

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA
AT KAMPALA

5

{Coram: Katureebe, Tumwesigye, Arach-Amoko, JJS.; Tsekooko and
Okello Ag. JJSC}

10

Civil Appeal No. 01 of 2013.

15 MOHAMMED MOHAMMED HAMID APPELLANT.
Between
And

20 ROKO CONSTRUCTION LTD. RESPONDENT

{Appeal from the Ruling of the Court of Appeal at Kampala (Kavuma,
Nshimye and Kasule, JJA), dated 20th September, 2012 in Civil Appeal
No. 51 of 2011.}

Judgment of the Court.

30 This is a second appeal arising from the ruling of the Court of
Appeal which held that the appeal from a ruling of the High Court
setting aside an arbitral award was incompetent. The Court of
Appeal further held that the arbitral award was validly made in
favour of the present respondent.

35 **BACKGROUND:**

On 15.07.2005, Mohammed Mohammed Hamid, (the appellant)
agreed with ROKO Construction Ltd. (the respondent) for the latter
to construct for him a residential house at Plot 43B, Windsor Close,

Kololo, in Kampala City, at an agreed sum of money. Apparently, construction had partially started. The construction was to be completed by 28.02.2006.

5 According to the respondent, a standard building agreement prescribed by the East African Institute of Architects, was executed between the two and, on 29.07.2005, each of them signed the Bill of Quantities which were part and parcel of the agreement. On the other hand, while the appellant agrees that he signed the Bill of
10 Quantities, he denied having signed the main building agreement. According to him, the agreement was a different entity from the Bill of Quantities.

The respondent commenced construction on 01.08.2005 and by
15 25.01.2006, substantial work had been done. The appellant had, however, defaulted in payments. Pursuant to the building agreement, the respondent issued to the appellant a notice of intention to suspend the construction. On receipt of that notice, the appellant paid some money to the respondent which resumed
20 the construction. The period of completion of the work was subsequently extended.

The appellant again defaulted in payment and on 16.07.2007, the respondent terminated the contract. On 06.08.2007, the
25 respondent, again pursuant to the building agreement, referred the dispute to arbitration and an Arbitrator was proposed. The appellant was invited to consent to the appointment of the proposed Arbitrator within seven (7) days. The appellant did not respond. On 22.08.2007, the respondent wrote a letter to the

President of the East African Institute of Architects [EAIA], requesting that the President appoints an Arbitrator pursuant to the building agreement. The respondent copied that letter to the appellant. Both the President of EAIA and the appellant did not
5 respond. The respondent then applied to the Centre for Arbitration and Dispute Resolution (CADER) for the compulsory appointment of an Arbitrator under **section 11 (4) (c)** of the **Arbitration and Conciliation Act and Rule 13** of the first schedule to the Arbitration and Conciliation Act. The Centre, after affording an
10 opportunity to the appellant to be heard, heard and determined the application on 04th October, 2007, and appointed Justice Alfred Karokora, a retired Justice of the Supreme Court, as the Arbitrator.

The Arbitrator heard the dispute as **Arbitration Cause No. CAD /**
15 **ARB No.11 of 2007.** Both the respondent and the appellant appeared before the Arbitrator through their respective advocates. An arbitral award was delivered on 30.06.2009. The Arbitrator ordered the appellant to pay Shs.584,430,571/= to the respondent for the work carried out with interest thereon at 18% p.a., from the
20 date of filing the arbitration till full payment. The appellant was also ordered to pay general damages of Shs.100,000,000/= with interest thereon at the rate of 18% p.a. from the date of the award till payment in full.

25 The appellant did not accept the decision of the Arbitrator. So he instituted **High Court Civil Application No.731 of 2009**, and moved the High Court, Commercial Division, to set aside the award and to deregister the same award. He contended that there was no concluded arbitration agreement between him and the

respondent and, therefore, neither CADER nor the Arbitrator had jurisdiction in the matter.

Kiryabwire, J., the then Head of the Commercial Division of the High Court, heard and allowed the application on 09.03.2011. He set aside the award on the ground that though the parties had executed a building agreement, they had willingly excluded the arbitration clause so that the same was not binding on the parties. The Learned Judge concluded that the arbitration award was not in accordance with the **Arbitration and Conciliation Act** because the Arbitrator who made the award had no jurisdiction to do so.

With leave of the High Court, the respondent appealed against that High Court decision to the Court of Appeal which reversed the decision of the High Court. Consequently, the appellant instituted this appeal to this Court against the decision of the Court of Appeal and based the appeal on four grounds.

At the hearing, Mr. Godfrey Lule, SC, assisted by Mr. Peter Allan Musoke, represented the appellant while Mr. Enos Tumusiime represented the respondent.

