

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: ODOKI, C.J, TSEKOOKO, KATUREEBE, KITUMBA AND
KISAAKYE, JJ. S.C)

CIVIL APPEAL NO 15 OF 2009

BETWEEN

1. NATIONAL SOCIAL SECURITY FUND}
2. W. H SSENTOOGO T/A SSENTOGGO} ::::::::::: APPELLANTS &
PARTNERS _____ }

AND

ALCON INTERNATIONAL LIMITED ::::::::::: RESPONDENT

[Appeal from the decision of the Court of Appeal of Uganda (Mpagi-Bahigeine, Twinomujuni and Kavuma JJ.A) dated 25 August 2009, in Civil Appeal No 2 of 2008]

JUDGMENT OF ODOKI, CJ

This is an appeal against the decision of the Court of Appeal dismissing an appeal brought by the appellants against the respondent.

Background to the Appeal:

The brief facts of the case are that on 21st July 1994, the respondent, Alcon International Ltd entered into a contract with the 1st Respondent, the National Social Security Fund (NSSF) to erect and

complete a partially constructed structure on Plot No.1 Pilkington Road, Kampala. Construction work started and the second appellant, W.H. Ssentooogo, trading as Ssentooogo and Partners, was contracted as the project architect. The contract was varied from time to time leading to a supplementary contract on 8 June 1996. Due to extensive variations and changes, the 1st appellant on 21 November 1997 granted an extension of the time to the respondent to complete the project by 31st May 1998.

On various dates on 11th December 1997 and 30th April 1998, the 1st Appellant wrote to the respondent giving notice of termination of contract under Clause 25(i) of the contract, citing defaults allegedly committed by the respondent which the latter denied. Following incessant disputes between the parties, the 1st appellant terminated the contract on 15th May 1998.

On 30th November 1998, the respondent filed HCCS No. 1255 of 1998 against the appellants jointly for wrongful termination of the contract. In Paragraph 11 of its amended plaint, the respondent accused the 1st appellant of failure to utilize the remedy of arbitration pursuant to Clause 36 of the contract. The respondent stated that as a result of the 1st appellant's failure to accept the request for arbitration within the stipulated time, the respondent wrote to the East African Institute of Architects at Nairobi, Kenya, to intervene. It later transpired that the said institute was dormant and no action was ever taken.

The respondent pleaded collusion and fraud, and sought various orders including declaration that the termination of the contract and

breach of the co-financing agreement were wrongful, null and void, as well as special and general damages.

Subsequently, the respondent applied by way of chamber summons, for temporary injunction restraining the appellants from committing any further breach of the contract and injury under the contract, by awarding or executing the contract to another contractor. It was sought to maintain the status quo at the site so as to allow the respondent or its other authorized agents to make an inventory, to value and measure the work done and to value all the various properties belonging to the respondent.

On 14th June 1999, the learned trial judge refused to grant the temporary injunction but instead ordered that the matters in conflict between the parties be referred to arbitration. The learned trial judge made the following orders:

- “7. That a temporary injunction should not be issued against the respondents/defendants to restrain them from interfering with the applicants/plaintiffs property and from committing further breach of contract.**
- 2. That the main suit be stayed and the matter be referred to arbitration**
- 3. That the parties agree on an Independent Arbitrator within 14 days from the date hereof i.e 14/06/99**
- 4. That if the parties fail to agree to an independent arbitrator, the applicant shall refer the matter to the Chairman of the East African Institute of Architects to appoint an Arbitrator in accordance with Clause 36 of the contract. ”**

The appellants protested the order and filed a notice of appeal, but the appeal was never prosecuted.

The appellants refused to concur to the appointment of an Arbitrator. The respondent referred the matter to the President of the East African Institute of Architects (EAIA). The President of East African institute of Architects appointed an Arbitrator. The respondent filed its claim, the appellants filed a defence and the respondent made a reply thereto and arbitration proceedings commenced.

On 20th September 2001, the appellants filed Miscellaneous Application No 417/2001 seeking the removal of the arbitrator on grounds of bias. The appellants later on 15 November 2001 filed another application, Arbitration Cause No 4 of 2001, to set aside the Arbitral Award on grounds that there were errors of law on the face of the record, that the Arbitrator misconducted himself and that therefore the arbitration was improperly procured. Both applications were consolidated and dismissed on 30th September 2003.

Dissatisfied with the dismissal, the applicants appealed to the Court of Appeal on several grounds which included complaints that the learned judge erred in law and fact in not holding that she had erred in law in staying the suit and in referring the matter to arbitration, that the learned judge erred in law and in fact in not holding that the arbitration was improperly procured, and in holding that there were errors on the face of the record, among others. The Court of Appeal dismissed the appeal. Hence this appeal.

The appellants appealed to this Court on fifteen grounds but during the hearing of the appeal only the first three and the fifth grounds were argued and the rest were abandoned.

The four grounds which were argued were framed as follows:

“1. The learned Justices of Appeal erred in law in upholding an arbitration award for breach of contract to the respondent in the absence of a cause of action against the Appellants.

2. The learned Justices of Appeal erred in law in upholding an arbitration award that was obtained illegally and contrary to public policy.

3. The learned Justices of Appeal erred in law in holding that the learned Judge did not err in law in staying the suit and referring the matter to arbitration.

4.

5. (a) The learned Justices of Appeal erred in law in holding that the arbitrator did not misconduct himself.
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At the hearing of the appeal the first appellant was represented by Mr. G.S. Lule, Mr. Barnabas Tumusinguzi, Mr. David Nambale, Ms Patricia Mutesi and Ms Brenda Ntambirwaki. The 2nd appellant was represented by Dr J Byamugisha. The respondent was represented by Mr, Enos Tumusiime, Mr. M Kabega and Mr. Ronald Oine.

GROUND 1: ABSENCE OF CAUSE OF ACTION

Arguments of Parties:

The first ground of appeal is that the learned Justices of Appeal erred in law in upholding an arbitration award for breach of contract to the respondent in the absence of a cause of action against the appellants. Mr. Tumusingize learned counsel for the first appellant, submitted that according to the pleadings the first appellant entered into a contract on 21st July 1994 with Alcon International Ltd, a company incorporated in the Republic of Kenya with the address of Enterprise Road Industrial Area, P.O. Box 4169, Nairobi. Despite this, the Court of Appeal in Civil Application No 50 of 2007 found that:

1. ***Alcon International Ltd Kenya had no locus standi in Civil Appeal No.2 of 2004, that was Civil Appeal then pending in the Court of Appeal of Uganda, or any more than thirty cases filed on behalf of Alcon International Ltd Uganda still pending in Courts.***
2. ***Alcon International Ltd Kenya had no power to instruct a firm of advocates.***
3. ***Alcon International Ltd Uganda had the power to instruct advocates.***
4. ***Alcon international Ltd Kenya is struck off the record of Civil Appeal No.2 of 2004.***

This ruling was delivered on 18th February 2008 before the substantive appeal was heard in the Court of Appeal on 5th April 2009. Therefore, by the time the appeal was heard in the Court of Appeal, the respondent was Alcon International Uganda.

Learned counsel pointed out that apart from the building contract, there was a co-financing agreement between NSSF and the same Alcon International incorporated in Kenya. He argued that the thrust of the plaint was for breach of contract and orders sought for damages for wrongful termination of contract. These were the same grounds argued during the arbitration and the contracts provided the basis upon which the arbitrator gave his award.

