THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO.51 OF 2011

ROKO CONSTRUCTION LTD :::APPELLANT

AND

MOHAMMED MOHAMMED HAMID :::RESPONDENT

CORAM: HON. MR. JUSTICE S.B.K. KAVUMA, JA

HON. MR. JUSTICE A.S. NSHIMYE, JA

HON. MR. JUSTICE REMMY KASULE, JA.

RULING

This ruling is on a preliminary objection that the appellant has no right in law to lodge this appeal.

Background:

On 15.07.05 the respondent contracted the appellant for the construction of his residential house at plot 43B Windsor Close, Kololo, Kampala city at an agreed upon sum of money, the construction works to be completed by 28.02.06.

According to the appellant a standard building agreement prescribed by the East African Institute of Architects, was executed between the appellant and the respondent by each one signing on 29.07.05 the Bills of quantities which were part and parcel of the agreement.

The respondent's version is different. While agreeing having signed the Bills of quantities he denied having signed the main building agreement, which according to him, was a different entity from the Bills of quantities.

The appellant commenced construction on 01.08.05 and by 25.01.06, substantial works had been carried out. The respondent had however defaulted in payment. The appellant, pursuant to the building agreement issued to the respondent a notice of intention to suspend construction. On receipt of the notice, the respondent paid some money to the appellant who resumed construction. The period of completion of the works was subsequently extended.

Again the respondent defaulted in payment and on 16.07.07 the appellant terminated the contract. On 06.08.07 the appellant again pursuant to the building agreement referred the dispute to arbitration. The respondent was invited to consent to the said appointment within seven (7) days to a proposed arbitrator. The respondent did not respond. Thus on 22.08.07 the appellant, with a copy to the respondent, wrote requesting the President, East African Institute of Architects, to appoint an arbitrator pursuant to the building agreement. The said President, as well as the respondent did not respond. The appellant then applied to the Centre for Arbitration and Dispute Resolution through **Arbitration Cause No.11 of 2007** for the compulsory appointment of an arbitrator under **section 11 (4) (c) and Rule 13** of the **Arbitration and Conciliation Act, Cap.4.** The Centre, after affording an opportunity to the respondent to be heard, heard and determined the application by appointing Justice Alfred Karokora, retired Justice of the Supreme Court, as arbitrator.

The arbitrator heard the dispute as **Arbitration Cause No.CAD/ARB No.11 of 2007.** Both the appellant and the respondent appeared before the arbitrator represented by their respective legal counsel. An arbitral award was delivered on 30.06.09.

In the award the respondent was ordered to pay Shs.584,430,571/= to the appellant for the works carried out with interest thereon at 18% p.a. from the date of filing the arbitration till full

payment. The respondent was also ordered to pay general damages of Shs.100,000,000/= with interest thereon of 18% p.a. from the date of the award till payment in full.

Dissatisfied, the respondent, through **High Court Civil Application No.731 of 2009,** moved the High Court, Commercial Division, to set aside and to deregister the award. He concluded that there was no concluded arbitration agreement between him and the appellant. Therefore neither the Centre (CADER) or the arbitrator had jurisdiction in the matter.

Hon. Justice Kiryabwire of the High Court, Commercial Division, heard and determined the application on 09.03.2011 by allowing it. He set aside the award on the ground that though the parties had executed a building agreement, they had willingly excluded the arbitration clause so that the same was not binding upon them. Therefore the arbitration award was not in accordance with the **Arbitration and Conciliation Act**. The arbitrator who made the award was not seized of jurisdiction to do so.

With leave of the High Court, the appellant lodged this appeal against the said decision.

In this appeal Godfrey Lule, SC, assisted by Peter Allan Musoke represented the respondent while learned counsel Enos Tumusiime appeared for the appellant.

The issues:

The issue raised by the respondent as a preliminary objection, is whether or not the appellant has a right in law to lodge this appeal.

Submission of Counsel:

Respondent's Counsel:

For the respondent it was submitted that the appellant has no right of appeal. This is because the **Arbitration and Conciliation Act** does not confer such a right of appeal from the decision of

the High Court. Arbitration matters are not governed by the **Civil Procedure Act, Cap.71** and/or by the **Civil Procedure Rules** made there under. Neither the Constitution nor the **Judicature Act, Cap.13** confers a right of appeal against a decision of the High Court in arbitration matters. Counsel invited us to hold on the basis of the case of **B.D. BILIMORIA & ANOTHER V T.D. BILIMORIA [1962] EA 198** that no appeal lies.

