THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

ARBITRATION APPLICATION NO.3/98

TOTAL (UGANDA) LTD…… APPLICANT/OBJECTOR

- VERSUS -

BURAMBA GENERAL AGENCIES…… RESPONDENT/CROSS OBJECTOR

BEFORE: THE HONOURABLE MR. JUSTICE JAMES OGOOLA

JUDGMENT

By a Transport Agreement ("the Agreement") concluded between the Applicant/Objector: Total (U) Ltd ("Total") and the Respondent/Cross Objector: Buramba General Agencies ("Buramba"), Buramba undertook to transport and distribute Total's petroleum products. Subsequently, Total claimed a breach of that Agreement by Buramba; whereupon the parties agreed to refer the issue to arbitration by three arbitrators, whose award dated 14/11/97 found in favour of Buramba. Specifically, the arbitration award decreed that Total pay to Buramba Shs 60m/= as special damages for loss of income, and Shs l0m/= as general damages.

The present appeal by Total before this Court, challenges that arbitration award principally on the ground that one of the arbitrators (Mr. Kafuko-Ntuyo), appointed to the panel of the arbitrators by Total itself, was biased in carrying out his functions; in as much as he filed a reply to the formal statement of claim on behalf of Total; and, that therefore, Mr. Kafuko-Ntuyo ceased to be an impartial arbitrator; and "is deemed to have commenced his role' as an arbitrator with pre-conceived ideas and notions"; and should have disqualified himself altogether from participating in the arbitration proceedings. Secondly, Total also challenges the arbitration award on the grounds that the amount of Shs 60m/= special damages and Shs l0m/= general damages, was excessively high.

At the outset of this appeal, the parties raised three preliminary issues for the Court's determination. **First,** Total sought, against Buramba's objection, to amend the serial number of the summons for this arbitration award to read "No.3 of 1997" instead of "No.2 of 1997". The Court allowed the application to amend as prayed, on the ground that this was principally a mere slip of the pen. However, the Court awarded Buramba, the costs involved in this

interlocutory application. **Secondly,** Court agreed with both Counsel's view that Rules 10 and 11 of S.I. No.55-1 (made under the Arbitration Act), require service of court documents to be made on an arbitrator against whom an allegation of misconduct is made, and that where the court is satisfied that there is a *prima facie* case against such arbitrator, the court may join him as a party. Again, Court awarded Buramba the costs involved in that preliminary application. The third preliminary application was made by Buramba to the effect that Total's instant appeal was supported by two incompetent affidavits (deponed to by Mr. Matovu on 31/12/97, and 10/03/98, respectively), in that the affidavits contained "factual falsehoods" that were expressly "negatived" by paragraphs 2-13 of the opposing affidavit of Mr. Kafuko-Ntuyo. Counsel argued that in the absence of a competent affidavit, Total's chamber application was violative of rule 16 of S.I. No.55-1. The Court overruled this preliminary objection on the grounds that an affidavit is by its very nature a catalogue of matters stated on the deponent's own knowledge, usually intermixed with matters stated on the deponent's information and belief - See **Kassamali Co. V Kyrtatas [1968] EA at pp.544-5; Assanand & Sons (U) Ltd. v E.A. Records [1959] EA 360; Caspair, Ltd. v Harry Grandy [1962] EA 414;** and **In re Young Manufacturing [1900] 2 Ch.753.** In essence, therefore, an affidavit is a statement of facts and allegations adduced by one party - which are in turn rebutted by the other party's affidavit-in-reply.

It is then for the court to verify and contrast the veracity of these various facts and allegations. That is the very essence of our brand of litigation. Indeed, in our adversarial system of judicial inquiry, the standard practice and method of deciding questions is by consideration of rival evidence and contentions. Obviously, the rival evidence and contentions require substantiation by the alleging party. But substantiation is only called for at the appropriate stage of the proceedings - namely, during the substantive consideration of the merits of the case. Accordingly, at this preliminary stage of the appeal, Counsel's objections had no merits whatsoever, and the two Matovu affidavits (as well as the opposing affidavit of Mr. Kafuko-Ntuyo) were all properly before the Court.

