

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

MISCELLANEOUS CAUSE NO.133 OF 2018

INTERNATIONAL DEVELOPMENT CONSULTANTS LIMITED—— APPLICANT

VERSUS

1. JIMMY MUYANJA
2. THE CENTRE FOR ARBITRATION & DISPUTE RESOLUTION (CADER)
3. RAJESH DEWANI—————RESPONDENTS

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The applicant filed an application for Judicial review seeking the following prerogative orders;

1. A declaration that the proceedings, ruling and orders of the 1<sup>st</sup> respondent acting in his capacity as the Executive Director of the 2<sup>nd</sup> respondent in **CADER Misc. Appn. No. 67 of 2017 – International Development Consultants Ltd. v. AECOM (RoA) Pty S.A. Ltd. & Uganda National Roads Authority**; are null and void and of no legal effect.
2. An order of certiorari be issued to call for and quash the aforesaid proceedings, ruling and orders.
3. A permanent injunction be issued to restrain the 1<sup>st</sup> respondent from continuing to exercise the functions of an appointing authority under the Arbitration & Conciliation Act Cap 4. and/or all the functions exclusively reserved for the 2<sup>nd</sup> respondent under Section 68 (a) of the same law.

4. A declaration that the 1<sup>st</sup> respondent's appointment of the 3<sup>rd</sup> respondent as an Arbitrator pursuant to the ruling and orders of the 1<sup>st</sup> respondent in the matter referred to in 1. above; is null and void and of no legal effect.
5. A declaration that all the acts and deeds commenced and/or carried on by the 3<sup>rd</sup> respondent pursuant to his aforesaid appointment as an Arbitrator are null and void and of no legal effect.
6. A permanent injunction be issued to restrain the 3<sup>rd</sup> respondent from continuing to carry on the functions of an Arbitrator pursuant to his aforesaid appointment.
7. An order of mandamus requiring the 2<sup>nd</sup> respondent; properly and duly constituted to take over and reconsider the applicant's application for the appointment of an Arbitrator filed *vide* **CADER Misc. Appn. No. 67 of 2017**.
8. An order for special and general damages against the 1<sup>st</sup> and 2<sup>nd</sup> respondents jointly and/or severally.
9. Costs of this application.

The grounds upon which the application is based are set out in the Notice of Motion and expounded upon in the affidavits of **Prof. Sam Tulya-Muhika** the Managing Director of the applicant, **Mr. Anthony Rwebanda** the Projects Manager of the applicant and **Mr. Owiny Benard** a law clerk in the employment of the applicant's lawyers.

1. The applicant and 2 entities namely AECOM (RoA) Pty Ltd and Uganda National Roads Authority were parties to a contract for consultancy services for the upgrading from gravel to (bitumen) standard of Mpigi-Kanoni- Sembabule Road (137 Kms).

2. During the pendency of the said contract a dispute arose between the applicant on one hand and the 2 above named entities on the other hand. The said dispute necessitated a referral thereof to Arbitration in accordance with the relevant provisions of the parties' contract.
3. The parties failed to agree on the possible arbitrator, and the applicant applied for appointment of the arbitrator vide CADER Misc.Appn. No. 67 of 2017.
4. The aforesaid application was received by the 1<sup>st</sup> respondent acting in his capacity as the Executive director of the 2<sup>nd</sup> respondent and fixed by him for hearing on 20.11.2017.
5. The hearing of the application was presided over by the 1<sup>st</sup> respondent sitting alone on 20.11.2017. As soon as he called the matter for hearing, he took on a hostile attitude towards the applicant's representatives and their counsel. He questioned the veracity of the application and threatened to strike it out on grounds that the same had not been accompanied by a copy of a contract containing the Arbitration clause despite the fact that the existence of the said contract and arbitration clause was not in issue between the parties to the application and as a matter of fact, the same formed part of the documents which he had before him.
6. The respondent proceeded to hear the application and delivered the ruling. The applicant is challenging the 1<sup>st</sup> respondent for acting without jurisdiction in entertaining the application for the appointment of an arbitrator; such jurisdiction is vested only in the 2<sup>nd</sup> respondent in accordance with section 68(a).
7. The applicant contends that the proceedings, ruling and orders made therein should be declared null and void and void ab initio and of no legal effect and should be quashed by an order of certiorari.

