

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**CIVIL DIVISION**

**MISCELLANEOUS CAUSE NO. 037 OF 2023**

**UGANDA CIVIL AVIATION AUTHORITY:.....APPLICANT**

**VERSUS**

**CENTRAL PLUMBING WORKS (U) LIMITED:.....RESPONDENT**

**BEFORE: HON. JUSTICE. SSEKAANA MUSA**

**RULING**

This application was brought by chamber summons under Section 34(2)(a)(v) Of the Arbitration and Conciliation Act Cap 4, Section 14 of the Judicature Act and Rule 13 of the Arbitration Rules) for orders that;

- a) The Arbitral award made by the Arbitral Tribunal in CAD-ARB No. 14 of 2021 be set aside.*
- b) Costs of this application be provided for.*

The grounds in support of this application were stated in the supporting affidavit of the applicant but generally and briefly state that;

- i) That in the year 2013, the applicant invited bids for Works and Related Services earmarked as CAA/WRKS/12-13/00043 “Construction of Extra Water Reservoir at Entebbe International Airport” wherefore the respondent, Central Plumbing Works (U) Limited made a bid to undertake the works.

- ii) That following the consideration and appraisal process of the different bids, the Applicant announced the Respondent as the best evaluated bidder to undertake the works.
- iii) That owing to the fact that the contract involved expending public funds, the Applicant prepared a draft agreement and submitted it to the solicitor General for his perusal, guidance and approval as required by the law.
- iv) That on the 12<sup>th</sup> day of August 2013, the Applicant entered into a Construction works agreement with the respondent to construct extra water reservoirs at Entebbe International Airport at a total consideration of ugshs. 835,000,000/= (Eight hundred thirty-five million shillings only).
- v) That clause 25.4.1 of the special conditions of contract stipulated clearly on how the Arbitral tribunal would be constituted and how the members would be appointed.
- vi) That following a dispute arising out of the agreement, the Respondent/Claimant filed a claim before the Arbitration tribunal on the 2<sup>nd</sup> day of December 2021.
- vii) That contrary to the clear provisions of the Agreement, the parties by consent purported to amend clause 25.4.1 of the special conditions of contract which distinctly provide for the procedure on how the chairperson of the tribunal should be appointed.
- viii) That the said amendment was contrary to the law insofar as it did not get the Solicitor General's approval and clearance.

- ix) That indeed on the 25<sup>th</sup> day of November 2022 the Arbitration Tribunal Chaired by Ms. Belinda Lutaya Nakiganda made an arbitral award in favor of the Respondent/Claimant.
- x) That the Arbitration Tribunal was incompetent to entertain and make an Arbitral award in the matter filed before it, owing to its improper and irregular composition contrary to the clear provisions of the construction works agreement.

The respondent opposed this application and filed an affidavit in reply sworn by Gurjeet Singh Ghataurhae the Managing director of the respondent which has been summarized as follows;

1. That the application is incompetent, misconceived and an abuse of court process.
2. That in reply to the application and supporting affidavit, the respondent states as follows,
  - i) That the respondent commenced arbitration proceedings by way of a notice of arbitration served on the Applicant on 30<sup>th</sup> September 2020.
  - ii) That on 24<sup>th</sup> November 2020, the respondent appointed Mr. Victor Odongo as its party appointed arbitrator who accepted the said appointment while the Applicant appointed Eng. Patrick Batumbya on 3<sup>rd</sup> December 2020.
  - iii) That on 7<sup>th</sup> December 2020, the respondent wrote to the President Uganda Institution of Professional Engineers (UIPE) for purposes of appointing the 3<sup>rd</sup> Arbitrator.
  - iv) That at the insistence of the Applicant, the Respondent's lawyers on 15<sup>th</sup> April 2021 wrote to the Centre for Arbitration

and Dispute Resolution (CADER) to register the matter for purposes of administration of the arbitral proceedings.

