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**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)**

**MISCELLANEOUS APPLICATION No. 370 OF 2019
(ARISING FROM COMPANY CAUSE No. 10 OF 2019)**

10 **ROKO CONSTRUCTION LTD..... APPLICANT**

VERSUS

1. FINASI/ROKO CONSTRUCTION SPV LTD.

2. FINASI INTERNATIONAL FZC RESPONDENTS

BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW

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RULING:

Roko Construction Ltd (*hereinafter referred to as the "Applicant"*) brought this application under the relevant enabling provisions of the law against Finasi/Roko Construction SPV Ltd and Finasi International FZC (*hereinafter referred to as the "1st" and "2nd" Respondent respectively*) seeking orders that;

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- 1. A temporary injunction doth issue to restrain the 1st and 2nd Respondents, their officials, agents, or anyone acting under their authority, orders or instructions from evicting the Applicant from the site for the International Specialized Hospital in Uganda (ISHU) at Lubowa, Wakiso District, until**

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the petition filed by the Applicant against the 1st and 2nd Respondents is heard and disposed of.

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2. A temporary injunction doth issue to restrain the 1s and 2nd Respondents, their officials, agents, or anyone acting under their orders, directions or control from interfering with the Applicant's execution of the contract works and possession of the site for the International Specialized Hospital in Uganda at Lubowa, Wakiso District until the petition filed by the Applicant against the 1st and 2nd Respondents is heard and disposed of.

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3. A temporary injunction doth issue to restrain the 1st and 2nd Respondents, their agents, officials or anyone acting under their authority or control or orders or directions from entering into a contract with anyone or from engaging any contractor other than the Applicant to build the International Specialized Hospital in Uganda at Lubowa until the petition is heard and disposed of.

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4. The costs of this Application be provided for.

The grounds of the application are briefly that;



5 (a) *The Applicant and the 2nd Respondent incorporated a joint venture company, the 1st Respondent, solely to finance, design, build and equip the International Specialized Hospital in Uganda at Lubowa, Wakiso District.*

10 (b) *It was agreed by the Applicant, the 1st and 2nd Respondents that the Applicant would execute the construction of the International Specialized Hospital and the Applicant took possession of the site, graded, hoarded, drained and secured it and provided water and electricity services thereon.*

15 (c) *The 1st Respondent entered into a Project Works Investment Agreement (PWIA) with the Government of Uganda to design, finance, build and equip the International Specialized Hospital and that the Applicant would carry out the construction works.*

20 (d) *After the 1st Respondent with the aid of the Applicant had raised the financing for the project and obtained a Performance Security from the Applicant and a Letter of Comfort, the 2nd Respondent is threatening to alienate and stop the Applicant from carrying out the construction works*



and to remove the Applicant from the site which will unfairly prejudice the Applicant.

10 (e) Unless a temporary injunction issues as prayed, the Applicant will be severely prejudiced and will be alienated from the PWIA, and the construction contract works and the Applicant will suffer irreparable financial losses to the financial institutions will also suffer heavy default damages to the Government of Uganda.

15 (f) The Applicant has filed a petition in this court seeking Permanent Injunctions to restrain the 1st and 2nd Respondents from alienating it from the contract works, from being evicted from the contract site, for declaratory orders to cause the 1st and 2nd Respondents comply with the Memorandum and Articles of Association of the 1st Respondent, damages and costs of the petition and the said
20 petition has very high chances of success.

(g) The balance of convenience is in favour of the Applicant as the Applicant will suffer irreparable loss and the Respondent will not lose anything if the temporary injunctions are not granted.



5 ***(h)It is fair and just to all parties that the prayers for temporary injunction issue as prayed.***

The grounds of the application are amplified in the supporting affidavit of Mr. Mark Koehler the Managing Director (MD) of the Applicant. He swears that the Applicant was incorporated in 10 Uganda on 25th July 1969 and has since then constructed and reconstructed high profile buildings that grace the Kampala skyline. These include the Uganda Catholic Martyrs Shrine, Namugongo, Bank of Uganda Headquarters, Mapeera House (Centenary Bank), Communications House, Workers' House, Crested Towers, Lotis 15 Towers, to mention but a few.

That on 26th May 2015, the Applicant and the 2nd Respondent incorporated Finasi/Roko Construction SPV Ltd, the 1st Respondent herein, for the sole purpose to design, finance, construct and equip the International Specialized Hospital in Uganda (ISHU) at Lubowa 20 in the Wakiso District. A copy of the Memorandum and Articles of Association (M&AoA) is attached as *Annexure "A"*. That it was agreed between the Applicant and 2nd Respondent that the Applicant shall be the sole contractor for the construction works of the ISHU project. That on 25th May 2015, after the Solicitor General



5 cleared the Agreement, in letter *Annexure "B"* to his affidavit, the
GoU and the 1st Respondent as the Promoter/Sponsor entered into
a Project Works Investment Agreement (PWIA) (*Annexure "C"*) to
finance, design, build and equip the ISHU. Under the PWIA, the 1st
Respondent undertook to arrange the financing of the ISHU project
10 and the Applicant's MD, on behalf of the 1st Respondent,
approached and brought on board financial institutions which
include African Export – Import Bank (AFRIEXIM Bank), Eastern
and Southern African Trade and Development Bank, (TDB),
Barclays Bank of Uganda (BBUL) and Amalgamated Banks of
15 South Africa (ABSA Bank) who agreed to finance the ISHU project
and contributed US\$250,000,000 (United States Dollars Two
Hundred and Fifty Million only). That on 22nd October 2018, the 1st
Respondent made and filed a resolution (*Annexure "D"*) to secure
the said funding.

