

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**COMMERCIAL DIVISION**  
**MISC. APPLICATION NO. 231/2019**  
**ARISING FROM CAD/ARB/No. 62/2017**

**FORT PORTAL MUNICIPAL COUNCIL .....**  
**APPLICANT**

**VERSUS**

**PLINTH TECHNICAL WORKS LTD ..... RESPONDENT**

**BEFORE HON. JUSTICE DR. HENRY PETER ADONYO**

**RULING**

**1. Background:**

This application is brought under sections 4, 5, 6, 16, 71 (2) of the Arbitration and Conciliation Act, Cap. 4 and Rule 13 Arbitration Rules (1<sup>st</sup> Schedule) of the Act and Section 98 of the Civil Procedure Act.

It seeks the following remedial orders, among others that;

- i. The decision of the arbitrator under section 16 (6) of the Arbitration and Conciliation Act be set aside
- ii. Orders concerning and validating the Adjudication proceedings before Eng. Daka Michael appointed by the

Uganda Institution of Professional Engineers (UIPE) under Clause 24.1 of the contract which are being pre-empted by the Arbitrator

- iii. Orders in respect of the Arbitrator assuming an original jurisdiction under Clause 25.4 of the contract, thereby undermining his own jurisdiction by the nature of which under Clause 25.3 of the contract should be an Appellate Jurisdiction against the decision of the Adjudicator
- iv. Orders in respect of the Arbitrator re-opening and entertaining compensation claims and matters concluded concerning issues in regard to payment certificates which had been duly discharged, and in any case dispute of which should have been subject to Adjudication proceedings under Clause 24.1 of the contract and were not duly raised or determined by an adjudicator
- v. Orders that the Arbitral proceedings be stayed pending determination of this Application as well as a prayer for costs.

## **2. Brief Facts:**

The grounds and brief facts of the application as set out in the affidavit in support, and affidavit in rejoinder of Mr. Bamanyisa Bwagi Geoffrey, Town Clerk, FortPortal Municipal Council are that;

- i. The Applicant herein entered into Contract Reference No. MLHUD/WRKS/UD/USMID-/13-14/00401 with the Respondent herein

- ii. On the 17<sup>th</sup> August 2017, the Respondent declared a dispute which was duly communicated to the President UIPE on the 18<sup>th</sup> August, 2017 to which there was no response. On the 19<sup>th</sup> November 2017, the Applicant also wrote to the Uganda Institution of Professional Engineers (UIPE) reminding the institution of the Respondent's previous request invoking Clause 24.1 GCC, requesting appointment of an Adjudicator to resolve the dispute which had arisen between the parties regarding final accounts.
- iii. On the 18<sup>th</sup> August, 2017, the UIPE appointed Mr. Daka Micheal, Adjudicator of the dispute between the parties. The Respondent/ Claimant wrote to UIPE stating his objection to appointment of the Adjudicator, Mr. Daka Michael on 28<sup>th</sup> August 2017.
- iv. On the 31<sup>st</sup> October 2017, the Respondent/ Claimant filed an Application for appointment of an Arbitrator.
- v. On the 3<sup>rd</sup> of March 2018, the Executive Director, CADER, issued a ruling appointing an Arbitrator over the objections of the Applicant that the Adjudication proceedings were still pending.
- vi. On 3<sup>rd</sup> April 2018, the Executive Director, CADER appointed Mr. Mohammed Mbabazi Arbitrator in CAD/ARB/No.62 of 2017.

vii. The Arbitration proceedings commenced with the respective parties filing pleadings between 13<sup>th</sup> April 2018 and 2<sup>nd</sup> May 2018 respectively.

viii. The Applicant immediately raised the preliminary question of jurisdiction and the respective parties filed their written submissions between 2<sup>nd</sup> May 2018 and 30<sup>th</sup> October 2018 respectively.

ix. On the 30<sup>th</sup> November, 2018 the Arbitrator issued a notice of delivery of his decision until 18<sup>th</sup> March, 2019 when the Applicant received its copy of the interim award that was made on the 12<sup>th</sup> March, 2019

x. The Arbitrator determined, inter alia, that he was vested with jurisdiction to consider, entertain and determine the claims made in the Arbitration

xi. The Applicant is dissatisfied with the decision of the Arbitrator of the 12<sup>th</sup> March 2019 on the Preliminary Question of Jurisdiction and hence the instant application under section 16 (6) of the Arbitration and Conciliation Act Cap. 4 seeking orders stated above.

