any behaviour which, in fact or perception, reflects adversely on their impartiality. An award may be set aside for the arbitrator having created a perception of partiality, even where no actual bias occurred. The issue therefore is answered in the affirmative; the award is vitiated by a reasonable apprehension of partiality on the part of the arbitrator.

[46] When deciding whether bias has been established, the court personifies the reasonable man. The court considers on all the material which is placed before it whether there is any real danger of unconscious bias on the part of the decision maker. Having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the Arbitrator, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him. Not only must the procedure be conducted fairly, but the parties, particularly the one losing, must also perceive it as such. As Lord Hewart in *R. v. Sussex Justices, ex parte McCarthy [1924] 1 K.B. 256*, said "it is not merely of some importance but is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done." However, save in the case where the appearance of bias is such as to show a real danger of bias, apparent or unconscious bias is insufficient; for if despite the appearance of bias the court is able to examine all the relevant material and satisfy itself there was no danger of the alleged bias having in fact caused injustice, the impugned decision will be allowed to stand.

[47] To demonstrate evident partiality, the applicant must show that a reasonable person would have to conclude that an arbitrator was partial to the other party or the arbitration. It is not enough to demonstrate an amorphous predisposition toward the other side. The party asserting evident partiality must establish specific facts that indicate improper motives on the part of the arbitrator.

[48] 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." While "actual bias" denotes a demonstrable situation where an arbitrator has been influenced by partiality or prejudice in reaching his decision, "apparent bias" denotes existence of a reasonable apprehension that the arbitrator may have been, or may be, biased. The test for the latter is whether the circumstances create room for justifiable apprehensions of bias. There are two aspects to the requirement of impartiality; first, the Arbitrator must be subjectively impartial, that is, he should hold any personal prejudice or bias. Personal impartiality is to be presumed unless there is evidence to the contrary. Secondly, the Arbitrator must also be impartial from an objective viewpoint, that is, he must offer sufficient guarantees to exclude any legitimate doubt in this respect.

[49] Actual bias is established by evidence of the Arbitrator having some link with the party involved in a cause before him, whereby the outcome of that cause could, realistically, affect the arbitrator's interest. In the instant case, here is no evidence to show that the arbitrator has any financial interest whatsoever in the respondent, nor that he has a substantial relationship with its counsel. Therefore, the arbitrator did not stand to gain or lose anything from any ruling he made in the arbitration.

[50] On the other hand, apparent bias arises when, although the arbitrator is not a party to the proceedings, and does not have an interest in its outcome, there is something in the arbitrator's conduct or behaviour, their interests, affiliations or their allegiances, that gives rise to a suspicion that they have not decided the case in an impartial manner. Bias must be distinguished from improper conduct. Bias tends to involve intentional, deliberate, and corrupt violations of a fair arbitration. On the other hand, misconduct is usually unintentional improper

activities which prejudice the complaining party. The degree to which the conduct is indicative of bias, prejudice, or improper influence may include; conduct that overtly communicates hostile biases or naive stereotyping or actions which favoured, or might have favoured, one party. Evidence of such hostility might arise by way of comments or public statements made by the Arbitrator prior to or during the hearing, or in the course of the decision-making process. Such hostile comments or statements impair the fairness of the arbitral process.

[51] The concept of "bias" or "partiality" concerns the inclination of an arbitrator, either in favour of one of the parties or in relation to the issues in dispute. It must be demonstrated that the Arbitrator had an inclination, either in favour of one of the parties or in relation to the issues in dispute, or a direct and definite interest in the outcome of the arbitration. Bias was defined in *Re Medicaments and Related Classes of Goods (No 2) [2001] 1 WLR 700*, thus;

> Bias is an attitude of mind which prevents the Judge from making an objective determination of the issues that he has to resolve. A Judge may be biased because he has reason to prefer one outcome of the case to another. He may be biased because he has reason to favour one party rather than another. He may be biased not in favour of one outcome of the dispute but because of a prejudice in favour of or against a particular witness which prevents an impartial assessment of the evidence of that witness. Bias can come in many forms. It may consist of irrational prejudice or it may arise from particular circumstances which, for logical reasons, predispose a Judge towards a particular view of the evidence or issues before him.

[52] In the instant case, the Court is required to 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 observer is neither complacent nor unduly sensitive or suspicious when he examines the facts that he can look at. Before he takes a balanced approach to any information he is given, he will take the trouble to inform himself on all matters that are relevant. He is able to put whatever he has read or seen into its overall social, political or

geographical context. He is fair-minded, so he will appreciate that the context forms an important part of the material which he must consider before passing judgment. It is to be assumed too that he is able to distinguish between what is relevant and what is irrelevant, and that he is able when exercising his judgment to decide what weight should be given to the facts that are relevant (see *Gillies v. Secretary of State for Work Pensions [2006] 1 WLR 781 [17]*. An allegation of apparent bias must be decided on the facts and circumstances of the individual case including the nature of the issue to be decided.

[53] The only fact advanced by the applicant as being indicative of bias is that the Arbitrator opted to proceed *ex-parte*. 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-minded arbitrator in those circumstances might have done. This test is a fact-sensitive inquiry to be applied from the arbitrator's perspective. The record indicates that the Arbitrator was presented with proof of service by which he was satisfied that counsel for the applicant was duly served with hearing notices and a copy of the respondent's claim. Despite that service, counsel for the applicant neither filed a reply to the claim nor appeared before the Arbitrator on any of the specified dates. No reason was advanced on record to explain that failure. Proceeding *ex-parte* falls within the range of what a reasonable and fair-minded arbitrator in those circumstances might have done.

[54] It has not been demonstrated that the arbitrator had any past or present business, professional or other similar close relationship with either party or their advocates and neither has lack of subject independence been demonstrated. Apparent bias describes the situation where circumstances exist which give rise to a reasonable

apprehension that the Judge may have been, or may be, biased. Considering the circumstances and the procedural history of the arbitration, a reasonable person would not conclude that the Arbitrator was partial in favour of the applicant. There is no evidence to suggest that the Arbitrator had reason to prefer one outcome of the arbitration to another or that he has reason to favour the applicant rather than the respondent. The arguments of counsel are at best, uncertain and speculative. On these facts, a claim of evident partiality cannot be sustained. The answer to the issue therefore is in the negative; the award cannot be set aside on this ground since there is no manifest bias on the part of the Arbitrator.

iii. Whether the award is in conflict with the public policy of Uganda.