- v) That on 29<sup>th</sup> April 2021, the Respondent's lawyers communicated to the applicant that UIPE had informed them that the list of arbitrators would be availed upon payment of ugx 5,000,000/= and thus requested that Applicant pays a portion of the said amount of ugx. 2,500,000/= towards the cost as indicated by UIPE.
- vi) That in the same letter the respondent proposed to the applicant that the parties execute a submission agreement where CADER is nominated as the appointing authority to appoint the 3<sup>rd</sup> Arbitrator or that the dispute is entertained by one arbitrator to save both parties time and cost.
- vii) That the applicant, in response on 5<sup>th</sup> May 2021 wrote indicating that it was in agreement that a consent should be drafted and signed nominating the Centre for Arbitration and Dispute Resolution (CADER) to appoint a 3<sup>rd</sup> Arbitrator in addition to those nominated by each of the parties.
- viii) That the Respondent's lawyers prepared the consent and was duly executed by the parties on 31<sup>st</sup> May 2021 where Centre for Arbitration and Dispute Resolution (CADER) was nominated as the Appointing Authority for the 3<sup>rd</sup> Arbitrator.
- ix) That on 19<sup>th</sup> August 2021, the Centre for Arbitration and Dispute Resolution (CADER) exercised its mandate and appointed Ms. Belinda Lutaya Nakiganda as the 3<sup>rd</sup> Arbitrator.

- x) That the arbitral proceedings fully commenced upon the constitution of the tribunal and on 25<sup>th</sup> November 2022, the Tribunal rendered its award in favor of the Respondent.
3. That in further reply to the paragraphs of the affidavit, its correct that the Centre for Arbitration and Dispute Resolution (CADER) properly exercised its mandate to appoint the 3<sup>rd</sup> Arbitrator having derived its authority from the consent executed by the parties.
4. Furthermore, that the Applicant did not raise any objections during the entire arbitral proceedings therefore the application is intended to frustrate the Respondent from recovering the fruits of the Arbitral award.
5. That where the Applicant did not adhere to any legal or statutory requirement before executing the consent the same cannot be visited on the Respondent and that the Application lacks merit and should be dismissed with costs.

## **ISSUES FOR DETERMINATION**

The applicant raised the following issues for court determination;

1. *Whether the composition of the Arbitral Tribunal in CAD/ARB/14/2021 was improper and irregular in contravention of the clear provisions of the law and the Construction Works Agreement signed between the parties?*
2. *Whether the Arbitral award in CAD/ARB/14/2021 is regular and enforceable?*
3. *What are the remedies available to the parties?*

The applicant was represented by *Ssemambo Rashid* and *Lukwago David* while the respondent was represented by *Mukasa Albert*

## DETERMINATION

*Whether the composition of the Arbitral Tribunal in CAD/ARB/14/2021 was improper and irregular in contravention of the clear provisions of the law and the Construction Works Agreement signed between the parties?*

The Applicant's counsel submitted that in the year 2013, the Applicant who is a statutory body controlled by the Government of Uganda and the Respondent entered into a Construction Works Agreement, wherein the Respondent undertook to construct extra water reservoirs at Entebbe International Airport at a total consideration of UGX. 835,000,000/= (Eight hundred thirty-five million shillings only) as highlighted in paragraph 8 of the applicant's affidavit in support of the application.

Considering that the said agreement involved the dispensing of public funds by the Applicant herein, it was required of the Applicant to forward the same beforehand to the Solicitor General of Uganda for his perusal, guidance and approval as required by the Constitution of the Republic of Uganda 1995 as amended.

Counsel for the Applicant further submitted that where there is a clear deviation from the definite terms of an agreement by the parties to the same, regarding the composition of an arbitral tribunal, then the court may set aside any arbitral award made by such tribunal.

In reply counsel for the respondent submitted that the appointment made by CADER of the 3<sup>rd</sup> Arbitrator was made in accordance with the agreement of the parties and therefore a proper appointment in accordance with the Arbitration and Conciliation Act. He further stated that the applicant has not met the threshold as set out in Section 34 of the Arbitration and Conciliation Act to have the award set aside on this account.

### *Analysis*

Section 34(2)(a)(v) of the Arbitration and Conciliation Act stipulates that an arbitral award may be set aside by the court only if a party making the

application furnishes proof that the composition of the arbitral tribunal of the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate or in absence of an agreement, was not in accordance with this Act.

The same was provide for in the case of *Kinyara Sugar Works Ltd V Hajji Kasimbiraine Mohamoud Miscellaneous Application No. 151 of 2017* wherein it was held by the court among other things that in failing to adhere to the procedure of appointing an arbitrator provided for in the agreement, the Respondent had breached section 34(2)(a)(v) of the Arbitration and Conciliation Act therefore justifying the setting aside of the arbitral award.