xii. The Applicant is particularly aggrieved by the decision of the Arbitrator as follows;

a) The Arbitrator erred in law and fact in disregarding and, or pre-empting the Adjudication proceedings and usurping the powers of the Adjudicator under Clause 24.1 GCC and Clause 25.2 GCC

- b) The Arbitrator erred in law and in fact in making determinations on the preliminary question which can only be made where the matter is under Appellate Arbitration jurisdiction under Clause 25.3 GCC
- c) The Arbitrator erred in law and in fact in vesting himself jurisdiction purportedly under Clause 25.4 GCC to entertain the omnibus claims
- d) The Arbitrator erred in law and fact in vesting in himself with jurisdiction and purporting to review and revisit compensation claims long since determined by the Project Manager and not challenged under Clause 24.1
- e) The Arbitrator erred in law and in fact and made contradictory decisions in respect of Final Accounts and Final Payment Certificates vis-à-vis certificates as issued along the project
- f) The Arbitrator improperly exercised his discretion, misinterpreted and misconstrued facts and evidence misapplied the provisions of the Contract and arrived at erroneous conclusions.

An affidavit in reply was sworn by Mr. Joseph Mbazzi, the Country Director of the Respondent Company. Mr. Mbazzi depones that the appointed Adjudicator failed to exercise his mandate and because of the cost implications of the Respondent's contractual obligations, the Respondent could not sit on its rights and opted to apply to

CADER for the appointment of an Arbitrator. According to his affidavit, in the said application the Applicant's objections to the appointment of the arbitrator were overruled; and their Application challenging the jurisdiction of the Arbitrator was also overruled. He also states that the Arbitrator has jurisdiction to entertain the matter since his appointment was made pursuant to clause 25.4 of the General Conditions of the Contract.

**3. Submissions:**

Both parties filed written submissions.

**a. Applicant's submissions:**

Counsel for the Applicant highlighted three issues for determination under his submissions.

***i. Whether the Arbitrator had jurisdiction to entertain the Arbitration claims when the suit was already under Adjudication, or at all***

Counsel for the Applicant submitted that clause 24.1 GCC provides for adjudication as the mode of dispute resolution. He further submitted that this is the provision which the Respondent invoked when it declared a dispute on 17<sup>th</sup> August 2017 and wrote to the president of the Uganda Institution of Professional Engineers, on the 18<sup>th</sup> August 2017, requesting for the appointment of an Adjudicator.

He submitted that although a meeting was scheduled by the Adjudicator and duly communicated to all parties, the Respondent did not turn up for the meeting; and that the Respondent then filed an application for the appointment of an arbitrator without withdrawing the adjudication proceedings or awaiting their outcome. The Applicant's contention is that the Arbitrator, Mr. Mohamed Mbabazi was wrongly appointed by the Executive Director of CADER. Counsel cited ***International Development Consultants Ltd vs Jimmy Muyanja, the Centre for Arbitration and Dispute Resolution (CADER) and Another Misc. Cause No. 133 of 2018*** According to counsel, the proper interpretation of clause 24 GCC requires that disputes proceed to adjudication while clause 25.1 GCC is procedural clause. The Applicant's argument is that the Arbitrator should have found that he did not have jurisdiction to entertain the claim since the matter was prematurely brought before him and yet through his actions and ruling, he misinterpreted clause 24 GCC and Clause 25 GCC.

***ii. Whether the Arbitrator exceeded his jurisdiction by exercising powers and making pronouncements reserved for the adjudicator***

On this issue, the Applicant submitted that the Arbitrator, diminished the role and significance of the Adjudicator, usurped

the role of the adjudicator by over ruling the preliminary objection raised by the Applicant and proceeding with the hearing of the arbitration without taking into consideration clause 25.3 which grants the Arbitrator appellate jurisdiction from the decision of the Adjudicator.

Counsel argued that the interim award exceed the limits of the Arbitrator and should have been exercised as an Appellate entity.

