

THE REPUBLIC OF UGANDA

THE CENTRE FOR ARBITRATION AND DISPUTE RESOLUTION

CAD/ARB/NO.2 OF 2009

BAYETI FARM ENTERPRISES LTD APPLICANT

v.

1. TRANSITION GRANT SERVICES

2. HATCHTECH INCUBATION TECHNOLOGIES

3. ARK CHICK LIMITED RESPONDENT

RULING

This is an application for the compulsory appointment of a single arbitrator.

The arbitration clause in issue is derived from Article 79 of the Articles of Association for Ark-Chick Limited, signed in 13th September 2005.

The clause reads as follows:-

“ARBITRATION.

79. If and whenever any difference shall arise between the Company and any of the members of the members or their respective representatives touching construction of any of the articles herein contained or any act or thing made or done or to be made or done or omitted or in regard to the rights and company arising hereunder or arising out of the relation existing between the parties by reason of these articles

or of the Act such difference shall forthwith be referred to two arbitrators ion to be appointed by each party in difference or to an umpire to be chosen by the arbitrators before entering in the consideration of the matters referred to them and every such reference shall be conducted in accordance with the provisions of the laws of arbitration for the time being in force in Uganda”.

In Para.6 of the Affidavit in Support, Muyeti Joseph Zema depones that differences arose between the Applicant and the first and second respondent regarding management and investment issues of the third respondent company.

In Para.9 Muyeti Joseph Zema depones that he communicated Notice of Intention to Commence arbitration proceedings and notice to concur in the appointment of an arbitrator to the Respondents on 20th November 2008. This notice however solicited no response from the Respondents.

It is against this background that the Application for the compulsory appointment of an arbitrator was lodged.

The Respondents opposed the application, for the simple reason that the third respondent had sued the applicant in, **Ark Chick Ltd v. Joseph Muyeti Zema**, Commercial Court Division, HCCS No.147/2008. That this matter was still pending before Hon. Justice Geoffrey Kiryabwire.

The Respondents further submitted that the Applicant seeks to refer to arbitration the very issues which are due for trial before the Hon. Justice Geoffrey Kiryabwire.

The Respondents then pointed out that the Applicant had filed before the High Court the following Applications, M.A. No.352/2008 and M.A. No.14/2007, which were subsequently withdrawn.

However by the time this Application was lodged before CADER, on 16th January 2007, M.A. No.14/2007 was still pending. For this reason Section 6 Civil Procedure Act, had to be taken note of given that the same issues before the High Court were being referred to arbitration.

The Respondents submitted that it would be in the interests of justice, that the matters be finalized by the High Court whose jurisdiction the parties had conceded to.

The Respondents also denied that they ignored the notice to concur in the appointment of an arbitrator. Such misconception was due to the fact that the parties were served directly and reserved the right to respond through their Counsel.

In reply the Applicant observed that there was no conflict with the High Court cases given that HCCS No.147/2007 is a suit by the third Respondent against the Applicant company; therefore the parties were not the same as appeared in this instant Application.

Further that the orders sought in HCCS No.147/2007 are not similar to orders which the Applicant will seek to apply for before the arbitrator. For this reason I was invited to peruse the claim set out in Annex B (Joseph Muyeti Zema Affidavit). A comparison of the Annex B claim vis-à-vis the HCCS No.147/2007 prayers would indicate that the matters sought to be referred to arbitration were not the same which the court had to take into consideration.

Moreover that Joseph Muyeti Zema, the Defendant in HCCS No.147/2008 was distinct and different from Bayeti Farm Enterprises Ltd, the Applicant in this instant Application.

I now consider the merits of the Application before me.

To begin with, it is unfortunate that the discussion regarding the court case HCCS No.147/2007 paint the picture that Court proceedings halt the consideration of any Section 11 Arbitration and Conciliation Act proceedings.

For clarity of thought, let us note that the parties to the HCCS No.147/2008 are *Ark Chick Ltd v. Joseph Muyeti Zema* (Annex A Tom Magezi Samuel Affidavit).