Respondent's Counsel further submitted that the parties had not agreed that any appeal should be lodged in case of a dispute. Therefore the appellant had no right of appeal.

Appellant's Counsel:

Appellant's counsel submitted that the appellant had a right of appeal under **Section 38 of the Arbitration and Conciliation Act.** The High Court had granted leave to appeal. The case of **BILIMORIA V BILIMORIA** was no longer good law as it had been decided under the old Arbitration Act now repealed by the **Arbitration and Conciliation Act**. Further, the respondent had failed to apply to the High Court in time to set aside the ruling of the arbitrator on the preliminary objection.

The respondent therefore had no lawful application in the High Court by reason of having been out of time. Accordingly he has no right in law to raise the issue of lack of jurisdiction in this court.

Resolution of the issue by court:

The legal principle is that there is no right of appeal against a decision of a court of competent jurisdiction unless that right is expressly provided for. The right to appeal is a creature of statute. It cannot be given by mere implication: See: **Attorney General V Shah (No.4) [1971] EA 50.**

The application of the above principle is clear where a statute clearly grants or refuses a right of appeal. It is however not clear where a matter is specifically referred to the High Court by a statute but that statute is silent as to whether an appeal lies to this court from the decision given by the High Court. This issue was considered by **Viscount Haldane, L.C in the case of NATIONAL TELEPHONE COMPANY V POST MASTER GENERAL [1913] AC 546** when he stated that:

> **"When a question is stated to be referred to an established court without more, it, in my opinion, imports that the ordinary incidents of the procedure of that court are to attach and also that any general right of appeal from its decisions likewise attaches".**

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The above principle was applied by the Uganda Court of Appeal, which at the material time (08.04.82) was Uganda's highest court in the case of **MAKULA INTERNATIONAL LIMITED VS HIS EMMINENCE CARDINAL NSUBUGA & REV. DR. FATHER KYEYUNE, CIVIL APPEAL NO.4 OF 1981.**

Their Lordships, in what they described as **"a clear exposition of the law",** stated that:

> **" In our opinion, these sections confer a right of appeal to this court against orders made by the High Court in a matter which is brought to it by some statutory provision unless the appeal is specifically excluded by some special legislation"**

The sections that were being referred to were **sections 68 and 77 (now sections 66 and 76) of**
20 **the Civil Procedure Act.**

The facts of **Makula International (supra)** involved an appeal to the High Court against an order of a taxing master awarding exorbitant costs. The appeal was brought under **Section 61 (1) of the Advocates Act and Rule 3** of the **Taxation of Costs (Appeals and References) Rules**. The High Court Judge dismissed the appeal. The appellant then lodged **Civil Appeal No.4 of 1981** to the then Court of Appeal. The issue was whether there was a right of appeal to the Court

of Appeal as **Section 61 (1) of the Advocates Act** and the Rules made thereunder were silent on the matter.

Their Lordships held there was a right of appeal conferred by **Sections 68 and 82 (b) of the Civil Procedure Act**, now **Sections 66 and 81 (b) of the current Civil Procedure Act, cap.71**.

Under the then **Section 68, (now 66),** an appeal lay as of right to the Court of Appeal from the orders of the High Court, not made under the **Civil Procedure Act. Section 82 (b) now 81 (b)** provided that the provisions of the **Civil Procedure Act Part VIII** relating to appeals from original decrees shall apply to appeals from orders made under the Act and also from under any other law in which a different procedure is not provided. Therefore a right of appeal was conferred by the two sections.

The decision in **"Makula International" (supra)** was unanimously relied upon by this court in **Court of Appeal Civil Application No.31 of 2005: Denis Bireje V Attorney General.**

In the **Bireje case (supra)** it was contended that no appeal lay from decisions by way of prerogative orders of judicial review made by the High Court in the exercise of that court's prerogative jurisdiction.

It was submitted that **section 36 of the Judicature Act, cap.13,** does not give a right of appeal to the Court of Appeal against the prerogative orders of Mandamus, prohibition and certiorari. Where a right of appeal is given like in case of habeas corpus, **section 35 of the Judicature Act** had expressly stated so, but not in cases of other prerogative orders of mandamus, prohibition and certiorari.

