
UGANDA / JUDGMENT

Kenlloyd Logistics (U) Limited v Fratch AG (Miscellaneous Cause 78 of 2023) [2025] UGCommC 16 (6 March 2025) [2025] UGCommC 16

COURT

Commercial Court of Uganda

BEFORE

Harriet Grace Magala, J

CASE / FILE NUMBER

Miscellaneous Cause 78 of 2023

Source: ulii.org · Research copy typeset by Esheria. Not court-issued or certified.

5 THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS CAUSE NO. 0078 OF 2023

(Arising out of Arbitral Award No. CAD/ARB/28/2021)

KENLLOYD LOGISTICS (U) LTD ::::::::::::::::::::::::::: APPLICANT

VERSUS

FRATCH AG ::: RESPONDENT

BEFORE HON. LADY JUSTICE HARRIET GRACE MAGALA

15 JUDGMENT

Background

The Respondent commenced arbitration proceedings against the Applicant before the **Centre for Arbitration and Dispute Resolution vide CAD/ARB/28.2021** ('*Arbitration Cause*'), claiming USD \ \$ 145,980.42 (United 20 States Dollars One Hundred Forty-Five Thousand Nine Hundred Eighty and Forty-Two Cents only), being a sum arising out of unpaid invoices for the services provided by the Respondent to the Applicant.

On the 20th day of June 2023, the Parties appointed Arbitrator Wilson Keezi ('The Arbitrator'), who delivered his Award against the Applicant. It is this

25 Award that the Applicant seeks this Court to set aside and be referred to another arbitrator agreeable to the parties for resolution on the basis that the Arbitrator exhibited evident partiality and acted with bias in favour of the Respondent contrary to **Sections 28(4) and 34(2) of the Arbitration and Conciliation Act**. That the Arbitrator's acts and omissions amounted to

5 misconduct and he did not determine the dispute in accordance with the Arbitration and Conciliation Act.

Representation

The Applicant was represented by M/s Ojambo & Ojambo Advocates, while the Respondent was represented by M/s Dusabe & Co. Advocates.

10 Hearing

The Application was supported by two affidavits. One was deposed by Albert Muganga Albert, the Managing Director, and Mr. Bernard Mukeswe Mugeni, one of the lawyers who represented the Applicant in the Arbitration hearing.

The affidavits opposing the application were deposed by Mr. Mugisha Michael

15 Collins, an advocate who represented the Respondent during the hearing of the Arbitration Cause, and Joram Nyanzi, the Respondent's second witness in the Arbitration Cause.

Mr. Albert Muganga deposed an affidavit in rejoinder.

The parties filed their respective submissions.

20 Issues

- a) Whether the Arbitral Award delivered on the 20th of June 2023 should be set aside.
- b) What remedies are available to the parties?

Determination

25 a) Whether the Arbitral Award delivered on the 20th of June, 2023, should be set aside.

The Applicant is challenging the Award on the grounds that the Arbitrator was partial, biased and adjusted the timelines for delivering the Award without giving the Applicant a fair hearing.

5 **Section 34 of the Arbitration and Conciliation Act Cap. 5 of Laws of Uganda 2023 ('ACA')** provides the grounds for an application to this Court to set aside an arbitral award.

However, concerning this matter, **section 34 (2) (a) (vi) and (vii)** of the ACA is the basis upon which this application was filed. The Section states that:

10 "(2) An arbitral award may be set aside by the court only if*

(a) the party making the application furnishes proof that:

- ***(i)***
- ***(ii)***
- ***(iii)***
- **15 *(iv)***
- ***(v)***
- ***(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***

- 20 (vii) "the arbitral award is not in accordance with the Act."

The Court's intervention in arbitration is restricted. At this stage, the court must examine only the procedure adopted by the arbitrator to reach the Award being contested. The court cannot attempt to explore or re-evaluate the evidence or the arbitrator's decision. There are many cases, as shall be seen below, regarding the court's intervention in arbitration matters. In *Seyani Brothers & Co. Ltd Versus Cassia Ltd* HCCA No. 128 of 2011, **Hon. Kiryabwire Geoffrey, J** (as then he was) observed that:

"It is now fairly settled law that an application to set aside an arbitral award is not an appeal. Arbitration is final unless it can be shown that the award was procured contrary to the law as provided for under Section 34 of the ACA."