In this Application the parties are *Bayeti Farm Enterprises Ltd v. Transition Grant Services, Hatchtech Incubation Technologies and Ark Chick Ltd*.

Thus on the face of the record there is nothing to show a conflict between this Application and the case before the High Court.

This application is for the compulsory appointment of an arbitrator; in other words for the specific performance of Article 79 Articles of Association.

A glance at the prayers set out in the HCCS No.147/2008 Complaint reveals no prayer dealing with the forum issue as to whether the matter should be submitted to arbitration.

If indeed the subject matter in HCCS No.147/2008 is the same as that which the Applicant now seeks to refer to arbitration, then the onus falls upon both parties to recognize the truth worth of the arbitration agreement – the forum choice – and for what it is worth then it should be honoured by alerting the court of the same immediately.

Section 5 Arbitration and Conciliation Act, is binding upon the respondent to the extent that it has not been indicated that the arbitration agreement is null and void, inoperative or incapable of being performed or in fact that there is no dispute between the parties.

The essence of an arbitration agreement is defined in **Section 2(1)(c) ACA** as follows,

“2(1) (c) “*arbitration agreement*” means an agreement by the parties to submit to arbitration ***all or certain disputes*** which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not;” (emphasis mine).

In *Comtel Integrators Africa Ltd v. J & M Airport Road Hotel/Apartments and Leisure Centre Ltd*, CAD/ARB. No.1/2009, I observed that,

“**Section 5 ACA** is neutral section; any party seeking to enforce the arbitration clause can apply under this provision. Indeed I can foresee a situation where a party such as the Respondent, would conterminously apply to the trial court for a Stay Order in a bid to alert the trial court to the jurisdiction issue and yet in the same breath turn around to prove that there is indeed no dispute”.

Further on that,

“Under **Sections 5 or 16(6) ACA**, the issue of pending court proceedings does not arise, until the court makes a final determination regarding the validity of the arbitration clause or jurisdiction assumed by the arbitral tribunal”.

Sections 5(2), 16(6)-(7) ACA, inform us that the jurisdiction of an arbitrator appointed under Section 11 ACA is not dilemmatic because of a pending case before the court. What if the court on its own motion were to note the arbitration clause and dismiss or stay the High Court case. It would not be a day lost in court for the parties, who entered ready to litigate, for there the court would have enforced the forum previously chosen by parties.

I am now of the opinion that in Section 11 ACA applications, whenever it occurs to a Respondent that the court is presiding over a matter which might be affected by the arbitration clause in issue, then the Respondent is obligated to notify the court of the same, so that the matter may be resolved under Section 5

ACA promptly. A Section 5 ACA order, issued either way, by the Court serves to confirm the forum which the parties should utilize.

Therefore in considering whether or not to appoint an arbitrator in this Application, I am bound to only consider the presence of an arbitration agreement and the failure by the Respondent to appoint the arbitrator for whatever reasons.

Today, I am not satisfied that the pending case HCCS NO.147/2008 affects the Applicant's claim which I find to be valid.

Having found merit in this Application I now appoint Mr. Kagaba Muhumuza as the arbitrator.

Should Mr. Kagaba Muhumuza decline this appointment under **Section 12(1) ACA** on grounds of impartiality then Mr. Geoffrey Otim or Rachel Kabala shall be deemed appointed in sequential order to act second arbitrator.

The arbitrator is reminded to sign the Declaration of Impartiality, Party Undertaking Agreement and file the same with CADER upon assuming jurisdiction over this matter and return the file to CADER for archiving purposes upon completion of the case.

The parties and the arbitrators are reminded that all monies regarding the arbitration should be submitted through CADER.

Costs of this Application shall be borne by the Respondent.

CONTACT PARTICULARS:-

Arbitrator
Kagaba Muhumuza GTS Head Citibank Uganda Ltd Nakasero. Mobile: 0712 628 129 Email: kagabalaw@yahoo.co.uk

Delivered on 12th March 2009.



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**JIMMY MUYANJA,
EXECUTIVE DIRECTOR.**