It was counsels' contention that therefore at the same time the Court of Appeal heard the appeal, Alcon International that had filed the sit, the one that went for arbitration and the one that was in the Court of Appeal before it was substituted was the Alcon International incorporated in Kenya.

He submitted that the issue then was whether at the time the Court of Appeal heard the appeal, Alcon International Uganda did have any cause of action in the circumstances. The answer according to learned counsel was no because they were never a party to the contract. They could only have had a cause of action by pleading assignment because that is where they would have derived their right. According to Clause 17 of the building contract, any assignment would have required the consent of NSSF. The clause reads ***'The contract shall not without the consent of the employer (NSSF) assign the contract.'*** Therefore the only way Alcon Uganda could have derived a cause of action would have been with the consent of NSSF.

Mr. Tumusinguzi referred to the case of *Lindens Gardens Trust Lenestat Sludge Disposals Ltd* (1994) AC 85 (1993) 3 A II ER 417 case which considered a prohibition clause that prohibited assignment in similar terms to this Clause 17. He pointed that the holding in the case was that where an assignment is done ,first of all as a point of law there is a prohibition on assigning the burden of a contract, secondly that where an assignment is done where there is a prohibition in contravention of a clause, then there cannot be an effective assignment, and thirdly on that point it also gives the rationale of why there is that prohibition because simply a party has contracted to deal with party A and it has contract with party A because of the expertise or the skills. He argued that if that party has got to bring another party then it is only critical that its consent must be sought because you cannot know whether the other party brings to the table the same skill and experience that this other party is coming with.

It was counsel's contention that at the time the Court of Appeal sat to hear the appeal, the respondent Alcon International Uganda that had been substituted could never have had a cause of action on the pleadings as they were because the pleadings were pursuant to a contract to which Alcon International Uganda was never a party. He concluded that the only means through which they would have had a cause of action, the assignment, was contrary to the signed contract and was never pleaded, and was never proved.

Mr. Tumusiime for the respondent, submitted that at all times Alcon International Ltd referred to as a private limited liability company

carrying on the business of construction in Kampala. This was the same description used in the High Court Civil Suit 1255 of 1998 and in the arbitration. It never described itself as Alcon International Kenya.

Learned counsel maintained that the issue of cause of action can be answered by a simple question of who constructed Workers' House? To counsel that is where the cause of action is derived from. In Civil Application No.50 of 2007, he argued, the Court 'established beyond doubt that it's not a Kenyan company but a Uganda company which performed the construction contract with NSSF. Furthermore he contended that,

- All correspondences between NSSF and Alcon were addressed to the Managing Director Kultar Hanspal Alcon International Ltd, P.O. Box 9598, Kampala and not 47160, Nairobi.

- All payments were made by NSSF to Alcon International Ltd Uganda and it is to this company that the notice of termination of contract were sent.

- NSSF 'recognised Kultar Hanspal as the Managing Director of Alcon International the Ugandan company and did not ever correspond with Davinder Hanspal who is the Managing Director of the Kenyan company.

- All financial statements of Alcon Kenya for the period of the contract do not show that Alcon Kenya had any assets of any kind or any operations in Uganda.
- The attached minutes of meetings of Alcon International with NSSF clearly show who was attending meetings.
- The instructions to the law firm Tumusiime, Kabega and Co. were by letter from the Directors of this company in Uganda.
- Mr. Kultar Hanspal and Mr. Rajesh Kent were charged with failing to pay workers in Uganda after the termination of this contract.

Counsel argued that the Court of Appeal accepted the evidence of Rajesh and Manjit Kent that shortly after the signing of the contract an arrangement was reached in the Hanspal family whereby the construction of Workers' House would be done by Alcon International Uganda which would take responsibility for all assets and liabilities arising from the building contract. Counsel for the respondent maintains that there is a lot of evidence to corroborate the evidence of the assignment of the construction contract. Mr. Kultar Hanspal's affidavit clearly states that the assignment was brought to the attention of the management of NSSF.

Learned counsel admitted that contrary to what was stated in High Court Civil Suit 1255 of 1990, it was not Alcon Uganda that had signed the construction contract but it was assigned to them. They

stated that by virtue of the assignment, they took themselves right in the shoes of the signatory of that contract. The assignment was made before the first brick was laid. There was a co-financing agreement that was also signed by Alcon International Kenya before construction commenced and a supplementary agreement in 1996 that was signed by Alcon Kenya and equally assigned to Alcon Uganda.

Despite the fact that the company in Uganda did not have the track record in construction, the Managing Director of the Kenyan company was the same person who moved to Uganda and started the company here therefore as far as experience and resources are concerned, it was the same human being who had that experience in Kenya who was translating that experience that was needed in Uganda. The project's quantity surveyor confirmed that the contractor successfully completed 19 floors and the consultants were satisfied.

He also maintained that a cause of action emanates from the monies owed to them by NSSF to whom a loan of US\$1,248,000 was given and not repaid. The arbitrator also found that there was a sum of US\$3,435,727 owed to Alcon for the work done and not paid. Before the termination of the contract, the respondent had plant machinery and materials worth US\$ 2,781,528.52. These were confiscated by the appellant and have never been returned. There was also loss of opportunity where the land arbitrator made a provision for 50% as apportionment of loss of profit.

Counsel also submitted that this ground should not have been brought as a ground of appeal as it had never been brought before the court before. After the decision in Civil Application No 50 of 2007, the appellants had the opportunity to challenge the decision but they did not do so. The Court of Appeal could not deal with the matter because it was *functus officio* and rule 22 of Court of Appeal Rules was not applicable. The appellant therefore slept on their rights, he concluded. He prayed that the first ground of appeal should fail.

In response to arguments made by learned counsel for the respondent, counsel for the 1st appellant maintained that the contract was signed between themselves and Alcon Kenya and all letters were addressed to Alcon International which had an address in Kampala, but this is the norm for any company doing business within the country. There is also nothing within the contract that denotes that the word contractor would refer to assignees, administrators or successors in title. There was no account titled Alcon International Uganda to which NSSF paid money into and it also never paid any money into a Kenyan Bank. The co-financing agreement was between Alcon International Kenya and NSSF, the contract termination letter was sent to the Alcon address in Kampala because any company doing business in the country will have a local address.

Counsel pointed out that Mr. Kultar Singh himself stated in his affidavit that the Government of Uganda insisted that they wanted a company with a track record in construction which is why the contract was executed by Alcon International Ltd of Enterprise Road, Nairobi.

He goes on to say that the subject contract had nothing whatsoever to do with Alcon International Uganda or Alcon International UK.

Turning to the alleged assignment, learned counsel submitted that if it is true that the assignment was done 'even before the first brick was laid', why then would Alcon Kenya sign the supplementary agreement in 1996 almost 2 years after the date of the contract since the proper course of action would have been that Alcon Uganda had assumed all the rights. Apart from the case earlier referred to which clearly demonstrates that there can be no assignment under Clause 17, counsel made reference to ***Emden's Construction Law*** which states that "***there can be no effective unilateral assignment of the burden of a contract. A contractor A cannot without the consent of his employer B assign the burden of the contract to another***" If the cause of action had been in the assignment the defence would have been different and the arbitration would not have proceeded the way it did.

Counsel asserted that if there is evidence that counsel for the respondent was aware that Alcon Uganda was the ones actually doing the construction then the respondent would not have gone ahead to file pleadings that portrayed the plaintiff and subsequently the claimant as Alcon International Kenya because the plaint was based on breach of contract, which was executed by Alcon International Kenya. Counsel for the appellant maintained that NSSF was not privy to any of this information at the time.

