

THE REPUBLIC OF UGANDA

THE CENTRE FOR ARBITRATION AND DISPUTE RESOLUTION

CAD/ARB/No.18 of 2011

KASEEGU TECHNICAL SERVICES LTD APPLICANT

v.

ADVENTIST DEVELOPMENT RELIEF AGENCY LTD..... RESPONDENT

RULING

The Applicant filed the Application for the compulsory appointment of an arbitrator on 2nd September 2011. The Application was set for hearing at 11.00a.m., on 12th September 2011.

A dispute has arisen between the parties.

The Respondent on 17th March 2011, communicated notice of termination of the contract (**Annex B** to Applicant's Affidavit).

Applicant's counsel replied via an email attachment dated 1st April 2011, contesting the reasons advanced for termination of the contract.

The attachment also proposed two nominees for the Respondent's consideration, as follows,

“Alternatively, you are placed on notice under Clause 11 of the Contract, and pursuant thereof, our client recommends Arbitrators **RACHEL KABALA (of National Insurance Corporation)** and **STREPHEN MUSISI (Plot 4 Jinja Road Social Security House, 5th Floor Northern Wing.)** seeking you to consent to either of them and notify us, to allow commencement of Arbitration proceedings, within thirty (30) days from the date hereof.”

Respondent's Counsel (**Annex D** to Applicant's Affidavit) replied on 5th April 2011, as follows,

“Your proposed set arbitrators are rejected by our client and we propose either retired Judge of the Supreme Court Justice Galdino Okello or retired Judge of the Court of Appeal Justice Steven Engwau to be arbitrator in this matter.”

Applicant's counsel then replied (**Annex F** to Applicant's Affidavit) on 11th May 2011, as follows,

“That your proposed arbitrators are not acceptable to them and we are instructed to formally move the Centre of Arbitration and Dispute

Resolution-CADER to appointment an arbitrator/arbitrators to intervene in dispute between the Parties.”

The contentious agreement was executed on 12th November 2010. The date is barely decipherable from the copy filed before CADER.

The object clause reads in part as follows,

“2. ADRA “U” requires the services of a contractor to construct a valley dam and a functional irrigation system for the Nakayot water and food security project as specified in the detailed dam design for the Nakayot irrigation scheme.”

The arbitration clause reads as follows,

“11. Arbitration

11.1 All disputes between the parties arising from the construction, validity and performance of this agreement shall be exclusively and finally settled by arbitration.

11.2 Such arbitration shall take place in Kampapla and shall be in the English language.”

Respondent counsel Elsa Bamwegomba submitted that she was not opposed to the Application, as long as a retired Judge was appointed.

Who is an arbitrator?

Russell on the Law of Arbitration, 17th Edition, Stevens & Sons Ltd, 1963, provides the following definitions at p.115,

“The arbitrators are persons indifferently chosen to determine the matters in controversy **according to their own minds**, whether they be matters **of fact or law**.”

“Touching their (i.e. the arbitrators) sufficiency, such persons are to be elected as have **sufficient skill** of the matters compromitted, and have neither legal nor natural impediments to give an upright sentence.”

Communication between the parties seems to have hit a deadlock, because none endeavored to explain, to the other, how they perceived the detail of the dispute and how this dictated choice of their respective nominees.

The Respondent also submitted that it preferred a retired judge so as “...to guard against the blackmail of the applicant during the arbitration.”

I must say as a matter of fact that blackmail is a grave allegation but one which in any event is not entertained by our legal system. Further any coercion of the arbitral tribunal is not also accommodated by our **Penal Code, Chapter 120, Laws of Uganda**. I, humbly refer my publication, which correlates the Penal Code to the arbitration system, viz., “*A Note on Arbitration and Criminal Liability in Uganda*, Vol.16(3) September [1999] *Journal of International Arbitration*,119-126.”

The publication indicates that the Penal Code has elaborate provisions dealing with any manner of coercion or derailment of the arbitral process.

Arbitration is an integral part of Uganda’s justice system. The severe measures set out in the Penal Code are simply an elaboration of Uganda’s public policy, that any attempt to tamper with the course of justice in any arbitration proceedings, will be severely dealt with.

The protection set out in the Penal Code is not reserved to retired judges but is generic to all arbitral tribunals sitting within the Republic of Uganda.

None of the parties, in their submissions, explained the crux of the dispute and correlated it to their list of nominees.

A construction project is a technical project as opposed to a legal project. To my mind it is prudent to consider appointing a person with knowledgeable background in the construction sector. What is required here is an arbitrator whose cranial knowledge can be applied to first and foremost the technical aspects of the projects and secondly legal issues arising therefrom.

It must be recalled that one of the advantages of arbitration, is the room accorded to the parties to choose arbitrators who have industry or sector specific knowledge in the disputed subject matter.

I know as a matter of fact that construction projects can be too detailed for a legal mind to follow. I know this because of convincing and extensive illustrations made out to me, by my then arbitration tutor, the distinguished Prof. Nael Georges Bunni.

This is why I asked Respondent’s counsel to explain what she perceived to be the dispute from the Applicant’s side.

The response was “... *the Applicant did not **complete the works** and the Respondent is also seeking for a refund from part of the monies advanced, these monies were not utilized in execution of the contract.*” From this response, I am able to decipher that completion of the project, by the Applicant, has stalled and I would speculate possibly for some technical reasons.

I therefore am not swayed by the Respondent’s submission that a retired judge must be appointed. The Appointing authority’s discretion is only fettered in the circumstances set out in **S.11(6) Arbitration and Conciliation Act**.

I find merit in this Application for the statutory appointment of an arbitrator.

I therefore appoint Dr. Anania Mbabazi as the arbitrator in this matter. I have warned myself that Dr. Anania Mbabazi may not be able to accept this statutory appointment for an unforeseen event under **S.12(1) Arbitration and Conciliation Act**, then the matter shall be referred to Raj Dewani or Victor Odongo.

Should Dr. Anania Mbabazi not take up the appointment, then the alternative arbitrators they can only be approached in the sequential order listed. I award costs of the application to the Applicant.

Dated at Kampala on the 14th day of September 2011.

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Jimmy M Muyanja
Executive Director, CADER.