

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

MISCELLANEOUS APPLICATION No. 0283 OF 2018

5 **(Arising out of Misc. Application No. 1396 of 2017)**

CAPT. JOSEPH CHARLES ROY APPLICANT

VERSUS

10 **D & D INTERNATIONAL (U) LIMITED
RESPONDENT**

Before: Hon Justice Stephen Mubiru.

RULING

a. Background.

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On or about 28th January, 2010 the applicant executed a concession agreement with the respondent by which the respondent was granted permission to construct, develop and operate for a period of twenty-five years, a tourism lodge by the name “Amuka Lodge” located within the “Ziwa Rhino Sanctuary” complex at Nakitoma in Nakasongola District. The respondent completed the construction phase during or around the year 2014. Differences having thereafter developed between the parties regarding the modalities of payment of the applicant’s concession fee, the applicant on or about 16th October, 2017 wrote a letter to the respondent, terminating the concession for non-payment of concession fees, failure to contribute to the Rhino Fund Uganda, and failure to account for the proceeds of their business activities. The respondent invoked the dispute resolution clause contained in the agreement and on 22nd January, 2018 sought the appointment of an arbitrator.

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In the meantime, on 29th November, 2017 the respondent had filed an application before this court for an interim measure of protection, restraining the applicant from re-entering the concession and evicting the respondent, until the final conclusion of the arbitral proceedings. The application was dismissed with costs on 30th January, 2018. Upon the appointment of the single arbitrator for their dispute by the Centre for Arbitration and Dispute Resolution (CADER), the

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respondent renewed the application for the same restraining order, before the arbitrator. After hearing both parties on 12th April, 2018 the arbitrator granted the restraining order on 16th April, 2018 “stopping the applicant from re-entering/evicting and/or interfering with the operations of Amuka Lodge until the final conclusion of all arbitration proceedings by the arbitral tribunal” in the matter before it. The applicant now seeks to have that order vacated. At the same time, the applicant filed an application to the appointing authority, the Centre for Arbitration and Dispute Resolution (CADER), seeking termination of the arbitrator’s mandate. The arbitral proceedings were suspended by reason whereof the award is yet to be published, pending a ruling on that application.

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b. The application.

This application is made under the provisions of sections 16 and 34 of *The Arbitration and Conciliation Act*, and Order 52 rules 1 and 3 of *The Civil Procedure Rules*. The applicant seeks an order vacating the interim measure of protection granted by the arbitrator, restraining the applicant from re-entering the concession and evicting the respondent, until the final conclusion of the arbitral proceedings. The applicant contends that by granting that relief, the arbitrator exercised a jurisdiction not vested in him, proceeded with bias when hearing the application and exceeded his jurisdiction when he canvassed matters not submitted to him. The applicant further contends that the applicant was denied his right to a fair hearing during the preliminary process of the arbitral proceedings, received *ex-parte* communication from the respondent, and the relief granted practically constituted an appeal against the ruling of the Court that dismissed the application for similar relief.

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25. The affidavit in reply;

In the respondent’s affidavit in reply, it is averred that upon the appointment of the single arbitrator on 16th January, 2018 the arbitrator gave directions to both parties concerning the preliminary stages of the arbitration. While the respondent complied fully, the applicant did so only partially. When summoned to attend the preliminary hearing, the applicant and his counsel did not turn up, prompting an adjournment to a subsequent date. Still the applicant and his

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counsel did not turn up on the said date prompting another adjournment. At the third sitting, the preliminary hearing proceeded *ex-parte* due to the absence of the applicant and his counsel without explanation. The applicant did not file any defence to the respondent's statement of claim.

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When the applicant attempted to evict the respondent, the arbitrator on 12th April, 2018 considered the respondent's application *inter-parties*, for interim protective measures. This was after the hearing had been adjourned on 6th April, 2018 to enable counsel for the applicant file an affidavit in reply. In the meantime, the arbitration proceeded and the respondent closed its case
10 on 25th April, 2018. After a couple of adjournments to enable the applicant present his evidence in defence but to no avail and without justifiable cause for his failure to do so, the arbitrator fixed a date for final submissions. When the matter came up for final submissions on 25th June, 2018 counsel for the applicant categorically stated that the applicant would not participate any further in the proceedings because the arbitrator was biased. The arbitrator adjourned pending
15 delivery of the award. The respondent then filed an application to the appointing authority, the Centre for Arbitration and Dispute Resolution (CADER), seeking termination of the arbitrator's mandate. The award has since then not been made, pending a ruling on that application. Save for the interim measure of protection order, no award has ever been made in the arbitral proceedings.