The 1<sup>st</sup> respondent in reply or opposition to this application filed an affidavit by Jimmy Muyanja contended that 1<sup>st</sup> and 2<sup>nd</sup> respondent are a Judicial Officer and Subordinate court respectively.

The application ARB/CAD/67/2017 International Development Consultants Limited vs AECOM RoA (Pty) Limited and Uganda National Roads Authority was returned before the Executive Director pursuant to a mandate under Section 68 of the Arbitration and Conciliation Act cap 4, albeit various other similar matters before the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

The 1<sup>st</sup> and 2<sup>nd</sup> respondent contended that the applicant is only trying to circumvent section 9 and 11 of the Arbitration and Conciliation Act.

That the 2<sup>nd</sup> respondent, like all Arbitrations centres has a scale of fees contained in its compendium of ADR Laws that all its users adhere to and issued under the mandate under Section 68 of the Arbitration and Conciliation Act and if any excess fees were paid, a refund can be made on due process by the applicant.

The 3<sup>rd</sup> respondent in his affidavit in reply stated that he was appointed as sole arbitrator to preside over the Arbitral Proceedings in CAD/ARB/67/2017: INTERNATIONAL DEVELOPMENT CONSULTANTS LTD vs AECOM RoA LTD.

That the respondent had no hand in the proceedings and neither did he make decision in those proceedings. In addition he had no role and no participation in the matters leading to his appointment as Arbitrator.

That upon being given this appointment, the 3<sup>rd</sup> respondent filed and Arbitrator's Declaration of Acceptance and a Statement of Impartiality.

The application filed in court does not disclose any decision taken in my capacity as arbitrator that should be subject of Judicial Review.

The 3<sup>rd</sup> respondent contended that interference with Arbitral proceedings by this Honourable court is forbidden except as set out in the Arbitration and Conciliation Act. The arbitral proceedings by their nature are not amenable to judicial review and a party aggrieved by the decision of the arbitrator may apply to set it aside.

### **Issues**

- 1. Whether or not the court has jurisdiction to entertain the current application?**
- 2. Whether or not the application is properly brought against the 3<sup>rd</sup> respondent?**
- 3. Whether the ruling and orders of the 1<sup>st</sup> respondent in CADER Misc. Appn. No. 67 of 2017 are amenable to judicial review?**
- 4. Whether or not the 1<sup>st</sup> respondent acted lawfully when he entertained the application to appoint an arbitrator?**
- 5. What remedies are available to the parties?**

At the hearing of this application court directed the parties to file written submissions which they all did and I have read and considered them in the process of writing this ruling.

The applicant was represented by *Mr. Murangira Arthur* and the 1<sup>st</sup> & 2<sup>nd</sup> respondent was represented by *Mr. Mugabi Enoth* while the 3<sup>rd</sup> respondent was represented by *Mr. Paul Kuteesa*.

### **ISSUE 1**

#### **Whether or not the court has jurisdiction to entertain the current application?**

The applicant's counsel submitted that the court is duly empowered with the necessary jurisdiction to entertain this application. Firstly, the

jurisdiction of the court on an application for Judicial Review is established by Art. 42 of the Constitution which provides 'a right to fair and just treatment for any person appearing before any administrative official or body and a right to apply to court in respect of any administrative decision taken against any such person.' The jurisdiction is further amplified by Sect. 36 (1) (a), (b) & (c) of the Judicature Act Cap 13. and Rules 3 (1) (a), (b) & (2) (a), (b) and (c) of The Judicature (Judicial Review) Rules, 2009. Undoubtedly therefore, the court is clothed with jurisdiction to entertain an application for judicial review and to grant the orders sought.

The main contention in issue is whether the court has jurisdiction to entertain the current application in light of the provisions of **Section 9 of the Arbitration & Conciliation Act Cap 4** (hereinafter referred to as the **ACA**) which provides thus;

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

The aforesaid statutory provision and others similar to it are known in law as "*ouster clauses*." They occur in instances where the legislature having conferred decision making powers on administrative bodies may seek to limit, preclude or oust court's jurisdiction to scrutinize those powers. The issue then is whether in a case such the present one, **Section 9** of the **ACA** can be relied upon to exclude the judicial review jurisdiction of the court?

The applicant contended that it this provision cannot take away the jurisdiction of court to entertain an application for judicial review. According to them, the basis of the reasoning that **Section 9** of the **ACA** being a statutory provision of law, is inferior to the constitutional provision of Article 42 which establishes the court's judicial review jurisdiction.