Tsekooko J (as then was), in the case of *NIC v ARCONSULTS ARCHITECTS* (1984) 1 KALR at 112, held that:

"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 objective 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 be found with it"

Further to the above, in *Simbamanyo Estates Ltd Versus Seyani Brothers Company (U) Limited* HCMA No. 555 of 2022, **Justice Arach Amoko** (as she then was) observed that:

"When a Court is called upon to decide objections raised by a party against an arbitration award, the jurisdiction of the Court is limited, as expressly indicated in the Act, and it has no jurisdiction to sit in appeal and examine the award on merits. The arbitrator is the final arbitrator of disputes between the parties and the award is not open to challenge on the grounds that the arbitrator has drawn his own conclusions or has failed to appreciate the facts. Where reasons have been given by the arbitrator in making the award, the Court cannot examine the reasonableness of the reasons. If the parties have selected their forum, the deciding forum selected must be conceded the power of appraisal of the evidence".

Therefore, it does not matter if the Court could have arrived at a different decision from the arbitrator's considering the evidence before the arbitrator, but the court at this stage only examines the process of making the award. That is, if it is in consonance and conformity with the provisions of the Act. The Court cannot modify or substitute the decision of the arbitrator on merits. This is so, because arbitration is elected and adopted by the parties, who are bound by what they

Page 4 of 13

5 agreed to. To protect the sanctity of the arbitration in disputes, the court's authority or interference is restricted to only where the ACA provides so.

The Applicant alleges that the Arbitrator purposely ignored and did not record all the evidence on payments by the Applicant to the Respondent that arose out of the cross-examination of Joram Nyanzi, the Respondent's 2nd Witness, which

- 10 evidence confirmed that the Respondent had been paid the claimed amount. The Arbitrator purposely ignored or left out material evidence necessary to make a just and fair determination or decision. It is further alleged that the Arbitrator intentionally and with prejudice relied on an incomplete record of proceedings in arriving at the Award.
- 15 Mr. Albert Muganga deposed under Paragraph 15 of the Affidavit in Support that on the 18th day of November 2022, the Arbitrator sent them *Annexure 'J'* to the Affidavit in Support, purporting it to be the accurate record of proceedings. Still, it was incomplete and lacked substantial evidence in favor of the Applicant. The Applicant's lawyers protested, and the Respondent's lawyers did not refute the
- 20 errors cited. On the 7th day of December 2022, the Arbitrator sent the parties an email with an attachment of the record of proceedings, which is marked as *Annexure 'M'.* The Applicant's lawyers still objected to the Record of Proceedings.

The deponent further stated under paragraph 21 of the affidavit in support that on the 26th day of April 2023, the Arbitrator sent by email new proceedings,

- 25 herein marked as *Annexure 'O'* as the complete record of proceedings and the new proceedings included the evidence of Phillip Van Tilburg Maria and the cross-examination of Joram Nyanzi. However, the said record still did not capture the entire cross-examination of Nyanzi Joram on payments made by the Applicant to the Respondent which the witness claimed were not received.
- 30 This was evidence key to the Applicant's case but was completely and suspiciously left out of the record of proceedings. Under paragraph 25 of the affidavit in support, Mr. Muganga deposed that on the 19th day of June 2023, the Applicant's advocates in an e-mail to the Arbitrator marked as *Annexure 'P'*

Page 5 of 13

- 5 and copied to the Respondent's lawyers reiterated the fact that a substantial part of the cross-examination of Joram Nyanzi was not reflected in the proceedings. As such, the proceedings were inaccurate, and the Applicant could not respond to the Respondent's submissions and would do so by 21st June 2023. The protests by the Applicant notwithstanding, the Arbitrator

- 10 hurriedly signed and delivered the Award on 20th June 2023. Further, Mr. Muganga deposed under paragraph 29 of his Affidavit that the Applicant's lawyers had advised him that by leaving out crucial and material evidence which favoured the Applicant, the Arbitrator breached the cardinal rule of natural justice and demonstrated that he acted partially, fraudulently and or 15 corruptly and as such this award should be set aside.