[55] Under section 34 (2) (b) (ii) of *The Arbitration and Conciliation Act*, a court can set aside a domestic arbitral award if it finds that the award is in conflict with public policy. Public policy is a troublesome concept. It is necessarily open-ended, and defies attempts to distilfrom it clear or comprehensive principles. It is also not immutable: it ebbs and flows with the times. What is censured today, as being against the public interest, may be condoned tomorrow. Needless to say, such a fluid doctrine can be misused and is therefore treated with caution by the Courts. The concept of public policy cannot become a trap door to allow the controlof the substantive decision adopted by the arbitrators. the generally accepted view is that the public policy exception must be interpreted narrowly (see Public policy is therefore understood to be the set of public, private, political, moral and economic legal principles which are absolutely mandatory for the preservation of society in a given nation and at a given time, and from a procedural point of view, public policy is configured as the set of necessary formalities and principles of our procedural legal system, so that an arbitration that contradicts any or some of such principles may be declared as null for the violation of public policy.

[56] Public policy relates to the most basic notions of morality and justice. A set of economic, legal, moral, political, and social values considered fundamental by a national jurisdiction. 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 thelaw” (*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 policybehind a law or tend to harm the state or its citizens (see *Cooke v. Turner (1845) 60 Eng. Rep. 449 at 502*). The definition of public policy represents a certain topic that affects public benefit and public interest.

[57] Although public policy is a most broad concept incapable of precise definition, an award could beset 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, 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*).

[58] Public policy includes cases where arbitration is used as a means to cover up corruption, money laundering, exchange control fraud or other criminal activity. In some cases, though, 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*). There is no public policy to refuse the

enforcement of an award based on a contract during the course of the performance of which there has been a failed attempt at fraud. In that case it was found that even if public policy were engaged, any public policy considerations were clearly outweighed by the interests of finality.

[59] Among the principles that can be considered as belonging to public policy within the meaning ofsection 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 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. It is limited to those imperative or mandatory rules, from which the parties cannot derogate. If the court is satisfied that enforcing the award is contrary to public policy, it will set the award aside.

[60] 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 withthe most basic notions of morality or justice, including acts which would be generally detrimentalor 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 conceptionsin 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. Therefore, an award warrants interference by the Court under section 34 (2) of *The Arbitration and Conciliation Act* only when it contravenes a substantive provision of law or is patently illegal or shocks the conscience of the Court.

[61] Tribunals must ensure that in the process they do not ignore the public policy element while passing any award. Since no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good, it is also the function of the court to make certain that the enforcement of the arbitral award will not constitute a violation of municipal law. Public resources should not be employed for the execution of awards that are injurious to public morality or interest. The awards passed by the arbitral tribunals which are contrary or opposed to public policy therefore, can be challenged before the Courts of law and thereby denied recognition and enforcement. The realm of public policy includes an award which is patently illegal and contravenes the provisions of Ugandan law. Judicial interference on ground ofpublic policy violation can be used to refuse the registration and enforcement of an arbitral award,or any part of it, only when it shocks the conscience of the Court to an extent that it renders the award unenforceable in its entirety, or in part. There is nothing in the award that would be wholly offensive to the public policy of Uganda. This issue is therefore decided in the negative. The award cannot be set aside on this ground since it is not in conflict with public interest.

iv. <u>Whether the arbitral award was procured by fraud or undue means</u>.

[62] An arbitral award may be set aside if it was procured by corruption, fraud or undue means (see section 34 (2) (a) (vi) of *The Arbitration and Conciliation Act*). “Fraud” and “corruption” describe dishonest, illegal, and deceptive conduct. Fraud was defined in *Fredrick Zaabwe v. Orient Bank and others, S. C. Civil Appeal No. 04 of 2006* as follows;

> An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury. Anything calculated to deceive, whether by a single act or combination, or by suppression of truth, or suggestion of what is false, whether it is by direct falsehood or innuendo by speech or silence, word of mouth, or look or gesture…

[63] Fraud includes sharp practices to get advantage over another by false suggestion or by suppression of the truth, including all surprise, trick, cunning, disenabling and any unfair way by which another is cheated or deprived of an interest (see *Kampala Bottlers Limited v. Damanico Limited, S.C. Civil Appeal No. 22 of 1992*; *Sejjaaka Nalima v. Rebecca Musoke, S. C. Civil Appeal No. 2 of 1985*; and *Uganda Posts and Telecommunications v. A. K. P. M. Lutaaya S.C. Civil Appeal No. 36 of 1995*). Allegations of fraud are serious and have to be established by cogent evidence. although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than mere balance of probabilities is required (see *Ratilal Gordhandhai Patel v. Laljimakanji [1957] EA 314 at 317*; *Kampala Bottlers Ltd v. Damanico (u) Ltd, S.C. Civil Appeal No. 22 of 1992* and *Fam International Ltd and another v. Mohamed Hamird El- Fatih, S. C. Civil Appeal No.16 of 1993*).

[64] The fraud must be that of a party to the arbitration, or to which the party was privy, not fraud committed by anyone unconnected with the arbitral process. It is constituted by procuring an award through perjured testimony, the knowing concealment of evidence or other egregious, dishonest misconduct. An arbitral award procured by fraud must be set aside if there is clear evidence that the respondent engaged in fraudulent activity which, even with the exercise of due diligence, the applicant could not have discovered during the arbitration or prior to the award issuing; and the fraud materially related to an issue in the arbitration. There must be a nexus between the alleged fraud and the decision made by the arbitrator, i.e. materiality. The applicant, however, need not demonstrate that the arbitrator would have reached a different result had the fraud not occurred.

