THE REPUBLIC OF UGANDA

THE CENTRE FOR ARBITRATION AND DISPUTE RESOLUTION [CADER]

CAD/ARB/NO/30 OF 2015

DR. TIMOTHY KIMULI MAKANGA …….……. APPLICANT

VERSUS

JOHN MBABALI MAKANGA …… RESPONDENT

Applicant counsel.

MAGELLAN KAZIBWE - Magellan Kazibwe & Co. Advocates & Legal Consultants.

Respondent counsel.

ERIC KIINGI - Eric Kiingi & Co. Advocates.

RULING

1. The Application prays for the compulsory appointment of an arbitrator to resolve the dispute between the parties.

2. The parties executed a land lease agreement on 25th September 2009.

3. The parties are now in disagreement on whether or not an access road is part of the subject matter of the contract.

4. The Applicant invited the Respondent to cooperate in the joint appointment of an arbitrator, by sending through five names for the Respondent's consideration.

5. The Respondent's advocates replied that they deemed the proposed arbitration premature.

6. The Respondent's Affidavit in Reply extensively narrates the land management issues, which have arisen between the parties and similarly concludes that the proposed arbitration is still deemed premature.

7. Respondent's counsel submits that the Applicant's Affidavit in reply has not evidenced the refusal to work jointly with the Applicant to set up the arbitral tribunal.

8. Respondent's counsel submitted that it is not manifest that the access road issues can be deemed as differences or disputes, anticipated by dispute resolution clause, which states as follow,

> "6. In the event of any **difference or dispute** between the Lessor and the Lessee in connection with any matter under or in the construction of these presents the matter in dispute

> shall be referred to Arbitration by a Sole Arbitrator to be agreed in writing by the Lessor and the Lessee or failing such agreement to be appointed by a Judge of the High Court of Uganda and the decision of such Arbitration shall be final and binding on the Lessor and Lessee and such Arbitrator shall have power to decide to and by whom and in what manner the costs of the reference and award shall be paid and borne and these presents shall be deemed to be Submission to arbitration with the meaning of The Arbitration And Conciliation Act (sic) (Cap.4) or of any Statutory Modification (sic) thereof for the time being in force in Uganda the provisions thereof shall apply so far as they are application and are not hereby varied."

9. The issue to resolve is whether commencement of the arbitration process is dependent on the parties being agreed that there is indeed a difference or dispute.

10. It is instructive to note that the parties do not dispute that there is indeed a reference clause to arbitration.

11. The principal thrust of clause 6 is the reference to arbitration.

12. The opening part of the sentence serves only to indicate that the parties are conscious to the fact that it is disputes and differences arising between them, which shall be referred to arbitration.

13. To this extent it does not augur well for the Respondent to argue that the arbitration process ought not to commence because of their considered opinion that there exists no dispute or difference between the parties.

14. Section 2(1)(c) Arbitration and Conciliation Act, Cap.4 [ACA] defines an arbitration agreement as "*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 a defined legal relationship, whether contractual or not*".

15. The import of Section 2(1)(c) ACA is that it renders futile the investigation as to whether or not disputes or differences exist.

16. In *Tral Ltd versus Attorney General*, [2012] UGCADER 3, I observed as follows,

> "What was in dispute was whether the Applicant had been paid after fulfilling her contractual obligations. This can only be resolved when the Respondent answers all queries to the Applicant's satisfaction.
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> Saville J., in ***Hayter v. Nelson***, [1990] 2 Lloyds Report 265, page 268, observed that,
>
> > *"The proposition must be that if a claim is indisputable then it cannot form the subject of a "dispute" or "difference" within the meaning of an arbitration clause. If this is so, then it must follow that a claimant cannot refer an indisputable claim to arbitration under such a clause; and that an arbitrator purporting to make an award in favour of a claimant advancing an indisputable claim would have no jurisdiction to do so. It must further follow that a claim to which there is an indisputably good defence cannot be validly referred to arbitration since, on the same reasoning, there would again be no issue or difference referable to arbitration. To my mind such propositions have only to be stated to be rejected - as indeed they were*

rejected by Mr. Justice Kerr (as he then was) in ***The M.Eregli****, [1981] 2 Lloyds Report 169 in terms approved by Justices Templeman and Fox in* ***Ellerine v Klinger****, [1982] 1 W.L.R. 1375.*

As Lord Justice Templeman put it (at p. 1383):-

> *There is a dispute until the defendant admits that the sum is due and payable.*
>
> *In my judgment in this context neither the word "disputes" nor the word "differences" is confined to cases where it cannot then and then be determined whether one party or the other is in the right. Two men have an argument over who won the University Boat Race in a particular year. In ordinary language they have a dispute over whether it was Oxford or Cambridge. The fact that it can be easily and immediately demonstrated beyond any doubt that the one is right and the other is wrong does not and cannot mean that that dispute did not in fact exist. Because one man can be said to indisputably right and the other indisputably wrong does not, in my view, entail that there was therefore never any dispute between them."*

Templeman LJ, in **Ellerine Bros Ltd v. Klinger**, [1982] 2 All E.R., 737 (at p.741) observed that,

> *"…if letters are written by the plaintiff making some request or some demand and the defendant does not reply, then there is a dispute. It is not necessary, for a dispute to arise, that the defendant should write back and say, 'I don't agree'.".*

This is why I observed in the course of the hearing, that existence

or nonexistence of a dispute is a state of mind resident in either party."

17. The affidavits deposed by the parties do not indicate any past attempt to comply with any iota of the road map indicated in Clause 6 of the dispute resolution clause.

18. In effect the parties have totally disregarded and abandoned the arbitrator procedure previously agreed upon by the parties under Clause 6, even when they had lawyers at their disposal to advise them on compliance with the clause stipulations.

19. The Application has merit and I grant the prayer for appointment of an arbitrator pursuant to **Section 10(2) ACA**. Each party is to bear it's own costs.

20. Arbitrator's will be listed in the consequential ruling.

Dated at Kampala on the **3rd** day of **AUGUST 2016**.

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EXECUTIVE DIRECTOR