THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

MISCELLANEOUS CAUSE NO. 18 OF 2017

(Arising out of Civil Appeal No. 014 of 2015)

[*CORAM: Katureebe C.J; Arach-Amoko; Mwondha; Tibatemwa-Ekirikubinza, JJSC, Tumwesigye, Ag.JSC*]

BETWEEN

MOHAMMED MOHAMMED HAMID :::::::::::::::::::: APPLICANT

AND

ROKO CONSTRUCTION LIMITED :::::::::::::::::::::: RESPONDENT

Representation

At the hearing of the application, Mr. Peter Allan Musoke represented the applicant while Mr. Enos Tumusiime represented the respondent.

RULING OF COURT

This is an application for review of the judgment of this Court in Civil Appeal No.14 of 2015, Mohammed Mohammed Hamid vs. Roko Construction delivered on 5th May 2017.

The application is brought under Section 82 (b) of the Civil Procedure Act and Rule 2 (2) of the Rules of this Court seeking to review the said judgment for purposes of rectifying alleged apparent errors on the record. The applicant seeks for orders that:-

1. By reason of the errors of law apparent on the face of the record the judgment of the Court in Civil Appeal No.014 of 2015 be reviewed.
2. By reason of the conflict and the contradictions between the judgments of this Court in Civil Appeal No.014 of 2015 and Civil Appeal No. 006 of 2016, which were delivered a day apart, an error apparent on the face of the record was created which ought to be corrected through review.
3. Costs arising from this cause be met by the respondent.

The grounds contained in the affidavit of the applicant supporting the application are that:-

(i) The judgments of the Court in Civil Appeal No.014 of 2015 and Civil Appeal No.006 of 2016 that were delivered a day apart by the Supreme Court stem from similar facts, but bear different and conflicting precedents in law.

(ii) The judgment of the Court in Civil Appeal No.014 of 2015 embodies several holdings by the court that, on the face of the record, contravene provisions of statutes of parliament, thus creating a nullity.

(iii) The conflicting precedents set by the court on the same subject matter are potential sources of inconsistency and uncertainty in the jurisprudence of our jurisdiction.

Background to the application

The background to this application is that the applicant entered into a contract with the respondent to construct his house at Plot 43 B Windsor Close Kololo Kampala at an agreed sum of Ushs. 1,100,000,000/= excluding VAT. The applicant paid part of the construction sum and the respondent started the construction works.

Whereas both parties signed the bills of quantities, the contract was signed by the respondent only. The applicant refused to append his signature. At the time, the respondent had done substantial work but the applicant failed to pay for the work done.

The respondent issued a notice of termination of contract in accordance with the terms of the contract and there after issued a notice of arbitration to the applicant to agree on the appointment of an arbitrator to resolve the dispute between them. The applicant did not respond to any of the said notices.

The respondent applied to the President of the East African Institute of Architects to appoint an arbitrator in accordance with the terms of the contract and to the **Centre for Arbitration and Dispute Resolution (CADER)** in accordance with Section 11(4) of the **Arbitration and Conciliation Act**. Consequently,, Hon. Justice

Alfred Karokora was appointed as a sole arbitrator. On the 30th June 2009, Justice Karokora pronounced his arbitral award decision in the presence of both the parties and Counsel. He ordered the applicant to pay Ushs.584, 430,571/= with interest of 18% p.a from the date of filing the claim until payment in full and general damages of Ushs .100,000,000/= with interest of 18% pa from date of award and payment in full. On 4th November 2009, the bill of costs was taxed and allowed at Ushs. 92,507,410/= pa.

On 14th January 2010, the applicant being dissatisfied with the arbitral award, filed Civil Application No. 731 of 2009 in the High Court (Commercial Division) to set it aside. The application was successful and the award was set aside on ground that the condition of arbitration was not provided for in the Building Contract and therefore the arbitrator had no jurisdiction to make the award.

The respondent with leave from the High Court appealed to the Court of Appeal in Civil Appeal No. 51 of 2011 contending that the arbitrator had jurisdiction to hear the dispute. The Court of Appeal allowed the appeal on the basis that the respondent's appeal fell within the ambit of **Section 16** of the **Arbitration and Conciliation Act (ACA)** [which provides for jurisdiction of an arbitrator or arbitration tribunal] and not **Section 34** of the **Arbitration and Conciliation Act** [which provides for the jurisdiction of the High Court for purposes of setting aside an arbitral award].

The applicant was dissatisfied with the Court of Appeal decision. He appealed to the Supreme Court in Civil Appeal No.1 of 2013. The Supreme Court found that there was a different Coram of the Court of Appeal that heard the appeal and that which delivered the decision. On this premise, the Supreme Court returned the file to the Court of Appeal to reconstitute the Coram and hear the matter afresh.

The newly constituted Coram quashed the decision of the High Court and reinstated the award. The applicant was dissatisfied with that decision and filed an appeal in this Court as Civil Appeal No.014 of 2015.

On 5th May 2017, the decision of the Supreme Court in **Mohammed Mohammed Hamid vs. Roko Construction, Civil Appeal No.14 of 2015** was delivered. The Court upheld the decision of the Court of Appeal and dismissed the appeal with costs.

The previous day -4th May 2017 – the Court had delivered a judgment in the case of **Babcon Uganda Limited vs. Mbale Resort Hotel ltd Civil Appeal No.06 of 2016**. In both **Mohammed Mohammed Hamid (supra)** and **Babcon (supra)**, a question of law arose as to whether a dispute originally handled by an arbitrator (under the **Arbitration and Conciliation Act**) and whose decision was challenged before the High Court is appealable to the Court of Appeal.

The applicant contends that the judgment of Court in **Mohammed Mohammed Hamid vs. Roko Construction (supra)** contains apparent errors on the face of the record which necessitates a review under **Section 82 of the Civil Procedure Act** and **Rule 2 (2)** of the **Rules of this Court**, hence the instant application.

The errors alleged by the applicant's counsel can be summarized into the following three (3) categories:

1. Jurisdiction of the Court of Appeal to handle appeals arising from arbitral disputes.
2. An arbitral award to be in writing.
3. Misinterpretation of Section 34, Section 71 of the ACA and Rule 7 (1) of the first schedule to the ACA.