The above reasoning was rejected by this court. The court held that there was a right of appeal to the Court of Appeal from the decision of the High Court regarding prerogative orders of certiorari, mandamus and prohibition. This right is given by **Article 134 (2)** of the Constitution, which provides that an appeal lies to the Court of appeal from a decision of the High Court as may be prescribed by law. **Section 10 of the Judicature Act and Section 66 of the Civil Procedure Act, cap.71,** were then held by court to create a right of appeal from court decisions made pursuant to **section 36 of the Judicature Act.**

Their Lordships also found in the **Bireje case (supra)** that the orders the subject of the appeal, amounted to a decree within the meaning of **section 2 of the Civil Procedure Act** and as such the decree was appealable as of right under **Section 66 of the Civil Procedure Act.** The case of **Inspector General of Government Vs Mrs Gladys Aserua Orochi, Court of Appeal Civil Appeal No.90 of 2000** where the Court of Appeal decided that it had no appellate jurisdiction over the decision of the High Court in exercise of its prerogative remedy of certiorari was held in the **Bireje case (supra)** to have been wrongly decided.

In the course of the hearing of this appeal, we were referred to the High Court (Commercial Division) **Miscellaneous Application No.0579 of 2005: B.M. STEEL LIMITED V KILEMBE MINES LIMITED**, where His Lordship Egonda-Ntende J., held that an order setting aside an arbitral award made under the Arbitration and Conciliation Act cannot be appealed as of right, or even with leave of the court, because the same is not made under the **Civil Procedure Act and the Rules thereunder.**

The learned trial judge relied on the decision of **B.D. BILMORIA & ANOTHER V J.D. BILMORIA [1962] EA 198** decided under the old **Arbitration Act, cap.55.**

It is necessary to examine in some detail the current law governing arbitration in Uganda before deciding one way or the other whether the decision in the **B.M. STEEL LTD V KILEMBE MINES LTD** case is still good law.

The **Arbitration and Conciliation Act, cap.4,** commenced on 19.05.2000. In its preamble, it is an Act to amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards and to define the law of conciliation of disputes. Prior to 19.05.2000 it is the **Arbitration Act, cap.55, 1964 Edition,** that governed arbitration.

There is no specific provision in the new **Arbitration and Conciliation Act** repealing the old **Arbitration Act, cap.55.** The preamble of the new Act states the Act is amending the law relating to Arbitration**. Section 1 of the New Act** provides that the Act shall apply to domestic and International Arbitration. The saving **section 74 (1) of the new Act** provides that the repeal of the **Arbitration Act, cap.55, 1964 Revision**, is not to affect any arbitral proceedings commenced before the coming into operation of the new Act. It thus remains unclear whether the new Act expressly or impliedly repealed the old Act or whether it just amended some of its provisions as the preamble states.

Section 9 of the Arbitration and Conciliation Act is to the effect that subject to its provisions, no court shall intervene in matters governed by the Act. The Act then proceeds to provide for specific instances where no appeal is allowed. These are **S.11 (5):** a decision of the appointing authority of an arbitrator, **S.14 (3):** a decision of the Centre on termination of the mandate of the arbitrator, and **S.16 (7):** a decision of the High Court in an appeal to it on a preliminary question whether the arbitral tribunal has jurisdiction.

Section 16 of the **Arbitration and Conciliation Act,** as far as it is relevant to this appeal, provides that:

"16. Competence of arbitral tribunal to rule on its jurisdiction.

(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement.

(a) ……

(b) ……..

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence, but a party is not precluded from raising such a plea because he or she has appointed or participated in the appointment of an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) …….

(5) The arbitral tribunal shall rule on a plea referred to in subsections (2) and (3) as a preliminary question.

(6) Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party aggrieved by the ruling may apply to the court, within thirty days after having received notice of that ruling, to decide the matter.

(7) The decision of the court shall be final and shall not be subject to appeal.

(8) While an application under sub-section (6) is pending before the court, the arbitral tribunal may continue the arbitral proceedings and make an arbiral award". [Emphasis is by court].

The old **Arbitration Act, cap.55** did not have a section similar to **Section 16** of the new Act. Accordingly it did not confer a right of appeal against an order setting aside an arbitral award.