It was counsel's submission that the constitution is the supreme law of the land per Article 2 thereof, it stands to reason that **Section 9** of the **ACA** cannot operate to oust the constitutionally established judicial review jurisdiction of the High Court. In this connection, we rely on the authority in the case of **Fr. Francis Bahikirwe Muntu & 15 Ors. v. Kyambogo University – Misc. Application No. 643 of 2005 (Unreported)**, where Hon. Mr. Justice Remmy Kasule held thus at pg. 7; (*Refer to the highlighted portion of a copy thereof attached and marked 'A1'*),

*"The right to apply for judicial review is now Constitutional in Uganda. Article 42 gives one, before an administrative official or body, a right to be*

*treated fairly with a right to apply to a court of law regarding an administrative decision taken against such a one. The right to just and fair treatment cannot be derogated according to Article 44..."*

In addition, regarding the import and effect of **Section 9** of the **ACA** vis-à-vis the matter now before court, it is a long established principle of the Common law that an '*ouster clause*' such as that embedded in **Section 9** of the **ACA** cannot and does not operate to oust the jurisdiction of the court in judicial review where the subject matter of the complaint is an *ultra vires* decision and therefore a nullity in law. In support of this view, we rely on the passages appearing at pgs. 272 – 282 of the legal text entitled '**Judicial Review, Law Procedure and Practice, 2<sup>nd</sup> Ed. Peter Kaluma, Law Africa.**

The applicant's case is that the 1<sup>st</sup> respondent acted unlawfully and/or illegally in entertaining and rendering a decision on the applicant's application for appointment of an Arbitrator made *vide* **CADER Misc. Application No. 67 of 2017.**

It is not in dispute that applicant's application for appointment of an Arbitrator was made under the provisions of **Section 11** of the **ACA** and **Rule 13 of the Arbitration Rules**. It is also not in dispute that the said application was received, exclusively entertained and decided upon by the 1<sup>st</sup> respondent in his capacity as Executive Director of the 2<sup>nd</sup> respondent.

It also appears from the averment in paragraph 6 of the 1<sup>st</sup> respondent's affidavit in reply that he entertained the said application on the basis of some delegated authority of the 2<sup>nd</sup> respondent under Section 68 of the **ACA**. However, it is not provided for anywhere in Section 68 that the 2<sup>nd</sup> respondent can delegate its powers and functions to the 1<sup>st</sup> respondent. This therefore is a clear admission of a breach of the Administrative law principle of '*delegatus non potest delegare*' which is to the effect that a person or body to whom parliament has delegated the exercise of statutory powers and functions cannot in turn delegate the exercise of such powers and function to another person or body. On this score alone, the decision and all actions of the 1<sup>st</sup> respondent in relation to **CADER Misc. Appn. No. 67 of 2017** are null and void.

Furthermore, the jurisdiction to entertain an application for appointment of an Arbitrator under the **ACA** vests exclusively in the 2<sup>nd</sup> respondent and/or

an “appointing authority” by virtue of **Sections 67 (1), 68 (a), 11 (3) (a) (b), (4)** of the **ACA**. An “appointing authority” is defined under **Section 2 (1) (a)** to mean ‘*an institution, body or person appointed by the Minister to perform the functions of appointing arbitrators and conciliators.*’ The 1<sup>st</sup> respondent is clearly different from the 2<sup>nd</sup> respondent and he is not an appointing authority within the meaning of the **ACA**. At all material times hereto, the 1<sup>st</sup> respondent has served and continues to serve in the office of the Executive Director of the 2<sup>nd</sup> respondent. That office is established under **Section 70 (1)** of the Arbitration Act and the functions thereof as per **Section 70 (2)** are restricted to acting as the administrative officer of the 2<sup>nd</sup> respondent charged with the day-to-day operations of the 2<sup>nd</sup> respondent. The present application as rightly pointed out by the applicant’s counsel is for judicial review orders against the decision of the 1<sup>st</sup> respondent in appointing an arbitrator. The applicant is questioning the powers to appoint an arbitrator which in my view is about wrongful exercise of power as provided under the Arbitration and Conciliation Act.