[65] On the other hand, “undue means” is arguably broader in scope. But the term “undue means” must be read in conjunction with the words “fraud” and “corruption” that precede in the Act. To establish “undue means” the court will therefore require proof of intentional misconduct or bad faith, or behaviour that is immoral if not illegal. Procuring an award by undue means occurs where the award is the result of immoral, but not necessarily illegal conduct, which is underhanded or conniving but falls short of corruption or fraud; ways of procuring an award that are similar to corruption or fraud, but do not precisely constitute either.

[66] It was argued by counsel for the applicant that the respondent procured the award after misrepresenting to both the applicant and the court in Miscellaneous Application No. 193 of 2023 arising out of Civil Suit No. 112 of 2023, which was an implication for a temporary injunction restraining the respondent, its agents, servants, assignees, employees or anyone deriving authority, from enforcing demands or encashment of the Performance Guarantee No. P/210/7001/2019/000012 for US $ 1,232,732.48 and the Advance Payment Guarantee No. P/210/7001/2019/000009 worth US $ 569,595.04, that the arbitration proceedings between the two parties has abated due to expiry of time, only for the respondent’s counsel to revive them by a letter dated 5th April, 2023, addressed to the Arbitrator seeking an extension or time and disposal. The arbitrator obliged and extended the period for another two (2) months up to 30th June, 2023 resulting in the award handed down on 19th May, 2023. In counsel for the applicant’s view, this was a trick, cunning, or disenabling conduct that enabled the respondent procure the award in an unfair manner.

[67] It is trite that *The Advocates (Professional Conduct) Regulations* cannot address every ethical situation of professionalism. Upholding the spirit of the Rules, not just the letter, is integral to professionalism in the practice of law. Consequently, an advocate is required to be courteous, civil, and act in good faith towards the

Court, fellow advocates and with all persons with whom the advocate has dealings in the course of litigation. An advocate should avoid sharp practice or taking advantage of or acting without fair warning upon slips, irregularities, or mistakes on the part of professional colleagues. Advocates have a positive obligation to be courteous to each other and deal in good faith. It is for this reason that trial tactic that go beyond the vigorous representation of a client's case and enter into sharp practice are not permitted. Counsel may not mislead the Court or opposite counsel. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading. The lawyer's conduct as an advocate cannot include the use of dishonest means to secure a legal remedy for a client. It is not acceptable for an advocate to knowingly misstate, misrepresent, or distort any fact or legal authority in order to gain a procedural advantage over an adversary.

[68] However in the instant case, perusal of paragraph "q" of the respondent's affidavit in rejoinder in *Miscellaneous Cause No. 0083 of 2021: Roko Construction Company Limited v. Pearl Marina Estates Limited and another*, reveals that the respondent's averment was to the effect that; "the arbitral proceedings could not be finalized because the Respondent absconded and dodged the arbitration on various occasions...wherein the arbitrator advised that he could not proceed without both parties and the 60 days within which the arbitration was supposed to be conducted expired." Counsel for the applicant submitted that the respondent had commenced arbitration proceedings against the applicant which were yet to be concluded. When the trial Judge eventually delivered her ruling on 24th July, 2023 in Miscellaneous Application No. 193 of 2023, she ordered that "the arbitral proceedings in CAD/ARB/No.04 of 2022: Roko Construction Limited – versus – Pearl Marina Estates Limited be continued and an arbitral award made. That ruling was delivered two months after the award was handed down and had the effect of validating the award.

[69] To state that "the 60 days within which the arbitration was supposed to be conducted expired," which was a fact, cannot be construed as a positive assertion that the arbitration proceedings had abated. I have not found evidence of any false representation of a matter of fact, whether by words or by conduct, a false or misleading allegation or concealment of that which deceived and was intended to deceive counsel for the applicant, the Arbitrator or the Court, on the part of the respondent or its counsel. Similarly, there is nothing in the conduct of the respondent or its counsel in relation to the actual arbitration proceedings that constituted intentional misconduct or bad faith, or behaviour that is immoral if not illegal that was involved in procuration of the award. This issue is therefore decided in the negative. The award cannot be set aside on this ground since it was not procured by fraud or undue means.

v. The arbitral award is not in accordance with the Act.
vi. The applicant was not given proper notice of the arbitral proceedings and was thus unable to present his or her case; violation of the right to a fair hearing.
vii. The Arbitrator exceeded his mandate and there are errors apparent on the record.

[70] For convenience since they are inter-related, the three grounds will be considered simultaneously. An award can be set aside for not being in accordance with the Act when 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 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, i.e. the arbitral award deals with the dispute which is

not within the terms of the submission to the arbitration agreement, or contains decisions which were not submitted to the arbitrator; (vi) incapacity of either party; a legal restriction preventing a party from entering into a legal and binding relationship; (vii) invalidity of the Arbitration Agreement; (viii) non-arbitrability of the dispute.

[71] Not every violation of the Act will lead to a refusal of enforcement or setting aside of the 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 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.

[72] All mistakes in procedure committed by the arbitrator which have or may have unjustly prejudiced a party are classified as “misconduct.” Misconduct is used in the technical sense as denoting irregularity, and not any moral turpitude or anything of that sort (see *London Export Corporation Ltd. v. Jubilee Coffee Roasting Co. Ltd. (1958) A.W.L.R. 661*). Misconduct is usually constituted by unintentional improper activities which prejudice the complaining party, such as; - an arbitrator deciding an issue without any evidence being presented on the issue; discussion of the matters with third persons; non-observance of the principles of natural justice; delegating the decision making power; exclusion by two of the arbitrators of the third from hearings or deliberations; a visit by one arbitrator alone to a construction site in violation of the submission agreement along with the obtaining of additional information from one of the parties on the equipment used, which information influenced the award; the tribunal’s failure to give the parties

notice and a proper opportunity to consider and respond to a new point that ultimately affected the arbitrator's reasoning in the award, and so on.

