THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION NO. 2966 OF 2023

(ARISING OUT OF CIVIL SUIT NO.1466 OF 2023)

TAIBA MANPOWER AGENCY LTD :::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

PROGRESSIVE WORKERS WORLD WIDE FZ LLC :::::::::: RESPONDENT

BEFORE: HON. LADY JUSTICE PATIENCE T.E. RUBAGUMYA

RULING

Introduction

This application was brought by way of Chamber Summons under **Sections 5 and 9 of the Arbitration and Conciliation Act, Cap.4**, **Section 33 of the Judicature Act, Cap.13**, **Section 98 of the Civil Procedure Act, Cap. 71 and Order 9 rule 3 of the Civil Procedure Rules SI 71-1**, seeking:

1. A declaration that under the circumstances of the case, the Court has no jurisdiction to try this matter.
2. An order that the Respondent's case be dismissed and or otherwise vacated or set aside by the Court for want of jurisdiction.
3. An order that in the alternative, the Respondent's suit be dismissed and or otherwise vacated and referred for arbitration.
4. Costs of this application be provided for.

Background

The background of the application is contained in the affidavit in support by Ms. Akumu Catherine Cheryl, the Applicant's Managing Director, and is summarized below:

1. That the Respondent filed Civil Suit No.1466 of 2023 against the Applicant seeking orders that a declaration be made that the Applicant is in breach of the Memorandum of Understanding signed between the parties on 27th January, 2022, recovery of USD 7000 for unpaid rent arrears/fees on the Mega Musaned System during the contract period, recovery of lost commission to the tune of USD 220,320 and UGX 12,785,000/=, as operational costs for the contract period, an order for general damages, inconveniences, discomfort, misery and anguish occasioned due to breach of the contract and costs of the suit.
2. That the said Civil Suit No.1466 of 2023 hailed or otherwise is premised on the Memorandum of Understanding signed between the Applicant and the Respondent on 27th January, 2022.
3. That owing to clause 11 of the Memorandum of Understanding, the parties restricted themselves to the jurisdiction of arbitration in regards to dispute resolution arising from the same and as such this suit was wrongly brought to this Court.
4. That the Arbitration and Conciliation Act, Cap.4 under Section 9 ousts this Court's jurisdiction by barring Court from interfering with arbitral matters such as this one.
5. That as per the said clause, the Respondent was required to first serve the Applicant with notice to amicably settle the dispute, if any, and upon failure to derive a solution or otherwise non-compliance by

the Applicant, then the Respondent was to cause notice of joint appointment of an arbitrator which were not done and even where such notice is given and never complied with which is not the case, the Respondent is required to seek for mandatory appointment of an arbitrator which was also never done by the Respondent.

6. That the Applicant is not whatsoever guilty of any non-compliance with arbitral processes as the same were never initiated by the Respondent.
7. That this Court is clothed with powers to dismiss this matter and or otherwise vacate the same with costs; then refer the matter for arbitration.

In reply, the Respondent through Ms. Caroline Hope Nyesigire Spiegl the Respondent's Executive Director, opposed the application contending that:

1. This application is devoid of merit and an abuse of Court process since this Court has unlimited jurisdiction to hear any matter before it under the law.

2. It is not true that the parties restricted themselves to arbitration but rather to an amicable settlement of the dispute between themselves failure of which they proposed they would proceed to arbitration. That failure of amicable settlement was the precursor to arbitration.

3. That by their conduct, the Applicant's representatives; Director and General Manager indicated that they were not interested in any amicable settlement of the dispute between themselves and the Respondent having turned down several requests and their adamant refusal to respond to two demand notices for amicable settlement of the dispute between themselves failure of which would automatically lead to arbitration.

4. That clause 11 of the Memorandum of Understanding is nugatory having served for only 11 months as provided for under clause 9 therein which stated that the Memorandum of Understanding was to serve for only 11 months, and the fact that the Respondent did not initiate Civil Suit No.1466 of 2023 during the continuance of the Memorandum of Understanding, coupled with the fact that the Applicant had already furnished notice of non-renewal of the Memorandum of Understanding.

5. That the Arbitration Act does not completely take away the Court's jurisdiction to hear arbitral matters. That however, there are exceptions provided for in the same Act coupled with various case interpretations.

In rejoinder, the Applicant through Ms. Akumu Catherine Cheryl reiterated her averments contending that:

1. The law on arbitration has clearly defined procedures that the parties to an agreement have to undertake and WhatsApp chats and demand notices do not constitute a complete arbitration process.