It is of significance that the appellant as an aggrieved party on the issue whether or not the arbitrator had jurisdiction was required under **Section 16 (6) of the Arbitration and Conciliation Act** to apply to the High Court within thirty (30) days of the receipt of notice of the ruling, for the High Court to decide the matter of his grievance. Indeed even under **section 34** of the same **Act** under which **Application No.731 of 2009** was lodged to the High Court, he, the appellant, was required by **section 34 (3)** to lodge the application not later than one month from the date the appellant received the arbitral award.

10 The arbitrator ruled on the preliminary objection that he had jurisdiction 25.01.08 in the presence of Mr. Moses Kimuli, the then counsel for the respondent. From 25.01.08, the arbitrator conducted the arbitration with the appellant and the respondent until 30.06.09 when the arbitral award was delivered, in the presence of the respective counsel for the appellant and the respondent. From 25.01.08 (ruling on the preliminary objection) to 30.06.09 (arbitral award delivery) is almost 1 ½ years.

The respondent lodged in the High Court **Civil Application No.731 of 2009** on/or about 21.12.09 which is almost two (2) years from 25.01.08 and is five (5) months from the 30.06.09. The respondent never applied for any extension of time to lodge **Civil Application No.731 of 2009** out of time.

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In our considered view it is **Section 16 of the Arbitration and Conciliation Act** which deals with issues on whether or not the arbitrator is seized of jurisdiction to arbitrate and those that concern the existence or validity of the arbitration agreement. Therefore **Section 16** clearly applied to the facts of this case.

The respondent's main contention was that there was no arbitration agreement executed between him and the appellant. Therefore the arbitrator had no jurisdiction to act in the matter. It is **Section 16 (1**) that governs this objection for it provides that:-

"The Arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement.

Once the arbitrator ruled on the issue of jurisdiction which he did on 25.01.08, the option available to the respondent was to apply within 30 days of the date of receipt of the notice of the ruling, to the High Court to decide on the matter. Had that course of action been taken by the respondent and then the High Court decided on the matter, the decision of the High Court would have been final with the appellant having no right of appeal in terms of **Section 16 (7)** which provides:

"(7) The decision of the court shall be final and shall not be subjected to appeal".

The respondent however, after the arbitrator had ruled that he had jurisdiction did not make any application to the High Court within the prescribed period of 30 days. He only applied two (2) years later on 21.12.2009 through **Civil Application No.731 of 2009** to set aside the award.

The respondent purportedly did so under **sections 4, 34 and 71** of the **Arbitration and Conciliation Act** as well as **Rule 7** of the **Arbitration Rules and 0.52 rule 1** of the **Civil Procedure Rules.**

Section 4 is as to waiver of the right to object, while **section 71** provides that the Centre may make rules under the Act. **Order 52 (1)** is as to the form of the application to be by Notice of Motion and to be heard in open court. These provisions of the law were therefore only incidental to the law under which the respondent lodged his application in the High Court.

The substantive operating law under which the respondent moved the High Court in **Civil Application 731 of 2009** was **Section 34 (1), 2 (a) (ii)** and **Rule 7 (1)** of the **First schedule of Arbitration Rules** under **Arbitration and Conciliation Act.**

We find **Section 34** to have been inappropriate for this application. Unlike **section 16, Section 34** has no specific provisions to deal with the issue of objections with respect to the existence or validity of the arbitration agreement. The section provides that an arbitral award may be made only by application for setting aside the award, on the applicant furnishing proof ***of only*** the following grounds:

(i) **Some incapacity on the part of a party to an arbitration,**

(ii) **That the arbitration agreement is not valid under the law to which that agreement is subjected or the law of Uganda.**

(iii) **No proper notice of appointment of the arbitrator or of the arbitral proceedings was given to a party or the party was unable to present his or her case.**

(iv) **The arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration, or is beyond the scope of the reference to arbitration.**

(v) **The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties.**

(vi) **The arbitral award was procured by corruption, fraud or undue means or there was partiality or corruption in the arbitrator(s).**

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

(viii) **The court finds the subject matter of the dispute is not capable of settlement by arbitration under the law of Uganda.**

(ix) **The arbitral award is in conflict with the public policy of Uganda.**

Section 34 (3) enjoins the one desirous of setting aside the arbitral award to do so before the lapse of one month from the date on which the party making the application received the arbitral award.