[73] In order to intervene on basis of misconduct, the court must be satisfied that there may have been, not must have been, or that the irregularity may have caused, not must have caused, a substantial miscarriage of justice that would be sufficient to justify setting aside or remitting of the award. The applicant must show both an irregularity affecting the tribunal, the proceedings or the award and that the irregularity has caused, or will cause, substantial injustice. Findings of the arbitrator on the factual matrix need not to be interfered with as the Court does not sit in appeal and the Courts are also refrained from re-appreciating or re-evaluating the evidence or the material before the arbitrator unless perversity is writ large on the face of the award or the award suffers from the vice of jurisdictional error, sanctity of award should always be maintained.

[74] Parties are free to agree on the procedure to be followed by rules of the arbitral tribunal in the conduct of the proceedings (see section 19 (1) of *The Arbitration and Conciliation Act*). Subject to the mandatory provisions of the Act, such as the parties' fundamental right to be heard and to be treated equally as the basis of arbitral due process and provision dealing with the competence of Courts, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings, either by reference to a set of arbitration rules or by agreeing on specific rules for the conduct. They are also free to agree on the place of arbitration (see section 20 (1) of the Act). If the parties fail to agree on either, the arbitral tribunal may, subject to the Act, conduct the arbitration in the manner it considers appropriate at a place of its choice having regard to the costs and the circumstances of the case and to the convenience of the parties. Where the award has been made by the arbitrator in breach of the agreed procedure, a party is entitled to have it set aside, not because there has been necessarily any breach of the rules of natural justice, but simply because the parties have not agreed to be bound by an award made by the procedure in fact adopted (see *London Export*

Corporation Ltd v. Jubilee Coffee Roasting Co. Ltd. [1958] I W.L.R. 271 at 277).

[75] It is only in absence of party agreements concluded prior to or during the arbitration that the arbitrators may develop or choose their own procedural rules. Unless the parties have by their submission to arbitration decided otherwise, arbitrators have a discretion to determine the form in which an arbitration is conducted. An arbitrator though should ensure that the parties are aware of the arbitrator's powers and the procedure to be followed. Arbitration typically involves six stages; - preparation and introduction; presentation of the parties' claims and defences; narrowing the issues; hearing of evidence; the concluding arguments; and the award. The purpose of first stage is to create confidence in the arbitrator and a climate that is conducive to the resolution of the dispute and to deal with any preliminary issues that may arise. The purpose of the fourth stage is to record the evidence led by the witnesses and to give each party the opportunity to question the witnesses and to challenge their testimony.

[76] In the instant case, the parties' "consent appointment of arbitrator" dated 16th May, 2022 does not contain a choice of procedural rules clause. The Arbitrator fixed 6th June, 2022 for the preliminary meeting but on that date both parties were absent, which prompted him to adjourn the proceedings to 6th July, 2022. On that day, only counsel for the respondent was in attendance whereupon the Arbitrator proceeded to issue directions and timelines for the parties to file their respective pleadings. Still the Arbitrator did not specify the rules that would govern that process but directed that the parties were to meet "with [the] Arbitrator on 3rd August, 2022 at 10:00 am for preliminary hearing and agreeing on the way forward." On that day both parties and their respective counsel were absent. The arbitrator noted that Since Counsel for the Claimant (the respondent in the current proceedings) had filed the claim with witness statements, Counsel for the respondent (the applicant in the current proceedings) was granted two weeks within which to file a reply with witness statements, if any. He adjourned the preliminary hearing to 23rd August, 2022. He indicated that it was when "the Arbitration fees to be paid to [the]

Arbitrator shall he agreed upon and the time within which this arbitration will be handled shall be agreed as well." The next time the matter came up was on 17th April, 2023 when the Arbitrator extended the time for conclusion of the arbitration and fixed it for hearing on 26th April, 2023. It is on 28th April, 2023 that the Arbitrator granted counsel for the respondent leave to proceed *ex-parte*.

[77] At no point in that process did the parties agree on the rules of procedure. The Arbitrator too did not specify the rules which guided the process. Where the parties to a contract have agreed in writing that disputes in relation to their contract shall be referred to arbitration to CADER, then such disputes have to be settled in accordance with CADER Arbitration Rules of June 1998 as the default rules, subject to such modification as parties may agree with in writing (see Article 1 of *The CADER Arbitration Rules*). The provision allows the parties to modify the institutional arbitration rules to meet the needs of their particular transaction. In the instant case, given the parties' designation of CADER as the supervisory authority regarding the resolution of their disputes under the agreement, when on 16th May, 2022 they unconditionally signed a "consent appointment of arbitrator," they are deemed to have adopted *The Centre for Arbitration and Dispute Resolution, Arbitration Rules* of June 1998. Unless the parties expressly agree to the contrary, a choice of arbitral institution is deemed to be also a choice of its rules.

[78] Parties who signed a binding arbitration agreement are, in principle, bound by its terms. Once a dispute arises and a claimant commences arbitration proceedings against a respondent, a general assumption is that the parties will cooperate and actively participate in the proceedings. When the other party, usually the respondent, simply refuses to participate in arbitration proceedings, either from the beginning of the arbitration or at later stages, regardless of the reasons behind a respondent's decision not to participate, most arbitration rules provide that in the absence of a respondent's participation, the arbitration proceedings will nevertheless continue on an *ex parte* basis. Parties cannot absent themselves from appearing at a hearing without sufficient cause. Section 25 (c) of *The*

Arbitration and Conciliation Act to similar effect is meant to curb situations where parties willfully and willy-nilly choose to absent themselves.

[79] Where any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal is empowered by section 25 (c) of *The Arbitration and Conciliation Act* to continue the proceedings and make the award on the evidence before it. When the other party refuses to participate, the Tribunal may render an *ex parte* award once satisfied that the non-participating party has no acceptable excusefor its non-participation, and after recording in writing all procedural steps and efforts to include that party in the proceedings.

[80] It is therefore a well-established principle of arbitration that arbitrators have an inherent power to continue arbitration proceedings when the other party refuses to participate, and to render an *ex parte* award once satisfied that the non-participating party has no acceptable excuse for its non-participation, and after recording in writing all procedural steps and efforts to include that party in the proceedings. Arbitrators should not simply accept the contentions of the participating party without enquiry. They should include reference to any contentions, however raised, by the non-participating party but they should not advocate for the non-participating party by arguing its case. If the burden of proving any of the contentions rests on the non-participating party, it may be appropriate to decide that the point could not succeed because of the absence of evidence from the non-participating party. If, however, the contention goes to some feature of the case being advanced by the participating party, it may be appropriate to put the point to the participating party to seek its answer and refer to that answer in any subsequent reasoned award.

