THE REPUBLIC OF UGANDA

THE CENTRE FOR ARBITRATION AND DISPUTE RESOLUTION [CADER]

CAD/ARB/66/2017

ARIEL INVESTMENT LIMITED ---------- APPLICANT

VERSUS

KAMUNTU INVESTMENTS LIMITED ---------- RESPONDENT

Applicant Counsel	**Respondent Counsel**
Wandera Ogalo	Dennis Kwizera
Victoria Advocates.	Ayigihugu & Co. Advocates

RULING

1. The parties executed a Consultancy Agreement on 18th February 2018.

2. In relation to the dispute, which had arisen, the Applicant's counsel on 15th September 2017 notified of the respondent as follows,

> "Date: 15th September 2017.
>
> *In accordance with Article 5 and 8.2.2 of the agreement, and by virtue of the provisions of the Arbitration and Conciliation Act Chapter 4 Laws of Uganda, we hereby nominate the Centre for Arbitration and Dispute Resolution to act as Mediator. This is now to require you to consent to the appointment within 3 days from date hereof.*
>
> *Should you fail to do so within the stated time the same said Centre for Arbitration will automatically become the arbitrator on 2nd October 2017 under Article 8.3.1. of the agreement.*"

3. The Respondent's counsel replied as follows,

> "*Date: 4th October 2017*
>
> *(f) In view of the above our client does not see any need to subject the matter to mediation.*
>
> *(g) He does not consent to your client's nomination of the Centre for Arbitration and Dispute Resolution as mediator in the matter"*

4. The Applicant's supporting Affidavit and submissions in unison state that the respondent has failed to accede to mediation and arbitration.

5. Respondent's counsel acknowledged receipt of the Application, but did not file any reply affidavit.

6. The Respondent argues that granting the prayers sought would violate the text of the dispute resolution clause.

7. The pertinent clause reads as follows: -

> "***8. Alternative Dispute Resolution***
> ***8.1. Without prejudice meeting***
> *In the event of a dispute, the parties agree that they shall immediately meet on an informed and without prejudice basis, with a view to exploring a possible resolution of the dispute.*
>
> ***8.2. Non-binding Mediation***
> *8.2.1. In the event that the parties are not able to resolve the dispute then and in such event the parties shall mediate the dispute.*
>
> *8.2.2. In this regard the parties shall, by agreement, nominate a mediator who shall not have any right or entitlement to issue an award and/or decision which is binding on the parties.*
>
> *8.2.3 In the event the parties cannot reach agreement on the identity of the mediator, then and in such event the parties will turn to the courts of England and Wales who shall nominate a mediator.*
>
> ***8.2 (sic) Arbitration***
> *8.3.1. Should the dispute not be resolved within 14 (fourteen) days of either party calling for the mediation, the parties agree that the dispute shall be resolved by way of arbitration.*
>
> *8.3.2. In this regard the dispute shall be governed by the Rules of the Arbitration Foundation of Southern Africa ("AFSA"), save that the arbitration shall proceed urgently in accordance with AFSA's track rules."*

8. Is the Respondent right to assert only the courts of England and Wales should appoint the mediator?

   Yes the respondent is correct.

However the mediator appointment jurisdiction question is futile given that Respondent's counsel never reported any concession to mediation.

9. The 4th October 2017, rejection of mediation had a three-fold effect.

   First, abandonment of the participatory right to set up mediation panel.

   Secondly, frustration of the right to resort to the courts of England and Wales to nominate the mediator.

   The inconsistent stance on one and the same clause may cause other minds to wander on the shores of professional negligence.

10. The third effect was to open the arbitration channel envisaged under Clause 8.3.1.

    The respondent contends that the mandate to appoint the arbitrator lies with the Arbitration Foundation of Southern Africa (AFSA) and not CADER.

11. Close analysis reveals that it was evident to the parties that AFSA was simply listed as the forum for soliciting arbitration rules governing the dispute.