The wrongful exercise of any power by the Executive Director or CADER can be brought into question by way of judicial review. The exercise of power by persons not authorized by the Act can indeed be a subject of judicial review and does not in any way conflict with section 9 which bars intervention in matters governed by the Arbitration and Conciliation Act. It therefore follows that Arbitration must be carried out in a way that is consistent with Constitutional principles and values and any derogation thereof may be challenged as being unconstitutional and thus invalid.

Whereas it is true that Arbitration and Conciliation Act generally provides for limited rights of courts intervention in matters governed by the Act, there may be instances and circumstances that may warrant court’s intervention. For example, the Court may intervene on grounds of public interest if substantial injustice is likely to be occasioned.

While the State should continue to respect the role of private Arbitration and the need to avoid recourse to the courts in private dispute settlement, they must not permit private arbitrators to use laws that are likely to violate constitutional principles and other laws of the land. In the case of ***Sadrudin Kurji & another v. Shalimar Limited & 2 Others [2006] eKLR*** the Court held *inter alia* that:



*"...Arbitration process as provided for by the Arbitration Act is intended to facilitate a quicker method of settling disputes without undue regard to technicalities. This however, does not mean that the courts will stand and watch helplessly where cardinal rules of natural justice are being breached by the process of Arbitration. Hence, in exceptional cases in which the rules are not adhered to, the courts will be perfectly entitled to set in and correct obvious errors."*

It therefore follows that Arbitration must be carried out in a way that is consistent with Constitutional principles and values and any derogation thereof may be challenged as being unconstitutional and thus invalid.

This court has jurisdiction under judicial review to question the actions of the 1<sup>st</sup> and 2<sup>nd</sup> respondent derived from the Arbitration and Conciliation Act or which may be in contravention of the Constitution.

This issue is resolved in the affirmative.

## **ISSUE 2**

**Whether or not the application is properly brought against the 3<sup>rd</sup> respondent?**

The 3<sup>rd</sup> respondent's counsel submitted that this Application is incompetent and unsustainable as against the 3<sup>rd</sup> Respondent for the following reasons:

- The 3<sup>rd</sup> Respondent is not a public officer or public institution and is therefore not amenable to judicial review.
- The Application was brought against the 3<sup>rd</sup> Respondent in his personal private capacity instead of bringing the application in his capacity as the Arbitrator.
- The 3<sup>rd</sup> Respondent being an Arbitrator was a person acting judicially and was therefore granted immunity from civil actions by statute.
- In any event even if, the 3<sup>rd</sup> Respondent made any decision as Arbitrator, the decision is not subject to judicial review.

- Judicial review is not available to a litigant such as the Applicant who has alternative remedies.

The 3<sup>rd</sup> respondent's counsel contended that the 3<sup>rd</sup> Respondent is not a proper party to the proceedings before Court. In this Application, the 3<sup>rd</sup> Respondent is referred to as "Rajesh Dewani" and the Applicant purports to have commenced this action against him in that capacity.

Regarding the persons and bodies amenable to Judicial review the learned author Ssekaana Musa, *Public Law in East Africa*, 37 (2009) LawAfrica Publishing, Nairobi at P.37 stated:

***"The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. Judicial review is only available against a public body in a public law matter. In essence, two requirements need to be satisfied; first, the body under challenge must be a public body whose activities can be controlled by judicial review. Secondly, the subject matter of the challenge must involve claims based on public law principles and not the enforcement of private law rights".***

The position postulated by the learned author above was adopted and followed by Hon. Justice Stephen Mubiru in ARUA KUBALA PARK OPERATORS AND MARKET VENDORS COOPERATIVE SOCIETY LTD –V- ARUA MUNICIPAL COUNCIL, Arua High Court Misc. Cause No. 0003 of 20116 (unreported) while commenting on the purpose of judicial review stated at P. 3 of his ruling.

The 3<sup>rd</sup> Respondent is not a public officer and does not exercise any public functions. The application did not cite any exercise of a public function that was undertaken by the 3<sup>rd</sup> Respondent in this matter. Consequently the application as brought against the 3<sup>rd</sup> Respondent in his individual capacity is incompetent and should on this ground be dismissed.

The applicant's counsel submitted that the 3<sup>rd</sup> respondent was a necessary party to the application and the application is not seeking judicial review of any decision or action taken by the 3<sup>rd</sup> respondent but rather that because of the nature of the reliefs sought against the 1<sup>st</sup> and 2<sup>nd</sup> respondents considered together with the fact that if those remedies were granted, they

would affect the 3<sup>rd</sup> respondent's title as an appointed Arbitrator and indeed anything done or carried out by him in that capacity.

