THE REPUBLIC OF UGANDA
IN THE CENTRE FOR ARBITRATION AND DISPUTE RESOLUTION
CAD/ARB/NO.15 OF 2012

GAPCO (U) LTD …… APPLICANT

v.

CRANE MANAGEMENT SERVICES LTD ……..…….. RESPONDENT

RULING

A sub-lease agreement was executed between Gapco and East African General Insurance Company Ltd, on 20th June 2001.

Gapco and East African General Insurance Company Ltd executed a sub-lease agreement enlarging the term for a further five-year period effective 19th June 2006.

The successor in title to East African General Insurance Company Ltd is Crane Management Service Ld.

A dispute has arisen between the parties.

The pertinent clause to this Application reads as follows,

> *"2. THE SUB-LESSOR HEREBY COVENANTS WITH THE COMPANY as follows:-*
> *(b) in the event of any dispute arising as to the construction of this sub-lease the rights and or obligations of the parties herein, such dispute shall be determined in accordance with the provisions of the Arbitration and Conciliation Act No.7 of 2000."*

This Application was heard on 23rd April 2012.

Ms. Lillian Kuteesa appeared for the Applicant and was assisted by senior counsel Alex Rezida whom she consulted over the phone from time to time, in the course of the proceedings.

Mr. Enos Tumusiime appeared for the Respondent together with Mr. Tom Magezi.
Applicant's counsel submitted as follows:-

1. That the Applicant invited the respondent to concur in the appointment of the nominated arbitrator on 19th January 2012.
2. That the Applicant awaited a response until 11th April 2012, when it was decided that this application for the compulsory appointment of an arbitrator should be lodged with CADER – and so it was.
3. That until 11th April 2012, the Respondent did not concur or reject appointment of arbitrator nominated by the Applicant.
4. That CADER was vested with jurisdiction to effect the compulsory appointment of an arbitrator in light of the Respondent's inaction.
5. That costs be awarded in the Applicant's favor given the Respondent's recalcitrance.

Respondent counsel submitted in reply as follows:-

1. That the delay was occasioned by the Applicant's suggestion that there would be an amicable settlement. I was referred to communication from the Respondent's law firm dated 20th April 2012.
2. That should CADER exercise it's jurisdiction, then the Respondent's arbitrator nominated should be the one appointed by CADER.

I, then raised questions to Respondent's counsel, which were answered as follows:-

1. Where is the Respondent's Affidavit in Reply?
   We did not prepare any Affidavit in Reply, because we had written a letter to the other party.

2. What qualities in your opinion, does your nominee arbitrator possess, with regard to this dispute, since you have submitted CADER should appoint him?
   Because our client suggested that they would be comfortable with him.

The Applicant's counter-reply was to the effect that the notice for the appointment of the arbitrator had never been withdrawn or abandoned at any time. Lastly that they did not concur with the Respondent's proposed nominee.

I now turn my mind to addressing this Application.

The behavior of the parties is best followed in a tabular format.

	Date	**Action**	**Number of days passed since 19th January 2012 Notice**
1	19th January 2012.	Applicant invited the respondent to concur in the appointment of the nominated arbitrator.	
2	11th April 2012.	Application for the compulsory appointment of an arbitrator filed with CADER	82
3	20th April 2012	Respondent letter sent to Applicant	93
3	23rd April 2012	Application heard	95

A total of 82 days passed since the Applicant issued out the notice to concur in the appointment of an arbitrator, until the motion for the compulsory appointment of an arbitrator was filed.

The Respondent rather than file an Affidavit in reply to evidence the alleged stalemate which was occasioned by the Applicant's settlement proposition, filed a letter.

As it is we have counsel submitting from the bar, which renders the alleged 20th April 2012 communication inadmissible on the record, for which reason I treat as an expugned record!

What course of action should the respondent have taken upon receipt of the Applicants' 20th June 2011 demand letter?

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:*
>
> *First the Respondent would have consented to the Arbitrator suggested by the Applicant with a view of having a one-person arbitral panel.*
>
> *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.*
>
> *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."*

From the above we see that the Respondent should have given, a specific reply, one way or the other, addressing itself to formation of the arbitration tribunal.

Respondent's counsel in the alternative submitted that they were most comfortable with their nominee.

The key ground in appointing an arbitrator is the skill set they possess regarding the disputed subject matter. In this case the dispute surrounds breach of a tenancy agreement. Comfort is not a skill residing in the arbitrator, rather it is a perception (personal one might I add) resident solely in the Respondent's mind. I do not see how the comfort-perception can be sold to the other party for consideration as a skill vested in a nominee arbitrator.

Little wonder that this perception resulted in non-communication on the Respondent's part.

Who is an arbitrator?

Russell on the Law of Arbitration, 17th Edition, Stevens & Sons Ltd, 1963, provides the following definitions at p.115,

> *"The arbitrators are persons **indifferently** chosen to determine the matters in controversy according to their own minds, whether they be matters of fact or law.*
>
> *Touching their (i.e. the arbitrators) sufficiency, such persons are to be elected **as have sufficient skill** of the matters compromitted, and have neither legal nor natural impediments to give an upright sentence."*

So there it is – what is crucial is the neutrality and skill of the arbitrator, not the respondent party's perceived sense of comfort.

I find that the Applicant has proved the Respondent's lethargic approach to formulate the arbitral tribunal. This slothful mindset is not to be encouraged. This mindset can only lead to a drastic and catastrophic decline in confidence regarding arbitration clauses.

I find this a proper case to invoke the power to effect the compulsory of an arbitrator.

In so doing I shall only be curing failure by the Respondent to honor it's obligation under the arbitration clause, to co-operate with the Applicant to formulate the arbitral tribunal.

Lord MacMillan pointed this out, seventy years ago, in the House of Lords, in ***Heyman v. Darwins***, [1942] All E.R. 337, 347D 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*."

I therefore appoint Jackie Nakalembe as the arbitrator. In case Jackie Nakalembe is not be able to accept this statutory appointment for an unforeseen event under S.12(1) Arbitration and Conciliation Act, then the matter shall be referred to Mr. Kafuko Ntuyo or Stephen Musisi.

Should Jackie Nakalembe not take up the appointment, then the alternative arbitrators they can only be approached in the sequential order listed.

Costs of the Application are awarded to the Applicant.

Dated at Kampala on the 24th day of April 2012.

……
Jimmy M Muyanja
Executive Director
CADER.