We find that **section 34** has separate and distinct grounds for setting aside the arbitral award. These grounds are different from those required by **section 16** where the arbitrator rules whether or not he/she has jurisdiction and whether or not there is an arbitration agreement in existence, and if so whether the same is valid. Then whoever is dissatisfied with the ruling applies to the High Court to decide on the matter within thirty (30) days after receipt of the notice of the ruling.

Section 34 is also emphatic that only the grounds stated therein can be the basis for the application to set aside the award. The ground in **Section 34 (2) (a) (11)** that the arbitration agreement is not valid under the law to which that agreement is subjected or the law of Uganda presupposes that an agreement already exists between or amongst the parties, but the same is contrary to the law to which it is being subjected or the law of Uganda. This is different from what the respondent's counsel put up as his contention. The respondent's contention was that he had never signed any arbitration agreement with the appellant and therefore none existed at all between the parties. Because of its absence, he contended, the arbitrator had no jurisdiction to conduct the arbitration and to issue the arbitral award. In our considered view, the resolution of the respondent's contention fell within the ambit of **section 16** and not **section 34** of the Arbitration and Conciliation Act.

The respondent also called into play Rule 7 of the Arbitration Rules for his application. The Rule provides:

> **"7. (1) 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.

(2) The parties on whom the objections are served may, within fourteen days after the date of service of the objections, lodge cross objections which shall be served on the original objector".

Rule 7 is in contradiction with **sections 16 (6)** and **34 (3)** of the substantive Act both of which fix thirty days as the period within which a party has to apply to court to decide on the issue of jurisdiction of the arbitrator or setting aside the arbitral award. Further, while under **Rule 7** the period within which to apply to court runs from the date of the notice of filing the award is served upon the applying party, under **sections 16 (b)** and **34 (3)** the period of filing runs from the date of receipt of notice of the ruling or of the arbitral award.

Regarding **Rule 7, Arach Amoko, J**. (as she then was) held in **UGANDA LOTTERY LTD V ATTORNEY GENERAL: HIGH COURT (COMMERCIAL DIVISION) M/C 627 OF 2008 THAT:**

"……it appears this is a result of cutting and pasting the provisions of the old rules on the new rules without ensuring that there was no conflict between them and the ACA (Arbitration and Conciliation Act). It has therefore led to this confusion and in the absence of any ambiguity in the Act, the Act prevails over the rules…….".

Mulyagonja Kakooza, J. in High Court (Commercial Division) Arbitration Cause No.003 of 2007: KATAMBA PHILLIP & 3 OTHERS VS MAGALA RONALD, agreed in entirety with **Arach Amoko,J.** by holding:-

"The provisions of rule 7 Arbitration Rules are clearly a relic of the past. They definitely cannot apply anymore for they fly in the face of the provisions of S.34 ACA. I therefore could not agree with the proposition that the provisions of rule 7 of the Arbitration Rules empower a party to raise the grounds provided for in S.34 after the period of 30 days has expired because they are then precluded from doing so by expiry of time. Limitation has set in, and in this case there is no room provided for by the statute".

As we have already pointed out a decision of the High Court pursuant to an application to the High Court brought under the provisions of **Section 16 of the Arbitration and Conciliation Act** is final and not subject to appeal under **section 16 (6).** Such a decision includes the arbitrator ruling on whether he/she has jurisdiction and includes deciding on the existence or validity of the arbitration agreement.

We find that in this particular case, the facts of the subject of the preliminary objection to the arbitrator, the arbitrator's decision on the same on 25.01.08, the application by the respondent to the High Court in **Civil Application No.731 of 2009,** the decision of the **High Court (Kiryabwire J.)** setting aside the award on 09.03.2011 and those of the preliminary objection to this appeal, all fall squarely within the ambit of **section 16 of the Arbitration** and **Conciliation Act**. To that extent we hold that where the procedures and timelines set under that section are complied with, there is no right of appeal against the decision of the High Court to this Court.

With regard to an application or facts falling within the ambit of **section 34** of the **Arbitration and Conciliation Act,** we note that there is absence of a provision similar to **section 16 (6)** which prevents any further appeal to this court against a decision of the High Court made in an application whose facts constitute grounds for setting aside an arbitral award under that section. We are however constrained to read and apply **section 34** together with **section 9** of the same **Act. Section 9** provides that:

"9. Extent of court intervention.