Modern conventional legal practice dictates that where any court action is likely to affect any other person's rights or title, such other person ought to be joined in the action and afforded the right to be heard before a decision in the matter is arrived at. To do otherwise would certainly qualify as condemning a party unheard and therefore unconstitutional.

It was counsel's view, that the use of the phrase 'any person' in the text of both rules also covers persons who whereas they are not ordinary amenable to judicial review, they are nevertheless material to a proper and conclusive determination of the matters in controversy in a judicial review application.

The overriding consideration here is whether in the circumstances of the case, the 3<sup>rd</sup> respondent was necessary and /or a proper party to be joined in the action so as to enable the court to properly and effectually adjudicate on all the matters in issue and so as to avoid a multiplicity of suits?

The applicant had requested the 3<sup>rd</sup> respondent to halt proceedings in the matter pending the applicant's application for judicial review. He declined and instead proceeded to take steps whose effect would be to expose the applicant to certain attendant liabilities such as determination of the dispute in its absence and the possibility of making an award against it.

The joinder of the 3<sup>rd</sup> respondent as the person who was likely to be affected by the decision that would be arrived at by the court was proper even though he was not involved in decision making process that led to his appointment.

In addition, the fact the 3<sup>rd</sup> respondent had taken up the responsibility as an Arbitrator, it was justifiable that he be joined as a party in order to restrain him from continuing with the intended arbitration proceedings that were under challenge in court. The 3<sup>rd</sup> respondent was an essential party to bring before the court in these proceedings in order to confirm the decision that had been made by the 1<sup>st</sup> respondent.

A party may be joined in a suit not because there is a cause of action against it, but because that party's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the cause or matter. See *Deported Asian Property Custodian Board vs Jaffer Brothers Ltd [1999] 1 EA 55*

The applicant sought an Order of *certiorari* to quash the proceedings, ruling and orders made as a result of which the 3<sup>rd</sup> respondent was appointed an Arbitrator and also a declaration that the appointment is null and *void ab initio*.

The applicant also sought specific orders against actions of the 3<sup>rd</sup> respondent;

- *A declaration that all the acts and deeds commenced and/or carried on by the 3<sup>rd</sup> respondent pursuant to his aforesaid appointment as an Arbitrator are null and void and of no legal effect.*
- *A permanent injunction be issued to restrain the 3<sup>rd</sup> respondent from continuing to carry on the functions of an Arbitrator pursuant to his aforesaid appointment.*

The 3<sup>rd</sup> respondent was an indispensable party whose participation was required for purposes of rendering a judgment and his rights (appointment) would be directly affected by the disposition of the case.

The nature of the orders sought required the presence of the 3<sup>rd</sup> respondent in order not to be condemned unheard contrary to the Constitution.

This issue is resolved in the affirmative.

### **ISSUE 3 & 4**

***Whether the ruling and orders of the 1<sup>st</sup> respondent in CADER Misc. Appn. No. 67 of 2017 are amenable to judicial review?***

***Whether or not the 1<sup>st</sup> respondent acted lawfully when he entertained the application to appoint an arbitrator?***

The applicant's counsel argued the 3<sup>rd</sup> and 4<sup>th</sup> issues together and equally relied upon the earlier submissions on the 1<sup>st</sup> issue. He reiterated that 1<sup>st</sup> respondent acted unlawfully and/or illegally when he entertained the applicant's application for the appointment of an Arbitrator *vide* **CADER Misc. Appn. No. 67 of 2017**.

The applicant's counsel further submitted that that the ruling and orders of the 1<sup>st</sup> respondent in **CADER Misc. Appn. No. 67 of 2017** are amenable to judicial review on grounds of illegality. He cited the case of ***Ntinda New Market Property Owners Co-operative Society Ltd. v. Uganda Land Commission & 3 Ors. - High Court Misc. Cause No. 27 of 2011 (Unreported)***.