1. Jurisdiction of the Court of Appeal in arbitration disputes.

Applicant's submissions

The applicant alleges that whereas this Court held in the **Babcon** case that the Court of Appeal did not have jurisdiction to handle an appeal against a decision of the High Court made in an application to set aside an arbitral award, in **Mohammed Mohammed Hamid**, the Court held that such an appeal was permitted.

The applicant argues that according to the provisions of **Section 82** of the **Civil Procedure Act** and the authorities of **Edison Kanyabwera vs. Pastori Tumwebaza (Civil Appeal No.06 of 2004)**

and Sakar's Law of Civil Procedure, 9th edition 2000, Volume 2, this Court can review its own judgments.

Section 82 (b) of the **Civil Procedure Act** provides that-

> **Any person considering himself or herself aggrieved—**
>
> **(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order on the decree or order as it thinks fit.**
> (Emphasis of Court)

The essence of the arguments made by counsel is that the Court in the **Mohammed Mohammed Hamid** appeal did not follow its earlier decision in the Babcon appeal. That in the **Babcon** appeal, the Court held that, *there [was] no evidence by the appellant or respondent that there was any question of law agreed upon to bring the dispute within the ambit of Section 38 of the ACA.* Therefore, there was no right of appeal to the Court of Appeal.

However in the **Mohammed Mohammed Hamid** appeal, the Court held that, *where there was no agreement to appeal, an application to court for leave to appeal sufficed to constitute a competent appeal to the Court of Appeal.* Furthermore, *that there having been no objection to the application of leave to appeal, it was good to supply and infer an agreement of parties under* ***Section 38 (3)*** *of the* ***ACA.*** This Section provides that:-

Notwithstanding sections 9 and 34, an appeal shall lie to the Court of Appeal against a decision of the court under subsection (2) if—

(a) the parties have so agreed that an appeal shall lie; and

(b) the court grants leave to appeal, or where the court fails to grant leave, the Court of Appeal grants special leave to appeal, and on such appeal the Court of Appeal may exercise any of the powers which the court could have exercised under subsection (2). (Emphasis of Court)

The applicant's counsel further submits that the judgment of **Mohammed Mohammed Hamid** contravenes the principle of stare decisis which enjoins a court to stand by its earlier judicial decisions when the same point arises again in litigation.

In conclusion on this point, counsel submits that the error not only violated the principle of stare decisis but also created uncertainty to the applicability of the ACA and in so doing contravened Sections 3, 9 and 38 of the ACA.

Respondent's reply

The respondent's counsel opposed the application and stated that there are no errors in the judgment. Counsel argues that the applicant did not appreciate the background laid by the Court before it upheld the judgment of the Court of Appeal. Counsel submits that the Court found that the respondent had successfully applied for leave to appeal against the High

Court decision. Furthermore, counsel contends that since it is on record that the application for leave was not objected to, it made the appeal competent before the Court of Appeal by virtue of **Section 38 (3) (b) (supra).**

On the principle of stare decisis, counsel submits that the applicant failed to distinguish the facts of the two judgments. That whereas in the Babcon case the Court held that the High Court was not exercising its original jurisdiction and thus no automatic right of appeal accrued, in the Mohammed Mohammed Hamid case the right of appeal accrued because the respondent sought the leave of court. That had the respondent not sought the leave, there would be no automatic right of appeal. Therefore, there is no contradiction between the said judgments.

Court's consideration

The applicant contends that in both the **Babcon** and the **Mohammed Mohammed Hamid** cases, Court dealt with similar questions of law which should have been interpreted in the same way but were not.

In order to resolve the contention, we have found it pertinent to reproduce in substance the facts and issues that were dealt with in each judgment.

In **Civil Appeal No.006 of 2016** between **Babcon Uganda Limited** and **Mbale Resort Hotel Ltd**, the respondent entered

into a contract with the appellant to construct an annex building to the existing Mbale Resort Hotel in Mbale Municipality. The agreed contract sum was Ushs.666, 337,984/= and the date of practical completion was set for 30th October 2007.

On the 2nd October 2007, the respondent terminated the contract which resulted into a dispute. By consent of both parties, the dispute was referred to an arbitrator, Hon. Justice Karokora (Rtd). On the 18th April 2010, the arbitrator made an arbitral award in favour of Babcon as follows:-

a) Claim for costs incurred in the modification of the original design, Ushs. 132,585,395.34/=;

b) Claims arising out of wrongful termination of the contract, Ushs 1,272,700,857.00/=;

d) General damages for unilateral breach of contract, Ushs. 100,000,000.00/=.

The total arbitral award was Ushs. 1,712,880,153. The awards made under (a) and (b) would attract interest at 10% from the date of breach while the general damages would attract interest at 8% p.a from the date of the award. The respondent Mbale Resort Ltd) filed in the High Court an objection against the award. The High Court Judge (Kiryabwire Geoffrey J) partially granted the application by the respondent by setting aside the special damages of Ushs. 272,700,875/= and general

damages of Ushs.100, 000,000/=. The learned Judge also awarded the appellant 1/3 of his taxed bill of costs.

The Respondent was dissatisfied with the decision and orders made by the High Court. He instituted an appeal in the Court of Appeal against the decision of the High Court for partially setting aside of the award. When the appeal was called for hearing, counsel for the respondent raised a preliminary objection that the appeal was incompetent because the appellant had no right of appeal to the Court of Appeal. The contention was that this matter arose out of the decision of the High Court made under Section 34 of the Arbitration Act and not as a court of original jurisdiction.

The Court of Appeal struck out the appeal on account of its being incompetent and set aside the ruling of the High Court. It further ordered that the appellant pays one half the costs in the High Court and those in the Court of Appeal.

The appellant (Babcon Uganda Ltd), dissatisfied with the decision and orders of the Court of Appeal, appealed to this Court but was still unsuccessful. The Court *inter alia* held that:

"It was clear to me that S.34 of the ACA provides the recourse to the Court against an arbitral award only by way of an application for setting aside the award under subsections 2 and 3 ... From the above provisions, it is clear that when the High

Court is hearing the application under S.34 (1) of ACA, it is not ... at all exercising original jurisdiction. The original jurisdiction had been exercised by the arbitral tribunal consisting of a sole arbitrator ...