Consideration of The Submissions and the Law:

The appellants contend that the respondent (Alcon International Limited, Uganda) has no cause of action because the basis of this suit is the contract that was signed between the first appellant (NSSF) and Alcon International Limited, Kenya, of which Alcon (Uganda) was not a party.

The arbitration was based on various clauses within the contract such as Clause 25 which set the grounds and procedures for the termination of the contract by the employer. The arbitrator found that 'the termination of the contract was in breach of Clause 25 of the contract.' The damages awarded were also based on details within the contract such as the employer's use of the contractor's equipment. Based on the available evidence, both the High Court in Miscellaneous application No.4 17 of 2001 and the Court of Appeal in Civil Appeal No 02 of 2004 upheld the arbitration award. It was not until Court of Appeal Civil Application No 50 of 2007 when the manipulation of company names by the Hanspal Family came to light that the court decided that Alcon International Limited (Kenya) has no *locus standi* in Civil Appeal No.2 of 2004 and should be struck off.

This finding was based on the evidence that it was Alcon International Limited (Uganda) that had constructed Workers House. The court still found that Kultar Hanspal had signed the contract on behalf of Alcon International Limited (Kenya). Counsel for the respondent, Alcon International Limited (Uganda), admitted that it was indeed Alcon International Limited (Kenya) that signed the contract, the co financing agreement and the supplementary agreement.

Taking into account the above facts, I am of the view that the cause of action is derived from the contract and therefore it is the Alcon International Limited (Kenya) that can make a claim in this regard.

It should be noted that Alcon International Limited (Uganda) then changed its case and pleaded assignment instead of performance instead. A valid assignment would give them *locus standi* to bring this claim. The issue of assignment of contract was dealt with in Civil Application No 50 of 2007 and the conclusion of the Court of Appeal was that the Alcon which signed the contract is not the Alcon that performed the contract. The respondent explains this by stating that there was an assignment of the contract, following an agreement within the Hanspal family that despite not having been successful during the tendering process, Alcon Uganda would perform the contract. *In Halsburv's Laws of England.4th edition, Vol. 9, it is stated:*

“As a rule, a party to a contract cannot transfer his liability under that contract without the consent of the other party..... There is however, no objection to the substituted performance by a third person of the duties of a party to the contract where those duties are not connected with the skill, character, or other personal qualifications of that party.by the consent of all parties, liability under a contract may be transferred so as to discharge the original contract. Such a transfer is not an assignment of a liability but a novation of the contract”

What is clear from this quotation is that while assignment or indeed novation is permitted by law, there still has to be a fulfillment of the elements necessary for a valid contract. There must be offer and

acceptance between the parties, and there must be an intention to create legal relations. All these require both parties to be aware of whom they are contracting with. The principle upholds the doctrine of the privity of contract which states that 'a contract cannot confer rights, or impose obligations on strangers to it.' It is also clear that there has to be consent from both parties, which makes the arrangement within the Hanspal Family, without the knowledge of NSSF an invalid assignment.

The Linden Gardens Trust Ltd vs Lenesta Sludge Disposals Ltd and Others case (supra) further clarifies this when it states that "Clause 17 of the JCT form of building contract prohibited the assignment of any benefit of the contract ... and an attempted assignment of contract rights in breach of the contractual prohibition in Clause 17 was ineffective to transfer any such contractual right to the assignee."

The same case also held that "an attempted assignment of contractual rights in breach of a contractual prohibition is ineffective to transfer such contractual rights ... if the law were otherwise, it would defeat the legitimate commercial reason for inserting the contractual prohibition, viz, to ensure that the original parties to the contract are not brought into direct, contractual relations with third parties."

According to this authority, the assignment did not fulfill the requirements necessary in order to be construed as legal assignment

by law. Therefore Alcon (Uganda) cannot base their claim on assignment.

Counsel for the respondent also maintained that they had a cause of action because they performed the contract. The respondent relies on the affidavits of Rajesh and Ranjit Kent as proving the assignment as well as the finding of the court in Civil Application No 50 of 2007 that it is established beyond doubt that it is not a Kenya company but the Uganda company which performed the construction contract with NSSF.

Counsel also submitted while Alcon International Limited (Uganda) may have constructed the building, legally, they have no cause of action since they did not sign the contract. Without a valid assignment either, NSSF may not owe Alcon (Uganda) anything. They might be able to bring a case against Alcon International (Kenya) for the money owed, based on whatever internal agreement they claim they had.

The respondent contended further that it has a cause of action based on the money it loaned to NSSF which includes 1,248,000/= which was given and not repaid the sum of US\$ 3,435,727 that the arbitrator found was owed to Alcon for the work done and not paid, and the US\$ 2,781,528.52 for the plant machinery and materials that were confiscated by the 1st appellant and have never been returned. There was also loss of apportionment where the learned arbitrator made a provision for 50% as apportionment of loss of profit.

The money that was loaned to NSSF was awarded at arbitration for breach of the Co-Financing Agreement. It has since then come to light, and been acknowledged by counsel for the respondent that it was in fact Alcon Kenya that signed the Co-Financing Agreement as well as the contract. For that reason, Alcon Uganda is not entitled to that money.

NSSF did not dispute or rebut the claim regarding around the plant machinery and materials. Since it has been proved that it was Alcon Uganda that built Workers House, it is likely that material they used was theirs. Rajesh Kent in his affidavit stated that NSSF had promised to hand over the equipment once the work was done but has never done so. Since there has been no evidence presented to disprove this, Alcon Uganda could claim the cost for their plant machinery and materials.

The respondent also argues that this ground should not have been brought as a ground of appeal as it had never been brought before the Court of Appeal. After the decision in Civil Application No 50 of 2007, the appellants had the opportunity to challenge the court but they did not do so. They would have been able to raise some of the issues before in the Court of Appeal before that Court became *functus officio* and Rule 2(2) of Court of Appeal Rules was not applicable. The appellants slept on their rights. The appellants on the other hand maintain that this issue was already brought up in the Court of Appeal Civil Application No 149 of 2010 but was dismissed because the matters were subjudice in the Supreme Court and

therefore now that they are before the Supreme Court, it is only fair to have them considered and resolved.

The Court of Appeal found that it was functus officio and therefore Rule 2(2) of the Court of appeal rules did not apply. The Court therefore found that it did not have powers 'to entertain an application that seeks orders to consider matters that the court and other lower courts have already pronounced themselves on (resjudicata) or are pending to be pronounced upon by the Supreme Court (subjudice).'

Taking these matters into consideration, I am of the opinion that in the interest of justice and taking into account the fact that the matter could not be heard the Court of Appeal as it was subjudice in the Supreme Court, it is important that it is heard here in this Court.

It must be emphasized that the matter could not be raised earlier because of the fraud and misrepresentation perpetrated by the respondent as we shall see later in this judgment.

For these reasons, I would allow the first ground of appeal.

GROUND 2: AWARD OBTAINED ILLEGALLY OR CONTRARY TO PUBLIC POLICY Arguments of Parties:

The second ground of appeal is that the learned Justices of Appeal erred in law in upholding an arbitration award that was obtained illegally or contrary to public policy. Ms. Mutesi for the 1st Appellant

submitted that under Section 12 of the Arbitration Act where an arbitrator has misconducted himself or an award has been improperly procured, the Court may set it aside. She cited Section 34 of Arbitration and Conciliation Act which provides:

“1 (2)An arbitral award may be set aside by the Court only if -

(vi) the arbitral award was procured by corruption, fraud or undue means or there was evidence of partiality or corruption in one of the arbitrators; or

(b) the court finds that -

(i) the award is in conflict with the public policy of Uganda.”