20 That on 4th December 2018, GoU and the 1st Respondent amended
the PWIA by signing a Direct Agreement (*Annexure "E"*) with
AFRIEXIM Bank, TDB Bank and BBUL under which GoU would
issue Promissory Notes to AFRIEXIM Bank who would act as a
Purchaser, Administrative Agent and Security Agent and the 1st



5 Respondent would act as a Seller who in turn would sell and endorse the Promissory Notes at a discount to the Purchaser for a Total Face Value not exceeding US\$379,683,117 (United States Dollars Three Hundred Seventy Nine Million, Six Hundred Eighty Three, One Hundred and Seventeen only). That on 4th December 10 2018, GoU as the Issuer of the Promissory Notes entered into a Fixed Rate Advisory Mandate Agreement (*Annexure "F"*) with ABSA Bank (as a Fixed Rate Advisor) and the 1st Respondent, AFRIEXIM Bank, TDB Bank, BBUL would act as Arrangers. AFRIEXIM Bank would also act as Administrative Agent. Further, that in March 15 2019 the Attorney General of Uganda gave a legal opinion (*Annexure "K"*) in support of the financing and the Parliament of Uganda passed a resolution (*Annexure "L"*) to borrow money by issuing Promissory Notes for US\$379.6 Million (United States Dollars Three Hundred and Seventy Nine Million, Six Hundred 20 Thousand) to the 1st Respondent. That GoU further contracted a British consultant firm, M/s. Turner & Townsend, which carried out a due diligence on the 1st Respondent and on 9th July 2018 submitted a report (*Annexure "G"*) that the Applicant had the necessary competence and capability to deliver the ISHU project.



5 The Applicant avers that at all material times it was agreed between
the Applicant, the 1st and 2nd Respondents that the Applicant would
be the sole contractor to build ISHU because under Clause 12.1.10
of the PWIA, the 1st Respondent, *"is a special purpose company set
up solely for the purpose of implementing the project in accordance
10 with the terms of the PWIA."* That it was also agreed, under Clause
12.1.5 of the PWIA that while executing, delivering and performing
the PWIA, the 1st Respondent should not do anything to breach the
1st Respondent's M&AoA or any agreement or understanding to
which the 1st Respondent is a party.

15 That soon after signing the PWIA, GoU handed over the site to the
1st Respondent which also immediately handed it over to the
Applicant in May 2015 as the contractor and the Applicant, at its
own cost, hoarded off the entire perimeter of the project site, graded
the areas, connected utility services and has since paid for water,
20 electricity and telephones, services, carried out drainage works, did
soil tests, set up containers for offices and storage, put up toilets
and provided security up to now.

That in November 2017, the 1st Respondent asked the Applicant to
provide a Performance Security for the construction works of the



5 ISHU project, which the Applicant duly complied with and provided
a Performance Security (*Annexure "H"*) worth US\$7,908,515.60
(United States Dollars Seven Million Nine Hundred Eight Thousand,
Five Hundred Fifteen and sixty cents) to the 1st Respondent. That
further in May 2019, the 1st Respondent required the Applicant to
10 provide a Letter of Comfort to the 1st Respondent from the
Applicant's bankers. That the Applicant complied and duly
submitted to the 1st Respondent a Letter of Comfort (*Annexure "I"*)
issued by TDB.

That in November 2018, the 1st Respondent handed over to the
15 Applicant a draft construction contract (*Annexure "J"*) for the ISHU
project which was reviewed by both the Applicant and the 1st
Respondent and agreed upon with minor amendments but that the
1st Respondent has not signed the contract up to now.

That to the Applicant's shock and surprise, the Applicant's MD was
20 informed by Mr. Willie Swanepoel and Mr. Ashaba Ainea, the
Applicant's Operations Director and Manager respectively, who were
at the project site at the material time preparing to commence
construction works on Monday 10th June 2019, that Enrica Pinetti,
the Chairperson of the 2nd Respondent accompanied by people in



5 military attire, police officers and several Chinese people came to
the project site and told the Applicant's staff to hand-over the site to
the Chinese persons and vacate the site. That when the Applicant's
MD was so informed, he instructed their Operations Director not to
hand-over or move from the site and all the Applicant's staff and
10 security stayed put on the site and never handed it over to the
Chinese.

The Applicant avers that the 1st Respondent did not hold a general
or extra ordinary meeting or any meeting at all, to decide to remove
the Applicant from the site or to handover the site to another
15 contractor. Further, that the 1st Respondent has not been dissolved
and remains the party that contracted under the PWIA with GoU to
design, finance, build and equip the ISHU and that the Applicant is
the sole contactor to build the said hospital.

The Applicant maintains that the threatened actions of the 2nd
20 Respondent will cause calamitous repercussions to the entire ISHU
project and upon the Applicant who has over the last four years
spent colossal sums of money and man hours to design, plan for
construction slated to start on 10th June 2019, mobilized financial
resources, plant, machinery tools, materials, hired senior



5 specialized construction managers and supervisors from abroad,
secured the construction site by hoarding and providing security
staff to guard the site, brought water and electricity to the site,
among other activities, and that this will cause irreparable financial
loss and damage to the Applicant and will unfairly prejudice the
10 Applicant.

Further, that under Clause 21.1.2 and 24.2 of the PWIA, the
threatened actions of 2nd Respondent will constitute default events
on the part of Finasi/Roko Construction SPV Ltd and Roko
Construction Ltd as both are members of Finasi/Roko Construction
15 SPV Ltd and the contractor Roko Construction Ltd will suffer heavy
financial losses in damages for default to the GoU. Furthermore,
that the Applicant and Finasi/Roko Construction SPV Ltd have
concluded financial contracts with several financial institutions and
if the threatened actions of the 2nd Respondent are not stopped, the
20 Applicant and Finasi/Roko Construction SPV Ltd will be in breach
and will be liable to the said Financial Institutions in damages of
millions of United States Dollars which will cause irreparable
financial losses to the Applicant and severely prejudice the
Applicant. That unless the 2nd Respondent is restrained from



5 evicting the Applicant from the project site or handing over the site to another contractor, the Applicant will suffer heavy financial loss from the lost profits which will unfairly prejudice the Applicant's financial interests.

10 In addition, that the 2nd Respondent's actions are illegal and in breach of the terms of the M&AoA of the 1st Respondent, the terms of the PWIA and Financing Agreements and that unless restrained, the 2nd Respondent will perpetuate the said illegal actions. That the 1st and 2nd Respondents will not lose anything if the orders of temporary injunction are granted, but that the Applicant stands to 15 lose everything if the orders sought are not granted. That the balance of convenience lies in favour of the Applicant. The Applicant prayed that on this account the application be allowed.

