THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

Coram: *Katureebe, C.J., Arach-Amoko; Mwangusya; Opio Aweri; Mwondha JJ.S.C.*

CIVIL APPEAL NO. 06 OF 2016

BETWEEN

BABCON UGANDA LIMITED ..... APPELLANT

VERSUS

MBALE RESORT HOTEL LTD ..... RESPONDENT

(Appeal from the decision of the Court of Appeal before Nshimye JA, Egonda-Ntende JA, and (Kakuru JA, Dissenting) in Civil Appeal No 87 of 2011 dated 23rd June, 2015)

JUDGMENT OF MWONDHA JSC

The appellant was dissatisfied with the decision and orders of the Court of Appeal and appealed to this Court against the majority decision of 2-1.

The memorandum of appeal has six grounds as follows:-

1. The learned Justices of the Court of Appeal erred in law in holding that the right of Appeal created under Section 66 of the Civil Procedure Act does not extend to decisions of the High Court under Sections 34 of the Arbitration and Conciliation Act.

2. The learned Justices of the Court of Appeal erred in law in relying on Mr. Justice Harold Platts Commission of Inquiry Report to interpret, Section 66 of the Civil Procedure Act, Sections 9 and 34 of the Arbitration and Conciliation Act.

3. The learned majority Justices of the Court of Appeal erred in law in holding that the decision of the High Court which set aside only part of the award was not null and void.

4. The learned majority Justices of the Court of Appeal erred in law in not considering the ground of appeal which demonstrated that the High Court's interference with the

award was contrary to the provisions of Section 34 of the Arbitration and Conciliation Act.

5. The learned majority Justices of the Court of Appeal erred in law not setting aside the illegality which was committed by the High Court in setting aside part of the Award.

6. The learned majority Justices or Court of Appeal erred in law in striking out the appeal with costs

It was proposed that this Court makes the following orders:

(a) Appeal be allowed
(b) The decision of the Court of Appeal be set aside
(c) The decision of the High Court be set aside
(d) Costs of the Appeal and in the Court below

Background

The brief facts are that the respondent entered into a construction contract with the appellant to erect and construct an annex building to the existing Mbale Resort Hotel in Mbale Municipality. The contract was agreed at Shs666,337,984/=. The date of practical completion was 30th October 2007. On the 2nd October 2007 the Respondent terminated the contract and this resulted into the dispute. The dispute was referred to an arbitrator and by consent of parties agreed on Hon. Mr. Justice Karokora (Rtd) and he was appointed as such. The arbitrator made the award in favour of the appellant on the 18th April 2010 as follows:-

(a) Claim for costs incurred in the modification of the original design..... Shs.132,585,395.34
(b) Claims arising out of wrongful termination of the contract ..... Shs. 1,272,700,857.00
(c) Various other claims (outstanding certificates valuations interest or delayed payments and retention monies)
(d) General damages for unilateral breach of contract ..... Shs. 100,000,000.00
Total Shs.1,712,880,153.34

The awards made under (a) and (b) would attract interest at 10% p.a. from the date of the breach while the general damages would attract interest at 8% p.a. from the date of the award.

The High Court partially granted the application by the Respondent by setting aside the portions relating to special damages of shs.1,272,700,875 and general damages of Shs.100,000,000. He awarded the appellant 1/3 of his taxed bill of costs.

The Respondent was dissatisfied with the decision and order of the High Court Commercial Division and filed an appeal against the arbitral award in the Court of Appeal against only setting aside part of the award. When the appeal was called for hearing in the Court of Appeal Counsel for the respondent raised a preliminary objection on a point of law. The parties were allowed to argue the appeal including the preliminary point of law raised so as to save time of Court and the parties. Basically the preliminary objection on a point of law was that the appeal was incompetent in that the appellant had no right of appeal to the Court of Appeal. The contention was that this matter arose out of a decision of the High Court made under Section 34 of the Arbitration and Conciliation Act (ACA).

The Court heard the parties on the P.O. and the merits of the case together and struck out the appeal on account of its being incompetent and set aside the Ruling of the High Court and substituted it with a dismissal order. It further ordered that the appellant pay one half of the costs of the Court of Appeal and one half of the costs of the High Court

Representation:-

At the hearing Counsel Byamugisha Joseph represented the appellant while Counsel Kasirye Andrew and Rutisya represented the respondent.