In that case, Hon. Lady Justice Lydia Mugambe held that;

*"...Judicial Review is the process by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are engaged in the performance of public acts and duties..."*

In the same case, her Lordship reaffirmed the holding in the authority of ***Koluo Joseph Andrew & Others v. Attorney General and Ors. - Misc. Cause No. 106 of 2010*** where it was held thus;

*"The purpose of Judicial Review is concerned not with the decision but with the decision making process. Essentially, Judicial Review involves an assessment of the manner in which a decision is made. It is not an appeal and the jurisdiction is exercised in a supervisory manner, not to vindicate rights as such but to ensure that public powers are exercised in accordance with the basic standards of legality, fairness and rationality."*

As already pointed out above, in entertaining **CADER Misc. Appn. No. 67 of 2017**, the 1<sup>st</sup> respondent was acting in his capacity as the Executive Director of the 2<sup>nd</sup> respondent. That office is established by **Sections 69 (3) (b)** of the **ACA** which empowers the council in its capacity as the governing body of the 2<sup>nd</sup> respondent, to appoint the Executive Director 'on such terms and conditions as the council may determine.' The Executive Director is also a member of the secretariat and also the administrative officer of the 2<sup>nd</sup> respondent charged with the responsibility of handling the day-to-day operations of the 2<sup>nd</sup> respondent per **Section 70 (1) and 70 (2)** of the **ACA**.

The 2<sup>nd</sup> respondent on the other hand is a creature of **Section 67 (1) & (2)** of the **ACA**. The functions of the 2<sup>nd</sup> respondent are spelt out in **Section 68 (a) – (l)**. **Section 68 (a)** empowers the 2<sup>nd</sup> respondent to perform the functions referred to in **Sections 11, 12, 13, 14, 15 and 51**. One such function is that of appointment of Arbitrators is provided for under **Section 11 (3) (a) (b) and (4) (a) (b) (c)**.

Accordingly, the 1<sup>st</sup> respondent as Executive Director and 2<sup>nd</sup> respondent are both creatures of the **ACA**. The 2<sup>nd</sup> respondent is thereby vested with power to carry out certain quasi-judicial and other functions /acts of a public nature. The 1<sup>st</sup> respondent as Executive Director of the 2<sup>nd</sup> respondent is also a member of its secretariat in charge of its day-to-day affairs. In line with their aforesaid capacities, the acts and/or omissions of the 1<sup>st</sup> and 2<sup>nd</sup> respondents in connection with the applicant's application for the appointment of an Arbitrator *vide* **CADER Misc. Appn. No. 67 of 2017** are therefore amenable to judicial review.

The 1<sup>st</sup> and 2<sup>nd</sup> respondent's counsel submitted that their indulgence was founded upon the failure by the applicant and AECOM to appoint inter-parties an Arbitrator pursuant to their agreement to arbitrate as per their agreement.

That the applicant invoked section 11(4) of the Arbitration and Conciliation Act which provides that any party may apply to the appointing authority to take necessary measures, unless the agreement otherwise provides, for securing compliance with the procedure agreed upon by the parties.

Counsel cited section 2 of the Act read together with sections 67, and Sections 67 and 68(a),(c),(j) and (l) of the arbitration Act as the basis for authority to adjudication in the matter that resulted in the appointment of an Arbitrator.

He further submitted that in Uganda, the 2<sup>nd</sup> respondent is designated as an appointing authority, pursuant to sections 11, 12, 13, 14, 15 and 51 of the Arbitration and Conciliation Act.

The respondent's counsel further contended that in the case of Uganda the adjudication functions are designated to the 2<sup>nd</sup> respondent, whose

functions are performed by the Executive Director (1<sup>st</sup> respondent) under Section 68(a) and 70(2) of the Arbitration and Conciliation Act.

According to counsel, no evidence has been brought to this Court to dispel that 1<sup>st</sup> and 2<sup>nd</sup> respondents as the “appointing authority” within the meaning of section 2(1)(a) of the Arbitration and Conciliation Act.

The applicant’s counsel raises two issues and or challenges the actions of the 1<sup>st</sup> respondent as Executive Director for having taken decisions on behalf of the 2<sup>nd</sup> respondent-CADER which according to him is the appointing authority.

