

THE REPUBLIC OF UGANDA

**THE CENTRE FOR ARBITRATION AND DISPUTE RESOLUTION
CAD/ARB/03/2013**

NAMBALE ENTERPRISES LTD APPLICANT

V.

BUSITEMA UNIVERSITY RESPONDENT

RULING

The Applicant filed a Chamber Summons application praying for the compulsory appointment of an arbitrator and costs.

The matter was set for hearing on 4th March 2013. The Applicant served the Respondent but did not file an Affidavit of Service. The Respondent's prayer for an adjournment to file an affidavit of reply was granted on 4th March 2013.

The matter was adjourned to 2.00p.m, on 5th March 2013, for hearing of the Application.

The deficiently agreed facts, between the parties, are: -

1. There is a contract between the parties.
2. A dispute has arisen in respect of the contract.
3. The dispute has to be resolved by arbitration under the Arbitration and Conciliation Act [hereinafter referred to as the ACA].
4. The Respondent acknowledges receipt of the Applicant's Notice of Arbitration.
5. The Respondent had not replied to the Applicant's Notice of Arbitration by 5th March 2013.
6. The matter in contention is whether the matter should go to adjudication or arbitration.

I mentioned the parties had presented a set of deficient agreed facts because of the inherent contradictions, which cropped up.

First - Respondent counsel's indication that he was opposed to the Application, in effect negated the third agreed fact.

Secondly, the sixth agreed fact is on critical reflection an issue – not a fact!

The background to the proceedings, deciphered from the maze of paperwork before me is as follows: -

- a) The contract for rehabilitation and renovation of the University Mechanical Workshop at Busitema Campus was signed on 25th June 2009;
- b) The contract for refurbishment and renovation of staff houses at Busitema Campus was signed on 25th June 2009; and
- c) The Contract for construction of male ablutions at Nagongera Campus was signed on 25th June 2009.
- d) Respondent issued the termination letter for University Mechanical Workshop contract on 9th March 2011.
- e) Respondent issued the termination letter for Nagongera Campus works on 5th August 2011.
- f) The Respondent received the Applicant's Notice of Arbitration of 29th November 2012.
- g) The Respondent did not take action on the Notice of Arbitration.

The Applicant also evidenced **Annex E1** the Applicant's letter dated 16th December 2010 as part of the termination letters. I have perused the letter and noted that it is follow up communication on Nagongera Campus Works. The Applicant has therefore not evidenced any termination of the contract for refurbishment and renovation of staff houses at Busitema Campus.

The dispute resolution clause for both the contracts in issue are similar. They read,

“Part 4 Section 8.

Special Conditions of Contract.

The following Special Conditions of Contract (SCC) *shall supplement* the General Conditions of Contract (GCC). *Whenever there is a conflict*, the provisions herein *shall prevail over* those in the GCC.

GCC clause reference	Special Conditions
<i>GCC 25.1</i>	The procedure for disputes shall be as specified in GCC 25.2 to 25.4.
<i>GCC 25.4</i>	The arbitration shall be conducted in accordance with the Arbitration and Conciliation Act Laws (sic) of Uganda. Arbitration shall take place at: Kampala
<i>GCC 26.1</i>	The Appointing Authority for the Adjudicator is: Centre for arbitration (sic) and Dispute Resolution P.O. Box 25585, Kampala.

Part 4: Section 7

General Conditions of Contract for the Procurement of Works.

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.

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 types 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 of the Adjudicator to an Arbitrator within 28 days of the Adjudicator's written decision. If neither party 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 mechanism specified in the SCC, and in the place shown in the SCC."

The Respondent opposes this Application simply because she interprets that any disputes must first be referred to adjudication before being referred to an arbitrator.

Applicant's counsel argues that this cannot be the case since the termination, was in either case done by the employer not the Project Manager.

The arguments presented by both counsel, on the face of it, would require us to find the definition of Employer and Project Manager in the contracts.

To my mind, an adjudicator can only be appointed, under Clause 24.1 when there is a dispute regarding the Project Manager's decision.

I have however noted that the termination letters (dated 9th March 2011 and 16th December 2010), respectively deal with decisions emanating from the Contracts Committee.

The letters in both cases inform that the Applicant that the terminations arise from decisions made by the Contracts Committee.

I therefore find Clause 24.1 is inapplicable to the case at hand.

The SCC establishes the dispute resolution standard by stating that “*the procedure for disputes shall be as specified in GCC 25.2 to 25.4.*”

The SCC does not set stipulate any other formal procedure for disputes.

Clause 25.2 GCC informs us that [ANY] adjudicator appointed under the contract shall give a decision within 28days of receipt of notification of a dispute, providing that he is in receipt of all the information required to give a decision.

Ifind that Clause 25.2 GCC is a generic dispute resolution clause, which applies to all situations unlike Clause 24.1, which only applies to decisions made by the Project Manager.

In the circumstances, I can only effect compulsory appointment ofan adjudicator.

Where is the mandate to do so derived from?

Clause 1.1(b) GCC defines the adjudicator as “... *the person appointed jointly by the Employer and the Contractor to **resolve disputes** in the first instance.*”

I have held previously in **BOARD OF GOVERNORS, JOHN PAUL S.S. CHELEKURA v.KHENY TECHNICAL SERVICES LTD, CAD/ARB No.22 of 2012**, that the definition of adjudicator,

“is synonymous with the function of arbitration agreement set out in S.2(1)(e) Arbitration and Conciliation Act, Cap.4, [hereafter referred to as the ACA] which reads as follows: -

“arbitration agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of defined legal relationship, whether contractual or not.”

There is no provision in the ACA, which restricts the definition of an arbitrator.

My considered conclusion is that the ACA has to be purposefully construed.

*I therefore find that the powers to effect compulsory appointment of an arbitrator under **S.11 ACA**, equally apply to this clause, given that the test is failure of the agreed process to invoke the agreed dispute resolution procedure.”*

I therefore appoint Mr. Victor Odongo as the adjudicator, in respect of the University Mechanical Workshop and Nagongera Campus Works Contracts.

Should he decline this appointment, then Mr. Bharat B Gupta or Dr. Anania Mbabazi can be approached in sequential order.

I had previously noted that the Respondent did not reply to the Notice of Arbitration.

It is remiss for the Respondent to fail to honor its part of the bargain. We must be mindful that the dispute resolution clause is the only mutual clause, which binds the parties.

For example, if the Respondent had a claim, it would be bound to invoke the dispute resolution clause.

Establishment of the adjudicator panel is not a decision in favor of one or other position but mere neutral fulfillment of a process, which was agreed between the parties.

I find that the Respondent's officer has been negligent in failing to participate in formulation of the tribunal – more so when this is a right entrenched by the ACA.

Shirking of the party autonomy right, leaves me with no choice but to reluctantly award costs of this Application to the Applicant.

I award the Applicant half of its costs because the paperwork was not well collated.

Delivered at Kampala on the 12th day of March 2013.

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Jimmy Muyanja
EXECUTIVE DIRECTOR.