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d. Submissions of counsel for the applicant.

M/s Omongole and Co. Advocates on behalf of the applicant submitted that the appointment of the sole arbitrator was contrary to the law. The respondent was never given opportunity to
25 participate in the appointment of the arbitrator. The arbitrator never gave the parties an opportunity to agree on the procedure. The arbitrator erroneously chose to commence the arbitration without the parties' affirmation of the appointment, an agreement on fees and the rules of procedure. It is the appointing authority vested with the power to issue interim measure of protection. The applicant's right to a fair hearing was violated. The applicant was denied an
30 opportunity to file a defence to the claim, to be heard in position to the application for the interim

protective measures and the objections raised were overruled unjustifiably. In any event, the process of arbitration has been too prolonged such that the submission to arbitration has become inoperative.

5. Submissions of counsel for the respondent.

If counsel for the respondent M/s Kamahoro, Kiboome & Kirunda Advocates did file submissions, then they were not placed on record and I have not had the benefit of perusing them at the time of writing this ruling.

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f. The decision.

Although the arbitration is yet to be concluded nearly five years after its commencement, the application seeks this Court's intervention on basis of what the applicant considers to be a miscarriage of justice in the ongoing proceeding. It is trite that the jurisdiction conferred upon this Court by *The Arbitration and Conciliation Act* regarding disputes that have been referred to arbitration is only ancillary or auxiliary, and as such the court does not have a continuing power of supervision of the arbitral process. Section 9 of the Act provides that except as provided in the Act, no court is to intervene in matters governed by the Act. If the court could continually hear applications to vary interlocutory decisions of arbitrators, it would assume the function of an appellate court and deny the parties to the arbitration a stable base from which to launch or proceed with the arbitration. Save for specified circumstances, parties take their arbitrator for better or worse in both final and interlocutory decisions of fact and decisions of law.

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i. Role of the Court after closure of the arbitration proceedings.

Recourse to the court against an arbitral award may be made only by an application for setting aside the award. Section 34 (2) of *The Arbitration and Conciliation Act* sets out the limited instances where a party can apply to set aside an "arbitral award." An arbitral award is a determination on the merits by an arbitration tribunal in an arbitration, and is analogous to a judgment in a court of law. It is the final and binding decision made by a sole arbitrator or an

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arbitral tribunal, which resolves, wholly or in part, the dispute submitted to his/its jurisdiction. It is the decision that concludes a single and specific arbitration process, which puts an end to the dispute that has been submitted to arbitration. Only an award on the merits can be the subject of Court's intervention under this provision,

5 Sometimes the parties agree that certain matters are to be resolved separately from some of the merits of the case. This results in partial or preliminary awards. A partial award is one that partially resolves the merits of the case, i.e., it does not rule on all the points in dispute, but on some or some of them whose resolution can be anticipated. Most arbitral rules expressly permit the issuance of a broad array of substantive arbitral decisions, such as orders, rulings, final
10 awards, partial final awards, interim awards, and interim measures. A decision that resolves incidental or procedural questions, such as jurisdiction, standing, limitation or applicable law, but does not resolve all or part of the subject-matter of the dispute, and therefore is not a partial award. Only an award that decides on a part of the subject-matter of the dispute can be considered a partial award.

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Once the arbitrator renders his award, the courts enforce the award, but have limited ability to review or modify it. An award is not subject to appeal or to any other remedy except those provided for in *The Arbitration and Conciliation Act*. Save for the grounds specified by section 34 (2) of the Act on basis of which a party can apply to set aside an arbitral award, it is a settled
20 law that this court cannot substitute its own decision for that of the arbitrator both on facts and law. These provisions were made clearly with a view to circumscribe to a narrow point, the objections that can be entertained where an arbitral award is assailed. 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
25 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.

To the extent that there is no final award yet made, the implication is that the applicant cannot have recourse to the powers of this Court of setting aside an arbitral decision. Without a final
30 determination by the arbitrator, there is nothing for this Court to review or modify for purposes of setting aside within the ambit of section 34 (2) of *The Arbitration and Conciliation Act*.

ii. Role of the court before and during the reference to arbitration.

