

UGANDA / JUDGMENT

Bayeti Farm Enterprises & Anor v Transition Grant Services (CAD/ARB/ 4 of 2009) [2009] UGCADER 1 (5 April 2009)

[2009] UGCADER 1

COURT

Center for Arbitration and Dispute Resolution of
Uganda

CASE / FILE NUMBER

CAD/ARB/ 4 of 2009

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THE REPUBLIC OF UGANDA

THE CENTRE FOR ARBITRATION AND DISPUTE RESOLUTION

CAD/ARB/NO.4 OF 2009

BAYETI FARM ENTERPRISES LTD } JOSEPH MUYETI ZEMA }
APPLICANTS

v.

TRANSITION GRANT SERVICES RESPONDENT

RULING

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

The Affidavit in support of the Application is sworn by one Muyeti Joseph Zema.

The Affidavit evidences the contract (**Annex A**) signed on 28th June 2006, between Bayeti Farm Enterprises Ltd and Transition Grant Services, Clause 15 of which reads as follows:-

***"Dispute Resolution"**

- *i. it is agreed that this agreement is subject to Kampala jurisdiction*
- *ii. it is agreed that in event of any dispute, the parties hereto, shall endeavour to mutually resolve the dispute, and in case of failure, they agree to submit all disputes to Arbitration, under the Arbitration of the Centre for Arbitration and Dispute Resolution – CADER and otherwise any other Arbitration body under the Laws of the Republic of Uganda."*

The deponent Muyeti Joseph Zema refers to his lawyers communication (**Annex B**) dated 27th October 2008, wherein reference was made to arbitration and two nominee arbitrators were listed for the Respondent's consideration.

It is the Applicants' case that the request to refer the dispute between the parties was not responded to by the Respondent.

The Respondent's case is that this Application if entertained conflicts with a lawsuit now pending before the High Court – **Ark-Chick Ltd v. Joseph Muyeti Zema, HCCS No.147/2008** (**Annex A1** to the Tom Magezi Samuel Affidavit for the Respondent).

That any appointment of an arbitrator would permit the Applicants to cure HCCS No.147/2008, whose glaring glitch is the Applicants' failure to claim for "remuneration", which would lead to some kind of set-off.

Further that this Application would violate the **sub judice** rule with regard to HCCS No.147/2008.

The Respondent is also of the view that this Application is similar to **Bayeti Farm Enterprises Ltd v Transition Grant Technologies, Ark-Chick Ltd, CAD/ARB No.2/2009**. The Respondent submitted that this has created a multiplicity of suits. For this reason the Respondent argues that **S.6 Judicature Act, Cap.71** Laws of Uganda should be taken into account.

Having examined the provision cited verbatim by the Respondent, the intended reference is actually **Section 6 Civil Procedure Act, Cap.71** (hereinafter referred to as the CPA).

Section 6, CPA, Cap.71 reads as follows,

****"6. Stay of suit.****

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where that suit or proceeding is pending in the same or any other court having jurisdiction in Uganda to grant the relief claimed.

For this reason the Respondent prays that the Application should be dismissed with costs.

The issue to be resolved here is whether an order should be made for the compulsory appointment of an arbitrator or not.

At this stage, I have only to consider the existence of the arbitration clause, the request to submit any dispute to arbitration and the Respondent's refusal to cooperate in the appointment of an arbitrator.

I am not aware of any no provision which states that any matter pending before the court, extinguishes the subsistence of an arbitral clause.

For this reason in **Bayeti Farm Enterprises Ltd v Transition Grant Technologies, Ark-Chick Ltd, CAD/ARB No.2/2009**, I observed that once there is an arbitration clause in existence affecting a matter pending before the courts, then all counsel are obligated to bring the same to the attention of the court. This is to allow for court to refer matters affected by the clause to arbitration, under **S.5 Arbitration and Conciliation Act, Cap.4** (hereinafter referred to as the ACA).

Close perusal of the ACA, Cap.4 reveals the role of the court is to support the arbitral process by exercising judicial oversight over the arbitral process.

The CPA has no application to **Section 11 ACA** applications, because it's purview under Section 1 applies to the High Court and Magistrates Court.

Section 1 CPA reads as follows,

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

The High Court case is **Ark-Chick Ltd v. Joseph Muyeti Zema, HCCS No.147/2008**, whereas the parties in this Application are **Bayeti Farm Enterprises Ltd, Joseph Muyeti Zema v. Transition Grant Services**, CAD/ARB No.4/2009.

In this instance the Respondent does not deny that there might be grievances on the part of the Applicants to be heard. The Respondent's case is the danger of multiplicity of suits.

No reason was advanced as to why there was no direct response to refer the Applicants' proposed matters to arbitration or the proposed appointment of arbitrators.

The prediction that the arbitrator appointed in this case would deal with the remuneration issue is overridden by the principled consideration, that if indeed the matter before the High Court in HCCS No.147/2008 is affected by the arbitral clause, then both counsel are obligated to bring this to the attention of the court; there is also the fact that the court may on its own motion become aware of the arbitration clause and refer the affected matters to arbitration.

In **Comtel Integrators Africa Ltd v. J & M Airport Road Hotel/Apartments and Leisure Centre Ltd**, CAD/ARB. No.1/2009, I observed that,

> **"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".

Further on that,

"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".

I am not convinced that HCCS No.147/2008 is relevant to this Application. Consequently I find that this Application has merit.

I therefore appoint Mr. Stephen Musisi as the arbitrator.

Should Mr. Stephen Musisi decline this appointment under **Section 12(1) ACA** on grounds of impartiality then Mr. Samuel Mayanja or Rachel Kabala shall be deemed appointed in sequential order to act arbitrators.

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:-

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Delivered on 5th April 2009.

..... **JIMMY MUYANJA, EXECUTIVE DIRECTOR.**

Page 6 of 6

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