The 1st and 2nd Respondents opposed the application and filed affidavits in reply sworn by Mr. Matovu Moses, the Company 20 Secretary and Head of Legal of the 1st Respondent and Mr. Charles Byaruhanga, the Technical Advisor Ministry of Finance, Planning & Economic Development on behalf of the 1st and 2nd Respondents. Even though he attached the authority letter, he did not disclose in which capacity he could swear affidavits on behalf of private



5 companies where he is neither a member nor employee. His locus in this matter is very unclear.

For his part Mr. Matovu also restates the fact that the 1st Respondent is a project company contracted to undertake the design, finance, construction and equipment of the ISHU. That he has studied documents filed by the Applicant in this application and based upon his consultation and advice from the Respondents' lawyers and his own training and experience as a lawyer he believes that the temporary injunction should not be granted. Mr. Matovu avers that the Applicant was not in possession of the ISHU project site at the time of filing this application and even to date and that it is the 1st Respondent who has been and is still in possession thereof. Further, that the 1st Respondent has commenced execution of works under the PWIA between GoU and the 1st Respondent and that there is no contract or undertaking granting the Applicant mandate to carry out construction works of ISHU project.

Mr. Matovu further stated that the Applicant does not have an arguable of *prima facie* case that merits consideration by this court. That in his assessment of the facts the Applicant does not present an arguable or *prima facie* case that merits consideration by this



5 court. That the Applicant's main petition in Company Cause No. 10
of 2019 relates to allegations of how the 1st Respondent's affairs are
run and that these should not stop the project from continuing. He
denied that the affairs of the 1st Respondent are being or have been
conducted to the exclusion of and to the detriment and prejudice of
10 the Applicant. That the 1st Respondent's Chairperson together with
the Applicant's MD have met frequently in the past to discuss
matters relating to the company business in which they are
shareholders until the Applicant stopped responding to requests to
attend the meetings. That the Respondents have endeavored to
15 involve the Applicant in the affairs and conduct of the business of
the 1st Respondent but that the Applicant through its MD Mr. Mark
Koehler has been uncooperative and frustrated all the Respondents'
endeavors. That the Applicant has not demonstrated any conduct
that is unfairly prejudicial as to warrant court's intervention and
20 that the petition has no merit with any likelihood of success.
That the Applicant is not a party to any of the project contracts
including PWIA, the Direct Agreement between GoU and the 1st
Respondent, the Financiers and the Note Purchase Agreement
between the 1st Respondent and the Financiers. That there is also



5 no contract where the Applicant has been contracted to undertake construction works in relation to the ISHU project; which obligation lies with the 1st Respondent. That it is strange that the Applicant would claim to be a sole contractor for a project of this magnitude without any contractual undertaking.

10 That around 2014, Mrs. Enrica Penetti, the chairperson of the 1st Respondent, agreed with GoU to invest in the design, construction finance and operation of a modern state-of-the-art hospital facilities to be owned by the GoU. That subsequent to the understanding in 2015, the 1st Respondent was incorporated and established and
15 allocated a nominal shareholding of five percent (5%) shares to the Applicant, which to date the Applicant has neither paid for nor has the Applicant invested in the 1st Respondent. A copy of the M&AoA of the 1st Respondent is *Annex R under Tab R*. That as indicated in Clause 3 thereof, the 1st Respondent was incorporated for the sole
20 purpose of designing, financing, constructing and equipping the ISHU. That upon incorporation the 1st Respondent signed the PWIA with GoU to finance, design, build and equip ISHU with high specialization in cancer treatment, heart diseases, brain and neurosurgery, kidney transplant, liver diseases, fertility medical



5 services, epilepsy and orthopedic surgery among others. That it was further agreed between the 1st Respondent and GoU that the design, construction and financing of the specialized hospital will be performed or procured by the 1st Respondent. That contrary to what the Applicant's claims, under the PWIA clauses 2.1.1, 3.4.1,
10 10.1.10 and 10.2, the construction works from a critical component of the 1st Respondent's obligation with the GoU and that the 1st Respondent has not assigned or undertaken to subcontract the construction works to the Applicant.

That following the execution of the PWIA in May 2015, the 1st
15 Respondent embarked on the process of arranging financing for the project. That further contrary to the Applicant's averments, the financing was arranged by the 1st Respondent under the leadership of its Chairperson and not the Applicant or its MD Mr. Koehler. That this resulted in the Direct Agreement between 1st Respondent,
20 the GoU and the financiers as indicated in *Tab E* of the affidavit in support. Mr. Matovu denied that the Applicant and its MD ever played any role in securing financing. He further denied that Parliament has ever passed a resolution to borrow in relation to this



5 project, but rather it only passed a resolution authorizing the issuance of the Promissory Notes to the 1st Respondent.

Further, that the Applicant will not suffer any injury that is irreparable or which cannot be atoned for by an award of damages.

10 Further, that the Applicant would not suffer any injury which is neither quantifiable nor capable of being atoned for in damages.

That the nature of the injunction requested is not necessary to compensate the Applicant who has requested for reliefs in the main

suit that can be compensated. That the project has already suffered delays of over six months with grave financial and other

15 ramifications. That the 1st Respondent is under the obligation to deliver the finished hospital to GoU within twenty-two months from

the commencement date of 16th May 2019, and the 1st Respondent complied with all the conditions precedent under PWIA as a result

of which the Owner's Engineer declared 10th June 2019 as the
20 Construction Effective Date.

Regarding the status quo to be preserved, Mr. Matovu denied that the 1st Respondent has never handed over the project site to the Applicant. That whilst the 1st Respondent has been in possession of the site as a matter of fact, the formalities of the handing over of the



5 site by GoU were completed on 10th June 2019. Copy of the handover certificate signed by the Permanent Secretary MoH handing over the site to the 1st Respondent is marked as "S" under Tab S and photographs from the project site said to be from 8th – 20th June 2019 are collectively marked as "WX" under Tab WX.