Section 11 of the Arbitration and Conciliation Act provides that the parties are free to agree on the procedure of appointing the arbitrator. In case of failure to agree, the appointing authority shall make such appointment and his decision is final and not subject to appeal. In this case the parties under clause 25.4.1 described how the tribunal would be constituted and appointment of the members as follows;

*All disputes and differences in respect of which a decision (if any) of the Adjudicator has not become final and binding as provided hereinabove, or any other difference or dispute arising out of or in connection with this agreement or the carrying out of the works as to any matter or thing whatsoever nature (including any matter or thing left to the discretion of the Project Manager or to the discretion of the Project Manager of any certificate to which the contractor may claim to be entitled or any issue as to whether or not any certificate is in accordance with the provisions of this agreement) which are not referred or referable to the adjudicator shall unless the parties agree to the contrary, be referred to the arbitration and final decision of three (3) arbitrators, one appointed by each party and the third who shall be the chairperson of the panel, appointed by the President, Uganda Institution of Professional Engineers (UIPE) of if he is an interested party or such role or function*

would entail or involve him in a conflict of interest, then by a Justice of the Commercial Division of the High Court of Uganda.

It is not disputed that the appointment of the Chairperson of the panel of arbitrators was done by the Centre for Arbitration and Dispute Resolution contrary to the agreement between the parties as originally approved and consented to by the Solicitor General.

There is no reason advanced for the variation of the said agreement in respect of appointment of the Chairperson of the panel and how Centre for Dispute Resolution (CADER) got involved in choosing/appointment of the Chairperson. The respondent contended that it was done with consent of the applicant and therefore the same should not be questioned. The constitution of the arbitration panel is not a mere matter of procedural technicality but a fundamental matter going to the jurisdiction of the arbitrators. See *Agnes Muhindi and Anor v Joash Mugendo* [1991] KLR 78; [1988-92] 2 KAR 155

According to the letter written by the respondent's counsel to the Executive Director, CADER it was stated noted as follows;

*"However, when we wrote to the President of the Uganda Institute of Professional Engineers requesting for the appointment of the third Arbitrator, the respondent insisted that the arbitration should be conducted under the auspices of the Centre. Our client has no objection to this and as such we write to request that the matter is registered with CADER for purposes of administration of the arbitral proceedings."*

It would appear the respondent counsel had construed the insistence of conducting arbitration proceedings under CADER to mean an authority to allow the Executive Director of Centre for Dispute Resolution (CADER) to appoint the Chairperson of the panel which was a major variation of the original agreement between the parties. The direct effect of the respondent's letter and subsequently drafting a consent to appoint CADER to nominate the Chairperson of the panel was contrary to agreement as approved by Solicitor General.

This was a major variation or alteration of the original agreement approved by Solicitor General which set out a different procedure for the appointment of Chairperson of the panel of Arbitrators. Therefore, this was illegal and breached the law that regulates agreements executed with public bodies that involves expenditure of public funds and requires approval of the Attorney General.

The jurisdiction given to an arbitral tribunal depends on the mandate given to it by the parties in accordance with its establishment or composition. An arbitral tribunal will not have jurisdiction unless the dispute comes within the terms of the particular reference to arbitration. The powers of arbitration are only given to arbitral tribunal properly appointed or constituted in accordance with the agreement and not to persons who take powers of arbitration through improper or irregular appointment.

The parties in this case agreed on the procedure for appointment of the chairperson of the tribunal in accordance with the special conditions of the agreement. The clause envisaged all scenarios in order to avoid any stalemate in choosing a chairperson and this went to the root of the arbitration process. The President of Uganda Institute of Professional Engineers as a professional body was duty bound to appoint a chairperson of the tribunal and in case of any conflict of interest a Justice of the Commercial Division of the High Court of Uganda. The appointment of the chairperson had to be done as per the arbitration clause in the agreement.

The agreement that guided the appointment process of the Chairperson arbitral tribunal made reference to several avenues of appointment in case of a deadlock through the President- Uganda Institute of Professional Engineers or President-Uganda Law Society or the Justice of the Commercial Division of the High Court. The Executive Director-Centre for Dispute Resolution was never envisaged among the persons who would exercise any powers to appoint the chairperson of the tribunal. An amendment or variation or alteration of the agreement on the appointment of the

chairperson of the tribunal went to the root of the agreement and the Solicitor General must have been involved to approve such a major change in the agreement after a dispute had arisen.