[81] Therefore, a party who though repeatedly written to, does not appear before the arbitrator and allows the proceedings to go ahead *ex parte*, cannot later claim not to have been given an opportunity of being heard (see *The Pendrecht [1980] 2 Lloyd's Rep 56*; *Bernuth Lines Ltd v. High Seas Shipping Ltd [2005] EWHC 3020;*

M/s. Blue Horse Services and others v. M/s. Capfloat Financial Services Private Limited, 28 September, 2022 and *M/s Amardeep Prakashan v. M/s Siddharth Tradex (P) Ltd and another, 2016 Latest Caselaw 7055 Del*). A party who agrees to arbitrate cannot avoid an adverse arbitration award by ignoring the arbitration proceedings (see *Merchant Cash & Capital, LLC v. Ko, Case No. 14 Civ. 659*). If any party fails to appear at a hearing or to produce evidence without a justifiable reason, the arbitrator or the arbitral tribunal may continue the arbitral proceedings and may make the award according to the evidence before it. In a nutshell, ensuring that the other party was duly and timely notified about each and every step of the arbitration proceedings and received every single document submitted on the record is a sufficient answer to challenges of this nature at the enforcement stage.

[82] Section 25 (b) of *The Arbitration and Conciliation Act* and Article 28 of *The CADER Rules of Arbitration, 1998* require the arbitral tribunal to continue the proceedings despite the respondent's failure, without showing sufficient cause, to communicate his or her statement of defence without treating the failure by itself as an admission of the claimant's allegations. The Arbitrator should thus ensure that the non-participating party is given a fair opportunity to join proceedings in the arbitration in order to present its case and to comment on the arguments and evidence submitted by the opposing party. For these purposes, arbitrators should copy all parties including the non-participating party in all correspondence and send them and also instruct the participating party to send them, copies of all notices, procedural orders, directions and submissions, to avoid challenges on the grounds that the non-participating party was not given proper notice. If arbitrators consider it appropriate, they may extend any deadlines in order to give a further opportunity to the non-participating party to participate.

[83] Such efforts to include the non-participating in the proceedings should be recited in that award. Arbitrators should not simply accept the contentions of the participating party without enquiry. They should include reference to any

contentions, however raised, by the non-participating party but they should not advocate for the non-participating party by arguing its case. If the burden of proving any of the contentions rests on the non-participating party, it may be appropriate to decide that the point could not succeed because of the absence of evidence from the non-participating party. If, however, the contention goes to some feature of the case being advanced by the participating party, it may be appropriate to put the point to the participating party to seek its answer and refer to that answer in any subsequent reasoned award.

[84] Although the Arbitrator never specified the rules of procedure guiding the process, natural justice embraces the requirement that there must be fairness in the procedure. Therefore, both parties must be treated equally. Each must be given a full opportunity to present his case. This is a mandatory requirement under section 18 of *The Arbitration and Conciliation Act*. Each party must be afforded an opportunity of answering the case against him by meeting his opponent's evidence and contentions. The Court has a duty to ensure compliance with the principles of natural justice and when an award has been passed without complying with the mandatory principles of natural justice, this Court being the custodian of rights and liberties of parties, must take its guard to correct the infirmities which have already been carried out.

[85] The *audi alteram partem* principle entitles both parties in the matter to be heard, but if a party is given or granted that opportunity and it willfully refuses to participate like what happened in the present matter, there is no breach of the principle. A party cannot willfully absent itself from a hearing and then cry foul that the rules of natural justice were not followed. Such an attitude would exhibit a gross misconception of the rules of natural justice. Therefore, a party who though repeatedly written to, does not appear before the arbitrator and allows the proceedings to go ahead *ex parte*, cannot later claim not to have been given an opportunity of being heard (see *The Pendrecht [1980] 2 Lloyd's Rep 56*; *Bernuth Lines Ltd v. High Seas Shipping Ltd [2005] EWHC 3020; M/s. Blue Horse*

Services and others v. M/s. Capfloat Financial Services Private Limited, 28 September, 2022 and *M/s Amardeep Prakashan v. M/s Siddharth Tradex (P) Ltd and another, 2016 Latest Caselaw 7055 Del*). A party who agrees to arbitrate cannot avoid an adverse arbitration award by ignoring the arbitration proceedings (see *Merchant Cash & Capital, LLC v. Ko, Case No. 14 Civ. 659*).

[86] In the instant case, there is no independent proof on record of service of process upon the respondent. However, the arbitrator's notes indicate that he was presented with proof of service by which he was satisfied that the respondent was served. He recorded the procedural history as follows;

> This matter was started by Consent of the parties and their Counsels to appoint an Arbitrator and the Consent was dated 16th May 2022 in which the parties appointed Kafuko Ntuyo of Kafuko Ntuyo & Co Advocates as the Arbitrator to arbitrate in the mailer and it was filed in CADER on 19th May 2022. Counsel Robert Kafuko Ntuyo of M/s Kafuko Ntuyo & Co Advocates consented to arbitrate the matter and his Consent was filed in CADER on 26th May, 2022. Summons to the parties and their Counsel were extracted and duly served on the Counsel for the parties requiring them to file their pleadings and Statements and to meet the Arbitrator on 31st May, 2022. The Summons were duly served on Counsel for the respective parties and there is an Affidavit of service on record.
>
> Both Counsel for the Claimant and Respondent called the Arbitrator by phone a day before 30th May, 2022 informing him of their inability to attend due to other commitments. Counsel agreed with the Arbitrator to reset the meeting date to 6th June, 2022 which the Arbitrator did. On 6th May, 2022 Counsel Nelson Ainebyona appeared before the Arbitrator at CADER but nobody appeared for the Respondent. The matter was adjourned to 6th July, 2022 at 10:00 am and the parties were directed to file their respective pleadings and timelines for filing the leadings were given by the Arbitrator and a hearing notice was served on Counsel for the Respondent which was duly received and stamped by the Counsel for the Respondent M/s Kasirye, Byaruhangu & Co, Advocates on 8th June, 2022 at 10:14 am. None of the parties and their Counsel complied with the timelines given to file their pleadings.
>
> On 27th July, 2022 Counsel for the Claimant M/s Newmark Advocates by letter dated 25th July, 2022 Ref/NM/CADRE/025/007/2022 requested for extension of time within which lo file the claim which the Arbitrator allowed, extended the time to 30th September, 2022 and directed the Claimant to file the claim and serve