Counsel Kasirye for the respondent raised a preliminary objection on a point of law before hearing the appeal. His point of law was that no appeal lies of right to the Supreme Court. Counsel argued that the jurisdiction conferred on this Court is under Section 6(I) of the Judicature Act Cap 13 which provides:-

> **An appeal shall lie as of right to the Supreme Court where the Court of Appeal confirms, varies, reverses a judgment or order including an interlocutory orders given by the High Court in the exercise of its original jurisdiction and the Court of Appeal either confirmed, varied or reversed the decision of the High Court in its original jurisdiction.**
>
> **S. 14(I) of the Judicature Act provides for the original jurisdiction as here under:-**
> **The High Court shall subject to the Constitution have unlimited original**

jurisdiction in all matters and such appellate and other jurisdiction as may be conferred by the Constitution or this Act or any other law.

He submitted that section 6(I) of the Judicature Act give that right of Appeal to the Supreme Court only when the High Court is exercising its original jurisdiction. The present appeal came to the High Court following an exercise of jurisdiction by the Commercial Division of the High Court under S. 34 of the Arbitration and Conciliation Act and after the appeal was filed in the Court of Appeal.

He asserted that:-

S. 14 (I) of the Judicature Act has a limb after original jurisdiction to the effect that the High Court shall have other jurisdiction which is either conferred by either the Constitution or this Act or any other law.

He submitted that the Arbitration and Conciliation Act is one of the laws. He contended that S. 34 (I) of ACA has the title 'Application for the setting aside Arbitral Award (I) Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections 2 and 3.'

He further argued that there are several limbs of subsection 2 and several limbs of S. 34(3), 34(4) and 34(5) which don't provide for appeal. He said this was the argument the appellant had with the respondent in the Court of Appeal. He affirmed that S. 34 is not part of the original jurisdiction of the High Court. It is the other laws which the High Court is empowered to consider much as it comes from section 14(I) of the Judicature Act.

Counsel for the respondent further raised the question as to how this appeal arrived in the Supreme Court in the first place. He argued that since the contention or dispute in the High Court was not part of the original jurisdiction of the High Court from which an appeal arose and went to Court of Appeal, the High Court was not acting in the exercise of its original jurisdiction but, other jurisdiction an exercise of other jurisdiction of the Arbitration and Conciliation Act. So the instant appeal falls outside Section 6 (I) of the Judicature Act and consequently there is no right of appeal available to the appellant in this Court. He prayed that the appeal be struck out. He submitted that it is of fundamental importance that this Court clearly defines what matter can come before it so as to prevent blatant abuse of Court process. He further prayed that the objection be upheld and costs be awarded to the respondent.

Dr. Byamugisha counsel for the appellant in reply on the point of law objection, referred to Section 14 (I) of the Judicature Act and S. 34 (I) of the Arbitration and Conciliation Act reproduced supra. He submitted that the present appeal was appealable as of right under Section 6 of the Judicature Act. He relied on the Supreme Court decision in Civil Appeal No. 01 of 2013, **Mohammed Mohammed Hamid v. Roko Construction Ltd**. He argued that this Court in that appeal dealt with an appeal from the Court of Appeal and decided as follows on page 13 from line 18 of the judgment.

> **"the proper procedure is to allow the appeal, set aside the orders of the Court of Appeal and return the matter to the Court of Appeal for that Court to constitute a suitable different Coram to hear and decide the appeal in accordance with established procedures."**

He submitted that the Court of Appeal heard the appeal **CACA No 0051 of 2011 Roko Construction Limited v. Mohammed Mohammed Hamid**. The Court of Appeal citing Dennis Birejje case quoted:

> **"The Court of Appeal in Mukula International v. His Eminence Cardinal Nsubuga and Another – held that when an order is made by the High Court on a matter brought before it by some statutory provision other than the Civil Procedure Act or Rules, it is appealable as of right, unless the appeal is specifically excluded by law."**

He also relied on the case of **Mausukhulal Manji Karia (2005)ULSR 157**) where the Supreme Court relied on its previous judgment basing on the Expropriated Properties Act to hold that an appeal from a decision of the High Court on the Ministers decision was appealable as of right up to the Supreme Court among others. He relied also on the **SCCA No of 2010 Kituma Magala & Co Advocates v. Celtel (U)** (unreported) where Katureebe JSC as he then was) with whom the other Justices agreed said;

> **"in my view the use of the word appeal in Section 62 (I) of the Advocates Act is analogious to the use of the same word in other statutes where provision is made for appeals to the High Court against decisions of administrative or quasi judicial authorities. This Court has held in a number of cases that such appeal are not appeals in the judicial sense as would be envisaged by S. 6 (2) of the Judicature Act**."