I am not convinced by the submissions of counsel that when the High Court was dealing with the application, it was exercising its original jurisdiction and its decision after the Court of Appeal is appealable to the Supreme Court under S.6 of the Judicature Act."

In the Babcon case, this Court held that there was no automatic right of appeal to the Court of Appeal from a decision of the High Court when that court is dealing with arbitration matters.

In the **Mohammed Mohammed Hamid** case, this Court, in addressing the issue whether Section 66 of the Civil Procedure Act [providing for appeals to the Court of Appeal] was applicable to the facts of the case, held as follows:

"The Court of Appeal Justices reproduced S.66 of the Civil Procedure Act as follows:- ***'Unless otherwise expressly provided in this Act, an appeal shall lie from the decrees or any part of the decrees and from the orders of the High Court to the Court of Appeal.'*** *The Court of Appeal relied also on* ***Makula International Ltd vs. His Eminence Cardinal Nsubuga and Another*** *where it was held that when*

an order is made by the High Court on a matter brought before it by some statutory provision other than the CPA or rules, it is appealable as of right unless the appeal is specifically excluded by law.

The Court of Appeal concluded by stating in the judgment that, 'Applying the above stated principles to the facts of this case, we find that this appeal is competent before Court as it appropriately qualified under provisions of S.66 of the CPA. It is an order made by the High Court on a matter brought before it under the ACA ...'

With due respect to the Court of Appeal Justices, I differ from their view and accept learned counsel for the appellant's submissions that Section 66 had no place in this case. I also accept that the learned Justices never considered S.38 (3) of the ACA which provides:-

Notwithstanding sections 9 and 34 an appeal shall lie to the Court of Appeal against a decision of the Court under subsection (2) if-

(b) the Court grants leave to appeal ..." (Emphasis of Court)

What can be deduced from the above holding of Court is that the Court faulted the Court of Appeal for applying Section 66 of the Civil Procedure Act which provides for an automatic right of appeal to the Court of Appeal from the High Court in exercise of its original jurisdiction. The Court in fact pointed

out that the Court of Appeal did not address its mind to Section **38 (3) (b) (supra)** of the **Arbitration and Conciliation Act** which requires a party dissatisfied with an arbitral award decision to first seek the leave of the High Court in case an appeal is preferred.

From the foregoing, we come to the conclusion that both judgments maintain that there is no automatic right of appeal to the Court of Appeal from an arbitration decision of the High Court. The leave of court must first be sought before an appeal is lodged. It is the seeking of leave in the **Mohammed Mohammed Hamid** appeal which gave the Court of Appeal jurisdiction to hear the matter otherwise the appeal would have been incompetent. This fact made the case distinguishable from that of **Babcon** where no leave to appeal was sought before the appeal was lodged in the Court of Appeal.

Therefore, the applicant's assertion that the judgments in **Mohammed Mohammed Hamid vs. Roko Construction Civil Appeal No. 014 of 2015** and **Babcon Uganda Limited vs. Mbale Resort Civil Appeal No.06 of 2016** are contradictory and create inconsistencies is unfounded and lacks merit.

We hold that there is no error to be corrected.

2. An arbitral award to be in writing.

Applicant's submissions

The applicant contends that the Court in its judgment erred by suggesting that an arbitral award need not be in writing. The relevant portion of the Judgment of Court faulted by the applicant reads as follows:

"There is nowhere the law requires that an arbitral award be in writing before it is recognized. This means in my view the arbitral award ... may be in form or substance."

Counsel submits that the above holding was an inadvertent error on the face of the record as it was an infringement of Section 31 (4) of the **Arbitration and Conciliation Act** which provides that, "*an arbitral award shall be made in writing and shall be signed by the arbitrator or the arbitrators.*"

Respondent's reply

Counsel argues that the applicant has not shown any proof that the award was not in writing and not signed by the Arbitrator. That in fact the award annexed to the pleadings in the Supreme Court and in the courts below shows that the Arbitrator - Hon. Justice Karokora – signed the award.

Court's Consideration

Section 31 (4) of the **Arbitration and Conciliation Act** provides that:-

An arbitral award shall be made in writing and shall be signed by the arbitrator or the arbitrators. (Our emphasis)

The subsequent provisions of **Section 35** of the **Arbitration and Conciliation Act** provide for the recognition and enforcement of an arbitral award as follows:

Recognition and enforcement of award.

(1) An arbitral award shall be recognized as binding and upon application in writing to the court shall be enforced subject to this section.

(2) Unless the court otherwise orders, the party relying on an arbitral award or applying for its enforcement shall furnish—

(a) the duly authenticated original arbitral award or a duly certified copy of it; and

(b) the original arbitration agreement or a duly certified copy of it.

(3) If the arbitral award or arbitration agreement is not made in the English language, the party shall furnish a duly certified translation of it into the English language.

The cumulative effect of the above provisions is that an arbitral award must be in writing.

We therefore hold that the Court was mistaken in holding that *nowhere is it required under the law that an arbitral award be in writing before it is recognized.*

On this point, the applicant succeeds.

3. Misinterpretation of Sections 34, 71 of the **Arbitration and Conciliation Act** and Rule 7 (1).

Applicant's submissions

Counsel contends that the Court misconstrued the provisions of **Sections 34(3), 71(1), (2) and Rule 7 (1)** of the **schedule** to the **Arbitration and Conciliation Act**.

The applicant's counsel submits that the Court misdirected itself by holding that, *Rule 7 (1) is inconsistent with the earlier provision of Section 34 (3) of the Arbitration and Conciliation Act.* Counsel contends that there is no contradiction since the two provisions provide for different scenarios and prays that the judgment of Court in **Mohammed Mohammed Hamid Civil Appeal No.14 of 2015** be recalled so that the alleged error is corrected.

Respondent's reply

Counsel agreed with the Court's holding that there are inconsistencies in the provisions. He argues that the applicant failed to appreciate the conflict pointed by the Court. Counsel prays that the application be dismissed with costs.