the Respondent and the Respondent to file their Reply and Statements. Counsel for the Claimant filed the Claimant's claim on 27th July, 2022 and served the Counsel for the Respondent. Counsel for the Respondent did not file any Reply although there is an affidavit of service stating that Counsel for the Respondent was served on 28th July, 2022.

The Arbitrator fixed the Preliminary hearing of this arbitration on 3rd August, 2022 after receipt of a copy of the claim for 23rd August, 2002 at 10:00 am at CADER and granted the Respondent two (2) weeks within which to file their Reply and Witness Statements. The Hearing Notice for 23rd August, 2022 was duly served on Counsel for the Respondent on 5th August, 2022 at 10:22 am but no action was taken by Counsel for the Respondent. Thereafter, Counsel for the Claimant communicated, phone to the Arbitrator that he had lost a close relative and could not appear on 23rd August, 2022 and the matter stalled there.

On 5th April, 2023, Counsel for the Claimant wrote to the Arbitrator seeking to have the claim disposed of and sought extension or time to do so. The Arbitrator has noted the chequered history of this matter and notes that it has been unreasonably delayed by acts of Counsels on both sides. Nonetheless the time was extended to 30th June, 2023.

The inaction by Counsel for the Respondent who initially indicated to the Arbitrator by phone that they were to participate in this arbitration on behalf of the Respondent is surprising. Under Section 25 (b) of *The Arbitration and Conciliation Act*, the Arbitrator is enjoined to treat the inaction and /or failure by the· Respondent to communicate his or her Statement of Defense as not an admission of the claim hut the Arbitral Tribunal shall continue with the proceeding. This Tribunal has reason to believe that the inaction by Counsel for Respondent is not inadvertent and so the Tribunal orders that the Hearing of this arbitration shall continue. This Tribunal orders the Claimant to proceed to prove its claim ex-parte.

The time within which this arbitration is to be disposed of is extended for another two (2) months up to 30th June 2023. The Claimant is directed to file its Witness Statements in proof of its claim. The Hearing of the Claimant's case is fixed for 9th May, 2023 at 10:00 am. The Arbitrator fees shall be Shs 80,000.000/= (Shillings Eighty Million Only) payable in two instalments. The first instalment of Shs 40.000.000/= (Shillings Forty Million Only) should be paid before 9th May, 2023 to enable the Hearing commence. The balance of Shs 40,000.000/= (Shillings Forty Million Only) shall be paid before the Award is delivered.

[87] The record therefore indicates that the Arbitrator was presented with proof of service by which he was satisfied that counsel for the applicant was on 8th June,

2022 at 10:14 am served with a hearing notice notifying them of the hearing that was scheduled for 6th July, 2022 at 10:00 am. There was also an affidavit of service filed in proof of the fact that on 28th July, 2022 counsel for the applicant was served with a copy of the respondent's claim. There was further proof that the hearing notice for 23rd August, 2022 was duly served on counsel for the respondent on 5th August, 2022 at 10:22 am. I have not found any reason to doubt the accuracy of this record. Despite all incidents of service, counsel for the respondent neither filed a reply to the claim nor appeared before the Arbitrator on any of the specified dates. No reason was advanced on record to explain that failure.

[88] Section 34 (2) (a) (iii) of *The Arbitration and Conciliation Act* allows for setting aside and arbitral award where the party making the application furnishes proof that he or she was not given proper notice of the appointment of an arbitrator, or of the arbitral proceedings, or was unable to present his or her case. Arbitrators have a duty to render a valid and enforceable award, in case of the other party's failure to participate. This includes ensuring that the other party has been properly notified of the commencement of the arbitration proceedings and has received the Request of Arbitration/Notice of Arbitration. This also applies to other procedural steps during the course of an arbitration. The arbitrator also needs to ensure that the other party has been given a fair opportunity to present its case and, if it decides, to start participating at any given moment.

[89] In practice, ensuring that the other party has received all notifications, documents and correspondence related to the case can easily be proven from the record together with proof of delivery. In a nutshell, ensuring that the other party was duly and timely notified about each and every step of the arbitration proceedings and received every single document submitted on the record is a sufficient answer to challenges of this nature at the enforcement stage. On the facts of this case, the applicant was given a fair opportunity to participate in the proceedings but without any explanation, it elected not to take the opportunity. The applicant was

therefore never denied a fair hearing. For unexplained reasons, the respondent opted not to participate.

[90] As regards what the applicant considers to be errors apparent on the face of the record of arbitration, it is trite that besides errors which are manifestly erroneous and have caused substantial injustice, interpretations of the law by the arbitrators are not subject to judicial review for error in interpretation. The setting aside process cannot be used as a mechanism for reversing alleged errors of law or fact but it is designed to deal with true jurisdictional errors. Mere error in the evaluation of evidence or misinterpretation of the law by the arbitrator, is never a ground for setting aside an award. The Court is not empowered to review the award as to whether the findings of fact rendered by the arbitrator are, on the entire record of said arbitration proceedings, supported by substantial evidence, and whether as a matter of law based on such findings of fact the award should be affirmed, modified or vacated. Such a ground is in the nature and tenor of an appeal. It calls for the court's re-appraisal of the evidence before the arbitrator, yet in proceedings of this nature it is not possible to re-examine the facts to find out whether a different decision can be arrived at.