2. The subject matter of Civil Suit No.1466 of 2023 pertains to the Memorandum of Understanding and therefore, any issues arising from the same ought to be resolved in accordance with its terms, as the parties' unfulfilled obligations under the Memorandum of Understanding if any, remain valid and enforceable even after its non-renewal as clause 11 of the Memorandum of Understanding was never premised on renewal for its validity and enforceability.

Representation

The Applicant was represented by Learned Counsel Munguriek James of M/s Barenzi & Co. Advocates while the Respondent was represented by Learned Counsel Wande Anthony of M/s Nsereko-Mukalazi & Co. Advocates.

Both parties were directed to file written submissions which they did and the same have been considered by the Court.

Issues for Determination

1. Whether Civil Suit No.1466 of 2023 is competent before this Court?
2. What remedies are available to the parties?

Issue No. 1: Whether Civil Suit No.1466 of 2023 is competent before this Court?

Applicant's submissions

In his submission Counsel for the Applicant first referred to the case of ***Vantage Mezzanine Fund II Partnership Vs Simba Properties Investment Co. Limited and Another HCMA No. 201 of 2020***, wherein the Court laid out the following considerations for a party to secure a reference of a matter such as this one to an arbitral tribunal that; there is a suit filed between the parties and that the defence has been filed (existence of a dispute between the parties), there is a binding and enforceable arbitration agreement and that the Court has no jurisdiction to hear the suit.

Submitting on the existence of a dispute between the parties, Counsel relied on **Section 5 (1) (a) of the Arbitration and Conciliation Act** contending that, for one of the parties to apply to have a suit referred to

arbitration, there must be a suit before Court and that a defence has been filed. That the above was confirmed in the case of ***British American Tobacco Uganda Limited Vs Lira Tobacco Stores, HCMA No.924 of 2013***, wherein the Court held that:

> "*What is material under Section 5 of the Arbitration Act is whether there is an arbitration agreement between the parties. An arbitration agreement is defined under Section 2(1) of the Arbitration and Conciliation Act and the question for consideration is whether the matter before the judge or magistrate is subject to an arbitration agreement (as defined by the Act).*"

Relating the above to the matter at hand, Counsel submitted that paragraph 4 of the affidavit in support of this application, shows that the Memorandum of Understanding which was executed between the parties contained an arbitral clause that is binding and which in effect ousts the jurisdiction of this Court.

On whether there exists a binding and enforceable arbitration agreement, Counsel quoted the case of ***British American Tobacco Uganda Limited Vs Lira Tobacco Stores (supra)***. Counsel submitted that page 5 of the Memorandum of Understanding, particularly paragraph 11 states that:

> "*Any dispute arising out of this Memorandum shall first be resolved amicably between the parties themselves and failure of which the same shall be referred to an arbitrator jointly agreed upon and or in accordance with the laws of Uganda.*"

Counsel further submitted that the mandatory wording of the clause by using the word 'shall' indicates that the parties had no other option for resolving the disputes arising from the Memorandum of Understanding.

Counsel further quoted the case of ***Golf View Inn (U) Ltd Vs Barclays Bank (U) Ltd, HCCS No.358 of 2009***, in which the Court stated that once parties have executed agreements, they are bound by them and evidence of the terms of the agreement should be obtained from the agreement itself and not from extrinsic evidence.

In further submission, Counsel contended that the Respondent's suit is premised on the breach of the Memorandum of Understanding as seen in annexure "**A**", a copy of the Memorandum of Understanding attached to the application, whose terms bind the parties.

On whether the Court lacks jurisdiction, Counsel contended that **Section 6 of the Arbitration and Conciliation Act** prohibits the intervention of any Court in a matter that is subject to an arbitration agreement beyond the scope allowed under the Act as was affirmed in the case of ***Babcon Uganda Ltd Vs Mbale Resort Hotel Ltd, Court of Appeal Civil Appeal No.87 of 2011*** and that according to the agreement and the governing laws to which the parties submitted their interests, this Court is not clothed with the jurisdiction to hear and finally determine **HCCS No.1466 of 2023** or any application thereunder. That **Section 15 (5) of the Arbitration and Conciliation Act** also provides for the appointment of arbitrators and even where a Defendant fails to respond to the notice of appointment of an arbitrator which was never the case in this instance, the Respondent is required to apply to the authority for the appointment of an arbitrator.

Counsel further relied on the case of ***Vantage Mezzanine Fund II Partnership Vs Simba Properties Investments Co. Limited and Another (supra)***, wherein the Court stated that:

"*It follows therefore that where the question as to the existence and validity of an arbitration agreement has been brought before the Court, if the Court upon investigation finds that the arbitration clause exists and is not invalid, the Court must refer the matter to the arbitral tribunal to investigate any other matter concerning the contract between the parties.*"

In conclusion, Counsel for the Applicant submitted that upon the Court finding as such, the Court would have no choice but to refer the matter for arbitration; in which case, the pending suit would lapse together with all the proceedings thereunder.

