

THE REPUBLIC OF UGANDA

THE CENTRE FOR ARBITRATION AND DISPUTE RESOLUTION

CAD/ARB/NO.11 OF 2009

UGANDA POST LTD APPLICANT

v.

R.4 INTERNATIONAL LTD RESPONDENT

RULING

On 1st May 2008 (Annex A1) and 5th May 2008(Annex A2), the parties executed two tenancy agreements.

The arbitration clause in both the tenancy agreements reads as follows,

“11.0 ARBITRATION:

Any disputes arising from this Tenancy Agreement other than interpretation shall be referred to Arbitration. Each party shall appoint an independent arbitrator which two arbitrators will appoint a third neutral arbitrator. From the avoidance of doubt, the UNCITRAL Rules shall apply. The arbitration shall be done at Kampala, Uganda and the language of arbitration shall be English. The award granted by the Arbitration Tribunal shall be FINAL and BINDING.”

The 21st July 2009 Affidavit in support of the Application is deponed to by Mr. Samuel Kaali, who indicates that on 21st May 2009 the Applicant appointed Mr. Chris Bwanika as the arbitrator, on its part.

The 26th August 2009 Supplementary Affidavit evidences the fact that notice of appointment was communicated to the Respondent .

Mr. Ernest Sembatya Kaggwa informed us that he was not opposed to the Application in principle. In the same breath, he immediately exfoliated his stand without compunction when he elaborately argued that it was incumbent upon CADER to outline the scope of the arbitral tribunal's authority. He maintained the same position after I had invited him to read **Sections 16(2) and 16(3) Arbitration and Conciliation Act, Cap.4** (hereinafter referred to as the ACA).

He illustrated this by reference to three other tenancy agreements between the parties [Annex R1 (10th June 2005), Annex R2 (10th May 2005) and Annex R3 (30th June 2006)], which did not have arbitration clauses. It was for this reason he submitted that the arbitration proceedings should relate to period before 1st August 2008.

Time has now come again to repeat the message that the appointment of an arbitrator is a mutual obligation, which is imposed on all parties. A party unwittingly forfeits its statutory right, when it fails to participate in the appointment of the arbitrator. The duty would then fall upon the advocate to advice the client that the appointment of an arbitrator is a task, which ought to be performed by a party, since that is the essence of the undertaking, upon signing the arbitration clause. Assuming the party is not well versed with arbitration, then the advocate would be best placed person to advice the client on the unpropitious task to be performed.

Lord MacMillan wisely expounded by sixty-seven years ago, in *Heyman v Darwins*, [1942] All E.R. 337, 347D as follows,

*“I venture to think that not enough attention has been directed to the **true nature and function of an***

arbitration clause in a contract. It is quite distinct from the other clauses. The other clauses set out the obligations which the parties undertake to each other hinc inde; but the arbitration clause does not impose on one of the parties an obligation in favour of the other. It embodies the agreement of both parties that, if any dispute arises with regard to the obligations which one the one party has undertaken to the other, such dispute shall be settled by a tribunal of their own constitution.”

This obligation subsists notwithstanding that one party may be under the impression that there is in fact no dispute; see **Hayter v. Nelson**, [1990] 2 Lloyd's Report 265, 268 and **Ellerine Bros Ltd v. Klinger**, [1982] 2 All E.R. 737, 741.

I do not agree with the Respondent's counsel submission that CADER is not stopped from limiting the arbitral tribunal's scope of inquiry, for the reasons which I shall elaborate below.

Under **Section 11 ACA**, CADER is only tasked with putting in effecting the compulsory appointment of an arbitrator where the case is made out that the respondent has either refused or neglected to perform it's duty.

Section 16 ACA empowers the arbitral tribunal to determine it's own jurisdiction.

Again **Section 16 ACA**, vests the parties with the complementary power to address the arbitral tribunal it's jurisdiction.

That said only the arbitral tribunal has power to determine the scope of it's jurisdiction under **Section 16(6) ACA**.

The jurisdiction question is so critical that it constitutes a ground upon which the arbitral award either can be set aside – **Section 34(1)(iv) ACA** or cause continuance of the arbitral proceedings or invoke further action from the tribunal – **Section 34(4) ACA**.

Moreover any attempt to delimit the arbitral tribunal’s jurisdiction may invite the criminal charge for threat of injury to the arbitrators under **Section 93 Penal Code, Cap.120**, given that they are deemed persons in public employment under **Section 2(u)(iv) Penal Code**.

I therefore find merit in this Application, since the Respondent failed to co-operate in the appointment an arbitrator by its inaction or negligence.

I therefore appoint the retired Principal Judge (emeritus) Hon. Herbert Ntabgoba as the second arbitrator in this matter.

Should Hon. Herbert Ntabgoba decline this appointment under **Section 12(1) ACA** on grounds of impartiality then retired Supreme Court Judge (emeritus) Hon. Alfred Karokora or Mr. Stephen Musisi shall be deemed appointed in sequential order to act second arbitrator.

The arbitrators are 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
Hon. Rtd Principal Judge J. Ntabgoba Kampala Associated Advocates

5th Floor Workers House
Pilkington Road, Kampala

Delivered on 1st September 2009.

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**JIMMY MUYANJA,
EXECUTIVE DIRECTOR.**