There are only six instances prescribed by *The Arbitration and Conciliation Act* where the court
5 may intervene in a matter, that is the subject of an arbitration agreement, before any efforts are
made to refer a dispute to arbitration, as well as after commencement and during the subsistence
of the arbitration, to wit; the appointment of an arbitrator where the parties so agreed (section 11
(2); to grant an order of stay of a suit (section 5); to review preliminary rulings on the jurisdiction
of arbitrators (section 16 (6); assistance in taking evidence for use in arbitration (section 27); to
10 consider applications for interim measures of protection (section 6); and where the parties have
agreed that an application by any party may be made to a court to determine any question of law
arising in the course of the arbitration (section 38 (1) (a). Outside these six instances, by virtue of
section 9 of the Act, no court may intervene before or during the subsistence of an arbitration of
a matter that is the subject of a submission to arbitration.

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By virtue of section 11 (2) of *The Arbitration and Conciliation Act* the parties are free to agree
on a procedure of appointing the arbitrator or arbitrators, reason whereof they could select a
specified court to make such appointment. As regards the grant of an order of stay of a suit, the
jurisdiction exercised by the court under section 5 of *The Arbitration and Conciliation Act* is
20 triggered by the need to consider an application to stay of proceedings where the parties have a
valid, operative and enforceable arbitration agreement and upon a dispute arising on a matter
covered by the same, one party goes to the court in breach of the arbitration agreement.

On the other hand, the jurisdiction exercised by the court under section 6 of *The Arbitration and*
25 *Conciliation Act* is ancillary to the process of arbitration. While the subject matter jurisdiction
rests with the chosen arbitrator, that of this court is invoked only in aid of, or supplementary to,
the process of arbitration for the purpose of: (i) procuring or preserving evidence; (ii) facilitating
the proceedings as the justice of the case might require; (iii) restraining the assertion of doubtful
rights; (iii) providing for the safety of property either pending arbitration or when it is in the
30 hands of accounting parties or limited owners; (iv) where the efficacy or integrity of the arbitral
proceedings is in jeopardy; (v) enforcing awards obtained, and so on.

As a matter of fact, arbitration proceedings witness diverse applications that mainly seek conservatory and protective orders in respect of the subject matter of arbitration. Essentially, these applications address the needs of the parties for immediate and temporary protection of rights and property pending a decision on the merits by the arbitration tribunal. Invariably, the orders seek to protect and/or conserve the subject matter of the arbitration from dissipation. In other instances, for instance in an application for orders of security of costs, the aim is ensuring the rights granted at conclusion of the arbitration via the arbitral award are not nugatory, i.e., unenforceable. The application for such interim reliefs may be before the arbitral tribunal or the court where the tribunal is yet to convene or be constituted.

An interim measure of protection is an order granted by a court or arbitral tribunal, before commencement of, or during the course of, proceedings, against a party to the proceedings, or against a third party, requiring it to do, or refrain from doing, something, usually on a temporary basis. It is any temporary measure, whether in the form of a ruling, order or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to: (a) maintain or restore the *status quo* pending determination of the dispute; (b) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to any party or to the arbitral process itself; (c) provide a means of preserving assets out of which a subsequent award may be satisfied; or (d) preserve evidence that may be relevant and material to the resolution of the dispute.

They are procedural mechanisms used by courts and arbitral tribunals to address urgent matters generally at an early stage of the proceedings, but also at later stages, mainly with a view to protecting the subject matter of the dispute. Conservative and protective measures preserve and enhance the likelihood of future fruitful enforcement, pending a decision on the merits. Measures of provisional regulation ensure the continued safeguarding of rights during the proceedings, while anticipatory measures help to reduce the often too lengthy a gap between timely performance and coercive enforcement of an executory decision. Evidence measures often prove crucial to securing one party's chances of success on the merits. Unless otherwise

agreed by the parties, the arbitral tribunal may, at the request of a party, grant any of the said interim measures.