Persons who have executed an agreement which requires an approval of the Solicitor General have a corresponding duty of ensuring that the agreement satisfies the requirements of the law or the necessary approvals are secured before they embark on execution. It is not enough to plead ignorance and absence of necessary approvals from solicitor general which are a requirement of the law.

**Article 119 (5) of the Constitution** provides that;

*Subject to the provisions of the Constitution, no agreement, contract, treaty, convention or document by whatever name called, to which Government is a party or in respect of which the Government has an interest, shall be concluded without legal advice from the Attorney General, except in such cases and subject to such conditions as Parliament may by law prescribe.*

In addition, the ***Guidelines on the Negotiations and Execution of Government Contracts*** provides as follows;

13. *Unless otherwise waived by the Attorney General or the Solicitor General, the Attorney General's chambers shall be fully involved and represented at the following stages of the bidding process, preparation of terms of reference, preparation of short list of firms, determination of the selection procedure and criteria for evaluation, bid evaluations, selection and award of contract, negotiations and approvals of contract.*
15. *Every contract shall not be concluded or executed without clearance from the Attorney General or from the Solicitor General.*

The variation and alteration of the agreement had to be equally approved or cleared by the Solicitor General and any action that made such changes without approval of the Solicitor General became questionable and would thus render such illegal and/or irregular. Whereas, the position of the law

and practice in arbitration is that a party is not allowed to contest an arbitration and raise a jurisdictional objection for the first time if the award is unfavourable, this court is mindful of the breach of the law that governs agreements involving public bodies like the applicant. The court should not facilitate illegalities that may be committed by some persons' public officials through unexplained means and commit the public funds after altering the clauses of the agreement illegally without approval of the solicitor general. The actions of the parties amounted to wrong composition of the arbitral tribunal and would result in setting aside an award. See *Haresh Chinnubhai Shah v Rajesh Prabhakar Jhaveri & Anor* [2004] (2) R.A.J 179 (Bom)

The court shall not look on when a glaring illegality is brought to its attention which goes to the root of the arbitral award made after altering an arbitration dispute clause in the main agreement without the approval of solicitor general. The respondent equally had a duty to ensure that the agreement is not irregularly altered without necessary approvals of solicitor general. The fact that there was no objection at the arbitral proceedings about the constitution of the tribunal cannot result in validating the arbitral tribunal's jurisdiction if its constitution was illegal and contrary to the agreement or made after illegal alteration. Courts cannot confer jurisdiction on themselves by consent of the parties and clothe themselves with jurisdiction. A court cannot merely assume jurisdiction merely on account of non-objection by the parties. The same is also true of Arbitral Tribunals.

When the forum is incompetent then it has no jurisdiction to decide the matter and this will go to the root of the matter. Even if the decision is right on merits, it is by a forum which is lacking in competence with regard to its composition. Counsel for the respondent argued that the decision was by all the three arbitrators and unanimous. The question of wrong composition without approval of solicitor general renders it questionable. Even then a 'right' 'decision by a' 'wrong' forum is no decision. It is non-existent in the eye of the law as such is nullity. See *Union of India v Builders Corp (P) Ltd* AIR 2010 (NOC) 750 (Cal); 2010(5) R.A.J. 548; 2010 (2) Arb.L.R 375

Once a party has complained of the appointment process, the entire procedure adopted by the parties is their attempt to choose the arbitrator must be scrutinized. The process that led to the appointment of the chairperson of the panel in this matter was flawed and the applicant was right to come to court.

This court agrees with the submission of the applicant's counsel and the tribunal was not properly constituted and the award would have to be quashed and set aside. The appointment of the Chairperson of the Tribunal by the Executive Director- Centre for Dispute Resolution (CADER) without the approval of the Solicitor General after the purported amendment of the arbitration clause of the original agreement was irregular and illegal.

The second issue was arising out of issue one and is therefore redundant.

*What are the remedies available to the parties?*

The application succeeds and the Arbitral Award made by the Arbitral Tribunal in CAD-ARB No. 14 of 2021 is set aside.

Each party shall meet its costs.

I so Order.

**SSEKAANA MUSA**

**JUDGE**

*25<sup>th</sup> January 2024*