

THE REPUBLIC OF UGANDA

**THE CENTRE FOR ARBITRATION AND DISPUTE RESOLUTION
[CADER]**

CAD/ARB/NO.25 OF 2017

OIKOCREDIT ECUMENICAL

DEVELOPMENT CO-OPERATIVE SOCIETY, U.A. APPLICANT

VERSUS

1. ISHAKA FARMER SACCO LTD

2. NABOTH ARINAITWE

3. REV. PISON BAGUMA

4. FRANCIS KAPAKA RESPONDENTS

Applicant counsel.

Magellan Kazibwe - Magellan Kazibwe & Co. Advocates.

Counsel for first Respondent.

Portase Byarugaba - Byarugaba & Co. Advocates.

Counsel for second, third and fourth Respondents.

James Agaba - Agaba & Co. Advocates.

RULING

The Loan Agreement executed between Oikocredit Ecumencial Development Co-operative Society, U.A. on 11th December 2015, bears the following arbitration clause,

“6. Arbitration and Jurisdiction

- a) Without prejudice to Oikocredit’s remedies of sale of the mortgaged property without recourse to court or other tribunal and the appointment of a Receiver under the mortgage or debenture, any dispute, controversy or claim arising out of or relating to this Agreement in regard to the interpretation, termination or invalidity thereof may, at the sole option of Oikocredit, be referred to and finally resolved by arbitration in accordance with UNCITRAL Arbitration Rules. The matter shall be referred to one arbitrator who shall be appointed by the Executive Director of CADER.

- b) The Arbitration tribunal shall not be authorized to take or provide, and the Borrower shall not be authorized to seek from any judicial authority, any interim measures of protection or pre-award relief against Oikocredit any provisions of UNCITRAL Arbitration Rules notwithstanding. The Arbitration tribunal shall have authority to consider and include in any proceedings, decision or award any dispute properly brought before it by Oikocredit or the Borrower insofar as such dispute arises out of this Agreement, but, subject to the foregoing, no other parties or other disputes shall be included in or consolidated with, the arbitration proceedings. In any arbitration proceedings, the certificate of Oikocredit as to any amount due to Oikocredit under this Agreement shall be prima facie evidence of such amount.

- c) 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.”

When the matter came up for hearing, First respondent's counsel submitted that they were not opposed to the Application.

The second, third and fourth respondents are party to the Guarantee Deed which they individually signed up to.

The Guarantee Deed dispute resolution clause states as follows,

“Article III

Section 3.2

This Guarantee shall be governed in all respects by the Laws of Uganda and any actions for or connected with its enforcement shall be brought in a Court of competent jurisdiction in the Republic of Uganda.”

Applicant's counsel submitted that: -

- 1) The guarantors are relevant parties to the intended arbitration action;
- 2) The guarantors are the first respondent's board of directors;
- 3) Clause 6 of the Loan Agreement authorizes the arbitrator to include other parties who ought to be included in consolidation proceedings;
- 4) Article II, Section 2.1(a), bound the second, third and fourth respondent guarantors under the *terms of the loan agreement*, rendering them an integral part of the arbitration proceedings.

Respondent's counsel opposed this application because of the Guarantee Deed dispute resolution clause because: -

- 1) The Loan Agreement and Guarantee Deeds are distinct documents;
- 2) Applicant's counsel prematurely relied upon Clause 6(b) Loan Agreement, because the tribunal had not yet been constituted to consider whether the dispute had been properly brought before it;
- 3) Applicant counsel erred in submitting that the recitals in the Loan Agreement bound the second, third and fourth respondents, because Clause 6 is a substantive arbitration clause; and
- 4) In any event the Guarantee Deed did not commit the guarantors to resort to arbitration.

Applicant counsel's in rejoinder submitted tha: -

- 1) The Loan Agreement and Guarantee Deeds being inter-related and inter-connected should be interpreted *pari materia*;
- 2) This compulsory application is part of the arbitration proceedings;
- 3) Article 3.2 Guarantee Deed did not oust CADER's jurisdiction;
- 4) When Clause 3.2 Guarantee Deed mentions “..Laws of Uganda..”, this includes the Arbitration and Conciliation Act, Cap.4 [hereinafter referred to as the ACA].

I now turn to make my decision.

CADER's jurisdiction to resolve this Application arises from Section 11 ACA.

In a nutshell, CADER's statutory power to constitute the arbitration tribunal arises, when the parties have failed to set one up.

The statutory order can only be issued after it has been proved that an arbitration agreement exists between the parties presented before CADER.

Section 3(2) ACA commands that the arbitration agreement must be in writing.

The succinct arbitration clause only exists in the Loan Agreement.

I find no sufficient reason has been provided to cause reliance on the recitals in Loan Agreement.

Though the Loan Agreement and Guarantee Deed are interconnected, dispute resolution clauses by nature are a contract separate and distinct from the subject matter contract.

For example the parties to an arbitration clause have to either affirm or disaffirm default provisions laid out in the ACA.

In this instance the parties went an extra mile in Clause 6(b) in recording that no parties would be added or consolidated to the arbitration proceedings.

The effect of this negative pledge is to estop the Applicant from seeking to join the guarantors as parties to the arbitration proceedings.

I have observed previously that Section 11 ACA powers are limited to the compulsory appointment of arbitrators where the parties fail to put in place the tribunal.

CADER does not have jurisdiction to revoke the negative pledge, where the parties have bound the arbitral tribunal not to join parties or consolidate matters.

It is evident that Gurantee Deed Clause 3.2 also serves to confirm that the guarantors are not party to the Loan Agreement Arbitration Clause.

The Applicant shall bear the costs of the second, third and fourth respondent.

Each party shall bear their own costs with regard to the Application for the compulsory appointment of the arbitrator under the Loan Agreement.

Dated at Kampala on the 8th day of May 2017.

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EXECUTIVE DIRECTOR