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THE EFFECT OF ARBITRATION CLAUSES IN AGREEMENTS ON LITIGATION

The High Court of Uganda at Kampala Commercial Division in **Miscellaneous Application 1830 of 2022, Attorney General V Networth Consult Limited** has made crystal clear position on the meaning and interpretation of Arbitration Clauses in agreements and their legal effect on litigation.

The decision comes to overturn the position in the recent decisions such as **Fulugencious Munghereza V Price Water House Coopers (1997-2000)** that declared a dispute before a Court arising out of an agreement with an arbitration clause to be referred to an arbitrator rather than litigation.

Among other issues discussed by the court was the **Competence of affidavits deponed by advocates, the meaning of Frivolous, Vexatious, Abuse of Court or Judicial Process Claims and finally what amounts to a departure from pleadings.**

BACKGROUND

The respondent filed Civil Suit **No. 541 of 2022 {main suit}** against the applicant for breach of Consultancy Contract and recovery of sums that were stated to be paid under that contract. The applicant brought this application, contending that the dispute between the parties was amenable to arbitration. Accordingly, the applicant contended that the suit was barred by law.

The respondents in this application raised three preliminary points of law. The first, that the application was fatally defective owing to the fact that the affidavit in support was deponed by a person not entitled to do so, second, that the application was frivolous, vexatious and bad in law, that the application was brought out of time and therefore fatally defective and finally that it constituted a departure from the pleadings.

DECISION OF COURT

In regard to the first preliminary point of law, the court found that an advocate can depone an affidavit where the matters such affidavit speaks to are non-contentious. Where the affidavit merely narrates facts which the advocate knows, such affidavit is permissible.

In determining whether the application was brought out of time and fatally defective, the court interpreted the applicability of **Order 12 Rule 3(1) of the Civil Procedure** Rules to that provides for all interlocutory applications in a suit to be filed within 21 days from the date of completion of the Alternative Dispute Resolutions or where there has been no Alternative Dispute Resolutions, interlocutory applications are required to be filed within 15 days after the completion of the scheduling conference. Court found that applications asserting preliminary points of law are distinct from other applications. Court further found that the former could be raised at any point before judgment.

On the preliminary point of application departing from the pleadings, court found that the applicant hadn't demonstrated such departure. Further it was the reasoning of the learned judge that once a party alleges a departure from pleadings, they must show the exact area of departure, often contrasting what was asserted before from what is asserted now.

In upholding its decision on the effect of arbitration clauses providing for both litigation & Arbitration in agreements, the Court found that

the discretion to elect to initiate arbitration proceedings is available only to a party initiating Arbitration proceedings.
Turning to the merits of the application, the court found that the clause in dispute in the contract between the parties provided that "Any dispute between the parties arising under or related to this contract that cannot be settled amicably may be referred to by either party to the adjudication/arbitration in accordance with the provisions specified in the SCC."It was the applicant's contention that the clause subjected any disputes arising there from to arbitration. The court in its wisdom in interpreting the said clause found that the use of the word adjudication was intended to refer to litigation and that it would have been the intention of the parties to have adjudication(as an alternative dispute resolution) as well as arbitration before an expert arbitrator as this would have achieved the same thing.
The court further found that the parties intended that in the event of a dispute, and where amicable dispute resolution failed, recourse could be had to either arbitration or litigation. It was also found that from the contract, the initiating party was at liberty to decide how to initiate the dispute. Once they had made their election, the other party was obligated to defend or counterclaim in the forum in which the proceedings had been began.
The court re-echoed its role in enforcing clear agreements of parties.
It is therefore not fatal for a party to an arbitration agreement to opt for litigation rather than arbitration as it is at the option of a party that intends to elect the mode of commencement of the dispute resolution as the role of Court is to enforce a clear agreement of the parties since an arbitration clause is interpreted the same way as an ordinary contract.

CONCLUSION.

An arbitration clause that provides for both adjudication and arbitration is legally enforceable. Accordingly where a contract has a clause providing for both adjudication and arbitration, the initiating party has the election to determine which mode to commence in, and the other party has to defend in that forum.
A draftsman has to be keen in the way they draft their clauses should it be the wish of the parties to have multiple dispute resolution mechanisms from which they intend to elect the most suitable option to their circumstances.

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