The availability of effective interim relief proceedings is vital to the arbitral process. Interim relief in arbitration is thus one of the main interfaces between state courts and arbitral tribunals. Sections 6 (1) and 17 (1) and (3) of *The Arbitration and Conciliation Act* create concurrent jurisdiction between the Court and an arbitral tribunal with regard to interim measure of protection. Under those provision, a party to an arbitration agreement may apply to the court, before or during arbitral proceedings, for an interim measure of protection, and the court may grant that measure. This shared power is an exception to the general rule that where there is a valid arbitration agreement, the arbitrators have exclusive jurisdiction to hear the parties' disputes and award relief. This exception to the exclusive jurisdiction of the arbitrators is justified by the fact that, as a practical matter, arbitrators in some cases will not be able to issue effective interim measures of relief, for example, where the parties require relief before the tribunal is constituted. Parties to an arbitration agreement in need of immediate protection are free to seek interim relief either from the arbitral tribunal or from a competent court.

It is clear that, for an arbitral tribunal to consider and grant interim measures, it must have been empanelled. it must therefore be considered a practical reality that parties are not only at liberty but rather obliged to resort to the competent courts when seeking interim relief prior to the constitution of the arbitral tribunal. The allocation of jurisdiction between arbitral tribunals and the courts is not so clear once the arbitral tribunal is functioning. There are two diverging views on this allocation. One view presents the notion that a party seeking interim relief should first resort to the arbitral tribunal and only subsidiarily to a competent court. Courts may decline to grant an interim measure if the interim measure sought is currently the subject of arbitral proceedings and the court considers it more appropriate for the interim measure sought to be dealt with by the arbitral tribunal. The "court-subsidiarity model" may be found in the United Kingdom where section 44 (5) of *The Arbitration Act, 1996* which provides that court-ordered measures be limited to cases where the arbitral tribunal is not yet constituted and the measure requested is urgent (see *Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd, (1993) AC 334, at pp 367-368* and *Cetelem SA v. Roust Holdings Ltd [2005] EWCA Civ 618*).

When this approach is applied, courts can act only if or to the extent that the arbitral tribunal has no power or is unable for the time being to act effectively. Consequently, it is not appropriate for a court to grant interim measures which will pre-empt the decision which will ultimately be made by the arbitral tribunal. The court should not usurp the functions of the arbitrator. It is more appropriate for a court to grant interim measures when there are special reasons requiring the court to exercise its concurrent jurisdiction. Such special reasons include for example: (i) where the arbitral tribunal has not been appointed although the arbitral proceedings are deemed to have commenced when a request for a particular dispute to be referred to arbitration is received by the respondent; (ii) where an order is intended to bind a third party; or (iii) where the order is one which only a judge can make.

The other view is that once the panel of arbitrators has been seized of the dispute, applications for interim measures should normally be addressed to it. The prevailing opinion in the majority of national arbitration laws and arbitration rules, which is also reflected in section 6 (1) of *The Arbitration and Conciliation Act*, is to give full parallel jurisdiction to the courts to grant interim relief, even after the arbitral tribunal has been constituted and even if the latter acts effectively. If the parties have not provided otherwise, they are free to apply to a court or an arbitrator to request an interim measure. The affirmation of the concurrent jurisdiction between arbitral tribunals and the courts generally rests on the practicability arguments that: (i) Courts are oftentimes faster and more efficient when ordering interim measures; (ii) interim measures ordered by arbitral tribunals are generally not directly enforceable. Arbitral powers do not extend over third parties that may play a crucial role in the dispute, like banks or subcontractors; (iii) additional assistance of the courts is necessary. Lack of coercive powers will lead the parties to courts whenever the enforcement of interim order is needed, e.g., tribunals have no power to enforce freezing orders; and (iv) the free-choice model has the advantage that it leaves the assessment of where to apply to obtain the most efficient provisional remedy to the parties, thereby minimising grounds for dispute over the dispute resolution mechanism.

By virtue of the concurrent jurisdiction, a party may be tempted to file simultaneous applications for interim relief before both the arbitral tribunal and a court or, after having failed to obtain

interim relief from a court, a party may apply for the same relief from the arbitral tribunal in the hope of securing a more favourable ruling, or *vice versa*. With respect to interim measures, arbitral tribunals and courts are not bound by the doctrines of *lis pendens* and *res iudicata*. However, since judicial involvement in the field of interim measures is mandated by statute, and
5 given the fact that both jurisdictions are essentially similar, in order to avoid any potential conflict, there is a need to coordinate the powers and competences of courts and arbitral tribunals. In order to prevent conflicting decisions and promote adjudicative efficiency, arbitral tribunals and courts often decide that a party may not apply for interim relief before two instances at the same time and, once a court has dismissed a request for interim relief, a party
10 should not have a second chance to obtain the same interim relief from the arbitral tribunal, or *vice versa* before the courts, except where there has been a change in the circumstances.

