

THE REPUBLIC OF UGANDA

THE CENTRE FOR ARBITRATION AND DISPUTE RESOLUTION

CAD/ARB/NO. 09/2013

OIKOCREDIT ECUMENICAL DEVELOPMENT

CO-OPERATIVE SOCIETY, U.A. APPLICANT

v.

1. LUGAZI SUGAR CO-OPERATIVE SAVINGS & CREDIT SOCIETY LIMITED.
2. TIMOTHY MUWONGE
3. MUSTAFA BASUUTA
4. JOHN MUSAMALI RESPONDENTS

RULING

16th June 2009 was a happy day for Oikocredit Ecumenical Development Cooperative Society U.A. and Lugazi Sugar Co-operative Savings and Credit Society Limited when they jointly signed up the Loan Agreement.

Other parties tagged along in this Loan Agreement, by Paragraph 7.4.2 were the Chairperson, Vice Chairperson and Manager of the First Respondent who were required to execute personal guarantees in the Applicant's favor.

The guarantors are the first Respondent Timothy Muwonge (Chairperson), the second Respondent Mustafa Basuuta (Vice Chairperson) and the third Respondent John Musamali (Manager/CEO).

The personal guarantee was not part of the Application before CADER. Applicant counsel then prayed for the personal guarantee to be admitted on record. I granted the prayer for the following reasons.

In a nutshell the Respondents argue that Applicant's counsel did not do a tidy job when drafting the Application. The Respondents do not deny existence of the guarantee deed. In any event, the request to refer the dispute to arbitration (dated 20th June 2013 – Annex D to Applicant's Affidavit in support) was copied to the Respondents. I warned myself that CADER exists to resolve the deadlock between the parties not to adjudge the degree of negligence with which counsel have drafted their motions or argued their client's case. Any decision following this line will not resolve the dilemma which the parties have at hand. It is for this reason that I admitted the Guarantee deed on the record.

It is common ground between the parties that the loan agreement has been breached.

The Loan Agreement dispute resolution clause reads as follows:-

“8.0 Arbitration and jurisdiction.

8.1 *Any dispute, controversy or claim arising out of or relating to this Agreement or breach, termination or invalidity thereof my, at the option of the Oikocredit, be referred to and finally resolved by arbitration* in accordance with UNCITRAL Arbitration Rules. Oikocredit and the Borrower will each appoint one arbitrator and the two arbitrators so appointed shall together appoint the third arbitrator, failing which such third arbitrator shall be appointed that is agreeable to both parties.

8.3 Paragraphs (a) and (b) of this Clause notwithstanding, the parties *may agree to an alternative mode of dispute resolution* including arbitration under the Laws of Uganda or submitting to the jurisdiction of Ugandan Courts.”

The Application prays that CADER orders:-

1. The dispute between the parties be resolved by arbitration and each party be compelled to appoint its own arbitrator as per the terms of the loan agreement.
2. The third arbitrator be appointed by consent of both parties.
3. In the alternative, CADER appoints a third arbitrator.
4. The appointed arbitrators commence their work and complete the arbitration within 90 (ninety) days from date of appointment.
5. The arbitration be guided by CADER.
6. Costs of this application be provided for.

First Respondent's counsel opposed the application.

Reference was made to the First Respondent's two letters, which the Applicant ignored! The letters are both set out as Annex A to the Affidavit in Reply deposited by Loum Janan the First Respondent's Chairman Board of Directors.

These letters read as follows,

“Ref:CALC/GEN/5/5/13

Date: 8th May 2013

It is on this premise that our client asks for the remaining balance owed by them to be demanded from the said guarantors and is willing to assist in the recovery bid. We thus propose to have a meeting to settle the same at your convenience.”

“Ref:CALC/GEN/01/07/13

Date: 3rd July 2013

The purpose of this letter is to request you to respond on our letter dated 8th day of May, 2013 attached hereto for a meeting with your client or yourselves at your convenience to settle the same and way forward.

Your apt response in replying to our letter attached hereto which we wrote to your client will be highly appreciated.”

First Respondent’s counsel submitted that the letters were written to invoke any “... *alternative mode of dispute resolution* ...” pursuant to Clause 8.3.

This argument is unsustainable.

Clause 8.3 imposes an obligation on the party invoking any “... *alternative mode of dispute resolution* ...” to secure the consent of the opposite party.

Clause 8.3 can only be enforced when agreement has been sought from the other party regarding the specified “... *alternative mode of dispute resolution* ...”.

The Applicant’s notice to refer the dispute to arbitration was phrased as follows,

“Ref: MKA/CIV/22/2013

Date: 20th June 2013

Following your refusal to settle our client’s outstanding loan of Ushs.148,839,000/= ... as per our notice of intention to sue *cum* demand notice we served upon you on 18/04/2012; we do hereby; pursuant to clause 8 of the loan agreement you executed with our client on 16/06/2009, give you a demand notice for appointment of your own arbitrator within 30 (thirty) days from the date hereof and revert to us as soon as possible.”

Applicant’s counsel conceded that the request to refer the dispute to arbitration does not indicate their own appointed arbitrator.

I therefore find that the Applicant’s notice to refer the dispute to arbitration was deficient for having omitted the appointment of their own arbitrator. The Respondents replicated the error in failing to appoint their own arbitrator.

In essence the arbitration process has faltered at the hands of counsel advising the respective parties. Neither counsel focused the respective parties to proceed and appoint their own arbitrators.

I also find that the prayers sought by the Applicant are not in line with the needs of the Applicant. The prayers are also not in tandem with the letter of the **Arbitration and Conciliation Act (ACA)**.

The circumstances surrounding this Application are those envisaged by S.11(4) (a) Arbitration and Conciliation Act and I find it fit to invoke the powers bestowed upon me.

I therefore appoint two arbitrators.

These are Jackie Ndegeya Nakalembe and Patricia Basaza Wasswa.

In the event that these cannot accept the appointment for whatever reason I then appoint the succeeding arbitrators. The succeeding arbitrators can only be appointed in the sequential order listed.

1	Jackie Ndegeya Nakalembe	Patricia Basaza Wasswa
2	Geoffrey Otim	Stephen Musisi
3	Tusiime Evans Rushegera	Mohmed Mbabazi

No order as to costs.

Dated at Kampala on the 7th day of August 2013.

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Jimmy M Muyanja
EXECUTIVE DIRECTOR