Counsel submitted that The Arbitrator was not a Court and the respondent's application to the High Court to have the award set aside was such a reference and the right of appeal to both the Court of Appeal and the Supreme Court accrued to any aggrieved party in the proceedings. That the thrust of Counsel for the appellant's main submissions is to the same effect. He prayed that the objections be dismissed.

In a short rejoinder to the appellants' submissions Counsel for the respondent affirmed that the language in section 6 (I) of the Judicature Act has to be construed as to give effect to its spirit which effect was to limit matters appealable as of right to the Supreme Court

He, inter alia, submitted that Counsel for the appellant did not produce any judicial authority in support of the proposition that application to the High Court under Section 34(I) of the Arbitration and Conciliation Act are adjudicated upon in exercise of original Jurisdiction of the High Court as contemplated under Section 6(I) of the Judicature Act. He reiterated his earlier prayers that the appeal be struck out with costs.

Consideration of the objection on a point of law:

The issues to be determined in the objection on a point of law were (I) whether the application to the High Court under S. 34(I) of the Arbitration and Conciliation Act is adjudicated upon by the High Court in exercise of its original jurisdiction as envisaged in Section 6(I) of the Judicature Act and if so (2) whether the dissatisfied party has an automatic right of appeal to the Supreme Court.

SS6 and 14 (I) of the Judicature Act have already been reproduced. S. 34 of the Arbitration and Conciliation Act provides

Application for setting aside arbitral award

(I) Recourse to the Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3)

(II) An arbitral award may be set aside by Court only if (a) a party making the application furnishes proof that

i. a party to the arbitration agreement was under some incapacity.

ii. the arbitration agreement is not valid under law to which the parties have subjected it or if there is no indication of that law, the law of Uganda.

iii. **The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was unable to be sent 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 contains decisions on matters beyond the scope of the reference to arbitration, except that if the decisions on matters referred to arbitration can be separated from those not referred, only that part of the arbitral award which contains decisions on mattes not referred to arbitration may be set aside.**

v. **the composition of the arbitral tribunal or the procedure was not in accordance with the agreement of the parties unless the agreement was in conflict with a provision of this Act from which the parties cannot derogate or in absence of an agreement was not in accordance with this Act.**

vi. **the arbitral award was procured by corruption, fraud or undue means or there was evident partiality or corruption in one or more of the arbitrators or the arbitrator award is not in accordance with the Act.**

(b) The Court finds that

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law of Uganda or

(ii) the award is in conflict with the public policy of Uganda

3. ----------

4. ----------

5. ----------

For clarity S. 6 of the Judicature Act provides:-

Appeals to the Supreme Court in Civil matters

An appeal shall lie as of right to the Supreme Court where the Court of Appeal confirms, varies or reverses a judgment or order, including an interlocutory order given by the High Court in exercise of its original jurisdiction and either confirmed , varied or reversed by the Court of Appeal.

I carefully considered the respondents and appellants counsel submissions together with the authorities cited by both Counsels.

It was clear to me that S. 34 of the Arbitration and Conciliation Act provides for the recourse to the Court against an arbitral award only by way of an application for setting aside the award under subsections 2 and 3.
The Court is defined by the ACA Section 2(f) as Court meaning the High Court

Article 139 of the Constitution provides:-
Jurisdiction of the High Court

1. **The High Court shall subject to the provisions of this Constitution, have unlimited original jurisdiction in all matters and such appellate and other jurisdictions as may be conferred on it by this Constitution or other law.**
2. **Subject to the provisions of this Constitution and any other law, the decision s of any Court lower than the High Court shall be appealable to the High Court.**

From the above provisions it is clear that when the High Court is hearing the application under S.34 (I) of ACA it is not in the least or at all exercising original jurisdiction. The original jurisdiction had been exercised by the arbitral tribunal consisting of a sole arbitrator. This is defined in Section 2(c) of ACA.
(arbitral tribunal means a sole arbitrator or a panel of arbitrators, and includes an umpire.)

The Constitution Article 151 provides:-

In this chapter unless the context otherwise requires judicial officer means

a. **judge or any person who presides over a Court or tribunal how so ever described**.
b. **----------**
c. **such other person holding any office connected with a Court as may be prescribed by law.**

According to the **Blacks Law Dictionary 9th Edn**. The word original means existing at the beginning of a particular period, process or activity.
From the facts of this case it's apparent that the arbitration didn't originate from the High Court. It therefore follows that S. 6 of the Judicature Act cannot be applicable to the facts of this case.