10 Mr. Matovu further denied that the project site has any water, electricity or telephone services connected by the Applicant. That the process of procuring such utilities is being handled by the 1st Respondent. As proof he attached the 1st Respondent's letter to the Branch Manager of National Water and Sewerage Corporation, 15 Najjanankumbi, dated 4th April 2019 requesting for the supply of water marked "T" under Tab T and the quotation for electricity services from KAKA-Build Services Ltd as well as e-mail correspondences with the Owner's Engineer, collectively marked as "UV" under Tab UV.

20 Mr. Matovu further denied that the Applicant has in any way participated in the design of the hospital or any of the ancillary facilities. That the 1st Respondent's Board of Directors has not asked or authorized the Applicant to incur any expenses on the company's behalf, or at all. That until 10 June 2019 when the 1st



5 Respondent started to prepare the project site for commencement of works, the site has been nothing but a bush. Further, that Mr. Koehler is aware that the Owner's Engineer set 10th June, 2019 as the Construction Effective Date and ordered the 1st Respondent to commence works. Copy of the Commencement Order from the
10 Owner's Engineer, Ministry of Health dated 16th May, 2019 is "YZ" under Tab YZ. That as such the Applicant does not disclose a *prima facie* case with a likelihood of success in the main cause. That a temporary injunction would have no beneficial consequences for the Applicant but would have extremely severe consequences for the
15 Respondents altering the status quo rather than maintain it. That it is the 1st Respondent which has powers to subcontract under the PWIA and that having commenced works in accordance with the agreements entered into with the GoU and Financiers, it is now too late for an injunction to efficiently preserve the alleged rights of the
20 Applicant on the project site handed over to the 1st Respondent by the GoU through the PS Ministry of Health.

Further, that the balance of convenience lies in favour of refusing the application and that the Applicant does not come to the court with clean hands. That if it was ordered that the work be stopped,



5 the 1st Respondent will suffer much more in its business particularly with lenders', supplier's and employee's obligations. That the 1st Respondent who is in possession has already signed lending agreements that are already operational. That granting an injunction would be an event of default under the Direct Agreement.

10 That this project represents a significant foreign direct investment of over USD 249 million and will provide sustainable and specialized health care to many Ugandans. That ordering an injunction at this stage will jeopardize the progress. He prayed that the application be dismissed with costs.

15 The Applicant filed an affidavit in rejoinder essentially restating facts in the main affidavit in support clarifying on the new facts raised by the 1st and 2nd Respondents' respective affidavits in reply. In particular, the Applicant re-emphasized that it is the sole contractor and has done preliminary preparations for construction, done soil testing, provided Implementation Works Schedule as

20 required by GoU through MoH, mobilized man and equipment on the project site. The Applicant attached copies of documents *Annexure A and B* to support these averments and reiterated its earlier prayers.



5 The Applicant was represented by Mr. Enos Tumusiime while the Respondents were jointly represented by Mr. Patson Arinaitwe and Mr. Batanda. Counsel made oral submissions and supplied authorities to court which are on court record for which this court is thankful them. The submissions will not be reproduced in detail
10 in this ruling but will be referred to when occasion calls for it.

Opinion:

The law and principles governing temporary injunctions are well settled. See: **American Cynamid vs. Ethcon Ltd [1975] AC396;**
Kiyimba Kaggwa vs. Hajji A Nasser Katende [1985] HCB43.

15 From these authorities and others pertaining to the principles, the main purpose of a temporary injunction is to maintain the *status quo* of the subject matter of the litigation pending the determination of the substantive rights of the parties in the head suit. "Status quo" means simply the "existing state of things" or "existing
20 condition" existing before a particular point of time. See: **PK Sengendo vs. James Ndawula Lumaama & 3 O'rs HCCS No.243 of 203.** "When" and /or "before what time" will normally depend on facts of each case. In all circumstances, however, the existing state



5 of things must be as at the date when the defendant did the acts, or the first act which is alleged to have been wrongful; or the date when the plaintiff learned of the act; or the date when he/she issued summons.

10 In determining whether or not to maintain the *status quo*, all relevant circumstances surrounding the case have to be taken into consideration. See: ***Erisa Rainbow Musoke vs. Ahamada Kezaala [1987] HCB 81***. Where the *status quo* has substantially changed, then it is doubtful if an order of injunction will serve any purpose as it could mean preserving the illegality or the breach or
15 the wrongful act. See: ***Gapco vs. Muwanga T/a Musa & Moses Services H.C.C.S No. 84 of 1998***.

What constitutes the *status quo* in the instant case is purely a question of fact. The PWIA was executed in May 2015 between GoU and the 1st Respondent for the sole purpose of the construction of
20 the international specialized Hospital of Uganda (ISHU) at Lubowa. Copy of the PWIA, Annexure "C", to the affidavit in support of Mr. Koehler and the affidavits in reply of Mr. Matovu and Mr. Byaruhanga are proof of that fact. The PWIA spells out the 1st



5 Respondent's obligation as being to finance, design, build and equip
the ISHU with high specialization in cancer treatment, heart
diseases, brain neurosurgery, kidney transplant, liver diseases,
fertility, among others. The design, construction and financing of
10 the ISHU project would be performed or procured by the 1st
Respondent. This is buttressed in paragraph 10 of Mr. Matovu's
affidavit in reply and in paragraph 3, 5 and 6 of Mr. Koehler's
affidavit in support.