***iii. Whether the Arbitrator improperly determined that he is entitled to entertain compensation claims and claims arising from paid certificates which have not been subject to adjudication under clause 24.1 GCC***

According to the Applicant's submissions, each and every pronouncement made by the Arbitrator regarding compensation claims and final accounts and the prayers made in Clause 24.1 GCC, should have been made by the Adjudicator prior to being referred to the Arbitrator.

**b. Respondent's Submissions:**

In the Respondent's Counsel's view, no decision was taken by the project manager, pursuant to Clause 24.1, that required it to be referred to the Adjudicator yet this is a requirement under that clause. Referring to clause 25 of the GCC, Counsel argued that neither was a decision taken by the appointed Adjudicator. Regarding Clause 25. 3, Counsel submitted further that no decision was taken by the Adjudicator to warrant an appeal to the Arbitrator.

Counsel for the Respondent then argued that Clause 25.4 of the GCC which states that *'any arbitration shall be conducted in accordance with the arbitration law of Uganda, or such other formal mechanism specified in the SCC, and in the place shown in the SCC'* allows the parties to refer the matter to arbitration which the Respondent did.

In the Respondent's submission, there was no response to the request for the appointment of an adjudicator by the Uganda Institute for Professional Engineers, which forced the Respondent to refer the matter to arbitration.

Counsel disagreed with the Applicant's submissions and submitted that the Arbitrator did not usurp the powers of the Adjudicator since there was no decision made by the Adjudicator, that the Arbitrator was properly vested with jurisdiction and properly determined the issue of jurisdiction.

#### **4. Decision:**

#### **Whether the arbitrator had jurisdiction to hear the claim pursuant to clauses 24 and 25 of the GCC**

Section 10 (11) of the Contracts Act defines a contract as;

A contract is an agreement made with the free consent of parties with capacity to contract, for a lawful consideration and with a lawful object, with the intention to be legally bound.

In ***Ssempe vs Kambagambire Civil Suit No. 408/2014***, the court referred to the case of ***Greenboat Entertainment Ltd vs City Council Kampala C.S No 0580/2003*** where a contract was defined as;

In law, when we talk of a contract, we mean an agreement enforceable at law. For a contract to be valid and legally enforceable there must be: capacity to contract; intention to contract; consensus ad idem; valuable consideration; legality of purpose; and sufficient certainty of terms. If in a given transaction any of them is missing, it could as well be called something other than a contract”

Additionally, arbitration or dispute resolution clauses must be drafted clearly and without ambiguities. When the clauses are clear, it is the duty of the court to enforce and give effect to the parties’ wishes. Each party to the agreement can pursue their own intentions as long as there are no misrepresentations, and the agreement is within the limits of the law. Where the clause has been poorly drafted, then parties could find themselves with unintended consequences.

It is not in dispute that the Applicant entered into a contract/agreement with the Respondent for procurement of works, specifically for the construction of Nyakana and Kagote roads for the contract price UGX 4, 625, 184, 078 (One billion, six hundred twenty five million, one hundred eight four thousand, seventy nine Uganda Shillings)

In the agreement for construction works for infrastructure/ contract, it was agreed under clause 24 of the General Conditions of Contract that;

#### **Clause 24. Disputes**

*24.1 If the Contractor believes that a decision taken by the Project Manager was either outside the authority given to the Project Manager by the Contract or that the decision was wrongly taken, the decision shall be referred to any adjudicator appointed under the contract within 14 days of the notification of the Project Manager's decision.*

#### **Clause 25. Procedure for Disputes**

*25.1 Unless otherwise specified in the SCC, the procedure for disputes shall be as specified in GCC 25.2 to 25.4*

*25.2 Any Adjudicator appointed under the contract shall give a decision in writing within 28 days of receipt of a notification of a dispute, providing that he is in receipt of all the information required to give a decision*

*25.3 Any Adjudicator appointed under the contract shall be paid by the hour at the rate specified in the SCC, together with reimbursable expenses of the type specified in the SCC, and the cost shall be divided equally between the Employer and the Contractor, whatever decision is reached by the Adjudicator. Either party may refer a decision is reached by the Adjudicator. Either party may refer a*

*decision of the Adjudicator to an Arbitrator within 28 days of the Adjudicator's written decision. If neither party refers the dispute refers the dispute to arbitration within the above 28 days, the Adjudicator's decision will be final and binding*

*25.4 Any arbitration shall be conducted in accordance with the Arbitration law of Uganda, or such other formal mechanisms specified in the SCC, and in the place shown in the SCC.*

The Respondent contends that the dispute did not arise from the decision of a project manager as required under the agreement. The question then arises whether or not there was a decision made by the project manager.