As regards the substantive appeal, Counsel for Total based his application on Section 12 of the Arbitration Act (Cap.55) and on Rules 7, 8, and 16 of S.I. 55-1. The grounds of the appeal were stated to be the misconduct of one of the arbitrators, as well as the excessiveness of the damages awarded to Buramba against Total. Counsel for Total defined "misconduct" as such

handling of the arbitration as is likely to amount to substantial miscarriage of justice [per **Williams vs Wallis Courts (1914) 2KB at 485].**

The alleged misconduct consisted of the arbitrator in question, Mr. Kafuko-Ntuyo filing with the arbitrators the statement of claim on behalf of Total. This, Counsel argued, constituted a partisan act on the part of Mr. Kafuko-Ntuyo which, thereafter, deprived him of impartiality as an arbitrator, and made him a judge in his own cause - in violation of one of the most fundamental rules of natural justice [see, for instance, Lord **Denning in Metropolitan Properties Co. Ltd. vs Lannon & Ors (1969) 1QB at 577]**

Total's Counsel argued that the subsequent withdrawal by Kafuko-Ntuyo of the claim, was improper as it was done in the absence of Total's representative on the arbitration panel; that the illegality of his act precluded acquiescence, if any, in his continuance as an arbitrator (and that this illegality cannot be ignored by the court **[Makula vs Cardinal Nsubuga(1982) 2 HCB 11];** that the misconduct was bound to lead to and did indeed lead to injustice in the final arbitral award. Finally, given the duration of the underlying Transport Agreement between the parties (namely, a year-to-year contract), the arbitral award of special and general damages against Total computed on the basis of 32 months (instead of 12 months), was excessive and unconscionable.

In response to the above arguments, Counsel for Buramba made the following three basic submissions:

First, that in filing Total's statement of claim, Kafuko-Ntuyo (acted fairly without bias and without instructions from Total (such instructions were subsequently given to Total's Counsel in the arbitration, Mr. Kiwuwa); and that, in any case, Kafuko-Ntuyo filed the claim before he had been appointed arbitrator; and promptly withdrew the papers at a preliminary meeting of the panel of arbitrators as soon as he became an arbitrator - by which time Total's recognised advocate was Mr. Kiwuwa who, along with the other interested persons, proceeded to represent Total throughout the arbitration proceedings.

Secondly, (and in the alternative) neither Mr. Kiwuwa, nor Total, nor indeed Buramba or its advocate, ever raised any complaint concerning the conduct of Mr. Kafuko-Ntuyo as an arbitrator - whether before, during, or after the arbitration proceedings, or indeed during the

granting of the arbitral award itself. Total is now attempting to do so only belatedly and, as shown above, without any evidence of actual or perceived partiality on the part of Mr. Kafuko-Ntuyo. Total has sat on this for far too long (since September 1997). It did not challenge Ntuyo's competence during the arbitration stage. Any objection should have been raised as soon as the party prejudiced knows the fact. Further, if that party's advisors know of the disqualification, but let the proceedings continue without protest, they are held to have waived their objection, and the arbitrators' determination cannot be challenged - **Tolputh v Molle (1911) 1KB 36.**

Third, as regards the quantum of damages, Counsel for Buramba made the following points:

(i) That by choosing their own tribunal, the parties to an arbitration must accept the tribunal's result, whether such is right or wrong; and the courts will be slow to interfere with the tribunal's award, and will do so only where it is necessary in the interests of justice to correct a wrong understanding/interpretation of the law - **Rashid Moledina v Hoima Ginners (1967) EA at 657.** In the instant case, Total does not at all challenge/adduce any wrong legal basis for the arbitral award.