Evidence further confirms that the 1st Respondent was formed and
incorporated as a Special Purpose Vehicle joint venture between
15 Roko and Finasi, herein the Applicant and 2nd Respondent
respectively, for the sole purpose of financing, designing, building
and equipping the ISHU at Lubowa. This fact features so
prominently in the objectives of the 1st Respondent under Clause 3
of its M& AoA. A careful reading and proper interpretation of the
20 documents attached to the affidavits in support and reply,
particularly the e-mails, Letter of Comfort, Project Performance
Security, Promissory Note Purchase Agreement, Finance
Agreements, among others, also convey the idea and meaning that



5 for a long time now, there has essentially been a series of
interactions between the Applicant on the one hand and the 1st and
2nd Respondents on the other, demonstrating their clear intention
that the Applicant shall execute the construction works for the
ISHU project in accordance with the terms of the PWIA entered into
10 between the 1st Respondent and GoU. Several instances
demonstrate this inference. Under Clause 12.1,10 of the PWIA, the
1st Respondent undertook that;

15 ***“the execution, delivery, and performance of this PWIA
will not conflict with, result in the breach of, constitute a
default under, or accelerate performance required by any
of the terms of its Memorandum and Articles of
Association or any Applicable Laws or any covenant,
contract, agreement, arrangement, understanding, decree
or order to which it is party or by which it or any of its
20 properties or assets is bound or affected.”***

Under the Clause 3 of the M& AoA of the 1st Respondent it is also
stipulated that;

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“The Company is incorporated as a joint venture between FINASI International FZC and Roko Construction Limited with the object of undertaking the design, finance, construction and equipment of an international specialized hospital at Lubowa, in the District of Wakiso in Uganda, in accordance with a Project Works Investment Agreement”

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Thus under the PWIA, the responsibility to design, finance, construct and equip the ISHU would be undertaken by the 1st Respondent incorporated for that special purpose jointly between 2nd Respondent and the Applicant. Clearly, the Applicant being part of the SPV was from its inception an integral party in the contract for the construction of the ISHU project.

20

In addition, under the Promissory Note Purchase Agreement between the 1st Respondent and the various financiers of the project, the Applicant is variously recognized as the contractor for the works of the ISHU project. At page 10 thereof, “Major Project Contract” is defined to mean, inter alia,



5 ***“the construction contract between the Seller and Roko entered into in relation to the Project.”***

The Seller is the 1st Respondent and Roko referred to is the Applicant. This was therefore no mistake. It must be recalled that it was under the Promissory Note Purchase Agreement that funding
10 was mobilized for the ISHU project from the various financiers who duly recognized that within the SPV joint venture, Roko Construction Company Ltd would execute contract for the project construction works. This inference is made more poignant by the Performance Security, *Annexure H* to the affidavit in support, dated
15 07/12/2018, which the 1st Respondent required the Applicant to furnish it with worth US\$7,908,515.60 (United States Dollars Seven Million Nine Hundred Eight Thousand, Five Hundred Fifteen and sixty cents). This was in lieu of Applicant’s performance of the
20 contract for the construction of the ISHU. *Annexure “H”* (supra) is addressed to the 1st Respondent and states, in the relevant part, as follows;

“WHEREAS *Roko Construction Limited* (hereinafter called *“the Contractor”*) has undertaken, pursuant to the



5 Contract referenced above, dated 25th May 2005 to
execute a Project Construction of the International
Specialized Hospital of Uganda, which services shall be
carried out in accordance with the design requirements
set out in the PWIA and subject to the terms and
10 conditions therein (hereinafter called the Contract”);

AND WHEREAS it has been stipulated by you in the said
contract that the Contractor shall furnish you with a
security issued by a reputable guarantor for the sum
specified therein as security for compliance with the
15 Contractor’s obligation in accordance with the Contract;

.... THEREFORE WE hereby affirm that we are Guarantors
and responsible for you, on behalf of the Contractor up to
a total of USD 7,908,515.60...” [Underlined for emphasis].

From the above extract, three important aspects emerge. The first is
20 that the 1st Respondent recognizes the Applicant as the contractor
who is supposed to execute a project construction works of the
ISHU and even stipulated that much in contract dated 25th May
2005 the referenced the Performance Security. The second is that



5 the project financiers also recognize the fact that the Applicant is
the contractor to perform the hospital project works. The third is
that the financiers were willing to guarantee the execution of the
project works on account that the works are being undertaken by
the Applicant as contractor. Most importantly, the Applicant
10 complied and furnished the requisite Performance Guarantee to the
1st Respondent, which was in recognition of an undertaking with
the 1st Respondent, pursuant to the contract referred to dated 25th
May 2005, for the Applicant to execute the project construction
works.

15 In another instance, the 1st Respondent in May, 17th 2019 required
a Letter of Comfort from the Applicant's bankers in lieu of the
Applicant's performance of the project works. Again *Annexure "I"*
(supra) shows that the Applicant complied and duly furnished to
the 1st Respondent with a Letter of Comfort issued by TDB Bank.

20 That was in addition to a series of correspondences between the
officers of the 1st Respondent and the Applicant (*Annexure "E"* to
affidavit in rejoinder of the Applicant. All this manifest a consistent
pattern demonstrating that while a construction contract was yet to



5 be formalized between the Applicant and 1st Respondent, a strong
and clear intention and understanding already existed between
both parties to ultimately enter into binding contract for the
Applicant to execute the construction works of the project within
the overall context of the PWIA. The existence of a draft
10 construction contract between the parties (*Annexure "J"* to the
affidavit in rejoinder of Mr. Koehler, which was availed to the
Applicant by the 1st Respondent is further evidence of the parties'
clear intention.

Mr. Arinaitwe Patson, counsel for the Respondents, submitted that
15 a draft contract is not a contract or at all; and cannot legally bind
the parties thereto. Court agrees to that extent and is indeed
acutely alive to that position. However, the evidence of the draft
contract must be viewed in proper context of the circumstances of
the instant case. When read together with all the other documents
20 and correspondences already referred to between the 1st
Respondent and Applicant, overall the draft contract is further proof
of the clear intention of the parties to be ultimately bound thereby.
It is not denied or controverted that the 1st Respondent availed the

A handwritten signature in cursive script, appearing to be 'Arinaitwe Patson', located at the bottom right of the page.

5 draft copies of the contract to Applicant and both parties agreed on
minor amendments thereto and only awaited appending their
respective signatures. For all intents and purposes, it was a
contract that was to be. That is the status quo that ought to be
preserved in so far as the relationship between the SPV and Roko is
10 concerned.

In addition GoU retained services of a UK firm M/s. Turner &
Townsend which, on 09/ 07/ 2018 issued an Independent
Technical Review Report *Annexure G* of its assessment and
evaluation of the Applicant's capacity to undertake construction
15 works of the project. The Applicant's firm's profile in respect to
competence and capacity to execute the project works, work
experience, technical expertise, personnel and suitability of
equipment were all assessed and evaluated and passed as suitable
to undertake the construction works of the project within the terms
20 of the PWIA and the Applicant was recommended to GoU through
the Solicitor General.

