

THE REPUBLIC OF UGANDA

**THE CENTRE FOR ARBITRATION AND DISPUTE RESOLUTION
(CADER)**

CAD/ARB. NO.18 OF 2013

CHINA JIANGXI INTERNATIONAL LIMITED APPLICANT

VERSUS

KWALNET TECHNOLOGY LIMITED RESPONDENT

RULING

The Respondent sub-contracted the Applicant for fiber civil works and installation services on the MTN Uganda Optical Fiber Tx Project 2013, on 25th May 2013, under three contracts. The difference is the geographical terrain covered by the contracts.

The first contract covers 3.16km between Mubende Town and Mubende Hill. The second covers 32.77km between Mubende Hill and Nabingora. The third relates to 40.1km between Kakabala and Kyenjojo.

All contracts have a common arbitration clause which reads as follows:-

“Any and all disputes or claims between the Contractor and the Subcontractor arising out of this subcontract shall be resolved by submission of the same to an arbitrator before being referred to the courts of law.”

It is common ground, between the parties, that a dispute has arisen regarding the: -

- i) amount paid or payable to the Applicant;
- ii) quality of works finalized by the Applicant; and
- iii) which party abandoned its contractual obligations.

Respondent’s counsel communication dated 25th July 2013, reads as follows,

“ Please note that our client would have preferred to refer this matter to an arbitrator as set out in the contracts”.

The Applicant’s counsel reply on 22nd August 2013, stated

“TAKE NOTICE therefore that since you proposed arbitration in your letter of 25/07/2013 and since under clause 6 of the contracts the parties agreed to resolve their disputes through arbitration; we shall within thirty (30) days from the date hereof; apply to the Centre for Arbitration and Dispute Resolution (CADER) in Kampala for the appointment of an arbitrator to resolve this dispute.”

The Respondent's belated reply in Para.8 (Affidavit in Reply deposited by Mugerwa Herbert) states,

*“That in the circumstances I would rather that a representative from the main contractor **MTN Uganda Ltd be appointed as Arbitrator** as the Contractor and since they are beneficiaries of the project and are the Main Contractors.”*

I say belated, because the Applicant's counsel took offence to the fact that the 22nd August 2013 request to appoint an arbitrator went unheeded.

It is this deposition which informed the Respondent counsel's submission that they are not opposed to this Application.

Respondent's counsel preference was that the arbitrator be appointed from MTN Uganda Ltd.

I find that Applicant's counsel misconstrued Respondent's 25th July 2013 deictic communication. This communication did not indicate if the Respondent was indeed making any reference to arbitration. It merely expressed preference to assert the contracted right to submit to arbitration.

The Applicant's counsel 22nd August 2013 communication on the other hand indicated the ongoing dispute required an arbitrator, whose appointment would be invoked through CADER.

The chicken and egg question arising from this background is what comes first.

The subcontracts before me do not indicate any specific agreement on:-

- a) notification and reference of disputes arbitration; and
- b) the procedure the parties would use to appoint the arbitrator [S.10(2) ACA].

Applicant's counsel was therefore not right to caption this Application under S.11(4) (a) ACA absent proof a procedure agreement regarding the appointment of an arbitrator.

We therefore have to resort to S.21 Arbitration and Conciliation Act (ACA), which states that,

“Unless the parties agree, the arbitral proceedings in respect of a particular dispute shall commence on the date on which a request for the dispute to be referred to arbitration is received by the respondent.”

I find that both counsel, absent a procedural agreement, have nevertheless failed to focus the parties on the intricacies on appointment of an arbitrator.

Am I right to find both counsel at fault?

I believe I am because no evidence was tendered before me on what effort was expended towards the actual appointment of an arbitrator.

In this instant case, I would have expected Applicant's counsel to submit a list of nominees for the Respondent's consideration. The second option would be an invitation to the Applicant's counsel to concede to a joint application before an arbitration institution for a list of nominee arbitrators. The third option would be an invitation to Applicant's counsel to concede to delegation of the appointment of an arbitrator to an arbitration institution.

The Respondent submitted that the arbitrator should be appointed from MTN who is a beneficiary of the works. This to my mind is a proposition, which should have been sold to the Applicant. It is misplaced to ask CADER to look to MTN because the CADER roster of arbitrators is not administered by MTN. In any event, CADER's task is to ensure that only neutral arbitrators are appointed, not beneficiaries to preside over the dispute.

Catherine Muganga in a similar context, *B.M. Steels v. Kilembe Mines*, CAD/ARB/10/2004, set out the normative behavior in relation communication on the appointment of arbitrators, as follows,

“It is prudent to point out at this stage three possible courses of action which could have been taken by the Respondent:

- a) First the Respondent would have consented to the Arbitrator suggested by the Applicant with a view of having a one-person arbitral panel.
- b) Secondly the Respondent would oppose the Applicant's nomination by indicating another Nominee Arbitrator whilst inviting the Applicant to consent to the Respondent's nomination with a view to having a one-person arbitral panel.
- c) Thirdly the Respondent would oppose or consent to the Applicant's nomination. Nevertheless the Respondent would then proceed to indicate another Nominee chosen by the Respondent and invite the Applicant to consent to the second nomination person with a view of having a two person tribunal.”

In effect Catherine Muganga held that it falls as a duty upon respective counsel to guide the parties on realization on the appointment of an arbitrator.

I find that failure to agree on the appointment of an arbitrator, absent a procedure agreement, is governed by S.11(2)(b) ACA. The parties have in this case failed to agree on the arbitrator.

I find merit in this Application and hereby appoint Mr. Victor Odongo as the arbitrator in this matter.

Should Mr. Victor Odongo decline this appointment under **Section 12(1) ACA** on grounds of impartiality then Dr. Anania Mbabazi or Patricia Basaza Wasswa shall be the replacement arbitrator.

Owing to the oversight by both counsel, I order that each party shall bear its own costs.

Delivered on 28th October 2013.

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JIMMY MUYANJA,
EXECUTIVE DIRECTOR.