***Section 2(1)(a) of The Arbitration and Conciliation Act*** provides as follows;

***“appointing authority” means an institution, body or person appointed by the Minister to perform the functions of appointing arbitrators and conciliators”;***

The appointing authority is vested with power to appoint arbitrators under section 11 of the Arbitration and Conciliation Act as follows;

***11(3) provides;***

***Where-***

***(a) In the case of three arbitrators, a party fails to appoint the arbitrator within thirty days after receipt of a request to do so from the other party of if the two arbitrators fail to agree on the third arbitrator within thirty days after their appointment; or***

***(b) In case of one arbitrator, the parties fail to agree on the arbitrator, the appointment shall be made, upon application of a party, by the appointing authority.***

***11(4) provides;***

***Where, under a procedure agreed upon by the parties for the appointment of an arbitrator or arbitrators-***

***(a) A party fails to act as required under that procedure;***

*(b) The parties or two arbitrators fail to reach the agreement expected of them under that procedure; or*

*(c) A third party, including an institution, fails to perform any function entrusted to it under that procedure,*

*Any party may apply to the appointing authority to take the necessary measures, unless the agreement otherwise provides, for securing compliance with the procedure agreed upon by the parties.*

*11(5) provides;*

*A decision of the appointing authority in respect of a matter under subsection (3) or (4) shall be final and not be subject to appeal.*

*11(6) provides;*

*The appointing authority in appointing an arbitrator shall have due regard to any qualifications required of an arbitrator by the agreement of the parties and such considerations as are likely to secure the appointment of an independent and impartial arbitrator.*

The functions of the centre are provided for under section 68 which provides;

*The functions of the centre shall, in relation to arbitration and conciliation proceedings under this Act, include the following-*

*(a) To perform functions referred to in sections 11, 12, 13, 14, 15 and 51*

Section 69 provides for the governing body of the Centre for Arbitration and Dispute Resolution;

*(1) The governing body for the centre for Arbitration and Dispute resolution shall be a council.*

*(2).....*

*(3) The council shall consist of the following-*

*(a) The chairperson appointed by the Minister on such terms and conditions as the Minister may determine;*

*(b) The executive director of the centre appointed by the council on such terms and conditions as the council may determine;*

*(c) The president of the Uganda Commercial Court;*

*(d) Three representatives appointed by the Minister from the existing private sector organisations or their representatives;*

*(e) A representative of the Uganda Law Society.*



It can be discerned from the above provisions that indeed the Centre and the Executive Director are very different and the functions of the Centre are supposed to be performed by the Council.

The 1<sup>st</sup> respondent cannot usurp the powers of the centre and act in the name of the centre and yet the function is vested in the governing council. I agree with the submission of the applicant that a delegate cannot sub delegate-*delagatus non potest delegare*. It means that power conferred on a particular person or body must be exercised by that very person or body. See *Public Law in East Africa* by Ssekaana M pg 109

I do not agree with the argument of the 1<sup>st</sup> and 2<sup>nd</sup> respondent's counsel's argument that both the 1<sup>st</sup> and 2<sup>nd</sup> respondent are appointing authority within the meaning of section of section 2(1)(a) of the Arbitration and Conciliation Act.

A public body could only delegate powers if it was provided for in the legislation that created it. The 1<sup>st</sup> respondent in this matter alleging delegation must adduce evidence to show that the responsible person/authority had either expressly or impliedly delegated one or more of its functions.

In determining whether a statute should be interpreted as authorising or prohibiting a particular act of delegation, the courts had commonly taken a particular strict view in relation to the delegation of functions of a judicial or disciplinary nature, or where they regarded the statutorily designated decision maker as having been selected because he was especially suited or qualified for the task. See *Suisse Security Bank and Trust Limited v Francis BS 2003 SC 63*

Normally the courts are rigorous in requiring the power to be exercised by the precise person or body stated in the statute, and in condemning as ultra vires action taken by agents, sub committees or delegates, however expressly authorised by the authority endowed with the power. See *H.W.R*

*Wade & C.F. Forsyth Administrative Law 10<sup>th</sup> Edition 2009 pg 260.*

The 1<sup>st</sup> respondent has not adduced any evidence of delegation of such function to him as the Executive Director since his role and functions are confined to the day to day operations of the centre under section 70(2) of the Arbitration and Conciliation Act.

The authority/body conferred with power is not allowed to delegate the exercise power to someone else, because that would be contrary to the intention of Parliament as expressed in the words of the Act. If Parliament had wanted that other person to exercise the power, it would have conferred power on them.

The function of appointing arbitrators and conciliators is one of the key and core functions for which the Act was enacted. Any attempt to delegate such an important function would be *ultra vires* the Act.

The function of appointing arbitrators and conciliators is so important that it would be equated to appointing judicial officers which could not be delegated or vested in a sole individual-Executive Director.