Learned counsel referred to **Blacks Law Dictionary** 6th edn at page 163, for the definition of “**improper**” as something incorrect, unsuitable or irregular or something which is fraudulent or otherwise wrongful. She contended that the record shows that the respondent in obtaining the arbitral award conducted itself in a manner that was improper and which amounted to fraudulent conduct and which is an illegality in the eyes of the law. She argued that there were two main aspects of this ground of appeal, namely that;

(1) The respondent fraudulently misrepresented itself in order to obtain the award.

(2) The respondent was found to have been manifestly fraudulent in obtaining the contract itself.

She submitted that these are all findings of fact arrived at by a court law.

Learned counsel further submitted that this Court defined fraudulent intent in the case of Fredrick Zaabwe vs Orient Bank & Others Civil Appeal No 04/2006, as “an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable things belonging to him or to surrender a legal right A false representation as a matter of fact whether by words or by conduct by false or misleading allegations or by concealment of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury.”

The Court in that case also cited the definitions provided in **Blacks Law Dictionary**, 6th edition, page 660 on the issue of fraud as follows:

“An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which deceives and it is intended to deceive another so that he shall act upon it to his legal injury. Anything calculated to deceive, whether by single act or combination, or by suppression of truth, or suggestion of what is false, whether it is by direct falsehood or innuendo by speech or silence, word of mouth, or look or gesture ■■■■■■ ■ ■ a generic term, embracing all multifarious means which human ingenuity can devise, and which are resorted to by one individual to get advantage over another by false suggestions or by suppression of truth, and includes all surprise, trick, cunning, dissembling, and any

unfair way by which another is cheated, dissembling, and any unfair way by which another is cheated, “bad faith” and “fraud” are synonymous, and also synonymous of dishonesty, infidelity, faithfulness, perfidy, unfairness, etc
.....

As distinguished from negligence, it is always positive, intentional. It comprises all acts, omissions and concealments involving a breach of a legal or equitable duty and resulting in damage to another. And includes anything calculated to deceive, whether it be a single act or combination of circumstances, whether the suppression of truth or the suggestion of what is false whether it be by direct falsehood or by innuendo, by speech or by silence, by word of mouth, or by look or gesture ”

The same Dictionary defines the word “fraudulent” as

“To act with “intent to defraud” means to act willfully, and with the specific intent to deceive or cheat; ordinarily for the purpose of either causing some financial loss to another, or bringing about some financial gain to oneself.”

Counsel maintained that the respondent’s fraud is proved by reference to the findings of the Court of Appeal in Civil Application No 50 of 2007. As these are findings of a Court they are no longer at the level of allegations but are findings of fact that have never been appealed against in that application.

The Court found that:

- NSSF entered into an agreement with Alcon International Kenya, but Alcon International Uganda executed the building contract.

- Alcon International Uganda constructed Workers' House and it is the one that filed Civil Suit No 1255 of 1998 but it is not the one that signed the contract, that was Alcon Kenya and they concealed this material fact.
- There was manifest deceit in those actions of misrepresentation, there was concealment that was misleading and the arbitrator acted on those misrepresentations to give a benefit to the respondent who had been described as another person.
- Misrepresentation of filing and prosecuting the suit and arbitration claim by describing itself as a party as Alcon International Kenya, and by describing itself as a party to the subject contracts.
- Concealing its identity as Alcon International Uganda from the arbitrator, the High Court and thereby preventing the claim and the suits from being properly determined.
- Both companies applied for the contract. NSSF said it specifically wanted to deal with Alcon Kenya based on its past record which Alcon Uganda did not have. Although this was made clear, after Alcon Kenya won the contract, it immediately assigned it to Alcon Uganda in an internal family arrangement. An award which was procured like that by fraudulent misrepresentation would be illegal and contrary to public policy.

- The finding of the Court was that NSSF had insisted on using a company with a track record of construction which Alcon Uganda did not have which is why Alcon Kenya was used in order to win the contract.
- ***The assignment itself was fraudulent as it was a collusion between the two Alcons without the knowledge of NSSF and therefore cannot be the basis of any claim. In Farm International Ltd, Ahmed Farah vs Mohamed Hamid Farih Civil Appeal No 16/1993, the Supreme Court cited the principle that “No court will allow a person to keep an advantage which he has obtained by fraud. Fraud unravels everything the Court is careful not to find fraud unless it is distinctly pleaded and proved but once it proved it vitiates contracts, judgments and all transactions whatsoever.”¹³***

On the basis of these findings by the Court of Appeal, Ms. Mutesi submitted that the arbitral award should be set aside having been obtained by fraud. She contended that fraud is an illegality and that “a Court of law cannot sanction that which is illegal” as held in the case of *Makula International vs His Eminence Cardinal Nsubuga & Another*, Civil Appeal No 4/1981 (CA) and *Active Automobile Spares Ltd vs. Crane Bank Ltd*. Civil Appeal No 21/2001 (SC).

Mr. Tumusiime for the respondent disagreed with the submissions of learned counsel for the 1st appellant. He maintained that an arbitral award can only be challenged under S.12 of the old Arbitration Act

(Cap 55) or under S.34 of the Arbitration and Conciliation Act (Cap 4). He submitted that the appellant proceeded under S. 12 on the grounds that the award was obtained illegally and contrary to public policy. This is erroneous because under S 12 the award can be set aside only where: the award is improperly procured or; the arbitrator has misconducted himself and by extension where there is an error of law, on the face of the record.

He argued that counsel for the 1st appellant had made no reference whatsoever to the words error of law on the face of the record. Even if the appellants had a right under s. 12 of the Arbitration Act, Rule 7 of the Arbitration Rules gave them only 8 weeks to apply to set aside the award. He pointed out that it has been 11 years and under S 34 of Cap 4 they would have had 30 days. Counsel submitted further that the appellants had attempted to bring a similar argument in Misc. App. No. 149 of 2010 but the application was struck out by the Court of Appeal.

On the issue of whether the respondent obtained and sustained the contract through corruption and bribery and whether it can be allowed to take any advantage of the claim, counsel submitted that the learned arbitrator agreed with the respondent and relied on Order 6 Rule 2 of the Civil Procedure Rules. He decried the lack of particulars, pleading and evidence to confirm these allegations of fraud, corruption and bribery and therefore dismissed the issue. Counsel maintained that appellants had the opportunity to amend their pleadings and plead fraud but they did not do so. He submitted that in **Stephen Lubega vs Barclays Bank**. Civil Appeal No.2/92 the

court clearly stated that **“fraud must not only be pleaded, it must be particularised.”** He argued that it is settled law that a party is bound by its pleadings as these define issues in controversy to be adjudicated upon.

Counsel referred to the case of Fredrick Zaabwe Case (supra) which was relied on by the appellant, and submitted that the court states that **“a false representation of a matter of fact whether by words or conduct by false or misleading allegations or by concealment of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury.”** The Court went on to state that the term **“legal injury”** comprises all acts, omissions and concealments involving a breach of a legal or equitable duty and resulting in damage to another. Counsel contended that the appellant has never alleged that he lost anything. He submitted that fraud is a serious allegation and the particulars must be pleaded and proved. Order 6 Rule 3 goes into detail about what must be shown: time, place etc. None of these have been pleaded. He prayed that the second ground be allowed.