The Respondent disagreed with the averments of the Applicant. The Respondent averred that the parties noted the incompleteness of the Record of Proceedings and notified the Arbitrator as seen from *Annexures 'B' and 'C'*. To that end, a meeting was held on the 2nd day of December 2022 to address the

- 20 issue. The Respondent averred that their lawyers on the 26th of April, 2023, informed them that the Arbitrator had issued a completely new copy of the record of proceedings and issued new timelines for the parties to submit written submissions as seen from *Annexure 'E'*. The Arbitrator issued a notice of enlargement of timelines as seen from *Annexure 'F',* and none of the parties
- 25 objected to the timelines. Therefore, the shared copy of the record of proceedings was the true and complete record of proceedings and reflected a fair record of the evidence adduced during his cross-examination.

Further, the Respondent filed its submissions and served them on the Applicant, but despite reminders from the Arbitrator, the Applicant never filed its 30 submissions.

Under paragraph 23 of Mr. Nyanzi's Affidavit, he stated that the purported record of proceedings from the Applicant did not reflect, even in the slightest manner, the content of his cross-examination and was therefore strange to

Page 6 of 13

5 him. Mr. Nyanzi deposed that the Respondent's lawyers had advised him that the allegations of fraud and corruption levelled against the Arbitrator must not only be succinctly set out in the pleadings or application but must be proved strictly by the Applicant.

In his Affidavit in reply, under paragraphs 8-11, Mr. Michael Mugisha averred 10 that when the parties realised that the record of proceedings lacked some information, both counsel agreed to compare and review notes. The Applicant's lawyers never raised the matter of bias, partiality, corruption, or fraud against the Arbitrator but rather frustrated the process by not initiating the process of comparing their notes promptly. Later the Arbitrator shared a complete record

15 of proceedings and issued new timelines, but the Applicant failed to file submissions.

In Rejoinder, Mr. Muganga averred that the Respondents confirmed the inaccuracies in the first shared record of proceedings and that, in the second shared record of proceedings, evidence in cross examination of Nyanzi regarding 20 payments received was left out. Instead of correcting the inaccuracies, the Arbitrator rushed to issue an award which left out material facts.

For the Applicant, it was submitted that the Respondent admits that the record of proceedings first shared was incomplete and missed evidence that would have exonerated the Applicant. The Applicant's evidence was left out on purpose to

25 give the Respondent an advantage, which denied the Applicant fair and just treatment during the proceedings, and this was contrary to the provisions of the ACA.

Counsel for the Applicant it was argued that the Arbitrator ought to have addressed the issues raised by the Applicant's counsel regarding the 30 incorrectness of the record and should have acted in fairness and consideration of justice under **Section 31(1) of the ACA** and clause 12 of the undertaking signed by all parties. Counsel relied on the case of **Charles *Twagira Versus Uganda SCCA No. 27 of 2003*** to assert that the Applicant was denied a fair

Page 7 of 13

- 5 hearing. Counsel then concluded that the misconduct of the Arbitrator did not amount to fair treatment to the Applicant. The Arbitrator did not give the Applicant an opportunity for its case to be presented by hurriedly delivering an award without addressing the issues relating to the correctness of the record. Counsel relied on the case of ***Airtel Uganda Ltd Versus Opportunity Bank***
- 10 ***Arbitration Cause No. 12 of 2013*** to observe that evident partiality may be manifested by actual partiality or bias or by an appearance of partiality.

For the Respondent, it was submitted that the allegations against the Arbitrator were unfounded and unproven. Counsel admitted that the first copy of the record shared was incomplete. A new record was provided when both

- 15 advocates notified the Arbitrator of the anomaly. Directions for submissions were given, but the Applicant opted not to comply despite the Arbitrator's reminder. The Award was also delivered in time. That the Applicant generated their own record of proceedings, and they failed to prove that the Arbitrator was partial.
- 20 In rejoinder, counsel for the Applicant reiterated their earlier position that there was no explanation why the Arbitrator did not extend the time to rectify the record but delivered the award. The delivery of the Award was to cover the arbitrator's tracks after receiving a complaint from the Applicant, and this amounted to misconduct.
- 25 **Section 34 of the ACA** requires that for this Court to interfere with the arbitral award, the applicant must furnish proof to justify so. An allegation of bias or partiality against an arbitrator is a grave one and there must exist strong and convincing evidence on record for the court to exercise its powers. **DR. P C Markanda in Law Relating to Arbitration and Conciliation, 11th**
- 30 **Edition**, at **page 613 to 614** observes that:

"With regard to bias in relation to a judicial tribunal the test that is applied is not whether in fact a bias has affected the judgment but whether a litigant could reasonably apprehend that a bias attributable to a member of the"

- 5 "tribunal might have operated against him in the final decision of the tribunal. The test of likelihood of bias is whether a person in possession of relevant information would have thought that bias was likely and whether the person concerned was likely to be disposed to decide the matter only in a particular way." (Emphasis is mine)
- 10 Therefore, bias may be actual or imputed. The inference is that there existed reasons for the litigant to conclude that the adjudicator of his/her matter unjustly favoured the other party over him/her. In *Kilembe Mines Ltd Versus B. M Steel Ltd HCMC No. 002 of 2005*, **Hon. Justice Egonda-Ntende** (as he was) observed on evidential partiality that the arbitrator is obliged to treat the
- 15 parties before him or her equally. Evidential partiality does not have to be actuated by dishonesty, fraud, or corruption. The learned judge went ahead to note that:

"What is important is being even with all the parties before him or her in permitting the presentation of their cases, consideration of the same, and" 20 "decision making by the arbitrator. What is required to be established is that there was evidential partiality by the arbitrator(s). If it is demonstrated that the scales were not even, and this is evidence on the record, or in the award, or by some other evidence, partiality will have been established." (Emphasis added)

- 25 It is alleged by the Applicant that by delivering the Award without rectifying the record of proceedings, which had omitted part of the evidence of Nyanzi Joram during cross-examination, showed the Arbitrator's partiality and bias. **Section 28(4) of the ACA** requires that the tribunal shall decide on the substance of the dispute according to the considerations of justice and fairness. Further,
- 30 **Section 18 of the ACA** emphasises that the parties shall be treated with equality, and each party shall be given reasonable opportunity to present his or her case.
- 5 Both parties herein agree that the Arbitrator first shared an incomplete record of proceedings with them. This record, which is annexed to the Affidavit of Mr. Muganga as **Annexures 'M' and 'J'*, lacked substantial evidence. The parties complained to the Arbitrator who issued a new record of proceedings. However, the Applicant still contested this record of proceedings insisting that it was
- 10 inaccurate and omitted the evidence of the cross-examination of Nyanzi Joram on the payments. At page 25 of **Annexure O**, the Claimant's/Respondent's counsel Herbert Dusabe stated that:

"When we appeared Joram was cross-examined as to payments made by the respondent to the claimant that were not received. He could not readily" 15 "confirm some payment..."

Indeed, a look at Pages 13 to 16 of Annexure 'O' shows that this evidence, i.e., the witness's cross-examination on the payments made, was not captured. The Applicant attached Annexure 'S' as the correct record of proceedings. However, this cannot be taken as the true and accurate record of proceedings since the 20 Applicant and not the Arbitrator prepared it.

It is apparent that the arbitrator made errors in preparing the record of the proceedings. The Arbitrator prepared three records of the proceedings, each with different contents. The parties in their undertaking, marked as *Annexure C* to the Affidavit in support of this Application, never agreed on the form of

25 taking evidence. However, the form adopted by the Arbitrator must capture all the evidence presented by the parties.

It appears from the record that the second and third copies of the record of proceedings were generated after a meeting and phone calls between the parties and the Arbitrator on this matter and the parties compared notes of

30 what transpired during the cross examination of PW2, Nyanzi Joram. However, there is no evidence on record of what exactly transpired in these meetings or the phone calls made by the Arbitrator to the parties as alluded to in the

5 shared emails. Even then, the Applicant still contested the shared record of proceedings.

On the 29th day of May 2023, the Arbitrator emailed the parties reminding them of the filing of submission timelines. The Applicant's counsel on the 19th June 2023 wrote to the Arbitrator and the Respondent's counsel contesting the latest

- 10 record of proceedings. He stated that he could not make a reply to submissions of the Respondent/Claimant because he was adding to the record the evidence of the cross-examination of Joram Nyanzi that was missing. He requested that the time within which the award should be delivered be moved to the end of the month. The Arbitrator never responded to this request. The Arbitrator proceeded
- 15 to deliver the Award on the 20th day of June 2023. This was despite the complaint from the Applicant's lawyers on the correctness of the record of proceedings.