The action of the 1<sup>st</sup> respondent appointing an Arbitrator in **CADER Misc. Appn. No. 67 of 2017** as if he was the Centre was *ultra vires* the Arbitrations and Conciliation Act and hence illegal.

In the same vein, section 2(1)(a) as cited herein before defines appointing authority as Institution, body or person appointed by the Minister.

The Centre as constituted by the law is not wholly appointed by the Minister as the section 2(1)(a) envisages. The Minister appoints the chairperson and three representatives from the existing private sector. The other three members are appointed by different authorities and therefore they cannot be deemed to be appointed by the Minister in order to conform to the definition of "appointing authority".

The Minister should therefore formally appoint the governing council of CADER as the "appointing authority" for the Arbitrators and Conciliators as

the Interpretation section defines it. Alternatively, the definition “appointing authority” should be redefined to give a proper meaning to the whole Act.

This court cannot usurp the functions of the Legislature, since the court cannot legislate on the subject under the guise of interpretation against the will expressed in the enactment. It should not be open to the court to place an unnatural interpretation on the language used by the legislature and impute to it an intention which cannot be inferred from the language used by it by basing on ideas derived from other laws.

The meaning of “appointing authority” will cause further confusion in the interpretation and application of the whole Act and it may invite further litigation.

### **What remedies are available to the parties?**

The ever-widening scope given to judicial review by the courts has caused a shift in the traditional understanding of what the prerogative writs were designed for. For example, whereas *certiorari* was designed to quash a decision founded on excess of power, the courts may now refuse a remedy if to grant one would be detrimental to good administration, thus recognising greater or wider discretion than before or would affect innocent third parties.

The grant of judicial review remedies remains discretionary and it does not automatically follow that if there are grounds of review to question any decision or action or omission, then the court should issue any remedies available. The court may not grant any such remedies even where the applicant may have a strong case on the merits, so the courts would weigh various factors to determine whether they should lie in any particular case. See *R vs Aston University Senate ex p Roffey* [1969] 2 QB 558, *R vs Secretary of State for Health ex p Furneaux* [1994] 2 All ER 652

### **Certiorari**

An order of *certiorari* issues to quash the proceedings, ruling and orders arising from **CADER Misc. Appn. No. 67 of 2017** for illegality.

### **Declaration**

- The 1<sup>st</sup> respondent's appointment of the 3<sup>rd</sup> respondent as an Arbitrator pursuant to the ruling and orders of the 1<sup>st</sup> respondent vide **CADER Misc. Appn. No. 67 of 2017 is null and void.**
- The 1<sup>st</sup> respondent cannot exercise the functions of an '*appointing authority*' under the Arbitration and Conciliation Act to appoint Arbitrators and Conciliators.

### ***Mandamus***

An order of Mandamus issues directing the Governing Council of the Centre for Arbitration and Dispute Resolution to appoint arbitrator(s) in the CAD/ARB/67/2017: ***INTERNATIONAL DEVELOPMENT CONSULTANTS LTD vs AECOM RoA LTD.***

### **Special and General damages**

The applicant prayed for special and general damages. In judicial review court does not award those categories of damages but rather in deserving circumstances where there is justification may award damages.

The habit of seeking damages as if it is an automatic right in every application for judicial review should be discouraged. Judicial review is more concerned with correcting public wrongs and not demand or seek to recover damages.

An individual may seek compensation against public bodies for harm caused by the wrongful acts of such bodies. Such claims may arise out of the exercise of statutory or other public powers by statutory bodies.

The fact that an act is *ultra vires* does not of itself entitle the individuals for any loss suffered. An individual must establish that the unlawful action also constitutes a recognizable tort or involves a breach of contract. See ***Public Law in East Africa by Ssekaana Musa pg 245-249***

The nature of damage envisaged is not necessarily categorized as special or general damage. But such damage is awarded for misfeasance or nonfeasance for failure to perform a duty imposed by law.

The tort of misfeasance in public office includes malicious abuse of power, deliberate maladministration and perhaps also other unlawful acts causing injury.

The applicant has not made out any case for award of damages. No damages are awarded.

**Costs**

In the final result, this application is allowed with no order as to costs. Each party shall bear its costs. This is a matter of public interest and the dispute between the parties is yet to be determined. It is only fair that no order is made as to costs.

I so order.

**SSEKAANA MUSA**

**JUDGE**

**1<sup>st</sup> /03/2019**