In the Project Charter for ISHU (*Annexure "C"* to the supplementary
affidavit) the Applicant has clearly demonstrated that it has hired



5 the necessary required technical and expert personnel from abroad retained for the purpose, other human resource and suitable equipment that it takes to execute this contract, not only within 24months that the GoU is looking up to but in 22 months. In the implementation Works Schedule (*Annexure "B"* (supra)) the
10 Applicant has gone to great length to demonstrate a detailed programme of activities to be undertaken for the construction on a day to by day basis up to completion. The evidence in the e-mails attached to the affidavit in rejoinder as *Annexure "E"* show how much the 1st Respondent and the Applicant have undertaken to
15 ensure that come 10th June 2019, the Applicant would be ready commence execution of the ISHU project works.

On the other hand, the 2nd Respondent which is a crucial part of the SPV has not shown anywhere that it has the capacity or experience to construct project the works. There is no telling how it
20 would construct a USD \$379 million hospital if it does not have Roko Construction Limited as contractor, without breaching the terms of the PWIA or breaching its own M & AoA. The 1st Respondent has not shown who else it is going to do the



5 construction. It can only imply that for 1st Respondent to deliver the
project within the terms of the PWIA, the construction constituent
part of the project would only have to be undertaken by Roko
Construction Company Ltd as part of the SPV, unless of course the
SPV opted to subcontract another company under the very limited
10 instances spelt out in the PWIA; which is not the case. Clause
10.2.2 of PWIA stipulates that the Company;

15 ***“...may subcontract the performance of works to one or
more contractors possessing requisite technical and
financial expertise/capability, but the Company (SPV)
shall remain solely responsible for the performance of its
obligation under this PWIA. Any contractor or
subcontractor engaged by the Company for the Works will
require prior approval from MoH (not unreasonably
withheld or delayed) unless; (a) the Works are being
20 subcontracted to Roko or Finasi or any of their affiliates,
or (b) the contract is for less than 15% of the construction
costs.”***



5 There is nothing which suggests that the 1st Respondent has
complied with the terms of Clause 10.2.2 (supra) to suppose that
any other company has been subcontracted for the works. No
evidence of the 1st Respondent's company resolution was adduced
to that effect. It thus remains the sole responsibility of the Finasi/
10 Roko Construction Company Limited SPV to deliver the project.

The "15%" in Clause 10.2.2 (supra) is of significance in relation to
the contract for the project works. It is envisaged under the terms of
the PWIA that there would be a main contractor for the value of the
entire project works. Only works worth less than 15% of the total
15 value of the contract would be subcontracted. These ordinarily
include aspects like specialized technical services which have to be
outsourced by the client or main contractor. Even assuming that
the 1st Respondent subcontracted the project works in that context,
it cannot be reasonably said that less than 15% of the contract value
20 allowable represents the amount required to execute the entire
contract works. It would be illogical. The only logical conclusion is
that the Applicant is the main contractor and no works have been

A handwritten signature in black ink, appearing to be 'Anand', with a small 'P' or similar mark at the end of the signature.

5 contracted out by the 1st Respondent to a third party in accordance with the terms of the PWIA

It has further been shown in *Annexure "G"* to the affidavit in rejoinder that Roko has been on the project site since May 2015 after the 1st Respondent handed it over to the Applicant who
10 hoarded it with a fence, graded part of it, mobilized construction equipment, carried out drainage works, put containers as offices and generators, among other things, in the initial preparatory stages to carry out construction works of the project. It is also demonstrated, in *Annexure "A"* to the affidavit in rejoinder that as
15 far back as September, 2015 the Applicant was on the project site having sanctioned lab tests on soil samples, among others, to be done by Geotechnical Engineering & Technology Laboratory Ltd. Substantial amount of money was spent on the process by the Applicant. It took no less than the person of H.E the President of
20 Uganda as shown in *Annexure "F"* (supra) for a ground-breaking ceremony of the ISHU project. That signifies, inter alia, the importance of the project to the Government and people of Uganda.

A handwritten signature in black ink, appearing to be 'Kivungu', with a stylized flourish at the end.

5 The perusal of Annexure "B" to the affidavit rejoinder-the
Implementation Works Schedules and timelines which were
prepared by the Applicant for approval by MoH further fortifies
court's findings. While communicating the Construction Effective
Date to the 1st Respondent in letter Annexure "S" to the affidavit in
10 reply of Mr. Matovu, the Owners Engineer (MoH) noted that;

***"The purpose of this letter is therefore to confirm that all
conditions precedent were satisfied on 2nd May 2019 and to
notify you that in accordance with clause 17.32 of the
PWIA, the Construction Effective Date shall be the 10th June
15 2019. You are required to submit the following in
accordance with the signed contracts.***

- 1. A revised and updated Works Implementation Schedule
in accordance with clause 18.2.(i) and 18.2.2 of the PWIA***
- 2. The name and detailed Curriculum vitae of the Project
20 Manager in accordance with clause 17.1.7 and 18.1.1 of
the PWIA...." [Underlined for emphasis].***

Several inferences are drawn from this letter. The first one is that
there was already in existence a Works Implementation Schedule by



5 the contractor which only required updating. Other than that
presented by the Applicant in *Annexure "B"* (supra) there is no any
other by the 1st Respondent as at the time of the notification of the
Construction Effective Date. The second is that same date, the 1st
Respondent had not availed evidence of any other signed contract
10 with any other contractor except the one it availed to the Applicant
in *Annexure "J"*, albeit unsigned by the parties. Court has already
made its observations on it. The third is that as at the said date, the
1st Respondent had no other contractor whose Project Manager's CV
could be availed to MoH other than from those of the Applicant
15 already assessed and evaluated by M/s. Turner & Townsend.
Therefore, the reasonable conclusion would be that the Applicant
and not any other contractor would implement the construction
works of the ISHU project. It is more so that the Applicant, though
a separate legal entity is also an integral part of the SPV whose sole
20 purpose and responsibility is to deliver the ISHU project. There is
no way Roko could be left out of the construction contract without
the SPV breaching the terms of PWIA or its own M& AoA, in
particular Clause 12.1.5 thereof.