Court's Consideration

Section 34(3) of the **Arbitration and Conciliation Act** provides for setting aside an arbitral award by an aggrieved party as follows:

> **An application for setting aside the arbitral award may not be made after one month has elapsed from the date on which the party making that application had received the arbitral award, or if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral award.**(Our emphasis)

Section 71 provides for the making of Rules that govern arbitration procedures. Rule 7 (1) states that-

> **Any party who objects to an award filed or registered in the court may, within ninety days after notice of the filing of the award has been served upon that party, apply for the award to be set aside and lodge his or her objections to it, together with necessary copies and fees for serving them upon the other parties interested.** (Our emphasis)

Section 34 (3) provides for the setting aside of an arbitral award not later than a month from the date of the award decision.

Rule 7 (1) of the schedule provides in effect that any party who wishes to object to an arbitral award decision can apply to the High Court for it to be set aside within 90 days after service of the notice of filing the award is effected.

Our reading and analysis of the provisions shows that indeed there is a contradiction between the Rules and the principal legislation over the same subject. The provisions create confusion as to whether the time threshold to have an arbitral award set aside by the aggrieved party is one month or 90 days. These two provisions have dogged the arbitration proceedings in court for a long time. [See: **Kilembe Mines vs. B M Steel Miscellaneous Cause No.002 of 2005**; **Uganda Lottery vs. AG Miscellaneous Cause No.627 of 2008** and **Katamba Phillip & 3 Ors vs. Magala Ronald Arbitration Cause No.3 of 2007**].

We therefore come to the conclusion that the Court was right in its view that Rule 7(1) is inconsistent with Section 34 (3) of the **Arbitration and Conciliation Act**. We recommend that the legislature rectifies the contradicting provisions to avoid further confusion.

Arising from the above, we hold that there is no apparent error to be rectified. This point too fails.

Conclusion and Orders

We come to the conclusion that the application partially succeeds. We however hold that the substantial part of the application fails.

Therefore, the judgment of the Court in **Mohammed Mohammed Hamid Civil Appeal No.14 of 2015** is hereby

recalled to rectify the error that for an arbitral award to be recognized, it need not be in writing.

We hereby correct that error by expunging from the judgment the part that reads: *"There is nowhere the law requires that an arbitral award be in writing before it is recognized. This means in my view the arbitral award ... may be in form or substance."*

Accordingly, the rest of the judgment and orders of the Court in Civil Appeal No.014 of 2015 are upheld.

Costs

Although costs follow the event, the fact that the applicant was prejudiced by the contradictions contained in the statute, each party should bear its own costs.

We so order.

Dated at Kampala this 24th day of January 2019.

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BART KATUREEBE,
CHIEF JUSTICE.

.....

STELLA ARACH-AMOKO
JUSTICE OF THE SUPREME COURT.

.....

PROF. LILLIAN TIBATEMWA-EKIRIKUBINZA,
JUSTICE OF THE SUPREME COURT.

.....

JOTHAM TUMWESIGYE
Ag. JUSTICE OF THE SUPREME COURT.

THE REPUBLIC OF UGANDA IN THE SUPREME COURT OF UGANDA AT KAMPALA
MISCELLANEOUS CAUSE NO.18 OF 2017

(Coram: Katureebe CJ. Arach Amoko, Mwondha, Tibatemwa JJSC, Tumwesigye Ag. JSC)

BETWEEN

MOHAMMMED MOHAMMED HAMID..... APPLICANT

AND

ROKO CONSTRUCTUION LIMITED.....RESPONDENT

(Arising out of Civil Appeal No.006 of 2016)

RULING OF MWONDHA JSC

This was an application brought by Notice of Motion under 8.82 (b) of the Civil Procedure Act and Rule 2(2) of the Supreme Court Rules S1 13-11. The applicant sought for orders that:-

(1) By reason of errors of law apparent on the face of the record, the judgment of the Court in Civil Appeal No.006 of 2016 be reviewed.

(2) By reason of conflict and contradictions between the judgments of this Court in Civil Appeal No. 014 of 2015 and Civil Appeal No.006 of 2016, which were both delivered a day apart, there was created on the face of the record of the Court an error of law which ought to be corrected through review.

(3) Costs arising from this cause be met by the respondent

The application was supported by an affidavit deponed by the applicant. Briefly, it was deponed that:

(i) The judgments of the Court in Civil Appeal No. 014 of 2015 and Civil Appeal No.006 of 2016 were delivered a day apart by the Supreme Court from similar facts but bear different and conflicting precedents in law

(ii) |The judgment of the Court in Civil Appeal No.014 of 2015 embodies several holdings by the Court that, on the face of the record, contravene provisions of statutes of Parliament, thus creating a nullity

(iii) The conflicting precedents set by the Court on the same subject matter are potential sources of inconsistency in the jurisprudence of our jurisdiction

(iv) The application is inconsistent and in accordance with the jurisdiction of the Court

The respondent filed an affidavit in reply deponed by Diana Kasabiiti. She interalia stated as follows:

(1) That I deny the contents of paragraph 4 of Mr. Mohammed Mohammed Hamid's affidavit in so far as the said two cases SCCA Nos. 006 of 2016(Babcon Vs Mbale Resort) and SCCA No.14 of 2015 (MM Hamid VS Roko) have different backgrounds and facts.

(2) That contrary to what is stated in paragraphs 5,6,7,8,9 and 10 by the affirmant, MM Hamid , upon reading the judgment of SCCA No.14 of 2015 and SCCA No.006 of 2016, I am convinced that the Supreme Court addressed itself to the provisions of section 66 and 76 of the Civil Procedure Act, sections 34 and 38 of the Arbitration and Conciliation Act and section 10 Judicature Act and the Supreme Court did not come to different conclusions on identical questions of law in the two Supreme Court Civil Appeals.

(3) That contrary to what is stated in paragraphs 11, 12 and 13 of MM Hamid's affidavit, the decision in SCCA No.14 of 2015 was just and fair to all parties due to the fact that the respondent constructed the appellant's residential house, where he actually lives and the appellant refused to pay the contract sums to the respondent and the respondent has suffered the said financial loss from 2007 to date and continues to suffer due to non-payment by the appellant.

The background of the application have been stated in the judgment of Court so I will not labour reproducing it.

Representation:

The applicant was represented by Mr. Peter Allan Musoke and the respondent was represented by Mr. Enos Tumusiime

Applicant's submissions:

Mr. Musoke, counsel for the applicant submitted as follows: He submitted that the power of this Court to attend to this application was premised on section 82 of the Civil Procedure Act. He relied on the lead judgment of Tsekoko, JSC in Beatrice Kobusingye Vs Fiona Nyakana and George Nyakana Civil Appeal No.5 of 2004 and also Rule 2(2) of the Judicature (Supreme Court) Rules.