Mr. Lule first argued grounds 1 and 2. His assistant, Mr. Musoke, argued grounds 3 and 4. Mr. Tumusiime argued grounds 1 and 3 together, followed by ground 2 and then ground 4. The four grounds were couched in the following words—

*1. The Learned Justices of Appeal erred in law and fact when they delivered a ruling against the appellant without a **fair hearing**.*

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2. *The learned Justices of Appeal erred in law and fact when they upheld an illegal **arbitral award**.*

5 3. *The learned Justices of Appeal erred in law when the **panel that** delivered the judgment / ruling **was different** from the one that heard the case / appeal thereby occasioning a miscarriage of justice.*

10 4. *The Learned Justices of Appeal erred in law when they awarded the respondent costs.*

SUBMISSIONS ON GROUND 1 AND 3:

Grounds 1 and 3 appear to go to the root of this appeal. Therefore, we find it proper to consider the two grounds first. Mr. Lule made submissions on the first ground and his Assistant, Mr. Musoke, made submissions on the 3rd ground. Mr. Lule's main contention briefly is that the learned Justices of Appeal erred when after holding that the appellant did not comply with time lines and that the appeal was incompetent, they relied on the case of ***Makula International Ltd. vs. H.E. Cardinal Nsubuga & Another (Court of Appeal Civil Appeal No. 04 of 1981)*** and decided the question of the illegality without hearing the parties on that question. Yet the former Court of Appeal for Uganda which decided the **Makula case** (*supra*) decided the matter with regard to legality after first hearing both sides. (Unfortunately many pages of the copy of the authority supplied by learned counsel were missing so we had to search for and get a fresh and proper copy ourselves.) Learned counsel contended that in this case the learned Justices of Appeal should have asked the parties to address the Court on whether or not there were illegalities. Counsel contended that what appeared to the Court as illegalities were not illegalities at all. He contended that illegalities were in

fact in the Arbitration Proceedings and not in the High Court proceedings as held by the Court of Appeal. According to learned counsel, the Arbitrator was wrong when he held that an arbitration clause existed which was not the case. Therefore, learned counsel
5 prayed that this Court should allow the parties to address Court on the illegalities to enable Court decide the appeal instead of possibly referring it to the Court of Appeal for a rehearing.

Mr. Lule maintained that indeed the Court of Appeal upheld the
10 illegalities that were in the Arbitration Proceedings. That the Arbitrator did not check the relevant law. He prayed to Court to be allowed to make submissions to show that there were no illegalities in the High Court but that illegalities were in the Arbitration Proceedings. He concluded his submissions on ground
15 one by contending that in fact the appellant was denied natural justice and a fair hearing.

Mr. Musoke's major contention on the 3rd ground is that the decision of the Court of Appeal offended the Rules of Natural
20 Justice. Learned counsel contended that the Coram of the Court of Appeal which decided the appeal was different from the one that had heard the appeal in that the Coram which decided the appeal included his Lordship Justice Nshimye, JA., who never participated personally at all in the hearing of the appeal. Counsel contended
25 that this occasioned a miscarriage of justice. He relied on **De Smith's Review of Administrative Action [1980 Edit.] from Page 219; Re Election For Stann Greek West Electrical Divisions (1991) 1 LRC (Const.) 119 and Kamurasi vs. Accord Properties (2000) 1 EA9.**

Mr. Tumusiime, counsel for the respondent, submitted to the contrary. On the first ground he contended that the question whether an appellant can raise a point of law which was not argued before the lower court is a matter of discretion for the court. He argued that the Court of Appeal had the record before it to be able to take the decision. Learned Counsel contended that the appellant was therefore given a fair hearing. He also relied on the **Makula case** (*supra*). On the inclusion of Hon. Justice Nshimye, JA., on the panel that signed the court judgment when the learned Justice of Appeal had not at all personally participated in the hearing of the appeal, learned counsel contended, curiously, that although the appellant compiled the record of appeal, the appellant never challenged the appearance of Nshimye, JA. 's name in the judgment. Counsel contended that the appellant should have applied for review of this. Leaned counsel also curiously contended that as the court decision is by majority decision, the appellant was not prejudiced by the participation of Justice Nshimye, JA. in deciding the appeal. Further, learned counsel opined that this Court can administratively seek information from the Court of Appeal about what happened. _

COURT 'S CONSIDERARTION:

