THE REPUBLIC OF UGANDA

THE CENTRE FOR ARBITRATION AND DISPUTE RESOLUTION

CAD/ARB/NO.1 OF 2009

COMTEL INTEGRATORS AFRICA LTD …….. APPLICANT

v.

J & M AIRPORT ROAD HOTEL/APARTMENTS AND LEISURE CENTRE LTD …….. ….. RESPONDENT

RULING

This is an application for the compulsory appointment of a second arbitrator.

On 6th December 2006, the parties concluded a Sale Agreement for the supply and installation of the ICT Network Infrastructure at J & M Airport Road Hotel/Apartments and Leisure Centre Ltd.

> **11. ARBITRATION**
>
> If and whenever any difference shall arise between the Parties hereto relating to the construction of any of the provisions contained or anything done or omitted to be done in regard to the rights and liabilities arising hereunder or arising out of the relation existing between the Parties hereto by reason of this arrangement, **such difference shall forthwith be referred to two arbitrators**, one to be appointed by each Party. or to an umpire to be appointed by the two arbitrators an every such reference shall be

conducted in accordance with the provisions of the laws of arbitration for the time being in force in Uganda.

The applicant submitted that a dispute arose between the parties which necessitated termination of the agreement. Further that the applicant is indeed aware the arbitration agreement survives termination of the contract itself.

The applicant relied upon it's communication, dated 25th November 2008, (Annex B to the Affidavit in Support of the application) to evidence it's appointment of Patricia Basaza Wasswa as the arbitrator on their part.

Annex C, is the Applicant's communication to the Respondent, dated 25th November 2008, requesting the appointment of a second arbitrator. The Respondent, as put by the Applicant, to date has never appointed an arbitrator, hence this Application.

Respondent's counsel submitted as follows:-

1. CADER is enjoined before considering this Application to consider whether there is an arbitration clause.
2. The Applicant had no locus to present this Application, given the contract is now extinguished, owing to termination of the same by the Applicant; moreover **Section 3(4) Arbitration and Conciliation Act** (hereinafter referred to as the ACA presupposes that there must be an arbitration clause referred to in the agreement. Once the contract was terminated the Applicant lost any right to rely upon the same.
3. The Applicant had sued the Respondent in ***Comtel Integrators (A) Ltd v. J & M Airport Road Hotel/Apartments and Leisure Centre, HCCS***

No.28/2008, Commercial Court Division, High Court. This case was dismissed. The Applicant neither appealed against the dismissal Order nor filed an application to stay the case. In any event the Court being *functus officio* would not be in a position to deal with the stay application, which stay order it ought to have given under **Section 17(1) ACA**.

4. The Respondent by letter dated 28th November 2008 stated it's position why it was not appointing an arbitrator.
5. The application was bad in law because neither the applicant nor the advocate signed the Notice of Motion. The Notice of Motion failed to show who was the aggrieved party. The application was in such a sorry state that it would appear CADER sanctioned it, without being moved by the interested party, thereby rendering it incurably defective – **Masaba v. R, [1967] EA 488**.
6. The Applicant never filed any Affidavit in Rejoinder to that filed by the Respondent. This rendered the Respondent's Affidavit in Reply unassailable – **Gandesha v. V.G. Lutaaya, [1994] 3 KALR 20**.
7. Under **Order 47 Rule Civil Procedure Rules** (hereinafter referred to as the CPR) the Applicant has no *locus standi*, which goes a long way to show the abuse of court process which has been triggered by the application.
8. The Respondent also opposes the Application, given that arbitration is expensive and uncalled for at this stage because there is no agreement binding the parties – **Farmland Industries Ltd v. Global Exports Ltd [1991] HCB 72**, where it was held that "*it was the duty of courts in arbitration proceedings to carry out the intention of the parties …the intention of the parties was that before going for expensive and long procedures of arbitration, the parties had to first negotiate a settlement failing which they could resort to arbitration*".

9. In conclusion the Respondent prayed for dismissal of the Application.

Both parties in presenting their case, prayed for costs.

The Applicant's Counsel in reply admitted that there was no Affidavit in Rejoinder filed, simply because all matters had been sufficiently addressed by the Affidavit in Support of the Application.

That Chamber Summons are on the other hand signed by the Issuing Authority and not the litigating party or its advocate. Further that the Summons could not have been defective, for the authority cited by the Respondent's Counsel referred to Originating Summons and Chamber Summons. In any event that upon perusal of the Chamber Summons anyone could easily decipher who the complainant so to speak is and the content of the application.

Applicant's Counsel acknowledged that the High Court, had dismissed the case mentioned, but at a preliminary stage. That the dismissal instruction was to refer the matter to arbitration, which order all the parties had agreed to. That in other proceedings the Court did inquire into the progress of arbitration and encouraged the parties to expedite the arbitral process.

Applicant's Counsel believed that Respondent's Counsel was of the view that CADER being was an extension of the High Court and this application would only be heard if there was a reference by the Judge; for this reason he submitted that it should be understood whilst CADER was hosted within the High Court, Commercial Court division premises, it was crucial it's independent status should be understood by all. To this extent this Application was also independent of the aforementioned ***Comtel Integrators (A) Ltd v. J & M***

Airport Road Hotel/Apartments and Leisure Centre, HCCS No.28/2008, Commercial Court Division, High Court.

In response to the submission that the arbitration clause no longer existed, Mr. Stephen Musisi referred me to the contract Clause 12(3)(b) , which reads as follows,

> "12 (3) (b)
> Termination by any mode shall be without prejudice to either party's rights under this agreement and shall not disentitle such party to relief in respect of any antecedent breach by the other party".

To his mind Clause 12(3)(b) keeps alive the dispute between the parties, and therefore the arbitration clause too.