(ii) Upon proper and due consideration of the evidence before them (per normal rules of procedure that were adopted by the arbitration panel), the arbitrators decided to give a joint/unanimous award, having determined that the Transport Agreement had been terminated in contravention of its own contractual terms (including contravention of the requirement for one month's notice of termination); and that short of proper termination, the contract's duration would have been *ad infinitum.*

(iii) Section 16 of the Arbitration Act provides that the form in which the award is made, cannot be called into question.

This application raises some very important points of law that require careful appraisal by this Court. In particular, Court needs to address the issue of the applicable rules and principles governing alleged misconduct of an arbitrator; and the latitude that a Court of law is permitted to intervene in arbitration proceedings and, especially, in setting aside an arbitration award. In short, the Court needs to determine the general principles governing the inter-play between the powers of the Court, on the one hand, and on the other, the authority of a tribunal that is freely chosen by the parties themselves; and the application of those principles to this particular case of Total vs Buramba. In braving itself for this task, Court has listened extremely attentively to the very able submissions of both Counsel, and given due attention to all the evidence before it. Secondly, as will be seen in the rest of this judgment, Court has taken into consideration and been influenced by a great number of English cases on arbitration. Needless to say, these cases are not binding on this Court, but they have profound state-of- the-art value in this area of the law, and this Court has chosen to adopt the many principles of general application enunciated by this English jurisprudence.

In order to focus more sharply on the several contentions put before it, Court has redefined these contentions as constituting the following three principal issues:

(1) Whether arbitrator Kafuko-Ntuyo's conduct of the proceedings constituted misconduct (i.e. by way of partiality/bias)?

(2) Whether the arbitrators' award of special and general damages against Total was excessive?

(3) If the answer to (1) or (2) above is in the affirmative, what relief is available to Total?

Kafuko-Ntuyo was appointed arbitrator by the President of the Uganda Law Society on September 24, 1996. The appointment was made pursuant to powers conferred on the President under Section 36 (iii) of the Transport Agreement entered into between Total and

Buramba - to appoint an arbitrator in the event that either party to the Agreement fails to appoint an arbitrator or the two arbitrators fail to appoint a third arbitrator (see attachment "A1' to Mr. Kafuko-Ntuyo's affidavit-in-reply of 19/03/98). The letter of his appointment specifically stated that Mr. Kafuko-Ntuyo was appointed "to act as an arbitrator for Total (U) Ltd". This point is important, in the Court's view, as substantiating the claim in paragraphs 5 and 6 of Mr. Kafuko-Ntuyo's above affidavit to the effect that:

> "5 - The letter appointing me Arbitrator for Total (U) Ltd did not stipulate any terms of reference for me or my role as Arbitrator for Total (U) Ltd, therefore initially I assumed I had to act to protect Total (U) Ltd's interests in the matter.
> 6. …On 30th 5, 97, I was served with a written statement by the Claimant requiring me to respond which I did respond to mistakenly believing I had to, [whereas] not."

The Court is disposed to believe the above quoted - totally uncontroverted - statements of Mr. Kafuko-Ntuyo, and the innocence of his actions. This claim is wholly believable on at least two grounds:

First, the institution of the "arbitrator/advocate" is by no means a fanciful stretch of the imagination. It is clearly well known in the law of arbitration [see generally **Mustill & Boyd: Commercial Arbitration, (Butterworths 2nd** Edn. **1989), Chapter 19, pp.258-264].** Here, the arbitrators were appointed with the intention, from the outset, to carry out the arbitration proceedings as representatives and advocates of the parties - to present their evidence and arguments to the umpire -**Zwanenberg Ltd vs McCallum & Sons (1922)13 L1L Rep.380.**

Second, the Court is also mindful of the cardinal principle expressed by various jurists and in court cases, to the effect that an arbitrator is not liable, under a charge of acting without impartiality, if he acts "honestly", or acts "not in bad faith", or otherwise acts "without fraud" - see **Mustill & Boyd's Commercial Arbitration (supra) pp.231-232.** Indeed, **Russell on the Law of Arbitration (18th Edn.) at p.93** categorically states that an action against an arbitrator for want of skill, or for negligence, or for the like cause will not lie, provided he acts honestly, without fraud or collusion - **Chambers vs Goldthorpe [1901] 1 KB 624;**

Bsynton v Richardsons [1924] **W.N. 262.** In this regard, the same **Russell on Arbitration** concludes (at p.118) with the following legal principle, namely that:

> "Every person must use his own discretion in the choice of his judges; and being at liberty to choose whom he likes best, cannot afterwards object the want of honesty or understanding to them, or that they have not done him justice."

