

THE REPUBLIC OF UGANDA

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

CAD/ARB/68/2017

USAFI MARKET VENDORS ASSOCIATION ----- APPLICANT

VERSUS

1. SAFINET UGANDA LIMITED

2. KAMPALA CAPITAL

CITY AUTHORITY [KCCA] ----- RESPONDENT

Applicant Counsel

Wilberforce Seryazi.

Nshimye & Co. Advocates.

1st Respondent

Asingwire Rugamba Martin.

Kwesigabo, Bamwine & Walubiri
Advocates.

2nd Respondent

Ritah Mutuwa.

Directorate of Legal
Affairs.
KCCA.

RULING

1. This is an Application for compulsory appointment of an arbitrator.
2. These events arising from three documents are in issue.
 - a. First, the sub-lease agreement between the claimant and first respondent, where the arbitration clause lies.
 - b. Second, the statutory body (that is the second respondent) overseeing the activities between the claimant and first respondent took-over the sub-lease agreement; both parties consented.
 - c. Third, the second respondent bought out the first respondent's land holding interest, which is affected by the dispute.

Date	First Party	Second Party	Transaction
18-Dec-12	Safi Net Uganda Limited	Usafi Market Vendors Association	Sub-lease agreement
8-Nov-13		KCCA	Interim Administration Takeover Notice
10-Mar-15	Safi Net (U) Ltd	KCCA	Land Sale & Purchase Agreement

3. The reported dispute relates to a commission arising out of the sub-lease agreement.

4. The second respondent held consultative meetings with both parties and it was mutually agreed that there be a temporary take over of daily administration of the market.
5. The take-over was outlined as follows,

“Letter from Office of Executive Director
Kampala Capital City Authority.

... KCCA has held consultative meetings with both parties and it has been mutually agreed that from 11th November 2013, KCCA will temporarily take over the day-to-day administration of the Market until it stabilizes.

KCCA will supervise the day to day running of the market and coordinate the interests of both SAFINET and the vendors.

SAFINET as the developer will remain liable for the costs of running the market and any other costs relating to the property. The vendors shall on the other hand remain liable to pay all dues and observe market user regulations as earlier agreed upon.

... Both SAFINET and the USAFI Market Vendors leadership are hereby requested to handover functions in the market to KCCA which has identified staff to carry out these functions.”

6. The Sale Agreement between the first and second respondents reads as follows,

“SALE AGREEMENT OF LAND

SAFI NET (U) LTD ... hereinafter called the **vendor** ...

Kampala Capital City Authority ... hereinafter called the **Purchaser**

1. SALE AND PURCHASE

In consideration of the total sum of to be paid by the Purchaser to the Vendor as herein provided, the Vendor hereby agrees to sell and convey good and unimpeachable title to the Purchaser, and the Purchaser hereby agrees to buy and take from the Vendor, the said lands upon the terms and conditions herein contained.

3. DELIVERY AND TRANSFER OF TITLE

b) Upon payment of the first instalment (sic) the Vendor shall hand over the property (USAFI market and commuter Taxi Park) to the Purchaser together with a fill list of all

stall owners operating in the USAFI market, and a list of tenants occupying the shops in the taxi park.

PROVIDED ALWAYS that all the income collected for from the premises for the period ending 31st March 2015 including all arrears shall be collected by the vendor.

5. WARRANTY/INDEMNITY

v) Any outstanding liabilities at the execution of this agreement shall be borne by the Vendor.”

7. The Applicant argues that the second respondent has been in charge of the market since the take over date running through the purchase. Better still, the purchase, in light of a subsisting sub-lease agreement constitutes take over of the first respondent’s obligations, which includes the commission arrears.

The sub-lease, in both instances, continued running.

8. The first respondent opposes the Application because: -

- a. it prematurely disregards first reference point – mediation!

The applicant never made any reference to mediation.

The applicant did not prove that the first respondent frustrated any mediation reference, and

- b. the knock on effect of this oversight is to further deny the first respondent the right to participate in the nomination process leading to confirmation of the arbitral tribunal.

9. The second respondent opposes the Application because: -

- a. the Applicant is a stranger to the sub-lease agreement; it should be Uganda Market Vendors Association, and

- b. arbitration is a matter of last resort.

10. The following is summary from the Applicant’s rejoinder reply: -

- a. the Applicant now indicates Usafi Market Vendor’s Association as the Applicant in the case citation,

- b. regarding the name discrepancy, Section 28(4) ACA empowers CADER to “decide on the substance of the dispute according considerations of justice and fairness, without being bound by the rules of law, except if the parties have expressly authorized it to do so”.

- c. the second respondent is an assignee and successor in title.

The second respondent should on the basis of Art.126(2)(e) be joined as a party to the arbitration proceedings.

11. The dispute resolution clause reads as follows,

“5.0 DISPUTES

All disputes and differences which may arise between the parties to this agreement shall be referred to a mutually agreed upon mediator for resolution to Kampala Capital City Authority together with the minutes and documentation of the mediator, failure of which they shall submit the dispute for arbitration in accordance with the Arbitration and Conciliation Act¹, 2004 (Laws of Uganda).”

12. Is it right that the onus to commence mediation proceedings lay with the Applicant?

13. None of the parties presented a chronological list of communication documentation, which evidences actual discussions regarding the dispute resolution clause.

14. Mediation and arbitration laws are premised on the ideal of a collaborative commitment between the parties.

These laws are statutory licences, which empower the parties to select the alternative dispute reform forum.