I agree with the Applicant that by not resolving the issues concerning the correctness of the record before the delivery of the Award, the Arbitrator did not accord fairness to the parties since the record/evidence would end up as the 20 point of reference in the Award. The applicant perceived this conduct of the

arbitrator as bias and partiality. At this point, the Arbitrator made the ground uneven for the parties. The Applicant did not file submissions because they still contested the accuracy of the record of proceedings.

A record of proceedings is a paramount tool in the adjudication of matters before a tribunal/court. This is because it contains the evidence of the parties and reflects all that transpired before a tribunal or court. It should not be treated lightly. Before the delivery of an award or decision, the adjudicator must exercise caution to ensure that the record is correct, complete and accurate. A decision based on an incorrect or incomplete record of proceedings occasions a miscarriage of justice. Whereas this court is not convinced that *Annexure 'S'* is the correct record of proceedings since it was prepared by the Applicant's lawyers, this court observes that the Arbitrator abdicated his duty to prepare the record of proceedings and largely relied on the parties to reconstitute the record.

- 5 An arbitrator is chosen and contracted by the parties to superintend over their matter and not the parties managing the matter for him or her. He or she must exercise utmost expertise, professionalism, and control over the matter without conducting himself or herself in a manner that would raise suspicion or allegations of bias and partiality, as in this case. By turning to the parties to 10 reconstitute the record, the Arbitrator set himself up on a slippery terrain that would in the due course lead to serious allegations of fraud, bias and partiality, more so, when he did not conclusively solve the issue at hand relating to the
- accuracy of the record. By delivering an award based on a contested record of proceedings, he portrayed what can be perceived as bias or evident partiality.
- 15 I would not want to say that the Arbitrator rushed to deliver the Award to cover his tracks, as suggested by the Applicant's counsel, since there is no evidence on record proving corruption or fraud. What is certain is that the Arbitrator, despite being notified by the Applicant of the inaccuracies in Annexure 'O,' delivered the Award without responding to the Applicant or rectifying the 20 record.

Therefore, the Award was delivered in contravention of the **section 34 (2)(a)(vi) of the ACA** and for this reason, the Award delivered on the 20th June 2023 is hereby set aside.

b) What remedies are available to the parties.

- 25 This court has found that the Award delivered on 20th June 2023 *CAD/ARB.28/2021* was delivered with evident partiality and bias in contravention of the ACA. The dispute between the parties is hereby referred back to CADER for retrial a new arbitrator as shall be agreed upon by the parties.
- 30 The Applicant prayed for costs of this suit.

The generally established rule is that costs follow the suit unless the court finds otherwise. In the case of **Uganda Development versus Muganga**

Page 12 of 13

5 **Constructions** [1981] HCB 35 where it was held that a successful party can only be denied costs if it is proved that, but for his or her conduct, the litigation could have been avoided and that costs follow the event only where the party succeeds in the main suit.

Section 27(1) of the Civil Procedure Act provides that:

10 *"Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incident to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent those costs are to be paid, and to give* 15 *all necessary directions for the purposes aforesaid."*

The Parties are in this court because of a fault that is not of their own making. The matter is before this court because the Applicant was displeased by the manner in which the arbitrator conducted the arbitration proceedings. As 20 such, this court shall not condemn the Respondent to costs. I, therefore, order that each party bears its own costs.

Signed and dated at Arua this 5th day of March 2025.

25 Harriet Grace MAGALA

Judge

Delivered online via ECCMIS this 6th day of March 2025.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://ulii.org/akn/ug/judgment/ugcommc/2025/16/eng@2025-03-06>

CASE PAGE <https://chat.esheria.ai/case-law/uganda/kenlloyd-logistics-u-limited-v-fratch-ag-miscellaneous-cause-78-of-2023-2025-ugcommc-16-6-march-2025-unknown-topic-unknown-court-2025>

Prepared on 13 October 2026 · Esheria