In reply, learned counsel for the 1st appellant argued that though the respondent claims they never described themselves as Alcon Kenya, the plaint presented shows that the respondent was a party to the contract. The Court of Appeal itself found that there were a lot of **“dubious practices in the dubious dealings of the Hanspal family. A few examples include the manipulation of names of their companies in a manner calculated to confuse any tax authorities or those individuals and entities they deal with/** One

of the ways this was done was through the interchanging of Directors particularly the Managing Director of Alcon Uganda, who is also a Director in Alcon Kenya, on whose behalf he signed the contract. She reiterated her submissions that no evidence has been provided of the assignment apart from the affidavits of the Directors who have been proved to be not credible.

On the issue of whether the conduct of the respondent amounts to what is contrary to public policy, counsel cited the Kenya case of Christ for All Nations vs Apollo Insurance Co. Ltd (2002) 2 EA 366 in which the issue of setting aside of an arbitrator award was considered, the court stated that “public policy would cover anything that was either inconsistent with the Constitution or the Laws of Kenya or whether written or unwritten, that was against the national interest of Kenya or was contrary to justice and morality. With regards to morality the Judge said 7 would again without seeking to be exhaustive include such consideration as whether the award was induced by corruption or fraud whether it was founded on a contract contrary to public morals.’ It was her contention that an award that is induced by fraud or fraudulent misrepresentation is against public policy.

Counsel argued further that all the various misrepresentations by the respondent amount to fraud. When the Court asked counsel “has your case now changed that you are pleading as assignee and not beneficiary?” He answered yes. This was a material fact that was concealed in order to obtain a benefit and was therefore fraudulent. She submitted further that the Court of Appeal in its ruling

in Application No 50 of 2007, noted that under the laws of Uganda these practices would be considered criminal. She pointed out that the Penal Code criminalizes the action of false pretence and in as far as the definition of public policy includes anything that is contrary to the laws whether written or unwritten, then by going to court and withholding information that misleads a judicial officer into giving you a benefit that conduct is contrary to public policy. She submitted that as far as the pleadings are concerned the respondent specifically claimed to be a party to the contract which it later on in the Court of Appeal admitted that it was not. She contended that this would amount to the offence of perjury which is criminalised under S.94 of the Penal Code Act.

Learned counsel submitted further that although certain issues were raised about the ground of appeal not falling within S. 12, this section still states that an award that is improperly procured may be set aside. Therefore an allegation of illegality in procuring that award falls squarely within S. 12 because fraud is an illegality.

She concluded that as regards the standard of proof required for fraud, what was presented was based on findings fact of a court which have not been appealed against and are therefore not reversible. She contended that there is no higher authority than the court. Therefore the appellant was relying on findings of fact of a court on who signed the contract and who instituted the suit, and the court itself found that the contract tender was fraudulently won. She prayed that the award be set aside as it was obtained by fraud and fraud vitiates everything.

Consideration of Submissions and the Law:

The complaint in this ground of appeal is that the learned Justices of Appeal erred in law in upholding an award that was obtained illegally and contrary to public policy. Section 34 of the Arbitration and Conciliation Act (Cap 4) provides *inter alia*,

- (2) An arbitral award may be set aside by the court only if -**
 - (a) the party making the application furnishes proof that -**
 - (vi) The arbitral award was procured by corruption, fraud or undue means or there was evidence partiality or corruption in one or more arbitrators; or**
 - (b) The court finds that -**
 - (ii) the award is in conflict with the public policy of Uganda**

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 has received the arbitral award or if a request has been made under Section 33, from the date on which that request had been disposed of by the arbitral award.

Under the old arbitration Act (Cap.55) an arbitral award could be set aside by the Court where the arbitrator has misconducted himself or an arbitration has been improperly procured.

The first issue that must be dealt with is whether this appeal is barred by limitation. Under the above Section counsel for the respondent submitted that Under S. 12 Cap 55 of the Arbitration Act, Rule 7 of the

Arbitration rules gave them only 8 weeks to apply to set aside the award. It has been 11 years. Under S 34 of Cap 4 they would have had 30 days. The arbitral award was dated 21 March 2001. But for the appellant it is contended that this situation is different as once a matter is on appeal then time cannot be said to be running against something that was not even pleaded, as was stated in Makula International (supra). This is in reference to Misc. Application No 149 of 2010 of the Court of Appeal which was also referred to by counsel for the respondent who maintains that the issue was not addressed. Counsel for the 1st appellant argues that the reason why this happened was because the matter was pending before the Supreme Court and was therefore subjudice.

In Makula International Case the Court stated that as long as there is some matter of illegality discovered it can be raised at any time even if the appeal itself is totally incompetent. Counsel further submitted that all these facts came to the knowledge of the 1st appellant after the Court of Appeal had made a judgment and it was late in the proceedings in 2008 that these facts first came to light. Therefore there was no opportunity for this challenge to be made in the lower Court. It is for this Court allowed this ground to be added on the amended Memorandum of appeal.

One of the principles of law stated in Makula International (supra) is that as long as there is an illegality it can be raised at any time as **“a court of law cannot sanction that which is illegal.”** Counsel for the appellant maintains that the arbitral award was procured by fraudulent means, which is an illegality which this court must act

upon. I agree and hold that due to the fact that the fraud was discovered on appeal, the appellants were not barred from raising it in this Court. The Alcon Managers and Directors knew this fact which is why they concealed it. This conduct cannot be anything other than a deliberate concealment of pertinent information.

Counsel for the respondent refers to the decision in **Stephen Lubega vs Barclays Bank** (supra) where the court stated that **'fraud must not only be pleaded, it must be particularized.'** But counsel for the 1st appellant has made reference to the various incidences that prove that the actions by Alcon International of substituting one company with another were a planned operation. The appellants also proved this allegation by reference to admissions made by the Directors of Alcon that assignment was made after a discussion within the family members only.

In Alcon International Ltd vs Kampala Associated Advocates

Civil Application No 50 of 2007, the Court of Appeal made the following serious remarks regarding the conduct of the respondent:

"There are a lot of dubious practices in the business dealing of the Hanspal family. A few examples include the manipulation of the names of their companies in a manner calculated to confuse tax authorities and those individuals and entities they deal with and the manner in which they contrived to fraudulently win the Workers House construction tender bid. Under the laws of Uganda, these practices would be considered criminal. The worst culprits of them are Kultar and Davinder Hanspal. The two since 1971 crookedly registered and manipulated dubious companies variously called

Alcon International Ltd (Kenya) (two companies), Alcon International Ltd Uganda (originally Alcon International Ltd (UK). The activities and the demise of their other companies, namely Allied Concrete Works and allied Contractors Limited are not known. Nevertheless, we hold the view that these men are not credible at all and they can only tell some truths by accident. The evidence of Rajesh and Ranjit Kent as corroborated by numerous documents attached to the various affidavits of all the witnesses is preferable. ”

The issue of fraud or illegality in this case revolves around the identity of Alcon International Ltd. As it became apparent in Civil Application No 50 in the Court of appeal, the Alcon that signed the contract is not the Alcon that performed the contract. The respondent explains this by stating that there was an assignment of the contract, following an agreement within the Hanspal family that despite not having been successful during the tendering process, Alcon Uganda would perform the contract.