I now turn my mind to the Application.

I do not have to consider the issue raised relating to **Order 47 Rule 1 CPR**, given that when I requested Respondent's Counsel to peruse and address her mind to **S.1 Civil Procedure Act** (hereinafter referred to as the CPA), she recanted her position and concluded that both the CPA and CPR are inapplicable to any **Section 11 ACA** application.

S.1 CPA provides as follows,

> "**1. Application.**
> This Act shall extend to proceedings in the High Court and magistrates courts."

Grounds 5 and 6 raised by the Respondent, no not stretch my mind because **Constitution in Article 126 (2)(e)** dictates that substantive justice shall be administered without undue regard to technicalities. I say this having taken the view that CADER fits in within the **Article 129 (1)(d)** of "such subordinate courts as Parliament may by law establish".

In any event the **Section 11 ACA**, is not one regulated by a tedious set of Rules which for example dictate that the Chamber Summons require the signature of the Advocate or the colour of ink or paper. I take the view that such defect was cured by the content of the Application, the substance of which, the Respondent was able to reflect and articulately submit upon, sometimes tautologically.

The Respondent submitted that in the fourth ground that the reasons it advanced, in their communication 28th November 2008, for not appointing an arbitrator pursuant to the arbitration clause were sufficient to render this application nugatory.

The essence of an arbitration agreement is defined in **Section 2(1)(c) ACA** as follows,

> "2(1) (c) "*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;" (emphasis mine).

Did the 28th November 2008 communicate serve, to clarify the point that there indeed was no dispute?

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*'.".

In ***B.M. Steels v. Kilembe Mines***, CAD/ARB/10/2004, Catherine Muganga 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:
>
> a) First the Respondent would have consented to the Arbitrator suggested by the Applicant with a view of having a one-person arbitral panel.
> b) 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.
> c) 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."

What emerges from these authorities is that one party's assertion that there is no dispute in existence, is not enough.

This assertion has to be proved before the trial court, when an application for stay of a case has been lodged under **Section 5 ACA** for consideration.

Section 5 ACA is neutral section; any party seeking to enforce the arbitration clause can apply under this provision. Indeed I can foresee a situation where a party such as the Respondent, would conterminously apply to the trial court for a Stay Order in a bid to alert the trial court to the jurisdiction issue and yet in the same breath turn around to prove that there is indeed no dispute.

In the second instance the assertion regarding the non-existence of the dispute would be used, in negotiations between the litigating parties to derive a settlement under **Section 30 ACA**.

Was the arbitration clause extinguished, when the Applicant issued the termination notice?

This boils down to the severability and competence which is elaborately addressed by **S.16 ACA**, which reads as follows,

> **"16. Competence of arbitral tribunal to rule on its jurisdiction.**
> (1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with

> respect to the existence or validity of the arbitration agreement, and for that purpose—
>
> > (a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and"

Under **Sections 5** or **16(6) ACA**, the issue of pending court proceedings does not arise, until the court makes a final determination regarding the validity of the arbitration clause or jurisdiction assumed by the arbitral tribunal.

We therefore see from **Sections 5** and **16 ACA**, that the issues regarding the existence of a dispute or an arbitration clause, should be raised before the court or arbitral tribunal respectively and not CADER when considering a **Section 11 ACA** application for the compulsory appointment of an arbitrator.

With regard to the Affidavit in Reply, I find that the issue here is not whether it elicited any response from the Applicant, but rather if it provides any answer to the Application I have to deal with at hand. The legislature in entrenching arbitral practice in Uganda, stipulated in **Section 16 (8) ACA** that an arbitral panel may proceed to hear and resolve a case notwithstanding that a question regarding the jurisdiction of the panel is pending before court. Had the legislature deemed the question of pending court proceedings relevant or irrelevant in **Section 11 ACA** applications, it would have been spelt out elaborately as was done in **Section 16 (8) ACA**. Instead perusal of the ACA reveals that the role of the courts is complementary to the arbitral process. Whilst I find that the pending counterclaim is not relevant for me to consider at this juncture, the same issue was not presented comprehensively by the Respondent's counsel, as I illustrate below. What I have on record is the Affidavit deponed by Joseph Behakanira which in Para.2(c) indicates that there

is a pending counterclaim. During the course of the Hearing Respondent's counsel with the consent of the Applicant's counsel then tendered in a Decree. If the counter-claim documentation were relevant it should have been adduced through the Affidavit. Equally the dismissal of the case should have been elaborated by attaching the record of proceedings; a Decree is not a concise document elaborating the issues and course of trial in a case, it only captures what a judgment directs to be enforced.

Lastly, it was stated that the Respondent believed that arbitration is expensive. With respect this is putting the cart before the horse. The tribunal has first to be set up. In any event this is not relevant ground at this juncture.

I therefore find merit in this Application. The Respondent failed to appoint an arbitrator. I therefore appoint Deepti Chowdhury as the second arbitrator in this matter.

Should Deepti Chowdhury decline this appointment under **Section 12(1) ACA** on grounds of impartiality then Solome Luwaga or Rachel Kabala shall be deemed appointed in sequential order to act second arbitrator.

The arbitrator is reminded to sign the Declaration of Impartiality, Party Undertaking Agreement and file the same with CADER upon assuming jurisdiction over this matter and return the file to CADER for archiving purposes upon completion of the case.

The parties and the arbitrators are reminded that all monies regarding the arbitration should be submitted through CADER.

Costs of this Application shall be borne by the Respondent.

CONTACT PARTICULARS:-

Arbitrator
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Delivered on 5th February 2009.

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JIMMY MUYANJA,
EXECUTIVE DIRECTOR.