5 The role of the Applicant in the implementation of the contract is further reinforced in *Annexure "F"* to the rejoinder. The e-mail from TDB Bank actually shows that the Applicant spearheaded the negotiation for financing of the Project with bankers named therein. The said *Annexure "F"* proves that the Applicant through its MD
10 Mr. Mark Koehler, introduced Finasi to TDB Bank for mobilization of the financing of the project after there was a standoff with Citibank and another bank – Deutsche Bank had pulled out of the transactions. It is therefore an absurd and self – defeating argument for the Respondents to suggest that after all, it was not the
15 responsibility of the Applicant to mobilize funding for the project. Suffice it to note that the 1st Respondent (SPV) was formed and incorporated between the Applicant and 2nd Respondent. A series of emails between the parties in *Annexure "E"* of the affidavit rejoinder dispel any doubt. They duly show a progressive trend of
20 communication and understanding between the 1st Respondent's chairperson and its officials, the 2nd Respondent and its officials and the Applicant's MD and officials in the build up to the period where the Applicant would commence the execution of the construction works for the ISHU project.

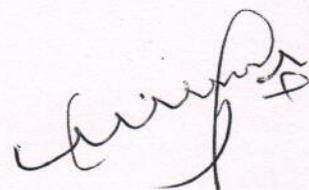
A handwritten signature in black ink, appearing to be 'Anirudh', is located in the bottom right corner of the page.

5 The two affidavits of Charles Byaruhanga the Technical Advisor
MoFP&ED filed after the rejoinder had been filed would ordinarily
be legally inadmissible for being filed after closure of pleadings.
They are, however, validated for purposes of completeness of this
matter. Apart from deponing to facts quite unrelated to this
10 application, in paragraph 22 he only reinforces the known fact that
the construction of ISHU lies with the 1st Respondent in accordance
with PWIA and that the 1st Respondent can only subcontract in
accordance with terms of PWIA. Except for that, it is apparent that
the deponent had not appreciated all the other surrounding facts
15 other than the narrow reading of the PWIA. The background to the
entire ISHU project and the surrounding facts would inevitably be
inquired into. That would show that the 1st Respondent's obligation
to carry out the construction works of the project was long before
agreed and settled as between itself and the Applicant. Preparations
20 and planning for the project progressed through to the advanced
stages and eventual finalization. It is only at the stage of signing a
formal contract that the chairperson of the 1st Respondent appears
to drag her feet and now seeks to exclude the Applicant from the



5 contract to deliver the ISHU project; probably in preference of a third party contractor.

As already observed that is not possible at this belated stage when performing the contract ought to have commenced for the 1st Respondent to turn around and seek to exercise its right to subcontract another contractor not being the 2nd Respondent, the Applicant or their respective affiliates without necessarily entailing the breach of the terms of the PWIA. The terms specifically restrict the 1st Respondent from subcontracting any other company not being the 2nd Respondent, the Applicant or their respective affiliates without first seeking and obtaining express approval of MoH. The restriction extends to subcontracting works only to a company or firm which has the requisite technical expertise and financial capacity to execute the works in issue. As already noted, as at the time the Owners Engineer (MoH) communicated the the Construction Effective Date to the 1st Respondent, there was no evidence whatsoever that any other company had been contracted by the SPV to implement the construction works. Since the SPV is between the 2nd Respondent and the Applicant and has the sole



5 responsibility to deliver the ISHU project, logically then, construction of the hospital by the SPV would fall to Roko. Certainly, Finasi would not meet the requirement of PWIA under Clause 12.1.6 which stipulates that that the company in the execution of the contract works;

10 ***“has the financial standing and capacity to undertake the project in accordance with this PWIA;”***

Other than just being the integral part of the SPV, there is no any other demonstrated or proven capacity of Finasi to execute the construction works of the ISHU project.

15 Thus, in determining the status quo to be preserved, this court is guided by all the above facts, particularly the major project contract the PWIA, the Direct Agreement, Approved Milestone Operational Certificate, the Construction Contract between the Seller, the 1st Respondent and Roko entered into relation to the project as defined
20 under the Promissory Note for Purchase Agreement. Also to be taken into account is the fact that for the financing to take effect, Roko/ Applicant must have entered into a contract with the Seller being Finasi/Roko Construction SPV Ltd.



5 After giving due consideration to all these facts, it leaves no doubt
that all along the Applicant has been or was made to know and/ or
believe by the 1st Respondent that it is the Applicant which is the
main contractor to execute the ISHU project works. It is thus in bad
faith that the 1st Respondent attempts to turn around and seek to
10 kick Roko out of the contract at the very last moment. Such
conduct legally estopped under Section 114 of the Evidence Act Cap
6 which provides as follows;

15 ***“When one person has, by his or her declaration, act or
omission, intentionally caused or permitted another
person to believe a thing to be true and to act upon that
belief, neither he or she nor his or her representative
shall be allowed, in any suit or proceeding between
himself or herself and that person or his or her
representative, to deny the truth of that thing.”***

20 For all intents, the change of heart by the chairperson of Finasi
which is the majority shareholder in 1st Respondent, is intended to
alter the existing state of things existing at the time of attempted
eviction of the Applicant from the project site. The 1st Respondent



5 has vainly attempted to deny this. If indeed it is not true, there would have been no need of the 1st Respondent chairperson coming to the site with police and men in military attire a day or so to the 10/06/2019 when the Applicant was to commence construction works and demanding that the Applicant's officials handover the
10 site to some unknown Chinese persons and also to vacate the site.

Altering the status quo would have dire consequences. As already observed, there has over time developed an understanding between the parties herein pertaining to the construction works. The project represents a significant GoU investment of USD 367 million
15 intended to provide specialized health care to many Ugandans and other persons in sub-Saharan African region. Given the huge amounts of money involved as between GoU and the 1st Respondent; and as between the 1st Respondent and Applicant and the various financiers; the financial and economic repercussions
20 would be so enormous on all sides. It would certainly be quite so for the Government and people of Uganda who stand to lose and be left "holding an empty bag" since altering the status quo renders a potentially high risk of failure of the entire project to which they



5 look forward to benefit from. The justice of the case under the circumstances would demand that the status quo be preserved and the project continues as initially agreed and planned pending the determination of the main cause.