However, while assignment or indeed novation are permitted by law, there still has to be a fulfillment of the elements necessary for a valid contract. I agree with counsel for the 1st appellant that there must be offer and acceptance between the parties, and there must be an intention to create legal relations. All these require both parties to be aware of who they are contracting with. Therefore to create a legal assignment, notice in writing of the assignment must be given to the debtor, or other person liable to make the payment in order to entitle the assignee to bring an action for the money or the debt. This principle upholds the doctrine of the privity of contract which states that a contract cannot confer rights, or impose obligations on

strangers to it. In this case it was necessary to have consent from both parties, which makes the arrangement within the Hanspal family, without the knowledge of NSSF fraudulent.

The identity of Alcon is at the crux of the issue because according to the 1st appellant, Alcon fraudulently misrepresented itself not only at the contracting stage but also during the performance of the contract, and throughout the subsequent legal proceedings.

Black's Law Dictionary (supra) defines fraud as “An Intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right.” Fraud requires a willful act and is therefore distinguishable from a negligent misrepresentation. A representation is fraudulent not only when the person making it knows it to be false, but also when he ought to have known or must be taken to have known that it was false. In this case, there has been an admission by the respondent that the decision to have Alcon Uganda do the actual construction of Workers House despite Alcon Kenya having won the tender was made exclusively within the Hanspal family. The reason why this information was hidden from NSSF was because NSSF had already evaluated Alcon Uganda during the tendering process and had deemed it incapable of fulfilling the contract to the required standard. This was not just a case of work being delegated to another capable company under the same umbrella group of companies. In this situation, the second company had been deliberately rejected in the award of the contract. The Alcon managers and directors knew this fact which is why they

concealed it. This therefore cannot be anything other than a deliberate concealment of pertinent information. Counsel for the respondent rightly refers to **Stephen Lubega vs Barclays Bank** (supra) where the court stated the 'fraud must not only be pleaded, it must be particularized.' The appellant has made reference to the various incidences that prove that these actions by Alcon of substituting one company with another were a planned operation. They also proved this allegation with reference to admissions by the directors of Alcon for example over the assignment that was made after a discussion within the family members only.

The respondent rightly mentions that Under S. 12 of the Arbitration Act, an arbitral award can only be set aside where the award is improperly procured or the arbitrator has misconducted himself and by extension whether there is an error of law, on the face of the record. However, it is also a well settled principle of law that if a transaction has been originally founded on fraud, the original vice will continue to taint it, however long the negotiation may continue, or to whatever ramifications it may extend. Not only is the person who has committed the fraud precluded from deriving any benefit under it, but an innocent person is so affected, unless there has been some consideration moving from himself. Therefore, although the issue is raised in relation to the arbitral award, it actually applies to the whole which contract is tainted having been based on fraudulent misrepresentation.

The Arbitration Act allows for 30 days in which to appeal an arbitral award. However it should be noted that in law, fraud or fraudulent

breach of contract postpones the period of the commencement of the period of limitation.

On what amounts to public policy, the Kenyan case of **Christ for All Nations vs Apollo Insurance Co. Ltd** (2002) 2 EA 366 indicated that public policy would cover anything that was either inconsistent with the Constitution or the Laws of Kenya whether written or unwritten that was against the national interest of Kenya was contrary to justice and morality. In this case, it is not enough to simply show that a party was misled. Court must be satisfied that some form of reprehensible or unconscionable conduct has contributed substantially to the award being obtained. As has been proved, Alcon deliberately misled NSSF by substituting one company with another. The arbitral award was then given on the basis of fraudulent information which might not have otherwise happened. The award was obtained contrary to public policy. Accordingly, I would allow this ground of appeal.

GROUND 3: ERROR IN REFERRING THE MATTER TO ARBITRATION

Arguments of Parties:

The appellants contend that the learned Justices of Appeal erred in law in holding that the learned Judge did not err in law in staying the suit and referring the matter to Arbitration.

Mr. Lule for the 1st Appellant submitted that the learned trial Judge erred in sending the matter to arbitration as this reference was made without jurisdiction and therefore anything out of it is a nullity.

Counsel pointed out that when the matter came up for trial, the trial Judge considered the plaint and the defences and having regard to a provision in defence that the suit was premature on the ground that it should have been referred to arbitration, the trial Judge then said that is where it should go. He contended that the trial Judge did not take into account the provisions of law which give her the jurisdiction. The Judge made the orders that temporary injunction should not be issued against the respondents but that the main suit be stayed and the matter referred to arbitration.

Learned counsel pointed out that the appellants then filed the appeal in the Court of Appeal where Dr. Byamugisha who was counsel for the appellants submitted that Section 17 of the Arbitration Act (Cap 55) (Laws of Uganda 1964 revision) provides for an order of stay of the suit by the Court and reference of the matter to arbitration. However, this order can only be made any time after appearance but before filing a written statement of defence or taking any other in the proceedings. He argued that in this case it was too late for the Judge to refer to arbitration, after all the two defences had already been filed, the application to amend the plaint had been made, heard and the reply thereto had been filed. The court was therefore at the stage of disposing of the application for a temporary injunction. Furthermore, the parties had not yet been given the opportunity of making any submissions on the reference to arbitration.

Dr. Byamugisha also argued that the arbitration could not even be ordered by the court under Order 47 Rule 1 of the Civil Procedure Rules. He stated that the learned Judge ought to have complied with

express provisions of order 47 instead of invoking the inherent powers of the court which was erroneous. He added that the inherent powers cannot be invoked where there is an express provision of the law. He cited Article 126 of the Constitution to the effect that courts must first and foremost apply the law even under the unlimited jurisdiction of the High Court as provided for in Article 139(1) of the Constitution and Section 14(2) of the Judicature Act. Counsel contended that the jurisdiction was ousted by an express provision of the law and therefore the staying of the suit and the ordering of arbitration were without jurisdiction.

Counsel pointed out the learned Judge in her judgment stated that the application is partially allowed and the Order sought under the prayer, namely, any other or further orders that the court may deem fit, is granted and it is further ordered that in the interest of justice, and for the speedy disposal of this matter, the main suit be stayed and the matter be referred to arbitration. Dr. Byamugisha submitted that these therefore are the grounds given by the Judge as to why she made that ruling and not under other any provision of the law. He also referred to Order 43 Rule 1(1) of the Civil Procedure Rules (old) now (O 47 R 1 (1) where it is provided,

“(1) Where in any suit all parties interested who are not under disability agree that any matter in difference between them in any such suit shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to court for an order of reference.”

It was counsel's submission that the import of this rule is that the court can only refer a matter to arbitration upon written application by one of the parties and the court then has power to make an order of reference after the consent of all parties.

Dr. Byamugisha for the 2nd Appellant submitted that the trial Judge erred in law in staying the suit and referring the matter to arbitration in respect of the 2nd Appellant who was not a party to the arbitration clause and this was not justified either under the Arbitration Act or Order 43.

Mr. Tumusiime, learned counsel for the respondent, submitted that the contract that parties entered into was an East African Institute of Architects Model which had an arbitration clause. When the parties started having disputes, the 1st appellant gave to the respondent a notice to terminate the contract. The respondent responded by requesting the 1st appellant to submit to arbitration in accordance with clause 36. The 1st appellant refused this and a week later terminated the contract. Following that, the respondent filed High Court Civil suit No. 1255 of 1998 and under that suit filed Application No 542 of 1999 to get a temporary injunction principally to stop NSSF from giving the contract to another party until the parties have gone to arbitration or have gone to court under Rule 55 and resolved their disputes.