The laws in cognizant of the collaborative capacity famously called the party autonomy principle mostly spell out default positions of which guide parties on matters which ought to be primary for the parties.

15. For example, the parties did not define the scope of mediation or otherwise stated the mediator’s jurisdiction.

16. The parties and the mediator will in this case be guided by **S.48(1) ACA** which provides the default framework which enables mediation of contractual and non-contractual disputes ***and all proceedings relating to the dispute [emphasis mine]***.

In passing it should be noted that the default jurisdiction mandate afforded by the Ugandan legislature is somewhat wider than **Article 1 1980 UNCITRAL Conciliation Rules** and **Article 1(3) 2002 UNCITRAL Model Law on International Commercial Conciliation**, by including all proceedings relating to the dispute.

The mediator may on a good day very well aid the parties, to settle an issue, considered by the advocates in the mediation room “***a point of law***” best left to the courts to resolve; because of the mediator’s jurisdiction to handle ***all proceedings relating to the dispute.***

¹ Hereinafter referred to as the ACA.

17. The collaborative commitment it has been observed in the past creates mutual obligations upon both parties.

Lord MacMillan seventy-six years ago, in the House of Lords, in *Heyman v Darwins*, [1942] All E.R. 337, 347D explained the mutual obligation as follows,

“I venture to think that not enough attention has been directed to the true nature and function of an arbitration clause in a contract. ***It is quite distinct from the other clauses.*** The other clauses set out the obligations which the parties undertake to each other *hinc inde*; ***but the arbitration clause does not impose on one of the parties an obligation in favour of the other.*** It embodies the agreement of both parties that, if any dispute arises with regard to the obligations which one the one party has undertaken to the other, such dispute shall be settled by a tribunal of their own constitution.”

The same holding has equal force when applied to mediation.

No injury occurs if for mediation purposes, the passage was recited as follows,

“I venture to think that not enough attention has been directed to the true nature and function of **A MEDIATION** clause in a contract. ***It is quite distinct from the other clauses.*** The other clauses set out the obligations which the parties undertake to each other *hinc inde*; ***but the MEDIATION clause does not impose on one of the parties an obligation in favour of the other.*** It embodies the agreement of both parties that, if any dispute arises with regard to the obligations which one the one party has undertaken to the other, such dispute shall be settled by **A MEDIATOR** of their own constitution.”

18. If we then extend the recitation to the normative expected behavior outlined by Catherine Muganga in, *B.M. Steels v. Kilembe Mines*, CAD/ARB/10/2004, from arbitration to mediation, her holding would then, again without injury, read as follows,

“It is prudent to point out at this stage three possible courses of action which could have been taken by the Respondent:

First the Respondent having **noted the procedural oversight redirected the Applicant to resort to mediation and even suggested the mediator.**

Secondly the Respondent would have invited the Applicant to counter-propose another mediator.

Thirdly the Respondent would state that it deemed the Applicant had abandoned mediation and consequently the secondary reference to KCCA for resolution.

Lastly the Respondent would have invited the Applicant to cure the pathological mediation reference clause.”

19. The elaboration in Paragraph 18 above is not an exhaustive list, but only goes to show that collaborative ideal does not permit Respondent counsel to sit back and point to shortcomings by the Applicant’s counsel.

This is because alternative dispute resolution clauses impose a mutual obligation on both sides.

20. In this case the first respondent counsel did not evidence the efforts taken to maintain the mediation and reference prerequisites.

The 14th July 2015, KCCA letter evidenced only points out that dispute resolution clause is staggered but stops short of recording the KCCA redirection on fulfillment of the prerequisite steps.

21. It is against this background that in line with past CADER precedents, I find inaction on the part of the Respondent amounts to either frustration or abandonment of the mediation and KCCA referral steps earlier on envisaged within the Clause 5 dispute resolution clause.

It is inequitable for the first respondent to demand compliance with mediation and the consequent KCCA referral when the sit back and fold hands attitude is repugnant to the collaborative ideal, which was entrenched by the Uganda legislature and international community in the UNCITRAL texts for the benefit of these very contracting parties.

22. I therefore conclude that a case has been made out for appointment of the arbitral tribunal.

23. We are now left with the question as to whether KCCA can be a party to the arbitration proceedings.

24. My Paragraph 2 analytical Table of the flow of events and the text of both documents does not indicate that the parties were conscious that alternative dispute resolution Clause 5, constituted a separate agreement under **Section 16 (1) (a) ACA**, which had to be directly incorporated into the takeover and Sale documentation.

25. The Applicant may still resolve the party joinder question by: -

- a. after obtaining the first respondent's consent, invite KCCA to join the arbitration proceedings for expediency sake,
- b. framing an Application to the High Court for orders confirming that it is necessary for KCCA to be joined to the arbitration proceedings as a co-defendant.

It seems to me that such an Application would be one framed in light of the inherent and unlimited powers vested in the High Court given that joinder is a matter not governed by the provisions of the Arbitration and Conciliation Act.

I see sense in this to the extent that I have sound belief that the High Court, conscious of the ever increasing backlog, may not be pleased to preside over issues which may very well be handled by the arbitrator.

26. The second respondent's costs shall be borne by the Applicant. The Applicant and First respondent shall bear their own costs.

27. The appointed arbitration shall be listed out in the consequential Ruling.

Dated at Kampala on **28th March 2018.**

JIMMY .M. MUYANJA
EXECUTIVE DIRECTOR