Under clause 1.1 (y) of the General Conditions of Contract, a *Project Manager* 'is the person named in the SCC (or any other competent person appointed by the Employer and notified to the Contractor, to act in replacement of the Project Manager) who is responsible for supervising the execution of the Works and administering of the Contract.'

The appointment of the project manager is not in dispute and in fact, in this case before the court, the Applicant requested the project manager/ (resident engineer), Eng. Babiiha Richardson, to prepare final accounts in preparation for the disengagement from the contract. As per the final accounts prepared and submitted to the Applicant by the project manager, the amount owing to the Respondent was UGX 24,904,889. The Respondent declined to sign

the final accounts. Subsequently, on 11<sup>th</sup> May, 2017, the contracts committee approved the end of the contract and recommended that all the contractual obligations were to be honoured by all the parties.

The Respondent then declared dispute in his letter dated 17<sup>th</sup> August 2017, citing a number of reasons that had previously been presented to the Respondent with no justifications. It was later established during the computation of the final accounts by the office of the Solicitor General that the net effect was for the Applicant to pay the Respondent UGX 1,218,898,142 but there were still disagreements regarding the final amounts.

The letter dated 17<sup>th</sup> August 2017, written by the Country Director of the Respondent is reproduced below;

**RE: CIVIL WORKS FOR THE CONSTRUCTION OF NYAKANA  
AND KAGOTE ROADS TO BITUMEN STANDARD IN FORT  
PORAL MUNICIPALITY REF: NO.  
MLHUD/WRKS/UD/USMID/13-14/00401**

**DECLARATION OF A DISPUTE**

*Reference is a made to the above and to our letters dated 27<sup>th</sup> July, Ref: MLHUD/US/USMID/PTWL/074F and 23<sup>rd</sup> June 2017 Ref: MLHUD/US/USMID/PTWL/073F received on the 26<sup>th</sup> July and 5<sup>th</sup> July 2017 respectively attached as Annexure A and B and to your letter dated 8<sup>th</sup> August 2017 to the consultant copied to us regarding the Final*

***Account and amicable disengagement of the contract, attached as Annexure C.***

*With all meetings and communications, nothing has yielded; whereas you have gone ahead to contract our works to another contractor.*

*The Contract under GCC Clause 24.1 provides that, ‘if the contractor believes that a decision taken by the Project Manager was either outside the authority given to the Project Manager by the Contract or that the decision was wrongly taken, the decision shall be referred to any adjudicator appointed under the contract within 14 days of the notification of the Project Manager’s decision.*

*We therefore declare a dispute and accordingly refer this matter to the President Uganda Institution of Professional Engineers (UIPE) for Adjudication.*

*Sincerely Yours,*

.....

*IBM Joseph Mbazzi*

*Country Director*

It is clear to me from the letter above that the declaration of the dispute arose from a decision of the project manager. The final accounts were prepared by the consultant upon request from the project manager as per annexure B dated 11<sup>th</sup> April 2017. In my

interpretation, this amounts to a decision of the project manager. It is also true that the dispute was also declared to the mutual disengagement but the court will place its focus on the project manager's decision regarding final accounts. I thus reject the Respondent's counsel arguments to the contrary.

Clause 1.1 (b) of the General Conditions of Contract defines an *adjudicator* as the person appointed by the employers and the contractor to resolve disputes in the first instance.

This clause also appears to impose an obligation on both parties to co-operate in the appointment of an adjudicator. In this particular matter, once an adjudicator had been appointed, the Respondent objected to his appointment but did not do much else and proceeded to file an application for the appointment of an arbitrator at CADER. At that point, it was upon the Respondent to co-operate with the Applicant to seek the appointment of another adjudicator once grounds had been found for the appointment of a new adjudicator pursuant to Clause 26 of the General Conditions of Contract.