On whether the High Court has the inherent power to stay a suit and refer it for arbitration, counsel for the respondent contended that in ***Yugasta Construction vs Coffee Marketing Board***, Arbitration Cause No 1/94 it was noted that under the Constitution of Uganda

and the Judicature Act, the High Court has unlimited original jurisdiction over all matters criminal and civil subject to written law. He contended that in that case they were trying to challenge the appointment of an arbitrator by the High Court. It is a cardinal principle of arbitration law and practice, counsel submitted, that where there is an arbitration clause, courts will always refer the dispute to arbitration. He relied on various cases including **Wellsford vs Watson Homes and Overseas Insurance** (1870) 3 CH 257 and the Tanzanian Court of Appeal decision of **Construction Engineers and Builders vs Sugar Development Corporation**. (1985) LRC (Comm) 596 In the Tanzanian Case, the Court of Appeal stated:

“I venture in things that not enough attention has been directed to the true nature and functions of an arbitration clause in a contract. It is quite distinct from the other clause, the other clause set out the obligations which the parties undertake towards each other but the arbitration clause does not impose on one of the party’s an obligation in favour of the other. It embodies the agreement of both parties that if any dispute arises with regard to the obligations which the one party has undertaken to the others such dispute shall be settled by a tribunal of their own constitution. And there is this very material difference that whereas in an ordinary contract the obligations of the parties which other cannot in general be specifically enforced and breach of them results only in damages the arbitration clause can be specifically enforced by the machinery of the Arbitration Acts. The appropriate remedy for breach of the agreement to arbitrate is not damages but enforcement. Moreover, there is the further significant difference that the courts of England had discretion power of dispensation as regards arbitration clauses which they do not possess as regards the other clauses of the contract.”

He pointed out that in this case the Court was looking at exactly Clause 36 of the East African Institute of Architects Building Model type of contract. Counsel maintained that the two parties therefore had to submit to arbitration. Section 17 of old Arbitration Act, Cap 55 which the appellant referred to refers to instances where one of the parties goes to court and applies for stay and does not cover instances where the High Court invokes its own jurisdiction to stay the proceedings and refer them to arbitration.

Counsel for the respondent further argued that this ground of jurisdiction should not even be entertained at all by this Court for two reasons. On the record of appeal there is Misc. Application No.417 of 2001 which was filed together with Arbitration Cause No 04 of 2001 which her Lordship consolidated. In Misc. Application No.417, the appellants applied to remove the arbitrator after the arbitrator had filed the award. Her Lordship found that this application had been overtaken by events. The application was premised on the same grounds like the ones we have here that the court made a mistake to stay the proceedings and refer the matter to arbitration and for that reasons they wanted the arbitrator removed. Since that application failed and was abandoned, it cannot be raised here as this is not an appeal against Misc. App. 417/2001. Secondly, following trial Judge's ruling, counsel for the appellant filed a Notice of Appeal against the ruling on 14th October 1999. On 1st October 2003, he got a record of proceedings from the court but up to today, that Notice of Appeal has been lying in the court and nothing has been done. It is 13 years later and this issue cannot now arise. It belongs to that appeal and it is in that appeal that this ground should have been addressed.

Counsel referred to the case of Suleiman Vaco vs Lakhani and Co.(1957) EA 49 Counsel also referred to S.4 of the Arbitration and Conciliation Act that states that “where a party to arbitration proceedings knows of any part of the act that is not being followed and continues to participate in these proceedings instead of going to court to apply for relief that party should not be heard to complain or should not raise that issue after that.”

Mr. Tumusiime then submitted that the issue of waiver and acquiescence was discussed in a decision of the Supreme Court of India in **Prasun Roy vs Karcata Metropolitan Development Authority** (1988) LRC (Comm) 596. In that case, the arbitrator was appointed by a court that had no jurisdiction to appoint an arbitrator and the parties went to arbitration and after 74 hearings, but before the award was made, one of the parties sought to challenge or to impeach the proceedings on the basis that the court which had appointed the arbitrator did not have jurisdiction. The court held that in participating in the proceedings they waived their rights and could not challenge the proceedings. In that case the award had not even been made.

Consideration of the Submissions and the Law:

In Misc. Application No 0542 of 1999, the respondent applied for a temporary injunction to stop the new contractor Roko Construction Company from executing the contract until the suit the respondent had filed is determined.

The learned trial Judge refused to grant the application for temporary injunction and instead ordered the suit to be stayed and the matter to be referred to arbitration. The learned Judge stated:

“if this injunction is granted it will interfere with the contract of Roko Construction, 3rd party and the 1st Respondent will face another suit by Roko Construction. On the other hand if the injunction is not granted, the applicant will suffer some inconvenience, which in my view can be taken care of under Clause 25 of the Contract signed between the two parties which provide for the rights of the contractor in case of termination by the employer. Most importantly, the parties have a right to arbitration in case of any dispute or difference between the parties during the progress of the works. Clause 36 of the contract provides, that such disputes or difference shall be referred to an arbitrator to be agreed on by parties within 14 days of notice, failing which an arbitrator shall be appointed by the Chairman or Vice Chairman of the East African Institute of Architects, who may delegate such appointment to be made by the chairman or vice chairman of the local (national) society of Architects - in this case the Uganda Institute of Architects. Finally according to Kakooza’s affidavit, the status quo has changed and there is therefore no status quo to be maintained by any injunction order. In the circumstances and for the reasons stated herein above, the orders sought in 1, 2, 3 and 5 are not granted. Instead the application is partially allowed and the order sought under 4, namely any or further orders that the court may deem fit is granted and it is further ordered that in the interest of justice, and for the speedy disposal of this matter:- (i) The main suit be referred to arbitration (2) The parties agree on an independent arbitrator within 14 days from the date thereof (3) Failure of which the applicants shall refer the matter to the Chairman of the East African

Institute of Architects to appoint an arbitrator in accordance with Clause 36 of the contract.”

In the Court of Appeal, Mpagi Bahigeine JA (as she then was) who wrote the lead judgment referred to the above conclusion of the trial judge and then cited the provisions of old order 43 rule 1 (l) of the Civil Procedure Rules which is now O 47 R 1 (i) which states:

“Where in any suit all the parties interested who are not under disability agree that any matter in difference between them in such a suit shall be referred to arbitration, they may, at any time before judgment is pronounced apply to court for order of reference. ”

The learned Justice of Appeal observed, quite correctly in my view, that the import of this rule is that the Court can only refer a matter to arbitration upon written application by one of the parties and the Court has power to make an order of reference after the consent of all the parties to the case before it. The learned Justice of Appeal then went on to say,

“In the instant case, none of the parties applied for the matter to be referred to arbitration as per order 43 R 1(1) of the old Civil Procedure Rules. The Judge relied on the prayer any other or further orders that the court may deem fit, to stay the main suit and referred the matter to arbitration. She made an order of reference at the time of hearing an application for an order of interlocutory injunction, when the main suit was set for hearing but before judgment. I do consider that the time was opportune for the court to make such order.

Clearly the learned Justice of Appeal considered that the *trial judge* was justified in making the order referring the matter for arbitration under the Rules cited. I think the learned Justice of Appeal was wrong in so holding.

In the first place there had been no such application for reference to arbitration, nor had the parties agreed to the reference.