He relied on Livingstone M. Sewanyana Vs Martin Aliker Misc. Application No.40 of 1991. He submitted further that the motion was grounded upon errors of law apparent on the face of the record of civil Appeal No. 014 of 2015 and on conflicts and contradictions between judgments of this Court in civil Appeal No.014 of 2015 and Civil Appeal No.006 of 2016 which were delivered a day apart besides other sufficient cause.

Counsel submitted on the errors on the face of the record of the judgment of the Court in Civil Appeal No. 014 of 2015. He stated that at page 17 of the judgment lines 24 & 25 having concluded that the Court of Appeal had no jurisdiction to entertain the appeal that was preferred before it by the respondent by reason that the appeal was excluded by Arbitration and Conciliation Act, proceeded to uphold the judgment of the Court of Appeal

He submitted that the decision runs counter to the fundamental rule that a judgment of a Court without jurisdiction is a nullity. He relied on Masaka District Growers Co-operative Union Vs Mumpiwakoma Co-operative Society Ltd and others (1968) EA at page 640 and

Halsbury's Laws of England 4th edition, volume 10 at page 32 para 715 and Mueller on the Code of Civil Procedure 13 edition, 2001 reprint at page 162 marked F" and G" respectively.

He further submitted that after this Court had found correctly that the dispute was filed under the Arbitration and Conciliation Act, the conclusion that past performance cured the want of signature contravened section 14 of the Judicature Act on the hierarchy of laws and section 3 and 9 of the ACA. He submitted that this was because the Court at page 13 of the judgment line 13 concluded that there was no arbitration agreement in the terms set out by the ACA but that part performance, a doctrine of equity sufficed to cure the statutory breach.

He cited section 14(2)(b) of the Judicature Act which is to the effect that only in instances when written law does not extend or apply, may a Court adjudicate a dispute in conformity with among others common law and doctrines of equity.

Counsel further submitted that section 34 of the ACA requires that parties receive an arbitral award is they are to elect a remedy under it. That in terms of section 31(4) of the ACA, an arbitration process can only result into an arbitration award if it is in writing and signed by the arbitrator. That when the court concluded at page 14 of the judgment lines 25 to 27 that; *there is nowhere the law requires that an arbitral award to be in writing before it is recognized. This means in my view, the arbitral award when it's pronounced it may be in form or in substance..."* was an advertent error on the face of the record as it was an infringement of section 31(4) of the ACA.

On the principle of stare decisis, he submitted that the doctrine of stare decisis enjoins Court to stand by earlier judicial decisions when the same point arises again in litigation save where there are urgent reasons and exceptional circumstances. He referred to Black's Law Dictionary, 9th edition.

He argued that the Judgment of Babcon Uganda Ltd Vs Mbale Resort Hotel Ltd Civil Appeal No.006 of 2016 delivered on the 4th day of May 2017 a day before the impugned judgment of Court, at page 12 lines 15 to 19, this Court stated; *"upon careful perusal of section 38 of the ACA, it is clear that it deals with a question of law which has been agreed upon in the arbitration agreement. There is no evidence by the appellant or respondent that there was any question of law agreed upon to bring the dispute within the ambit of section 38 of the ACA."*

He argued further that the impugned judgment at page 17 lines 15 to 20, the court faced with similar question suggested that where there is no agreement to appeal, an application for leave of Court above sufficed to occasion a competent appeal to the Court of Appeal and that the non-objection to such application for leave to appeal to the Court of Appeal by consent was good to supply and infer agreement espoused for a party under section 38(3) of the ACA.

On non-observance, misapplication and misconstruction of statute, counsel submitted that this Court considered S.34 (3) of the ACA in relation to section 71(1) & (2) and thereby rule 7(1) of the first schedule to the ACA. He submitted that this Court was of the view, that the application to set aside the arbitral ward having been made after the award had been filed and registered in the High Court was long out of time. That the Court's view which was hinged on the conception that rule 7(1) conflicts with section 34(3) of the ACA was a misapplication or misconstruction and therefore a non-observance of a statute. He argued

that 8.34 (3) of ACA provides for setting aside an arbitral award by an aggrieved party within 30 'days of receipt of such arbitral award. Conversely, section 71 and rule 7(1) provide for setting aside an arbitral award after such arbitral ward has been filed and registered with the High Court.

He further submitted that the two provisions of the Act provide for different scenarios and different processes within the same Act. On this account, he stated that there was no contradiction between the two parts of the statute, either of which makes provision for a different process.

He concluded thereafter that the Court misdirected itself on the applicability of the provisions and caused a miscarriage of justice. He prayed that the judgment be recalled and reviewed with a view of correcting errors on the face of the record.

Respondent's submissions:

He submitted inter alia that the application to review this Court's judgment in SCCA No.14 of 2015 alleging errors of law apparent on the face of the record and alleged conflict and contradictions between the two judgments Mohammed Mohammed Hamid Vs Roko Construction Ltd (SCCA No.14 of 2015) and Babcon Uganda Ltd Vs Mbale Resort Hotel (SCCA No.006 of 2016)

On the alleged errors of law apparent on the face of the record of Civil Appeal No.14 of 2015, counsel submitted that the applicant clearly chose not to read or grasp the contents of the judgment. He stated that from lines 005 to 20 at page 17 of the judgment, the Court gave a concise background to the facts surrounding this ground of appeal and the law applicable S. 9 and S.38 (3) of ACA. He quoted from the impugned judgment; *I do not however accept the submissions by learned counsel for the appellant that the High Court granted leave to appeal in error. There were undisputed facts and submissions that the respondent applied for leave to appeal to the Court of Appeal on the 9k March 2011 upon delivery of the Ruling by the High Court. The application was in the presence of Mr. Kimuli, then counsel for the appellant. The application was not objected to or opposed....it is therefore clear to me that the appeal was competent before the Court of Appeal by virtue of S.38 (3) ACA.*

He submitted that in view of the above foregoing, the applicant's submission that the Court of Appeal had no jurisdiction to entertain the apparel and the Supreme Court judgment is a nullity cannot succeed. There was no error of law on the face of the record.