The contrary of the above principle is that if the partiality complained of results from corruption or improper collusion with his opponent, the arbitrator should be joined as a respondent to the application that seeks to set aside the arbitral award - **Weise vs Wardle (1874) LR 19 Eq. 171; and Lendon vs Keen (1916) 1 KB 994.**

In the same vein, it is instructive to note that partiality on the part of an arbitrator has traditionally been closely linked to instances where the award has been procured by inducements or improper pressure - **Sutcliffe vs Thackrah (1974) AC 727.** In the instant application, there is absolutely no allegation, insinuation, or even as much as a vague hint to the effect that Mr. Kafuko-Ntuyo's conduct (in initially filing Total's claim - and much less in his subsequent substantive conduct of the entire arbitration proceedings) was "dishonest", or showed any "bad faith", or "ill will", or was "fraudulent", or otherwise resulted from "corruption or improper collusion", or was procured by "inducement or by improper pressure" - outside the ambit of the above principles. Far from it. On the contrary, Kafuko-Ntuyo made an innocent, albeit mistaken and naive, assumption in initially filing Total's claim with the arbitrators on 30/05/97. He neither received any instructions from Total with respect to that filing, nor was he remunerated by Total or anybody else for that matter, to act for Total as he did. At the earliest opportunity possible, when the arbitration matter first came up on 15/07/97 for a preliminary meeting of the arbitrators in the Chairman's Chambers, Mr. Kafuko-Ntuyo properly withdrew the papers he had filed earlier in error - whereupon the Chairman made an order that Total be served directly with the claim. It is important to note at this juncture that the withdrawal was effected at the earliest possible opportunity; that it took place in an executive session of the arbitrators themselves (i.e. not attended by Counsel or representatives of either party); that this meeting was purely a procedural one at which the arbitrators mapped out the strategy for the forthcoming proceedings - without any consideration or discussion of the substantive matters of the case before them; and without

any decisions taken or rulings made on the merits of the case; and that the Chairman of the arbitration panel proceeded to order alternative means of serving papers on Total in this matter. In sum, while the arbitrator's conduct could perhaps be stated to have been mistaken and naive, it certainly did not exhibit any dishonesty, bad faith, ill motive, fraud, collusion or corruption - to bring it anywhere near the ambit of the traditional areas of misconduct envisaged in the principles enumerated by the above quoted cases. And in this, Court is concerned only with Mr. Kafuko-Ntuyo's initial filing of Total's claim (which was a mere procedural ritual). There was no other element of misconduct complained of (subsequent to the filing and withdrawal of that claim) touching on Mr. Kafuko-Ntuyo's substantive conduct of the rest of the arbitration proceedings. In this Court's considered view, the absence of any dishonesty or ill motive on the part of Kafuko-Ntuyo coupled with the full and open disclosure of his actions before his peers, plus the effective withdrawal of the claim that had been earlier filed by himself, mitigated fully Mr. Kafuko Ntuyo's earlier innocent mistake, and vindicated his subsequent conduct of the substantive arbitration proceedings. The substantive proceedings did not in any way, manner or shape proceed with nor did they depend on or consider, nor were they otherwise coloured by the withdrawal of the papers of Kafuko-Ntuyo. Instead, the proceedings took into account and were limited only to the documents filed, inter alia, by Total's properly briefed advocate, Mr. Kiwuwa who, along with Total's other representatives, meticulously attended all the hearings of the arbitration panel. From the above analysis, this Court finds that Mr. Kafuko-Ntuyo did not commit any misconduct in the conduct of the arbitration proceedings. More specifically, the Court finds that he did not in any way and at any stage of the arbitration exhibit bias or partiality for or against any party to the proceedings. That finding would be sufficiently dispositive of this issue. However, there is the attendant issue (assuming that Mr. Kafuko-Ntuyo had acted with partiality) of whether the conduct had been waived or acquiesced to by the subsequent stance of the parties to the arbitration?