However, the learned Justice of Appeal found a justification for reference to arbitration in Clause 36(i) of the contract which provided,

“Provided always that in case a dispute or difference shall arise between the Employer or Architect on his behalf and the Contractor or either during the progress or after the completion or abandonment of works, as to the construction of this contract or as to any matter or thing left by this contract to the discretion of the Architect or the withholding by the architect of any certificate to which the contractor may claim to be entitled to or the measurement and valuation mentioned in Clause 30 (5) (a) of these conditions or the rights and liabilities of the parties under clauses 23, 25, 32, 33, 34 of these conditions, then such a dispute or reference shall be and is hereby referred to the arbitration and the final decision of the person to be agreed between the parties or failing agreement within 14 days after either party had given to the other a written request to concur in the appointment of an arbitrator a person to be appointed on a request of either party by the Chairman or Vice Chairman for the time being of the East African Institute of Architects who will, then appropriate, delegate such appointment to be made by the Chairman or Chairman of the Local (National) Society of Architects (4) The award of such arbitrator shall be final and binding on the parties.”

The learned Justice of Appeal went on to observe that by incorporating the above clause in their contract both the appellants and the respondent, for all intents and purposes recognized arbitration as an effective and efficient means of resolving all the disputes arising out of the building contract. She also recognized that the clause was binding on the parties to the contract. She noted that an arbitral award has an enduring and special effect, that is even if the parties decide to adopt a different dispute resolution mechanism for a particular dispute that arises under a contract, the arbitration continues in force and is not thereby totally repudiated unless there is a solid reason for doing so. She concluded, that courts will always refer a dispute to arbitration where there is an arbitration clause in a contract. In this connection she relied on Russel on Arbitration 22nd Ed, page 80, paragraph 2 - 119 where the authors state.

“A party may abandon its right to arbitration, for example by the delay or inaction, or by commencing court proceedings in breach of an arbitration agreement. However the Courts are slow to find such repudiation or abandonment without very clear evidence of an intention to abandon the right to arbitrate together with reliance by the other party to its detriment. Even if the right to arbitrate a particular dispute has been abandoned that does not necessarily mean that the arbitration agreement itself had been abandoned.”

The learned Justice of Appeal then observed that in fact the arbitrator had stated in his decision that he did not receive any objection by any

party to arbitration. She entertained no doubt that the learned judge did not err in law in staying the suit and referring the matter to arbitration.

The question is whether the learned Justice of Appeal with whom the other Justices of Appeal agreed was correct in holding that since the contract contained an arbitration clause the trial judge was justified in referring the matter to arbitration without the application of any of the parties to the contract, and when one of the parties had filed a suit despite the existence of arbitration clause in the contract.

Section 5 of the Arbitration and Conciliation Act (Cap 4,) provides for stay of proceedings where the Court refers the matter to arbitration. It provides as follows;

“(1) A judge or magistrate before whom proceedings are being brought in a matter which is the subject of an arbitration agreement shall, a party so applies after the filing of a statement of defence and both parties having been a hearing refer the matter back to the arbitration unless he or she finds-

- (a) that the arbitration agreement is null and void, inoperative incapable of being performed, or**
- (b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.”**

In the present case there is no doubt that no party to the arbitration agreement applied to the court to refer the matter to arbitration. It was argued that the court invoked its inherent jurisdiction to refer the matter to arbitration. However inherent jurisdiction cannot be invoked

where there is an express statutory provision dealing with the matter like in this matter where Section 5 is clear and unambiguous.

Secondly both parties were not given a hearing regarding the propriety of referring the matter to arbitration. There must have been good reasons why the respondent filed a suit instead of referring the matter to arbitration. Thirdly the appellant objected to the reference of the matter to arbitration and participated in the arbitration proceedings under protest. Fourthly it is doubtful whether the 2nd appellant was a proper party to arbitration having not been a party to the arbitration agreement.

In my view the learned trial judge prematurely referred the matter to arbitration thereby depriving the court of the opportunity to determine whether the reference to arbitration complied with the provisions of section 5 of the Arbitration Act.

As a consequence of the orders of the trial judge the party which had signed the arbitration agreement and which was entitled to file the suit and benefit from the arbitral award was not the beneficiary of the arbitral award and was ordered by the Court of Appeal to be struck off from all proceedings pertaining to this case.

The respondent who was declared the right party to the proceedings was not a party to the proceedings and had no valid assignment as there was no evidence presented. The 1st appellant had not consented in writing to the assignment as required by the building contract.

Accordingly, it is my view that the Court of Appeal, having discovered fraudulent conduct against the respondent, it erred in upholding the decision of the trial judge to stay proceedings and refer the matter to arbitration. Ground 3 should therefore succeed.

GROUND 5(a) ALLEGED MISCONDUCT BY THE ARBITRATOR

In this ground of appeal, the appellants complain that the learned Justices of appeal erred in law in holding that the arbitrator did not misconduct himself. Dr Byamugisha 2nd for appellant submitted that counsel for the respondent did not contradict him when he stated that the gift of \$5000 received by the 2nd Appellant was for his daughter's wedding. He urged court to hold that the arbitrator was wrong in holding that the gift was a bribe.

With regard to the denial of costs to the 2nd appellant counsel contended that there is no law prohibiting parties from filing a joint defence. The issue was framed whether the 2nd appellant was a proper party to the suit and it was for the court to decide. Costs could not be denied for adjournments which were properly granted. Counsel submitted that the failure to award costs were errors in law. He prayed that the award be set aside in respect of the 2nd appellant.

In reply Mr. Tumusiime for the respondent submitted that it is true the arbitrator held that the 2nd appellant should not have been made a party to the proceedings Section 27 of the Civil Procedure Act gives discretion to the arbitrator to deny a party costs for good reasons. He argued that the arbitrator gave sound reasons which included the 2nd

appellants' voluntary submission to the proceedings, filing a joint defence with the 1s appellant on issues in the contract of which he was not a party and failure to challenge his rejoinder in the arbitration. Counsel relied on the case of **Sheikh Jama vs Dubat Farah** (1959) EA 789 where it was held that **"costs of and incidental to all suits are in the discretion of the Court but where the court decides that any costs shall not follow the event the court must set out the reasons in writing. "**

With regard to the complaint by learned counsel for the 2nd appellant that the two appellants were wrongly lumped together in the appeal, Mr. Tumusiime acknowledged that this was an error of fact by the court which was not brought to its attention. He prayed that this ground of appeal be dismissed.

Finally learned counsel for the respondent prayed that the appeal be dismissed with costs and since the case has been going on since 1999 and a lot of research has been going on in the appeal, the court grants a certificate for three counsel.

It was not contested that it was wrong to proceed against the 2nd appellant when he was a party to the contract or the arbitration agreement. The reasons the arbitrator gave were insufficient to deny costs to the 2nd appellant. Accordingly, I would allow this ground of appeal.

DECISION AND ORDERS

For the foregoing reasons I would allow this appeal, set aside the judgment and orders of the Court of Appeal, and orders of the Courts below including the arbitral award.

I would remit the case back to the High Court for expeditious trial.

I would order that the costs of this appeal and of Courts below between the 1st appellant and respondent abide the outcome of the trial. I would award the 2nd appellant costs in this Court and Courts below.

As the other members of the Court also agree this appeal is allowed with the orders I have proposed.

Dated this 8th day of February

2013



B J Odoki CHIEF
JUSTICE