Counsel submitted that at page 4 of the applicant's submissions, he referred to parts of the judgment contravening statute law. He submitted that underground No.2 that the applicant's counsel repeated his averments that there was no arbitration agreement. The issue of part performance was in addition to the fact that there was an arbitration clause in the Building contract signed by both parties. Therefore, there was no error of law on the face of the record at all.

It was further submitted that at page 5 of the applicant's submissions, it was stated that section 34 of the ACA requires the parties to receive an arbitral award. Further that under section 31(4), the award must be in writing and signed by the arbitrator but counsel for the

applicant did not provide proof in the 13 paragraph of the affidavit that the award was not in writing and was not signed by the arbitrator. That on the contrary, as per page 2 of the judgment lines 8 and 9 Hon Justice Alfred Karokora delivered the award on 30th June 2009 in the presence of both parties and counsel. The award was annexed to the pleadings in the Supreme Court and all the Courts below had Hon. Justice Alfred Karokora signature. Therefore, there was no error of law on the face of the record.

On the principle of stare decisis, counsel submitted that the submissions failed to distinguish the provisions of S.38 (1) and (2) from the provisions of S.38 (3) of ACA. This Court in the case of Baboon Uganda Ltd Vs Mbale Resort Ltd held that the High Court was not exercising its original jurisdiction but other jurisdiction conferred by the ACA vide page 10, lines 20 and 21 and page 12 lines 04 and 05 of the judgment. Under lines 22 and 23 at page 12, this Court held that the appellant in that case did not have automatic right of appeal.

Similarly, in this instant case Mohammed Mohammed Hamid Vs Roko Construction Ltd SCCA No.14 of 2015, the respondent would have lost its right of appeal if it did not apply for and obtain leave (before the High Court) to appeal to the Court of Appeal under Section 38(3) of the ACA. Contrary to what counsel for the applicant stated, there was no conflict and contradiction between the two judgments above of this court.

Counsel submitted that the applicant's affidavit paragraphs 4,5,6,7, 8 and 13 show that the applicant did not comprehend the contents of both judgments of this Court. For there was no error of law on the face of the record and there was nothing legal or factual in the judgment to render it a nullity.

On the alleged Non observance, misapplication and or misapplication of statute, counsel submitted that there was failure by the applicant's counsel to appreciate that there was a conflict in the provisions of section 34(3) of the ACA and rule 7(1) of the first schedule and the Arbitration Rules. Quoting from the judgment page 13 line 19 to page 16 line 6: *"...the belated application to set aside the arbitral award in the High Court was incurably defective. There was no error of law on the face of the record but the applicant is asking this Court to sit on appeal against its decision."*

Counsel submitted further that this application offends the very essence of rule 2(2) of this Court Rules as follows:-

(a) The application cannot achieve the ends of justice as it seeks to deny a contractor, respondent its dues for work done to the employer applicant

(b) The application is an abuse of court process as it is an appeal from the decision of this Court when no such appeal is allowed by law

(c) The application is also an abuse of court process for causing the delay to provide judicial relief to the respondent, contractor who executed the contract works and has been denied its hard earned money for more than 10 years while the applicant enjoys accommodation of the house constructed by the respondent. The respondent prayed that the application be dismissed with costs which should be paid by counsel for the applicant.

Consideration of the Application:

The application was brought under section 82(b) of the CPA and Rule 2(2) of the Rules of this Court.

Section 82(b) of the CPA provides for review as follows:-

A person considering himself aggrieved-

(a).....

(b) by a decree or order from which an appeal is allowed by this Act may apply for a review of a judgment to the Court which passed the decree or made the order, and the Court may make such order on the decree or order as it thinks fit.

Rule 2(2) of the Supreme Court Rules provides:-

Nothing in these Rules shall be taken to limit or otherwise affect the inherent power of the Court, and the Court of Appeal to make such orders as may be necessary for achieving the ends of justice or to prevent abuse of the process of any court caused by delay.

It is clear according to the Notice of Motion that the applicant was seeking orders to review the impugned judgment of this Court by reason that it had errors of law on the face of the record and by reason that there was conflict and contradictions between the judgment No.014 of 2015 and Civil Appeal No.0068 of 2016.

My understanding of Rule 2(2) of this Court's Rules which carries setting aside the judgment, this application can only succeed after proof that the judgment is null and void after it was passed or that there was abuse of court process caused by delay.

I note that counsel for the applicant in the skeleton submissions also prayed that the judgment of this Court in Civil Appeal No. 14 of 2015 be recalled and reviewed with a view of writing right the errors on the face of the Court record.

It is apparent that the Notice of Motion does not mention a prayer for recall. This attracts the issue whether recall and review are synonymous to use it interchangeably. I will address it before discussion of the merits and demerits of the application.

According to Black's Law Dictionary 9th edition, Recall has three definitions. The third definition is the one relevant to the facts of this application.

Recall means revocation of a judgment for factual or legal reasons. It also means annulment, cancellation or reversal of a judgment or retract. I do not have to labour over the definitions of the words used to define what recall means because they are clear. Whereas on the other hand Review means a second or subsequent reading or look broadly over.

According to decided cases in other commonwealth jurisdictions, for example in India, the Supreme Court has affirmed that the power to recall is different from the power of altering/ reviewing judgments. The Court has held that there is a vital significant difference between the words, alter, review and recall.

In the Punjab Vs Davinder Singh Bhullar and others 2012 Cr. LJ Supreme Court of India (decision on 7 December 2011), it held:

If a judgment has been pronounced without jurisdiction or in violation of principles of natural justice or where the order has been pronounced without giving opportunity of being heard to a party affected by it, or where an order was obtained by abuse of court process which would really amount to its being without jurisdiction, inherent powers can be exercised to recall such order for reason that in such an eventuality, the order becomes a nullity and the provisions of S.362 of the Criminal Procedure Code would not operate. In such eventuality, the Judgment is manifestly contrary to the audi alteram partem rule of Natural Justice.

In Giridharilal and others VS Pratap Rai Mehta and another 1st June 1989, it was stated;

There is a distinction between a review petition and recall petition. While in a review petition, the court considers on merits whether there is an error apparent on the face of the record, in a recall petition, the Court does not go into the merits but simply recall an order which was passed without giving an opportunity of hearing to the affected party.