10 It must be emphasized that the injunction is not against the construction of the hospital project. On the contrary, it is an injunction to maintain the status quo by preserving the arrangements that have all along existed between the Respondents and Applicant in relation to construction of the hospital project. Altering that status quo would invariably have the effect of stalling
15 the construction from proceeding as agreed between the various parties to the agreements and undertakings referred. The injunction in this case means that the 1st Respondent should not seek to jump out of the terms of the PWIA with GoU, the Direct Agreement, Approved Milestone Operational Certificate, the Construction
20 Contract between the Seller and Roko in relation to the project as defined under the Promissory Note for Purchase Agreement, among others. It means that the 1st Respondent should not hinder the Applicant's continued execution of the construction works in



5 accordance with the Project Works Implementation Schedule. It also means that the 1st Respondents should not evict the Applicant from the project site or interfere with the Applicant's execution of the contract works.

10 An injunctions in these terms is thus a positive injunction in a sense that it allows the state of things existing at the point in time when the 1st Respondent sought to evict the Applicant to remain and continue. There is indeed no evidence of a company resolution passed by the 1st Respondent that it is contracting the construction works to another company. There is also no evidence that the SPV
15 has been dissolved for it to sideline Roko Constriction Company Limited in the implementation and delivery of the hospital project.

The other consideration when granting an injunction is irreparable injury. If the Applicant is to suffer irreparable injury, then an injunction ought not to be granted. See: **Geilla vs. Cassman**
20 **Brown & Co [1973] EA 358**. "Irreparable injury" does not mean that there must not be physical possibility of repairing the injury, but means that the injury must be substantial or material one that is; one that cannot be adequately compensated for in damages. See:



5 ***Kiyimba Kaggwa vs. Hajji N. Katende (supra); Tony Wasswa vs. Joseph Kakooza [1987] HCB 79.***

In the instant application, the Applicant has ably shown that if the injunction is not granted and it is evicted from the project site and another company contracted to do the project works, the Applicant will suffer irreparably. The Applicant has shown that it has several undertakings with financiers and that it stands to lose out on the financial income out of the contract which amounts to over U\$ 80 million. Further, that it stands the risk of being liquidated as it will not be able to repay its debts. The Applicant will "go under".

15 Court agrees with these averments and finds the response of the Respondents that after all, it was not the obligation of the Applicant to mobilize funding for the project quite shallow and insensitive. A party which gets its bankers to lead the financial mobilization from other financiers for this very important project cannot be treated in such unfair and shabby manner. In addition, it is not correct that the Applicant had no responsibility to mobilize funds. On the contrary, the Applicant was equally responsible in its position as an



5 integral part of SPV which under the terms of PWIA had the responsibility to mobilize funding.

As matters now stand, there is no telling whether the said financiers may not pull out of the whole financial arrangements if the Applicant that played crucial role in the financial mobilization
10 as part of the SPV is edged out of the construction contract. This puts the entire project at a potentially high risk of failure. Any order of court issued in the circumstances would therefore take into account all these considerations to grant an injunction; if for anything but to salvage the status quo and ensure that the hospital
15 project is on course as initially arranged by parties and does not suffer disruptions.

Needless to emphasize, that the Applicant has demonstrated a *prima facie* case with serious triable issues in the main cause, that merit court's consideration. In that regard, court finds no merit in
20 the argument of counsel for the Respondents that the main cause is brought under provisions of the law that are different from the cause for which the remedies are sought therein. It is now settled that citing of a wrong provision of the law or not citing the provision



5 at all under which a matter is brought is not fatal to the case. Such
omission is usually ignored in the context of Article 126(2) (e) of the
Constitution that substantive justice shall be administered without
undue regard to technicalities. It is also settled position that as
much as possible, the substance of the dispute as between the
10 parties should be inquired into and rights of parties determined on
merits.

Regarding the balance of convenience, this is usually resorted to
when court is in doubt as to the other considerations for the grant
of an injunction. From the foregone, court is not in doubt as to
15 whether or not to grant the orders of temporary injunction.
Accordingly, the application is allowed with the following orders;

**1. A temporary injunction doth issue to restrain the 1st and 2nd
Respondents, their officials, agents, or anyone acting under
their authority, orders or instructions from evicting the
20 Applicant from the site for the International Specialized
Hospital in Uganda at Lubowa, Wakiso District, until the
petition filed by the Applicant against the 1st and 2nd
Respondents is heard and disposed of.**



5 2. A temporary injunction doth issue to restrain the 1st and 2nd
Respondents, their officials, agents, or anyone acting under
their orders, directions or control from interfering with the
Applicant's execution of the contract works and possession
of the site for the International Specialized Hospital in
10 Uganda at Lubowa, Wakiso District until the petition filed
by the Applicant against the 1st and 2nd Respondents is
heard and disposed of.

15 3. A temporary injunction doth issue to restrain the 1st and 2nd
Respondents, their agents, officials or anyone acting under
their authority or control or orders or directions from
entering into a contract with anyone or from engaging any
contractor other than the Applicant to build the
International Specialized Hospital in Uganda at Lubowa
until the petition is heard and disposed of.

20 4. Costs of this application shall abide the outcome of the
main cause.


BASHAIJA K. ANDREW
JUDGE
04/07/2019.

CERTIFIED TRUE
COPY OF THE ORIGINAL

DEPUTY REGISTRAR
5/7/19

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Mr. Tumusiime Enos Counsel for the Applicant present.

Mr. Patson Arinaitwe Counsel for the Respondent present.

10

Applicant's Managing Director present.

1st Respondent's Company Secretary/ Head Legal present.

Ms. Jolly Kawuma Court Clerk present.

15

Ruling read in open Court.

20

Bashaija K. Andrew

BASHAIJA K. ANDREW
JUDGE
04/07/2019.

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DEPUTY REGISTRAR
DATE 5/7/19