The question whether or not the arbitral tribunal may reconsider a court's decision on interim measures and, as the case may be, reverse it, or whether or not there is an effect of estoppel from
15 seeking in the arbitration the same measures which it unsuccessfully sought to obtain in the courts, is not settled. Some arbitrators have been reported to have refused to entertain the new application for reasons of procedural economy and lack of sufficient protective interest of the petitioner. Others have argued that the jurisdiction of the courts does not deprive them of the possibility of ruling in the last resort since the decision of the arbitral tribunal, the body on which
20 the parties agreed for the settlement of the dispute and which has jurisdiction to rule on the merits of the dispute, should prevail (see Poudret, Besson, *Droit comparé de l'arbitrage international* (2002), at p 556 and *Da Cooper Lavalin Nv v. Ken-Ren Chemicals and Fertilisers Ltd (Liq)*, [1994] 2 All ER 465; *Coppée-Lavalin S.A./N.V. v. Ken-Ren Chemicals and Fertilizers Ltd.*, (1994) 170 N.R. 203). This latter view is supported by Article 23 (2) of the International
25 Chamber of Commerce (ICC) Rules which clearly shows that, in ICC arbitration, it is for the arbitrator to rule on interim measures. It provides that “the application of a party to a judicial authority for (interim or conservatory) measures...shall not...affect the relevant powers of the Arbitral Tribunal.”

30 For example, in *Amco Asia Corp. v. Republic of Indonesia*, ICSID Case No. ARB/81/1, award made on 20 Nov 1984, (extracts published in A. Yesilirmak, *Provisional Measures in*

International Commercial Arbitration (2005 ed) p. 107), the arbitral tribunal found itself not bound to follow the result on interim relief granted by national court. The tribunal observed that if a national judgment was binding upon the tribunal, such a procedure could be rendered meaningless. Similarly in *Blumenthal v. Merrill Lynch Pierce Fenner & Smith Inc*, 910 F 2d 5 1049 (2nd Circuit 1990), the US Court of Appeals recognized the power of the arbitral tribunal to re-evaluate the interim relief previously ordered by court.

Considering that the rationale of section 6 (1) of *The Arbitration and Conciliation Act* is to create a concurrent jurisdiction, not an overlapping one, a party should not be given a second chance to 10 obtain interim measures from the arbitral tribunal where: the party has already applied unsuccessfully for identical interim relief before a court; the application for interim relief before the arbitral tribunal was based upon the same facts and evidence as the one brought before the court; the arbitral tribunal would apply the same standards in deciding on the application for interim relief as had the court; and due process had been granted in the court proceedings. 15 Conversely, a party's prior application to a court should be no bar against the arbitral tribunal exercising its jurisdiction to order interim measures if: new facts have arisen since the decision of the court or new evidence has become available; and/or; the criteria for making the decision and the legal tests applied differ, even if the court had previously ruled on a similar or even identical application.

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In the instant case, the considerations upon which the Court dismissed the application for interim measures of protection sought by the respondent are not similar to the reasons or terms on basis of which the arbitrator granted the interim measures of protection. While the Court dismissed the application on ground that termination of the concession agreement on 16th October, 2017 25 implied the agreement could no longer be performed, and the arbitration had not commenced yet, the arbitrator granted it on consideration of the fact that the applicant had on 7th April, 2018 attempted to evict the respondent. While there had not yet been any attempt to evict the respondent, hence no eminent threat, at the time the Court considered the application, an attempt at eviction had been made, hence an eminent threat, at the time the arbitrator considered the 30 subsequent application, and a date for commencement of the arbitration had been fixed for three consecutive days starting 24th April, 2018. The Court though has not been furnished with a copy

of the ruling of the arbitrator in order to appreciate the reasons behind the decision of the arbitrator.