A perusal of the record of appeal containing the proceedings recorded during the hearing of the appeal in the Court below, shows two things standing out. On 15th May, 2012, the panel of the three Justices on the Coram consisted of the Hon. Lady Justice A.E.N. Mpagi-Bahigeine, DCJ., Justice S.B.K. Kavuma, JA., and Justice Remmy Kasule, JA. The DCJ presided over the hearing. This

is reflected in the typed copies of the proceedings recorded on that day by each of the three members of the panel. The panel heard arguments on the objection about the competence of the appeal. During the hearing each of the three members of the Panel who participated in the actual hearing recorded arguments in favour and against that objection. At the end of that hearing, the Court adjourned the ruling about the objection to be given on notice to parties. This was noted by each of the three members of the Court: This is from pages 802 to 818 of the record of appeal. Indeed the record of the notes of the Learned Deputy Chief Justice during the hearing run from page 805 to page 808. Clearly, therefore, in a legal system and tradition in which Justice must not only appear to be done but must be seen to be done properly and impartially, the appearance on record of a Justice who never personally participated in the hearing raises genuine concern about the fairness and propriety in the decision of the Court.

The reserved ruling was read on 20th September, 2012. This time the panel consisted of S.B.K. Kavuma, JA. (as the presiding Justice), A.S. Nshimye, JA. (who had not participated in the hearing) Remmy Kasule, JA. There is no explanation given whatsoever indicating why lady Justice Mpagi-Bahigeine, the DCJ., could not participate in the signing of the ruling or why from nowhere Nshimye, JA., became a member of the Panel which apparently decided and signed the ruling. Yet it is common knowledge that the Hon. Lady Justice Mpagi-Bahigeine was by then still the DCJ until late October, 2012 when she retired from the Judiciary. By whatever standards, this raises suspicion and questions about propriety of and the Court's impartiality in making the ruling.

The conduct of business by the Court of Appeal is generally regulated by, *inter alia*, the Rules of the Court of Appeal among which is rule 33.

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Rule 33 which deals with judgments reads as follows—

33(1) *This Rule shall apply to judgments and orders by the Court.*

10 **(2)** *Judgment or an order may be given at the close of the hearing of an appeal or application or reserved for delivery on some future day which may be appointed at the hearing or subsequently notified to the parties and which shall, in any case, be without delay.*

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In the present case the Court reserved the ruling.

20 **(5)** *In Civil Appeals, separate judgments shall be given by the **members of the court** unless the decision being unanimous, the presiding judge otherwise directs.*

As we understand it, the words “**members of Court**” refer to the Justices who personally participated in the same hearing of the cause and this appears clearly in subrule (10) of the same rule which is the most informative. Sub-Rule 33(10) states—

25 *33(10)“Where judgment, or the reasons for decision, has or have been reserved, the judgment of the court, or a judgment of any judge, or the reasons, as the case may be, BEING IN WRITING AND SIGNED, may be delivered by any judge, whether or not he or she sat at the hearing, or by the registrar.” [emphasis ours].*

30 It is obvious from this Sub-Rule (10) that a judge who never participated in the hearing may deliver a judgment or ruling which **has been written and signed** by the judges who actually heard and decided the matter. The effect of this Rule is to ensure that it

is the Justices who hear the appeal or an application who must decide and put their decision in writing and sign the same. This is indeed intended to minimize or prevent possible fraud and to ensure that written judgments and or rulings reflect accurately what those who heard the matter decided. Recently in the case of **Komakech Geoffrey & Another vs. Rose Akol Okullo & 2 Others (Supreme Court Civil Appeal No. 21 of 2010)** where final decision in the appeal was made without a proper Coram of the Court, this Court set aside the decision and returned the matter to the Court of Appeal to rehear afresh with a proper Coram.

With all due respect to Mr. Tumusiime, Counsel for the respondent, we are not persuaded by his contention that the appellant was not or could not be prejudiced by the participation of Justice Nshimye, JA., in the deciding of the appeal where the learned Justice had not participate in its hearing. In our opinion it is improper and contrary to natural Justice for a stranger to the hearing to decide and sign a purported judgment or ruling. Under our legal system and this is reflected in Article 28(1) of our Constitution, a person *is entitled to a public hearing before an independent and impartial court*. Parties have to know who is due to hear and decide their case. This enables litigants to raise objections against a Judicial Officer or Judicial Officers due to hear a case where a litigant has a basis for such an objection. Obviously no objection can possibly be raised where, as in this appeal, a Judicial Officer is brought in the case without the knowledge of the parties and during the final stage of the appeal namely during deciding and writing a judgment in the case.