This issue of "waiver was indeed vigorously argued by Counsel for Buramba, and countered equally forcefully by Counsel for Total. As to the applicable principles of law in this area, both treatises on the substantive law of arbitration, and judicial pronouncements on the subject are agreed that irregularities in the conduct of an arbitration can be waived - **Mustill & Boyd's Commercial Arbitration (supra), Chapter 35, pp.579-582; Mosley vs Simpson**

(1893) LR 16 Eq. 226; Wessanen's Koninklijke Fabrieken NV vs Isaac Modiano, Brotder & Sons Ltd (1960) Lloyd's Rep.257.

In particular, the types of arbitral irregularities that may be waived include partiality on the part of an arbitrator - **Re Elliot and South Devon Rly Co. (1848)** 2 **De G & Sm 17; Drew vs Drew and Le Burn 1855 2 Macq.1; Re Clout and Metropolitan and District Rly Companies (1882) 46 Lt 141. Indeed, even the** (more serious?) irregularity of an arbitrator acting as advocate before the disagreement, can be waived - **Biglin vs Clark (1945) 49 Sol.Jo 204.** Similarly, where an arbitrator retained a solicitor (who was a member of the law firm that frequently acted for one of the parties) to draft the arbitration award, it was held that this was no ground for the court to interfere - **Bunten and Lancaster (Produce) Ltd vs Kiril Mischeff Ltd [1964] Lloyd's Rep.386.** Moreover, in **Bright vs River Plate Construction Co.Ltd. 10 [1944] 2 Ch.835,** although the solicitors of one of the parties were "active and lucrative clients" of the arbitrator who was a barrister, the court held that this was no ground to restrain the arbitral proceedings. In this regard, the courts will intervene only where the arbitrator, or his firm has himself an interest in the dispute in question - **M'Dougall vs Laird & sons [1894] 22 R.71; Brener Handels Gesellschaft mbH vs Ets Soules et Cie (1985) 2 Lloyd's Rep. 199 at 202; Re Hawkes Bay Electric Power Board and Napier Borough Council (1930) NZL R 162. Nevertheless** it is important to note the nature of the "interest" envisaged. Typical instances of this self-interest are those

> "where the arbitrator has a formal and continuous business relationship with one of the parties: for example, if he is an officer of an associated company, or of a managing company, of that party; or he has a substantial shareholding in one of the parties; or becomes a member, even after appointment of a body corporate which is one of the parties" - **Mustill & Boyd's Commercial Arbitration (supra), p.251.**

In the instant case, Kafuko-Ntuyo was neither stated nor proved to have had a "formal and continuous business relationship" with Total, of the kind described above. If anything his relationship with Total was, at most, that of a "good customer or regular client"- such a relationship has been held not to constitute a good ground for the courts to interfere - **Bunten and Lancaster (Produce) Ltd vs Kiril Mischeff (1964) Lloyd's Rep.386** (where arbitrator retained a solicitor, who was a member of the firm which frequently acted for one of the

parties, to draft the award). Similarly, where an arbitrator selected an umpire who was a surveyor and who was sometimes employed by one of the parties, the court held that this fact would not justify setting aside the award - **Re Elliot and South Devon Rly (1919) 56 Sc LR 216 (H.L).** From the above authorities, this Court concludes that Mr. Kafuko-Ntuyo could not be accused of having acted with partiality. His relationship to Total was not a "formal and continuous business relationship". He was merely a one-time lawyer for Total who, on the occasion of filing Total's initial arbitral claim, did so only on his own impulse without any verbal or documentary instructions from Total, and without being remunerated; who promptly, at the earliest possible opportunity, made full disclosure of that fact to his peers on the arbitral panel; and who promptly and appropriately withdrew the filed papers from the purview of the arbitration proceedings. But, in any case, even if for argument's sake, Kafuko-Ntuyo were to be held to have acted improperly, still the position would be covered by the legal principle that:

> If the parties to a dispute, with full knowledge of the facts, select an arbitrator who is not an impartial person, or who has to perform other duties which will not permit of his being an impartial person, the court will not in general release them from the bargain upon which they have agreed; and if a party to a contract submits to the jurisdiction of a tribunal which has an interest of its own in the decision, the court will not in general on that account release him from the bargain (however improvident it may be) so long as the court is satisfied that he is aware or ought to have been aware of the terms of the bargain he has entered into. [emphasis added] - **Russell on Arbitration (18th Edn.) p.117/18**

Following from the above quoted principle, this Court finds that the conduct of Mr. Kafuko-Ntuyo in filing Total's claim, did not in itself evince any bias or partiality on the part of Kafuko-Ntuyo as an arbitrator, and could not have evinced any such likelihood in the eyes of a reasonable man as the facts thereof were promptly, openly and fully disclosed by the arbitrator in question to the full panel of his peers; and, thereafter, the conduct was effectively expunged by the withdrawal of the papers earlier filed. In any case, even if the conduct had been otherwise, all the parties to the arbitration must be held to have waived and otherwise acquiesced in that misconduct; and are now estopped from challenging it at this late stage.

Accordingly, Total in particular, which in the first place submitted to the arbitration knowing full well that Kafuko-Ntuyo had acted as its advocate, cannot be released from that bargain.

The Court now turns to the final issue for determination, namely the excessiveness, if any, of the damages that were awarded against Total. To reiterate his arguments, learned Counsel for Total contended that the basis for computing the damages was 32 (instead of 12) months; and that, in the alternative, damages should have been circumscribed by the rule in the Transport contract between the parties requiring a 30-days' cancellation notice (i.e. Total should be penalised only for the failure to give the agreed 30 days' notice prior to its cancellation of the transport contract). On the other hand, learned Counsel for Buramba argued that the 32 months were chosen by the arbitrators as a basis for their computation of damages on the grounds that once the contract was breached by Total, the damages inflicted on Buramba by the breach could no longer be envisioned in terms of a year-to-year contract - but rather in terms of the aggregate period of the breach (namely from end-March 1995, the date of the summary termination of the contract, to mid-September 1997, the date of the arbitral award).

Here again, as with the other issues that were raised above in this application, this Court will begin with an analysis of the governing legal principles first, before coming to the application of those principles to this particular case. The general, overriding principle in matters of an appeal against an arbitral award was eloquently spelt out by SPRY, JA, in the classic case of **Rashid Moledina Co. vs Hoima Ginners Ltd. (1967) EA 645 at 647,** as follows:

> "What must always be borne in mind is that there is no appeal, in the ordinary sense, from the award of an arbitrator. The parties have chosen their own tribunal and they must, generally speaking, accept the result whether it is right or wrong. The circumstances in which the court will intervene are the exceptions to that general rule."

The above sentiments of SPRY, JA, have been re-echoed over and over again. Starting with our own Ugandan law, the SPRY principle has been followed by TSEKOOKQ, J (as he then was), when he rejected an application to set aside an arbitration award - **NIC vs Arconsults**

Architects (1984) 1 Kla Law Reports 112.