[91] It is not permissible to a Court to examine the correctness of the findings of the arbitrator, as if it were sitting in appeal over his findings. This Court does not have the power to re-appreciate and re-evaluate the evidence produced before the arbitral tribunal and thereafter to judge if the findings of the arbitral tribunal are correct or wrong. Interpretation of a contract is a matter for the arbitrator on which a court ought not to substitute its own decision. If the arbitrator interpreted the terms of contract in a particular way based on the material before him and the evidence adduced before him, even if another view is possible to be taken on the same materials and evidence, the Court cannot interfere with the said findings of the learned arbitrator.

[92] That notwithstanding, section 31 (1) of *The Arbitration and Conciliation Act*

requires arbitrators to 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. In the instant case,

[93] Unlike court proceedings, arbitrators derive their jurisdiction from the parties' agreement to arbitrate. Where a time limit is imposed within which the tribunal must make its award, failure to deliver an award within the specified time limit may mean that the parties' consent to arbitration has lapsed and any arbitration award issued after the deadline may be unenforceable.

[94] The general principle is that once a time limit or deadline lapses, the arbitrator no longer has the requisite jurisdiction to make a valid award (see *Ting Kang Chung John v. Teo Hee Lai Building Constructions Pte Ltd and others [2010] SGHC 20; [2010] SLR 625*). Parties to an arbitration do not bear the responsibility to monitor the timeline, nor are they under any duty to remind or prompt the arbitrator to keep within the timeline. Although remaining silent is not an option for the objecting party, but, be that as it may, a failure to raise an objection timeously does not extend the jurisdiction of the arbitrator automatically. If an arbitral award is not made either within the statutory time period or the mutually extended period, then the mandate of the tribunal stands terminated as it becomes *functus officio* (see *Suryadev Alloys and Power Pvt. Ltd. v. Shri Govindaraja Textiles Pvt. Ltd, AIR (2010) SC 640*). No award can be passed after the mandate of the arbitrator has been terminated by effluxion of time.

[95] Some courts have viewed failure to comply with time limits for the delivery of awards as a procedural matter. For example, in *Sunway Creative Stones Sdn Bhd v. Syarikat Pembenaan Yeoh Tiong Lay Sdn Bhd and another [2020] MLJU 658*, the Arbitrator neither issued the award within the three-month statutory deadline nor notify both parties of any extensions to this timeline. Instead, the award was

delivered on March 2019, almost 3.5 years late, in which the Arbitrator found in SCS's favour. Saliently, SCS's solicitors reminded the Arbitrator on four occasions between February, 2016 and December, 2018 on the need to deliver his Award in a timely manner. These reminders were copied to YTL's solicitors. YTL, however, did not send any such reminders nor raise concerns with the Arbitrator's non-compliance with the deadline. Following YTL's non-payment of sums under the Award, SCS sought recognition and enforcement of the Award against YTL. In response, YTL applied to the Malaysian High Court to set aside the Award under Section 37 of *The Arbitration Act 2005*, which largely mirrors Article 34 of the UNCITRAL Model Law.

[96] The Malaysian High Court refused to set aside an arbitral award because the applicant had not challenged the arbitrator's jurisdiction and conduct when the issues arose during the arbitral proceedings. The Court emphasised that such lack of protest can be deemed a waiver of a party's right to set aside an arbitral award on the same grounds at a later date. The procedural ground failed as YTL did not protest the Arbitrator's delay in issuing the Award when it arose. By its silence, YTL was understood to have waived its right to rely on this procedural defect as a ground for challenge. The Court viewed this consistent with the waiver principle under provisions *in pari materia* with our section 4 of *The Arbitration and Conciliation Act*, which requires a challenging party to promptly raise procedural objections or lose the right to subsequently rely on them. Accordingly, YTL should have raised a plea to the Arbitrator that he lacked jurisdiction to deliver his Award soon after 1 September 2015, i.e. upon the expiry of the time limit to deliver the Award. Having failed to do so, YTL lost the right to rely on the same jurisdictional defect in setting aside proceedings.

[97] Similarly, in *Katamba Phillip and three others v. Magala Ronald, H. C. Arbitration Cause No. 3 of 2007*, it was held that the arbitrator had the mandate under section 31 (1) of *The Arbitration and Conciliation Act* to extend the time within which to

make the award. This was a case in which the award had been handed down five months after expiry of the sixty-day period.

[98] To the contrary, other courts have viewed time limits for delivery of arbitral awards as a jurisdictional matter. For example, in *Ken Grouting Sdn Bhd v. RKT Nusantara Sdn Bhd and another, [2020] MLJU 1901*, the Malaysian Court of Appeal dealt with the issue of an arbitrator's failure to deliver the arbitral award within the specified timeline, and whether this resulted in a loss of the arbitrator's jurisdictional mandate. The applicable rules required the arbitrator to deliver his award as soon as practical but not later than 3 months from his receipt of the last closing statement from the parties. As such, the deadline for the arbitrator to deliver his award was 26th April, 2016. The Rules expressly provided that if the arbitrator considered that more time was required, "such time frame for delivery of the award may be extended by notification to the parties." Without any attempt by the arbitrator to extend the timeline for delivery of the award, the arbitrator delivered his award on 10th March, 2017. Neither party raised any objection to the fact that the deadline for delivery of the arbitral award had passed. However, on 27th March 2017, the respondent's solicitors wrote to the appellant's solicitors giving notice that they were objecting to the delivery of the Award beyond the timeline stipulated in the Rules.

[99] The High Court Judge held that the failure to (a) deliver the Award within the time frame and (b) extend the deadline as provided before delivering the Award meant that the Award was delivered without mandate or authority, and was therefore delivered in excess of the arbitrator's jurisdiction. This led to the Award being set aside pursuant to provisions *in pari materia* with our section 34 (2) (a) (v) of *The Arbitration and Conciliation Act*, on the basis that the arbitral procedure was not in accordance with the agreement of the parties. On appeal to the Court of Appeal, it was held that it was not an option for an arbitrator who conducts an arbitration under a time-sensitive arbitral regime to ignore, or be oblivious to, or be nonchalant to his duty and responsibility to deliver the award on time.