5 In light of the concurrent jurisdiction over matters of this nature, the Court therefore is not in position to determine, without speculating, that the facts placed before the Court and those before the arbitrator, and the considerations thereof in both fora were identical. Since from the scanty evidence available it already can be ascertained that new facts had arisen since the decision of the court and that new evidence had become available; and/or that the criteria for making the decision and the legal tests applied differed, the arbitrator cannot be faulted even if the court had
10 previously ruled on a similar or even identical application. In any event, the application based on this ground does not fit within any of the six instances in which the Court is empowered to intervene regarding interlocutory decisions during an ongoing arbitration.

iii. The objection regarding the procedure of appointment of the arbitrator.

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It is counsel for the applicant's contention that the appointment of the sole arbitrator was contrary to the law and that the arbitrator erroneously chose to commence the arbitration without the parties' affirmation of the appointment. Under the doctrine of *kompetenz-kompetenz*, the arbitral tribunal has the power to decide upon matters of its own jurisdiction (see *Golden Ocean Group Ltd v. Humpuss Intermoda Transportasi Tbk Ltd and another* [2013] 2 Lloyd's Rep 421, [2013] 2 All ER (Comm) 1025). Any jurisdictional arguments remain matters for the tribunal to
20 decide in accordance with the principle of *kompetenz-kompetenz*. Whereas a plea that the arbitral tribunal does not have jurisdiction should be raised not later than the submission of the statement of defence, and although a party is not precluded from raising such a plea because he or she has
25 appointed or participated in the appointment of an arbitrator (see section 16 (2) of *The Arbitration and Conciliation Act*), the principle of *kompetenz-kompetenz* provides that courts should as far as possible avoid anticipating a decision that the tribunal is empowered to make.

The determination of the question of the jurisdiction of a tribunal lies in its own domain, at least
30 in the first instance, by virtue of the principle of "*Kompetenz-Kompetenz*" (see also section 16 (1) of *The Arbitration and Conciliation Act*), According to that doctrine, an arbitral tribunal has

jurisdiction to consider and decide any disputes regarding its own jurisdiction, subject to, in certain circumstances, subsequent judicial review. This is one of the pillars of arbitration as it promotes party autonomy. Should the respondent maintain its objection in the proceedings, the tribunal will make its own jurisdictional determination. It is well established that tribunals may, and should rule on their jurisdiction *proprio motu*, even in the absence of a jurisdictional challenge. The corollary of this principle is that a tribunal is not bound by the parties' legal positions on jurisdiction. The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.

A challenge to jurisdiction that is not based upon any inherent lack of jurisdiction in the arbitrator but upon the process of appointment or the reference or submission itself, is capable of waiver. In the instant case lack of inherent jurisdiction by the arbitrator is not part of the applicant's argument; since he was appointed in terms of the agreement, but the argument is that the appointing authority did not have the power to appoint. Jurisdictional objections based on process rather than inherent jurisdiction are capable of waiver. Where the jurisdictional objection is capable of waiver by the affected party, the failure to raise it before the arbitrator himself, signifies consent to the arbitrator's jurisdiction. Section 16 (6) of *The Arbitration and Conciliation Act*), categorically limits judicial review of the arbitrators' decisions on jurisdiction, to thirty days after receiving notice of that ruling, for any party aggrieved by the ruling by the arbitral tribunal as a preliminary question that it has jurisdiction.

In the instant case, the appointment of the arbitrator was made on or about 22nd January, 2018. Counsel for the applicant appeared before the arbitrator soon thereafter and made representations on behalf of the applicant. The current application was filed on 17th April, 2018 sparked off, not by the alleged irregular appointment of the arbitrator, but by the arbitrator's restraining interim measure of protection order issued on 12th April, 2018. The decision to contest the procedure of appointment of the arbitrator is not only a glaring afterthought but also inordinately out of time. It cannot be raised now.

iv. Disagreement on the procedure guiding the arbitration.

Counsel for the applicant submitted further that the arbitrator never gave the parties an opportunity to agree on the procedure and without reaching an agreement on fees. In contractual arbitration, the arbitration agreement specifies the applicable law and procedural rules that will be applied during arbitration. In the instant case, Article IX of the concession agreement provides
5 as follows;

Any dispute, controversy or claim between the parties arising out of this agreement or the breach, termination or invalidity thereof, unless settled amicably under the preceding paragraph within sixty (60) days after receipt by one party of the other
10 party's request for such amicable settlement, shall be referred by either party to arbitration before a single arbitrator in accordance with the Laws of the Republic of Uganda then obtaining. The arbitral Tribunal shall have no authority to award punitive damages. Any arbitration award rendered as a result of such arbitration as the final adjudication of any such controversy, claim or dispute shall bind the parties.