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

It therefore appears to us that it is only where the **Arbitration and Conciliation Act** specifically allows an appeal from the High Court to this court that a right of appeal lies. We thus hold that even under **section 34 of the Arbitration and Conciliation Act**, no appeal lies to this court from the decision of the High Court. To this extent we find the decision of **Egonda-Ntende J.** in **High (Court Commercial Division) Miscellaneous Application No.0579 of 2005 BM STEEL LTD V KILEMBE MINES (SUPRA)** to be a correct decision in law. It follows therefore that the appellant has no right of appeal and this appeal is incompetent.

We seriously note, however, that Illegalities in law on the face of the record happened in the High Court in the handling of the application, the subject of this appeal we have found to be incompetent. We cannot let those illegalities go unattended to. This is so because:

" But it is the duty of the court when asked to give a judgement which is contrary to a statute to take the point although the litigants may not take it." : PHILLIPS V COPPING [1935] I KB 15, by Scrutton L.J. at p.21.

Also in **MAKULA INTERNATIONAL LIMITED VS HIS EMMINENCE CARDINAL NSUBUGA & ANOTHER, (SUPRA)** their Lordships of the then Court of Appeal after holding that the appeal was incompetent, proceeded on as follows:

" Secondly, there is no doubt that the award contravenes schedule VI and as such it is illegal. A court of law cannot sanction that which is illegal. As **Donaldson, J. pointed out in BELVOIR FINANCE CO. LTD V HAROLD G. COLE LTD [1969] 2 ALLER 904 AT 908, illegality, once brought to the attention of the court, overrides all questions of pleading including any admissions made thereon".**

It is not a contested fact that the arbitrator ruled on the preliminary objection and held that he had jurisdiction to entertain the arbitration on 25.01.08. **Section 16 (6) of the Arbitration and**

Conciliation Act required the respondent to apply to the High Court within thirty (30) days after receipt of the notice of ruling for the High Court to decide on the matter. The respondent only applied on 21.12.09 for the High Court to set aside the award on the very point that the arbitrator ruled on 21.01.08. This was almost two (2) years out of time.

The respondent purported to make his application under **Section 34 of the Arbitration and Conciliation Act** asserting he was setting aside the arbitral award delivered on 30.06.09. This was almost six (6) months out of time since **Section 34 (3)** enjoined the respondent to make the application within one month from the date of receipt of the arbitral award which was 30.06.09.

10 We have already held that **Rule 7 of the Arbitration Rules** could not override the specific substantial sections as to the time within which to lodge the applications in the High Court. Further, we have also already held that the respondent was under obligation to proceed under **Section 16 and not Section 34 of the Arbitration and Conciliation Act.**

The issue whether or not the High Court had jurisdiction to entertain the application to set aside the award was raised before the High Court, but unfortunately it was not resolved upon by the learned judge. The judge instead dealt with the contents of the agreement, and found, contrary to what is on the face of the agreement, that the parties had agreed to delete clause 36 of the agreement that refers disputes to arbitration.

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In our considered view, by reason of being caught by limitation of time, for which the respondent was entirely responsible, there was never a competent application before the trial judge for him to proceed to set aside the award. He accordingly had no jurisdiction in the matter. The order setting aside the award is accordingly a nullity.

In conclusion we hold that the appellant has no right of appeal to this court against an order to set aside an arbitral award by the High Court made under the **Arbitration and Conciliation Act.** The appeal is therefore incompetent and is thus struck out.

We also hold, as a result of an illegality on the face of the record having come to our attention, the incompetency of the appeal notwithstanding, that there was never a competent application before the High Court upon which the learned trial judge could proceed to set aside the arbitrator's award of 30.06.09. The **Application No.731 of 2009** was time barred and thus a nullity in law. Accordingly the order setting aside the award was also a nullity and the same stands vacated. The arbitral award of 30.06.09 remains valid and enforceable.

As to costs, given the decisions we have reached in this appeal, we order that each party bears its own costs of the appeal. Roko Construction Limited as the successful party in the arbitration shall have the costs of the proceedings before the High Court and those before the arbitrator.

We so order.

Dated this …**20th**…day of ……**September**…2012.

S.B.K. Kavuma
JUSTICE OF APPEAL

A.S. Nshimye
JUSTICE OF ALPPEAL

Remmy Kasule
JUSTICE OF APPEAL