Mr. Tumusiime, learned counsel for the respondent, submitted further that it is the majority who matter and, therefore, in effect, that there was nothing wrong done here. We are here tempted to
5 pause the question if it the majority who matter, why was it necessary for the Constitution to provide under Article 135 that **“the Court of Appeal shall be duly constituted at any sitting if it consists of an uneven number not being less than three members of the Court?”** Participation in the
10 hearing by an uneven number of members presupposes that the majority will carry the day but every member must have participated in the hearing at all stages of the appeal. It may possibly be argued that the majority who participated in the hearing could disagree with the stranger to the hearing. But it can
15 also legitimately be argued that the stranger could persuade the majority to his view. Whichever way, fair hearing and the need to exercise propriety and impartiality require that the panel which heard the appeal must be the same one which decides, writes and signs the judgment or ruling before it is delivered. That is what
20 subrule 33(10) stipulates. It is the guiding statutory procedure. Fairness must be apparent but not imagined. See House of Lords decision in ***In Re Pinochet Urgate II (1999) I ALLER 577*** where the House of Lords set aside its own judgment and stated that an appeal to the House of Lords will only be reopened when a
25 party, through no fault of its own, has been subjected to an unfair procedure.

Further we have perused the eight grounds of appeal which were lodged in the Court of Appeal on behalf of the present respondent.

None of those eight grounds of appeal in the memorandum complained about illegalities upon which the learned Justices decided the appeal. In our considered view and with great respect, the decision of the Court of Appeal contravened Rule 102 (c) of the Rules of the Court of Appeal. The sub-rule reads this way

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“102 (c) the court shall not allow an appeal or cross-appeal on any ground not set forth or implicit in the memorandum of appeal or notice of cross-appeal, WITHOUT AFFORDING THE RESPONDENT or any person who in relation to that ground should have been made a respondent, or the appellant, as the case may be, an opportunity of BEING HEARD ON THAT GROUND.” (emphasis is ours).

This requirement is mandatory. The subrule is a reproduction in identical terms of Rule 101(c) of the former Court of Appeal for East Africa Rules, 1972, which were operating when the former Uganda Court of Appeal decided the **Makula Case** (*supra*). That Court must have borne this in mind when it allowed parties to address it before it made its decision on the basis of illegality brought to the attention of the Court. And see also **H. Singh vs. S. S. Dhiman (1951) 18 EALA 75**. In that case the East African Court of Appeal held that although it is the right and duty of the Court to consider illegality at any stages yet, when it has not been pleaded and not raised in the Court below, or at best, only raised at the late stage, an appellate Court must be cautious and must consider whether the alleged illegality is sufficiently proved and must be satisfied that if there are matters of suspicion in the plaintiff's case, **an opportunity was given for explanation and defence**.

We may again point out that in the **Makula case**, advocates for the respondent had been awarded by the registrar of the court costs of the litigation at 10% of the damages awarded by the trial court. This was contrary to the relevant taxation of costs rules.

5 The former Uganda Court of Appeal which found the substantive appeal incompetent heard the parties on the aspect of violation of Taxation of Costs Rules before it reduced the costs in favour of one side.

10 There is no doubt that all the authorities cited by counsel for the appellant emphasize the need to hear both sides on a crucial point in a case before deciding the case one way or the other. And this is properly emphasized by clause (i) of Article 28 of our Constitution which provides for fair hearing. See **Re Election For**

15 **Stann Greek** case (*supra*) especially on observing the rules of natural justice.

The arguments made by Mr. Tumusiime, learned counsel for the appellant, do not really show that the Court of Appeal heard the

20 parties on the important question of illegality before it decided the appeal the way it did.

Furthermore, Mr. Tumusiime did not give a satisfactory answer to the question of why the Hon. Justice Nshimye, JA., participated in

25 deciding and writing the ruling which resulted in this appeal. Instead and with due respect, learned counsel casually asked this Court to find the answer through administrative inquiry which is not the normal thing to do in the circumstances of this appeal.

The Court of Appeal is the second highest court of appeal in Uganda. As prescribed under Article 28(1) of the Constitution, litigants expect the Court of Appeal to handle litigation with fairness and openness which was not the case in this appeal.

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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, grounds one and three must succeed. Mr. Lule asked us to hear arguments on the issue of
10 illegality and then decide the appeal. While that appears to be a possible quick mode of disposal of this litigation, with respect we do not think it is proper. 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
15 different Coram to hear and decide the appeal in accordance with the established procedures.

It is not necessary for us to consider arguments on grounds two and even four.

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In the circumstances of this appeal where the Court of Appeal is to blame, we order that each party should bear their own costs.

The appeal is allowed for reasons stated above.

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Delivered at Kampala this day of**2014.**

B.M. Katureebe
Justice of the Supreme Court.

5 **J. Tumwesigye**
Justice of the Supreme Court.

10 **S. Arach-Amoko**
Justice of the Supreme Court.

J.W.N. Tsekooko
Ag. Justice of the Supreme Court.

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G.M. Okello
Ag. Justice of the Supreme Court.