The parties chose the law applicable to be that obtaining in Uganda. Under the relevant law, parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings. In the event that parties are not agreed on the procedure to be followed in the
15 conduct of proceedings, the arbitral tribunal is free to conduct the proceedings in a manner which it considers appropriate (see section 19 (2) of the Act). In the instant case, attached as annexure "B" to the affidavit in reply, is a ruling of the arbitrator "on adjournment application" dated 6th
20 July, 2018. At page 7 thereof, it is indicated that on 12th March, 2018 the arbitrator determined that "the rules of the arbitration were those of the CADER Arbitration Rules and the CADER Evidence Rules." The Court has not been furnished with the record of proceedings of that date
25 and therefore is not in position to determine how that decision was arrived at.

Suffice it to mention at this stage that an arbitrator is not precluded from being procedurally guided by the fundamental principles underlying *The Civil Procedure Act*, *The Civil Procedure Rules* or *The Evidence Act*, but is not bound, as would a Civil Court, by the requirement of
30 observing the provisions of that legislation with all its rigour. The bottom line is that whatever rules of procedure are adopted, the parties should be treated with equality and each party given a full opportunity to present its case. The duty of the arbitrator is to ensure that a party is given a reasonable opportunity to prepare and present his or her case. The arbitrator has no duty of

ensuring that a party takes the best advantage of the opportunity to which he is entitled. In any event, the application based on this ground does not fit within any of the six instances in which the Court is empowered to intervene regarding interlocutory decisions during an ongoing arbitration. It is a ground that can only be raised for setting aside an award within the meaning of section 34 (2) (a) (iii) and (vii) of The Arbitration and Conciliation Act. It has been prematurely raised and cannot be decided at this stage.

v. Delayed conclusion of the arbitration.

Nearly five years to the day after its commencement on or about 22nd January, 2018, the arbitration is yet to be concluded since arbitral proceedings are terminated by the final arbitral award or by an order of the arbitral tribunal (see section 32 (1) of *The Arbitration and Conciliation Act*). Arbitration proceedings to be effective, just and fair, must be concluded expeditiously. An arbitrator must use reasonable dispatch in conducting the proceedings and making an award. Section 31 (1) of the Act requires arbitrators to make their award in writing within two months after entering on the reference, or such other period of time they may have by writing signed by them (see Form III found in the 2nd schedule of the Act), enlarged for making the award. In case the award is not made within two months or within the extended period as the case may be, on the application of either party or of its own motion, the arbitral tribunal may terminate the arbitral proceedings where there has been an unconscionable delay (see section 32 (3) of the Act).

The last effective hearing was on 6th July, 2018 or thereabout. An award which is passed after a period of nearly five years from the date of last effective hearing, without satisfactory explanation for the delay, is perilously close to being contrary to justice and, depending on the explanation for the delay, would probably defeat justice. It defeats the very purpose and the fundamental basis for alternative dispute redress. Delay which is patently bad and unexplained, constitutes undue delay and therefore is unjust. However, the question whether the delay in the pronouncement of an award after final arguments have concluded vitiates the award will depend on the facts and circumstances of each case. While inordinate delay in publishing an award could amount to a serious irregularity, without more, it was not enough to lead to the award being set aside (see *Hong Huat Development Co (Pte) Ltd v. Hiap Hong & Co Pte Ltd [2000] 1 SLR (R)*

510 at [57]; *Coal & Oil Co LLC v GHCL Ltd* [2015] SGHC 65 at [65] and *B.V. Scheepswerf Damen Gorinchem v. The Marine Institute* [2015] EWHC 1810 (Comm). The more probable effect where there has been a lengthy delay is that the Court will subject an award to greater scrutiny when deciding whether there has been a failure to deal with all of the issues. Otherwise,
5 a party complaining must show that the delay has caused or will cause substantial injustice to it.