Similarly, looking at the practice in English courts (even though such practice is of persuasive authority only to this court), it is self-evident that those courts have adopted a decidedly benevolent attitude to the interpretation of arbitral awards:

> "As a matter of general approach, the courts strive to uphold arbitration awards. They do not approach them with a meticulous eye endeavouring to pick holes, inconsistencies and faults in awards and with the objectives of upsetting or frustrating the process of arbitration. Far from it. The approach is to read an arbitration award in a reasonable and commercial way, expecting as is usually the case, that there will be no substantial fault that can be found with it." - per BINGHAM, J, in **Zermalt Holdings SA vs Nu-life Upholstery Repair Ltd (1985) 275 Estates Gazette 1134** - quoted in **Mustill & Boyd's Commercial Arbitration (supra), p.570 footnote 16).**

Accordingly, if it is alleged (as is the case in this instant application) that an award is subject to **error or** that it contains insufficient facts to enable the court to tell whether the arbitrators' conclusions were justified or not, the court will assume that any justifying facts which could exist, did exist - **Christopher Brown Ltd vs Genossenchaft Oesterreichischer etc (1954) 1 QB 8; James Clark (Brush Materials) Ltd vs Carters (Merchants) Ltd [1944] 1KB 566.** Applying the above quoted principles to the instant **case,** this Court finds that far from acting arbitrarily or even fancifully in arriving at their joint award against Total, the arbitrators had before them cogent evidence and well-argued submissions by Counsel for both parties - see last two pages of the official "Proceedings of the Arbitration", certified by the panel's Chairman, Mr. Walubiri, on 16/12/97. In this regard, one set of arguments advanced by Counsel for Buramba was for,

(i) an award for damages based on an average monthly loss of income of Shs 3m/= (which was duly supported by proper invoices), multiplied by 32 months (the period from the date of contract breach to the date of the arbitral award) - minus 35% for overheard expenses; and

(ii) an additional award of Shs l0m/= general damages based on the arbitrators' own discretion, as guided by the authority of a Supreme Court judgment **[Esso Standard (U) Ltd. vs Semei Amani Opio: S.Ct. Civil Appeal No.83/93, S.Ct. Vol.1, at pp.44, 54 and 56** - where the faults complained of were similar to the complaint in the instant application of Total].

The award by the arbitration panel was decided on the basis of the above arguments. As against those arguments, Total's Counsel now wishes this Court to substitute a different set of justifications and philosophy for computing the amount of the damages to be awarded to Buramba. Counsel has not adduced any sufficiently convincing reason for setting aside the exercise of the arbitrators' discretion in this matter. In any case, as per **Moledina's case (supra),** Court could interfere with the award only where the arbitrators had misconstrued a particular point of law. Such is not the case here. On the contrary, the arbitrators appear to have been swayed by, among others, the judgment of the Supreme Court in **Esso vs Opio** (supra). As regards the factual issue of whether the arbitrators exercised their discretion rationally and reasonably, the Court is satisfied that there was ample basis for their decision. With regard to the sheer "largeness" of the amount awarded, the courts have adopted the stance that was taken in Montgomery, **Jones & Co. vs Liebenthal & Co, (1898) 78 LT 406**, in which the judge refused to grant appellant's application to remit an arbitration award; and dismissed the appellant's ground to the effect that "the arbitrator had entirely omitted to consider or apply the ordinary rules of law as to the measure of damages". The judge's decision in that application, taken in chambers, was subsequently affirmed by the Court of Appeal. In similar vein, this Court is not at all alarmed by the apparent largeness and volume of damages awarded by the arbitrators in this case.

In the result, the application by Total (U) Ltd (the Applicant/Objector in this case), is dismissed. Costs of this application are awarded to Buramba General Agencies (the Respondent/Cross Objector in the case)

Ordered accordingly.

James Ogoola

AG. JUDGE

11/06/98

DELIVERED IN OPEN COURT, IN THE PRESENCE OF:

Barnabas Tumusinguze, Esq. - Counsel for Applicant/Objector.

Peter John Nagemi, Esq. - Counsel for Respondent/Cross Objector

Ms B. Ssesonga - Court Clerk.

James Ogoola

AG. JUDGE

11/06/98.