The party seeking for recall has to establish that it was not at fault.

When the Supreme Court of India was deciding the Giridharilal and others supra, referred to the All Bengal Licensees Association Vs Ragha Labendra Singh & others (2007(11) SCC 374) where the order passed therein cancelling certain licenses was passed without giving an opportunity of hearing to persons who had been granted licenses. A recall was made.

In Vishram Aragwal (appellants) Vs State of VP (Respondent) Supreme Court of India Criminal Appellate jurisdiction Cr. Appeal No.1323 of 2004. An appeal had filed against the impugned judgment when the criminal revision was listed in the High Court on 02/09/2003; no one appeared on behalf of the revisionist, though counsel for the respondent appeared. In the circumstances, the judgment was passed. Subsequently, an application was moved to recall of order dated 02/09/2003 alleging that the case was shown in the computer list and not in the main list of the High Court and hence the learned counsel for the revisionist had not noted the case hence his nonappearance. The Supreme Court held in paragraph 9 as follows:-

When the Court has passed the order without going into the merits, the same may be recalled and for which no bar is created under S.362 of the Cri, PC. The revisional application was disposed of on merit by a reasoned order and as such the recalling of the said order will be barred by S.362 of the Cr. PC. The application was dismissed. It was further stated that the inherent powers conferred upon Court has to be exercised sparingly, carefully and with caution and only where such exercise is justified by the tests specifically laid down.

I am aware that the cases mentioned above are of persuasive nature, but I hold the view that they set out good principles based on Criminal Procedure Code of India.

It is clear to me therefore that the learned counsel for the applicant when he prayed for recall, it was misdirection on his part as review and recall are not synonymous.

Issues raised in the application:

This application was brought under S.82 of the CPA and Rule 2(2) of the Supreme Court Rules as already reproduced in this Ruling. Rule 2(2) has been ably considered in **Orient Bank Ltd Vs Fredrick Zaabwe & another, Supreme Court Civil Application No.17 of 2007**, this Court held; *"it is trite law that a decision of this Court on any issue of fact or law is final, so that an unsuccessful party cannot apply for its reversal. The only circumstances under which this Court may be asked to revisit its decision are as set out in Rules 2(2) and 35 (1) of the Rules of this Court. On the one hand, Rule 2(2) preserves the inherent power of the Court to make necessary orders for achieving the ends of justice, including orders inter-alia setting aside judgments which have been proved null and void after they have been passed."*

In order to succeed in the prayer sought, the applicant has to prove that the judgment is null and void. Likewise, in order for the applicant to succeed, he had to prove that the impugned judgment is null and void after it was passed or that there was abuse of court process caused by delay.

Under Rule 35(1) of the Rules of Court, this court may inter alia correct any error arising from accidental slip or omission in its judgment in order to give effect to what was its intention at the time of giving the judgment.

In **Fangmin Vs Dr. Kaijuka Mutabazi Emmanuel Criminal Application No.06 of 2009**, this Court held; *"It is therefore fairly well settled that there are two circumstances in which the slip rule can be applied-namely (1) where the court is satisfied that it is giving effect to the intention of the court at the time when the judgment was given; or (2) In the case of a matter which was overlooked, where it is satisfied beyond doubt as to the order which it would have made had the matter been brought to its attention."*

In **Obote William Vs Uganda, Criminal ApplicationNo.1 of 2017**, this Court had this to say; *"clearly an application such as this one, we are bound to consider whether the judgment in issue is null and void or whether as a result of any error arising from accidental slip or omission, it is necessary to correct the judgment in order to give effect to the Court's intention. None of these is apparent."*

I will therefore resolve the issues raised in the application bearing the above in mind.

Alleged errors of law apparent on the face of the record of Civil Appeal No.014 of 2015:

Counsel for the applicant under the heading "Infringement of the rule of thumb and the effect of a decision borne out of its absence. He submitted interalia that since this Court stated that the Court of Appeal had no jurisdiction to entertain the appeal as it was excluded by the ACA, It proceeded to uphold the judgment of the Court of Appeal and yet it had been excluded and therefore the judgment was a nullity.

The background of the case was carefully laid down in the judgment and it was counsel for the applicant's submission that when the High Court granted leave to appeal did it in error. The law applicable to the facts/background was stated as 8.9 and 8.38 (3) of ACA in the judgment. The Court stated at page 10 lines 1-3 of the judgment: *in addition, he argued that*

section 9 of ACA prohibits any court to intervene in matters governed by the Act except as provided by it (emphasis mine)

S. 38(3) of ACA was reproduced at page 10 lines 9-13 as follows: - An appeal shall lie to the Court of Appeal against the decisions of the Court

(a) The parties have so agreed that an appeal shall lie
(b) The Court grants leave to appeal.

This Court's judgment as clearly correctly quoted by counsel for the respondent in the submissions reproduced in this ruling goes without saying that, the applicant's counsel submission that the Court of Appeal had no jurisdiction and so the Supreme Court judgment is a nullity cannot stand and has no merit.

I accept counsel for the respondent's submission that, the applicant is asking the Supreme Court to sit on appeal against its decision , not bearing in mind that this is the final Court of appeal in Uganda.

Parts of the judgment contravening Statute law:

The applicant's counsel in his submissions stated inter alia that; *this Court at page 13 of the judgment line 13 concluded that there was no arbitration agreement in the terms set out by the ACA but that part performance a doctrine of equity suffered to cure the statutory breach....It is our view that the proper conclusion ought to have been that the principle of part performance was inapplicable to the matters having root in the ACA.*

With respect to learned counsel for the applicant, he misquoted what the judgment stated. For avoidance of doubt, I will reproduce what the Court stated. Line 13 page 13 started from page 12(the last 3 paragraphs). It was not hanging in the air.

There was evidence that the appellants (now) had promised to sign and return the counter signed contract agreement but instead, he deposited part of the contract money and this was the basis upon which the respondent started the completion works. It is apparent that the appellant would be estopped from denying that there was an arbitration clause in the contract when the parties made part performance.

I had the liberty to read carefully the authority relied on by learned counsel for the respondent Credit Finance Corporation Ltd VS Ali Mwakasanga (1959)1EA 79(CAD) and which was referred to by Hon Justice Alfred Karokora JSC the arbitrator. Windham JA..... discussed the instances where the doctrine of part performance will, supply want of formal execution of a contract having been laid down in very clear terms...see more page 13 of the first paragraph of the judgment.