In the instant case, the delay has been explained by the fact that instead of presenting his defence and final submissions as directed by the arbitrator on 25th April, 2018 and 25th June, 2018 respectively, counsel for the applicant opted to file an application before CADER on 4th July,
10 2018 seeking termination of the mandate of the arbitrator on account of an apprehension of lack of independence and impartiality. It is trite that if the challenge is rejected the arbitrator remains *in situ* and the arbitration resumes. If the challenge is accepted, the arbitrator is removed and another appointed in his or her place.

15 While a challenge may be introduced at any stage of the arbitration, it has to be made within fifteen days after the party raising it becoming aware of the composition of the appointing authority or after becoming aware of any of the specified grounds for challenge (see section 13 (2) of the Act). In the challenge presented to CADER, the applicant did not disclose the date when he became aware of the arbitrator's lack of independence and her partiality, but pleaded a
20 series of events that justified his apprehension, thereby giving the impression of an accumulation of circumstances which, together, give rise to the challenge. Consequently, the date on which the applicant became aware of a sufficient number of circumstances to form the basis of a challenge. is undisclosed. the triggering event though seems to have been the arbitrator's failure to provide the applicant's freshly instructed counsel with a record of proceedings, rejection of a witness
25 statement on 17th June, 2018 and rejecting the prayer for adjournment on 25th June, 2018. That seems to be the proverbial final straw that broke the camel's back. A challenge filed on 4th July, 2018 would thus be timely.

Whereas *The Arbitration and Conciliation Act* does not provide for the suspension of arbitral
30 proceedings while an arbitrator is being challenged, in the instant case once the challenge was made, the arbitration proceedings were suspended pending the decision on the challenge. To-date

CADER has never taken a decision on that challenge, yet section 12 (2) of *The Arbitration and Conciliation Act* requires it to do so within a period of thirty days from receipt of a written statement, unless the arbitrator who is being challenged withdraws from his or her office.

5 The fact that section 31 (1) of the Act authorises an arbitrator to extend time is an indication that the time limit is not an immutable rule as to when an award must be published. The act has no provision for the suspension of arbitral proceedings while an arbitrator is being challenged. Whereas the reasons for continuation are balanced with, and arguably outweighed by, the reasons for suspension of the arbitration during a challenge, on the facts of this case I am
10 inclined to hold that the arbitration should continue to its logical conclusion, despite the arbitrator being challenged, when the thirty days' stipulated period elapses without a decision being made on the challenge. The main reasons for continuing with the arbitration notwithstanding the challenge are expediency and efficiency, as this case has demonstrated, and particularly to reduce the risk and effect of any dilatory tactic. It is noteworthy that there equally
15 is no provision in the Act automatically suspending or extending the time limit for making awards, by reason of the thirty days' duration for determination of challenges to arbitrators.

Furthermore, it hardly needs to be stated that delay *per se* is not identified as one of the grounds under Section 34 (2) of *The Arbitration and Conciliation Act*. To constitute a ground for setting
20 aside an award, it would have to be shown that the award suffered from patent illegality on account of such delay. In any event an arbitrator facing a section 13 (2) challenge can issue an award if he so wishes (see *Mitsui Engineering and Shipbuilding Co Ltd v. Easton Graham Rush [2004] 2 SLR (R) 14*). Another factor that requires to be accounted for is that the dispute between the parties has been pending since October, 2017. It would not be in the interest of
25 justice to stay the impugned proceedings only on the ground of delay and remit it for a fresh determination before another arbitrator. There is no evidence to show that the learned arbitrator appointed to decide the dispute is no longer available to conclude the process. A fresh arbitration before another arbitrator would not be justified considering the time and money already spent in the arbitral proceedings this far. Therefore, it is not considered expedient to simply stay the
30 proceedings on the sole ground of delay in the pronouncement of the award.

Consequently, if within thirty days from the date of being served by either party with a copy of this ruling the arbitrator shall not have concluded the arbitration proceedings and published her award, the arbitration agreement shall be deemed to have become inoperative or incapable of being performed and hence the proceedings will abate. Otherwise in view of my findings that the
5 objections raised by the applicant are not within the scope of the six instances prescribed by *The Arbitration and Conciliation Act* where the court may intervene in a matter that is the subject of an arbitration agreement, after commencement and during the subsistence of the arbitration, the application is misconceived and is hereby dismissed with costs to the respondent.

10 Delivered electronically this 19th day of January, 2023
Mubiru.....

.....**Stephen**

Stephen Mubiru
Judge,
19th January, 2023.