12. What then is at stake is whether the AFSA Rules impede the Applicant's prayer for appointment compulsory appointment of an arbitrator.

13. The common position between the parties is that the contract was performed within the Republic of Uganda.

14. The consequential result is that the Arbitration and Conciliation Act is applicable as the law of statutory relief law, for instituting the tribunal.

    The AFSA Rules cannot be neglected.

    Equally so the CADER Rules must be properly understood so as to avoid an undue market scare.

    Rule 33 CADER Arbitration Rules, states as follows,

> "33(1)
> The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute.
>
> Failing such designation by the parties the arbitral tribunal shall apply the laws determined by the conflict of laws rules, which it considers applicable.
>
> 33(2)
> The tribunal shall decide as *amiable compositeur* or *ex aequo et bono* only if the parties have expressly

> authorized the arbitral tribunal to do so and if the law applicable to arbitral procedure permits such arbitration.
>
> 33(3)
> In all cases the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usage of the trade applicable to the transaction."

15. We learn from the above that the Rule 33 is cognizant that arbitration proceedings are governed by the designated national arbitration law, designated arbitration rules, the conflict of laws rules, the designated jurisdictional powers invested upon the arbitration either by legislation or by the party designated rules.

16. In any event the Respondent's intention to have AFSA appoint the arbitrator is still caught up in abandonment.

    It has time and time again been emphasized that the arbitration clause is a mutual obligation process, which places an equal burden on both counsel. The fulfilled dispute resolution forum does not result in a merit decision affecting the substance of the dispute but mere realization of the agreed dispute resolution forum.

    Catherine Muganga in a similar context, ***B.M. Steels v. Kilembe Mines***, CAD/ARB/10/2004, set out the normative behavior in relation communication on the appointment of arbitrators, as follows,

> "It is prudent to point out at this stage three possible courses of action which could have been taken by the Respondent:
>
> 1. First the Respondent would have consented to the Arbitrator suggested by the Applicant with a view of having a one-person arbitral panel.
>
> 2. Secondly the Respondent would oppose the Applicant's nomination by indicating another Nominee Arbitrator whilst inviting the Applicant to consent to the Respondent's nomination with a view to having a one-person arbitral panel.
>
> 3. Thirdly the Respondent would oppose or consent to the Applicant's nomination. Nevertheless the Respondent would then proceed to indicate another Nominee chosen by the Respondent and invite the Applicant to consent to the second nomination person with a view of having a two person tribunal."

If there was good intention, then proof ought to have been brought to table evidencing the respondent's notice of rectification correspondence, which required compliance with the AFSA Rules.

17. In this case the failure was triggered by the Respondent who abandoned their obligation to take proactive steps to set up the arbitral tribunal.

    It is during this mutual obligation engagement phase that Respondent counsel would have ironed out any glitches on Applicant's part, to ensure smooth and seamless compliance with the dispute resolution.

    It is safe to speculate that during the collaborative engagement, Respondent Counsel may have successfully convinced the Applicant to enhance the dispute resolution clause by stipulating the appointing authority.

    Additionally both counsel would have taken several other steps such as confirming working venues, working dates and a whole host of critical details which are essential to help the parties to fulfill the envisaged dispute resolution clause.

    It is absence of such constructive engagement that leads me to conclude that the Respondent's non-collaborative actions constitute abandonment of the agreed dispute resolution process.

18. CADER's jurisdiction is provision of statutory relief establishing the arbitration panel in the event of failure by the parties to appoint an arbitral tribunal.

19. The abandonment in turn invoked the Applicant's right to seek statutory relief to enable compliance with the dispute resolution clause, thereby giving merits as I have found to this Application.

20. I have found merit in this Application and shall appoint the arbitrator under **S.10(2) ACA**.

21. The Respondent shall bear the Applicant's costs of this Application.

Dated at Kampala on **16th March 2018**.

JIMMY .M. MUYANJA
EXECUTIVE DIRECTOR