[100] It is this Court's view that setting a time limit is designed to speed up the arbitration process, but it can cause serious problems, particularly in cases where there is no provision for the time limit to be extended. Where the parties prescribe their own time limits in an arbitration agreement, such time-period can be extended only if the parties consent to the same. In cases where the parties have already taken recourse to enlarge the time period under an arbitration agreement, the arbitrator cannot exercise his or her power to extend such time, in the absence of consent of the parties (see *NBCC Limited v. JG Engineering Pvt. Limited (2010) 2, SCC 385*). It is accepted law that the mandate of an arbitrator can be extended via express or implied consent of the parties. No formalities are required and necessary consent may be implied from conduct (see *Alphamix Ltd v. The District Council of Riviére Du Rampart (Mauritius), [2023] UKPC 20*).

[101] The concept of jurisdiction as applied to courts differs from its application in arbitration. Whereas the Court's jurisdiction stems from sovereign power that a state exerts over private individuals, in arbitration it stems from the consent of the parties to select this or that person or entity to resolve their dispute. Arbitral jurisdiction derives from the parties' consent. Therefore, in arbitration, lack of jurisdiction can be overcome by a fresh agreement between the parties. In the absence of a formal extension, the court will take account of how the parties conducted themselves and what they said, even where there is no formal agreement recorded in writing.

[102] An arbitrator is bound to make and publish his award within the time mutually agreed to by the parties, unless the parties consented to further enlargement of time. The arbitrator cannot exercise his or her power in extending the time fixed by the parties in the absence of the consent of both of them. It is settled law that an arbitrator has no power to further extend the time beyond that which is fixed in the agreement without the consent of the parties to the dispute. In the absence of an extension, the mandate of a tribunal automatically terminates after the expiry of the fixed time. The important principles of speed and finality of arbitration, and the

autonomy of the parties recognised the Act, would be undermined if the Arbitrator is able to unilaterally extend the time limits. An arbitrator is unable to unilaterally extend contractual time limits absent party consent and the arbitrator's mandate to make the award terminates upon the expiry of the time fixed by the parties. If the parties have fixed a time-limit for rendering the award, the time-limit is extendable only by mutual consent. Failure to pay heed to the contractual provisions would frustrate the very intent of *The Arbitration and Conciliation Act,* i.e. to resolve disputes as per terms decided by the parties. The arbitration proceedings need to be conducted as per the terms and conditions agreed between the parties under the agreement.

[103] If consent for extension is denied by one party, and, the award is not rendered within the time fixed, the mandate of the arbitrator terminates (see *Jayesh H. Pandya and another v. Subhtex India Ltd. and Others, (2020) 17 SCC 383*). The time limit provided in the arbitration agreement in a given case cannot be said to have been extended by the act of one side or by conduct of one side. Where the arbitration agreement prescribes a period within which the Award is to be passed and the said period has expired and has not been extended by mutual consent of the parties, the award passed by the Arbitrator after efflux of such period is bad in law and contrary to the agreed terms by which the parties as well as the Arbitrator are bound.

[104] In the instant case, the parties did not specify the period of arbitration in their agreement. The two months' limitation period specified by the Act was therefore triggered by the parties' "consent appointment of arbitrator" dated 16th May, 2022. The implication is that the award ought to have been delivered not later than 16th July, 2022. Instead, it was handed down ten months later on 19th May, 2023. This followed two extensions at the instance of counsel for the respondent. The first extension was on basis of a letter dated 25th July, 2022; Ref/NM/CADRE/025/007/2022 whereupon the Arbitrator extended the time for lodgement of the claim to 30th September, 2022. The second extension was on

basis of a leter dated 5th April, 2023, whereupon the time was extended to 30th June, 2023. The extensions were sought and granted *ex-parte*, due to the applicant's unexplained failure to respond to notices served upon its counsel. On 26th April, 2023 the respondent was formally granted leave to proceed e*x-parte.*

[105] According to section 4 of *The Arbitration and Conciliation Act*, a party who knows of any provision of the Act from which the parties may derogate or of any requirement under the arbitration agreement which has not been complied with, and yet proceeds with the arbitration without stating his or her objection to the noncompliance without undue delay or, if a time limit is prescribed, within that period of time, is deemed to have waived the right to object. When she appeared in Court to oppose the respondent's application in *Roko Construction Limited v. Pearl Marina Estates Limited, H. C. Miscellaneous Application No. 193 of 2023*, one of the grounds of objection presented by counsel for the applicant was that the arbitration proceedings were still ongoing. The implication is that at al material time Counsel for the applicant was aware of the arbitral proceedings continuing way beyond the time limit.

[106] Failure to participate in arbitral proceedings or raise objections thereto, will be deemed a waiver of the right to object to the noncompliance with derogable provisions of the Act and will preclude the relevant party from raising such objections in subsequent proceedings (see *Quippo Construction Equipment Limited v. Janardan Nirman Pvt. Ltd. (2017) 7 SCC 678*). There is no difference between an objector before Court who did not participate in the arbitration proceedings and one who participates but did not raise objection of jurisdiction. Both are precluded from raising it before the Court.

[107] At no stage were objections in respect of expiry of time raised by the applicant before the arbitrator. The applicant chose not to participate and let the arbitration proceedings conclude and culminate in an Award. In light of section 4 of *The Arbitration and Conciliation Act*, the applicant must be deemed to have waived all

such objections and is now precluded from raising any objection on the point. In any event, by the order of Lady Justice Harriet Grace Magala given on 24th July, 2023 in *H. C. Miscellaneous Application No. 193 of 2023; Roko Construction Limited v. Pearl Marina Estates Limited,* directing that "the arbitral proceedings in CAD/ARB/No.04 of 2022: Roko Construction Limited – versus – Pearl Marina Estates Limited be continued and an arbitral award made," validated the extension of time within which the award was delivered, albeit retrospectively.

Order:

[108] In conclusion, since the application has failed on all grounds, it is hereby dismissed with costs to the respondent.

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Stephen Mubiru

Judge.

Appearances

For the applicant : M/s Kasirye, Byaruhanga & Co. Advocates and Solicitors.

For the respondent : M/s Newmark Advocates.