The dispute was awaiting the appointment of an Adjudicator on the request of both parties under clause 24.1. The Arbitrator in this matter entertained a matter that ought to have been placed before an adjudicator.

In his decision on this issue the Arbitrator noted that;

*‘ ...It is important to note that I have found clauses in question ambiguous, as each party’s interpretation is reasonable. When the clause of the contract or words in the contract are reasonably susceptible of more than one meaning then the contract is said to be ambiguous...’*

He also found that;

*“... If one applies the Haffman principles above to the contract clauses in our present arbitration dispute, what would be their interpretation in the context of disputes arising under the contract. The test would be of a reasonable having all the background knowledge that would reasonably have been availed him in the situation in which the contract was executed understanding the clauses to have a particular meaning...”*

Further that;

*“... Having found that the contract clauses in respect of the dispute resolution under the contract are ambiguous, it is my decision that at this stage I am unable to ascertain the intention of the parties without hearing the evidence for or against a preferred interpretation propounded by either party. Accordingly, the preliminary objection is overruled and the hearing of the parties shall proceed inter vivos and the parties are at liberty to produce evidence in support and against their preferred interpretation to ascertain the intention of the parties...”*

The Arbitrator found that he had jurisdiction to entertain the matter. I do not agree with the findings of the Arbitrator that the Clauses could not easily be interpreted and there was need to call for additional evidence to interpret the contract.

In an earlier ruling by the Executive Director, CADER dated 16<sup>th</sup> March 2019, he found that the agreement between the Applicant and the Respondent provides for two forms of arbitration dispute resolution mechanisms. According to the Arbitrator, the first mechanism is set out under Clause 25.3 on arbitration which is the result of the agreed appeal from the adjudicator's decision.

The second form of arbitration is the one provided for under Clause 25.4 which according to the Arbitrator, applies to other disputes, other than those that arise under Clause 24.1.

In my view this only interpretation is not plausible as it is a general procedural clause that governs the conduct of procedural aspect of arbitration proceedings.

I thus concur with the Applicant's counsel's that the parties were required to comply with clause 24 GCC to conclude adjudication first and also that any issues or concerns regarding the final accounts should have been determined by the Adjudicator before being referred to the Arbitrator under Clause 25 GCC.

In that regard I would find that the Arbitrator misinterpreted clauses 24 and 25 of the GCC in arriving at the conclusion that he was vested with jurisdiction to entertain the claim.

In the premises, I find that the Arbitrator did not have jurisdiction to entertain the above matter and that the application was prematurely brought before him since Clause 24.1 of the parties agreement is the trigger for any dispute resolution proceedings as embedded within the contract.

**Whether the Arbitrator was vested with original jurisdiction under Clause 25. 4 of the General Conditions of Contract**

***Whether the Arbitrator had appellate jurisdiction***

These two issues collapses as my having found in the earlier issue that the Arbitrator did not have jurisdiction under Clause 25.4 of the contract between the parties thereto since under the GCC the Arbitrator only has an appellate jurisdiction from the decision of the adjudicator and does not have original jurisdiction as provided under clause 25.

In the premises this application succeeds in whole with orders made as below.

**5. Orders:**

- i. The Arbitrator is not vested with jurisdiction to hear and determine the claim under Clause 24 and Clause 25.4 of the General Conditions of Contract (GCC) until after determination by the Adjudicator under Clause 24 in an original jurisdiction.
- ii. The decision of the Arbitrator dated 12<sup>th</sup> March, 2019 on the issue of jurisdiction raised by the Applicant is set aside.

- iii. The hearing of the dispute before Eng. Daka Micheal appointed by the Uganda Institution of Professional Engineers (UIPE) under Clause 24.1 of the contract or any other adjudicator agreed to by the both parties is ordered reinstated until its conclusion.
- iv. The arbitral proceedings before Mr. Mohammed Mbabazi are stayed until the final conclusion by the appointed adjudicator under Clause 24.1 of the General Conditions of Contract (GCC).
- v. Each party shall bear its costs.

I do so order

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**HON. JUSTICE DR. HENRY PETER ADONYO**

**JUDGE**

**20<sup>TH</sup> MARCH 2020**