It is not correct therefore for learned counsel for the applicant to submit that this Court concluded that there was no arbitration agreement. Page 13 lines 14-18 of the judgment are clear.

The Court at page 8 lines 8-12 stated the issues being resolved in grounds 1, 2 & 3 and they are reproduced here as follows:

(1) *Whether there was an arbitration clause in the agreement or the arbitration clause was deleted after it had been incorporated in the agreement.*

(2) *Whether the agreement was signed by both parties or not and if not whether it rendered it rendered the arbitration clause in the agreement invalid.*

Earlier at page 11 lines 12-18 this Court stated; it was clear on the record both the Court of Appeal and this Court that the learned counsel for the appellant admitted that the arbitration clause was in the Building contract/ agreement *not deleted (emphasis mine)*

... There was no agreement any longer whether or not there was an arbitration clause. The evidence on record shows that it was there and counsel for the appellants conceded that they signed on the first page and this was taken to the main summary signed on 29/07/2005 and 01/08/2005. I find the faulting of the Court of Appeal unjustified.

The issue of part performance cannot be considered and or construed in isulation of the above. It merely strengthens the fact that there was an arbitration agreement so it is in addition.

As I have said earlier in this Ruling, counsel for the applicant first attempted to make this Court sit in its own appeal against its own judgment by submitting that there was no arbitration agreement whereas the Court found that it was there. There was no error on the face of the record whatsoever to warrant review.

The applicant's counsel submitted that section 34 of the ACA requires that parties receive an arbitral award if they are to elect a remedy under it in terms of section 31(4) of the ACA. An arbitration process can only result into an arbitration award if it is in writing and signed by the arbitrator. That therefore when the court concluded: *there is nowhere the law requires that arbitral award to be in writing before it is recognized*, this means in my view, the arbitral award when it is pronounced may be in form or substance....." was an inadvertent error on the face of the record as it was an infringement on s.31 (4) of the ACA.

I have to point out that the above statement was not a conclusion. It came up as a by the way and not the real ground or issue which was being determined in the appeal to express the intention of the Court at the time of writing the judgment and passing it. The issue in ground 4 of the appeal was; *whether or not the application to set aside the arbitration award was made out of time.* It was only section 34(3) of the ACA referred to by counsel for the applicant. He argued that the one month limitation period arises if and only when the aggrieved party has received the arbitral award. He submitted at page 13 of the judgment, that receipt meant getting hold of the written award or duly certified or authenticated copy of the award and that hearing the award pronouncement is not receiving the award.

I am of the view that there can only be an error of law on the face of the record if it was true that the arbitral award was not in writing and was not signed by the arbitrator. The fact that counsel for the applicant has not produced evidence to prove that indeed the award was not in writing and not signed but this Court went ahead to uphold it becomes clear that the statement quoted was as a result of his unsubstantiated submissions at that time. The law has to be interpreted in relation to the facts of the case surrounding it.

Contrary to what learned counsel for the applicant submitted at page 2 of the judgment lines 8 and 9, Hon. Justice Alfred Karokora JSC Arbitrator delivered the award on 30 June 2009 in the presence of both parties. The award which was annexed to the pleadings in the Supreme Court and all the Courts below has Hon. Justice Alfred Karokora's signature. The applicant cannot be allowed to benefit from his own wrong. There is no error of law on the face of the record. The above cannot be construed to be an accidental slip either as there was no distortion of the intention of Court.

The principle of stare decisis:

The applicant submitted that the judgment violated the principles of stare decisis for differing from the decision in SCCA No.006 of 2016 (Babcon Vs Mbale Resort Hotel). He submitted that there is a contradiction and conflict between the two Supreme Court judgments.

I accept the submissions of learned counsel for the respondent to the effect that learned counsel for the applicant failed to distinguish the provisions of section38 (1) and (2) from the provisions of section 38(3) of ACA. If he did, he would have appreciated and therefore understood that whereas 8.38(3) covers appeals to the Court of Appeal against the decision of the Court (High Court) as per section 2(1) of the ACA. In the Babcon case (supra), this Court held that; *the High Court was not exercising its original jurisdiction but other jurisdiction conferred by the ACA (Emphasis mine)*. That is page 10 lines 20 and 23 and page 12 lines 4 and 5 of the judgment.

Further at page 12 lines 22 and 23, this Court held that the appellant in that case (Babcon) did not have an automatic right of appeal.

It therefore follows that in the instant case Mohammed Mohammed Hamid Vs Roko Construction (supra) the respondent would have lost its right of appeal if it did not apply for and obtained leave (before the High Court) to appeal to the Court of Appeal under section 38(3) of the ACA.

As such, there is no violation of the principle of stare decisis and there is no conflict and contradiction. It follows that there is no error of law on the face of the record in my view. I add that there is nothing legal or factual in the judgment to render it null and void or a nullity.

Alleged "Non observance or misapplication and or misconstruction of statute"

Learned counsel for the applicant submitted that this Court's view hinged on the conception that Rule 7(1) conflicts with section 34(3) of the ACA and that it was a misapplication or misconstruction and therefore a non-observance of statute among other things. He further submitted that the two provisions of the ACA provide for different scenarios and different processes within the same is obviously admission that there is conflict between the two provisions.

This issue was comprehensively dealt with by this Court from page 13 line 19 to page 16 line 6. It was in respect of ground 4 which raised the issue whether or not the application to set aside the arbitration award was made out of time. S.34 (3) of ACA and Rule 7(1) of the first

schedule of the ACA were reproduced. This court said; *"....the belated application to set aside the arbitral award in the High Court was incurably defective."*

There is no error of law on the face of the record. What the learned counsel for the applicant is doing is asking the Supreme Court to sit on appeal against its decision.

Consequently, there is no error on the face of the record of the impugned judgment. The applicant failed to prove that the impugned judgment was null and void and/or defeated the intention of Court. This application is an abuse of Court process.

I would dismiss the application for lack of merit with costs to be paid personally by counsel for the applicant to the respondent.

Dated at Kampala this 24th day of January 2019

.....

Mwondha

Justice of the Supreme Court