I am not convinced by the submissions of Counsel for the appellant therefore to the effect that when the High Court was dealing with the application it was exercising its original jurisdiction and its decision after the Court of Appeal is appealable to the Supreme Court under S. 6 of the Judicature Act. The High Court was exercising "other jurisdiction" conferred by the Arbitration and Conciliation Act, but not original jurisdiction.

I find the authority relied on by Counsel for the Appellant. **Mohammed Mohammed Hamid v. Roko Supra** not applicable because it has totally different facts and the appellants Counsel cited it out of context. Most important as far as **Mohammed Mohammed Hamid case** is concerned the Supreme Court had this to say:

> **"In our view and with the greatest respect to the Court of Appeal we hold that the Court did not follow permissible proper procedures in deciding the appeal and therefore, ground one and three must succeed. Mr. Lule asked us to hear arguments on the issue of illegality and then decide the appeal. While that appear to be a possible quick mode of disposal of this litigation, with respect we do not think it is proper ....."**

Then the Court continued the **proper procedure is to allow the appeal set aside the order of the Court of Appeal and return the mater to the Court of Appeal for that Court to constitute a suitable different Coram to hear and decide the appeal in accordance with the established procedures.**

In that case, the issue was that one Justice who was not a member of the Coram which heard the case signed the judgment among other others.

The Supreme Court noted

> **"By whatever standards this raises suspicion and questions about propriety of and the Courts impartiality in making a ruling" etc.**

The Supreme Court further emphasised the importance of Article 28 of the Constitution which provides for the Right to a fair hearing. In my view the substance of the appeal was not considered because of the failure by the Court of Appeal to follow the procedure.

The other case relied on **SCCA Kituuma Magala & C0 Advocates vs. Celtel (U) Ltd** (unreported) supra. Counsel submitted that the arbitrator was not a Court and the respondent's application to the High Court to set aside the award was such as a reference and the right of appeal to both the Court of Appeal and the Supreme Court accrued to any aggrieved party in the proceedings. He argued that this meant that the appellant has a right of appeal to the Court of Appeal and Supreme Court. I am unable to accept that submission. As already pointed out above, the Court was not exercising original jurisdiction but "other jurisdiction"

I accept Counsel the respondent's submission to the effect that this appeal fell outside the preview of S. 6 (I) of the Judicature Act and there was no automatic right of appeal to the Supreme Court. Section 34 of ACA does not constitute original jurisdiction of High Court, the High Court is only empowered to consider other laws like ACA according to the facts of this case.

Besides **Kituuma Magala & Co Advocates** case relied on by the appellant (supra) was highly distinguishable in as far as the facts and the laws applicable are concerned. It was in respect of a Debt Collection Agreement under Advocates Act & Advocates Remuneration Rules. This instant case was in respect of Arbitral award under the ACA. So that authority also could not be useful.

Before I take leave of this matter I am obliged to comment on the effect of S.38 of the ACA, which provides for questions of Law arising in Domestic arbitration. Upon careful perusal of S. 38 of ACA, it's clear that it deals with a question of law which has been agreed upon in the arbitration agreement. There is no evidence by the appellant or respondent that there was any question of law agreed upon to bring the dispute in the ambit of Section 38 of ACA. Section 38 cannot be invoked as it's outside the dispute.

It is my considered view therefore that the objection has merit and I am satisfied that the appeal doesn't fall under the S. 6 (I) of the Judicature Act. The appellant have no automatic right of Appeal to Supreme Court. The objection is accordingly upheld.

By upholding the objection it would logically follow that the appeal falls by the way side or dismissed since there was actually no appeal in law before this Court. However, for purpose

of completion I am convinced that it will be fair and just to dispose of the grounds of appeal nevertheless.

Ground one

It was to the effect that the Court of Appeal erred in law in holding that the right of appeal created under section 66 of the Civil Procedure Act does not extend to decisions of the High Court under Section 34 of the ACA. I had the liberty to read the judgment of the Court of Appeal, the proceedings and submissions of both Counsels. I did not find anywhere in the evidence of the appellant including the authorities or submission to the effect that an automatic right of appeal was available for the appellant to appeal to the Supreme Court. The authorities relied on by Counsel for the appellant of **Seyani Brothers & Co (U) Ltd v. Simbamanyo Estates Ltd (unrepotedO Application No 31 of 2009. Denis Birejje v. Attorney General Civil Applications No 31 of 2006, Makula International v. His Eminence Cardinal Wamala Nsubuga & Another and Joseph Bayego v. The Registrar of Titles CA No 20 of 1994** were not applicable because they were distinguishable as indeed the Court of Appeal found.

The cases were dealing with statutory provisions which had no connection with ACA. **Denis Biregye** was dealing judicial review so was **Pius Niwagaba Makula International** was dealing with Advocates Act and Joseph Beyago was dealing with Registration of Titles Act. The instant case proceedings are governed by the ACA as a specific law. The above cases decisions recognised the general right of appeal created by Section 66 of the CPA.

The instant case the right of appeal was specifically barred by S. 9 of the ACA which provides for the extent of Courts intervention as follows:- **Except as provided in this Act no Court shall intervene in matters governed by this Act**

The intervention is provided for ACA by S. 34 and Section 38 of the ACA. But as I have stated above S. 38 is not an issue in this dispute since it had not been originally agreed in the arbitration agreement and there was no leave of Court granted to the appellant.

The appellant could not invoke the general provisions of the CPA when there is a specific law which governed the proceedings of the case. This ground would fail.

Ground two:

It was to the effect that the learned Justices of the Court of Appeal erred in law in relying on Mr. Justice Harold Platts Commission of inquiry Report to interpret Section 66 of the CPA and sections 9 and 34 of the ACA.

The appellant's complaint was that the report was not put in evidence either in the High Court or the Court of Appeal nor was it referred to during the hearing of the appeal. That therefore it was an error for the learned justices to refer to it, because it influenced the decisions though in the passage quoted nothing was said about appeals.

With due respect to learned Counsel for the appellant my view is that it is important to always to know the background to the law with the objective of ascertaining why a particular law was put in place. In the long title of ACA. It states An **Act to amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards to define the law relating of conciliation of disputes and to make other provision relating to the foregoing**.

S.I of the Act is very instructive. It provides

Except as otherwise provided in any particular case, the provisions of this Act shall apply to domestic arbitration and international arbitration.

In my view whether the Report was put in evidence or not it is a fact apparently not disputed that Legal Notice No 3 of 1994 Commission of Inquiry on Judicial Reform was issued by Government which culminated in the Report. It was this report which provided the main input for Reform of the law relating to arbitration and resulted into the enactment of the Act.

The report recommended as quoted by the Court of Appeal that **there is need to incorporate into our international instruments and introduce radical provisions which will give arbitration the importance it plays in other jurisdictions**

There are principles laid down in several decided cases of this Court and other Courts in commonwealth jurisdiction and legal literature of persuasive authority which Courts rely on to interpret the provisions of the Constitution and other Acts of Parliament. See (**Paul Semwogerere v. Attorney General Constitutional Appeal No; 1 of 2002 Kanyeyihamba**

also Fox Odoi Onyelows & Another v. Attorney General Constitutional Appeal No 8 of 2003 (CC).

The Harold Platt Report is such literature which in my view the Court may look at and rely on in order to establish the purpose and object of a legislation before coming to the right conclusion.
These recommendation as quoted earlier is clear, I am therefore unable to fault the Court of Appeal. This ground would fail

Ground three and four:-
Counsel for appellant argued that by varying the award instead of either leaving it intact or setting it aside as a whole the Court ended up as an appellate Court on the merits of the award which the Act doesn't permit. He said that the Act S. 34 (I) only provides for setting aside.

With respect to Counsel for the appellant S. 34 does not prohibit varying the arbitral award so in my view the Court has a discretion to act as it did which is within the law. I therefore accept Counsel for the respondent's submission and the comment in Redform & M. Hunter, Law and Practice of International Commercial Arbitration London; Sweet & Maxwell 2004) at page 404. The purpose of setting aside, is to modify in some way the award in part or wholly. These grounds would fail.

Ground five:-
There was no proof of any illegality since varying is not prohibited. This ground would fail.

Ground six:-
The appellant's Counsel submissions were to the effect that the learned Justices erred in law in striking out the appeal with costs. It was apparent that submissions were premised on S. 66 of the CPA, which statutory provision did not govern the proceedings of the instant case. There was no appeal to be considered by the Court of Appeal. This ground would fail.

In the result I would uphold the objection on the point of law and I would dismiss the appeal with costs.

Dated at Kampala this.....05th . day of ...May..... 2017

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Hon. Lady Justice Faith Mwondha
JUSTICE SUPREME COURT