Respondent's submissions

In reply, Counsel for the Respondent referred to paragraph 3 of the affidavit in reply, **Articles 2 (2) and 139 (1) of the Constitution of the Republic of Uganda 1995** together with **Section 14 (1) of the Judicature Act** and submitted that this Court has unlimited original jurisdiction to hear any matter before it. Counsel then defined an arbitration agreement as per **Section 2 (1) (c) of the Arbitration and Conciliation Act**. He also relied on **Section 5** of the said Act which provides for a stay of legal proceedings and **Section 9** of the same Act which provides for the extent of Court's intervention in matters governed by the Act. He also relied on the case of ***Vantage Mezzanine Fund II Partnership Vs Simba Properties Investment Co. Limited and Another*** **(supra)** cited by Counsel for the Applicant for the conditions to be proved to secure a reference of a matter such as this to an arbitrator.

Counsel also submitted that whereas they do not dispute the existence of a dispute between the parties; the gist of which they filed Civil Suit No.1466 of 2023, they dispute the validity and enforceability of the

arbitration agreement as provided under **Section 5 (1) (a) of the Arbitration and Conciliation Act**. Counsel for the Respondent argued that the arbitration agreement is null and void, inoperative or incapable of being performed. That paragraph 6 of the affidavit in reply refers to annexures "**A1"**, **"A2"** and "**A3"** that show that the Applicant's representatives were not interested in any amicable settlement of the dispute, having turned down several requests and their adamant refusal to respond to two demand notices for amicable settlement of the dispute between themselves, failure of which would automatically lead to arbitration.

That as stated under paragraph 8 of the affidavit in reply, clause 11 of the Memorandum of Understanding had already been rendered nugatory because clause 9 stated that it was meant to serve for only 11 months and the fact that the suit was not initiated during the continuance of the Memorandum of Understanding, and further that the Applicant furnished a notice of non-renewal of the Memorandum of Understanding as shown by annexure "**B**". Counsel averred that in light of the above and considering the Applicant's conduct, it waived the right to arbitrate. Counsel then referred to **Section 5 (1) (a) of the Arbitration and Conciliation Act** and the case of ***AC Yafeng Construction Co. Ltd Vs The Living World Assembly Ltd and Others Civil Suit No.0739 of 2021***, where Court held inter alia that to determine if there was a waiver of the right to arbitrate, the Court will consider whether the party's actions are inconsistent with the right to arbitrate among others.

In response to the Applicant's submission that the mandatory wording of the Memorandum of Understanding using the word "shall" indicates that the parties had no other open option for resolving the disputes arising out

of the Memorandum of Understanding and the considerations for determining the existence of a binding and enforceable arbitration agreement as laid down in the case of ***British American Tobacco Vs Lira Tobacco Stores*** **(supra);** Counsel invited this Court to interpret the same as a whole. Counsel also argued that **Sections 6 and 15 (5) of the Arbitration and Conciliation Act** as cited by Counsel for the Applicant were wrongly quoted thus misleading the Court. Counsel further opposed paragraphs 6 to 21 of the Applicant's affidavit in support and paragraphs 4 to 8 of the Applicant's affidavit in rejoinder contending that they are wordy, argumentative and repetitive contrary to the Supreme Court decision in the case of ***Male Mabirizi Kiwanuka Vs Attorney General Constitutional Petition No.2 of 2018*** and that the same should be expunged off the record.

In his conclusion, Counsel for the Respondent prayed that the Court finds **clause 11** of the Memorandum of Understanding null and void, inoperative and unenforceable and that the application be dismissed with costs.

Applicant's submissions in rejoinder

In his rejoinder, Counsel for the Applicant submitted that the Respondent admitted that it is true that the parties intended to be bound by the arbitration agreement but only upon failure of an amicable settlement of the dispute amongst themselves. That this does not negate the fact that arbitration is still a necessity given the wording of the provision and the use of the word 'shall'. Counsel argued that if the Memorandum of Understanding is the basis of the suit, it is evident that the arbitration clause is valid. That a mere breach of the Memorandum of Understanding if any, does not invalidate the arbitration clause since such a clause becomes active upon disputes arising from the breach.

Analysis and Determination

Before I delve into the merits of the application, I wish to first resolve the objection raised by the Respondent's Counsel that paragraphs 6 to 21 of the affidavit in support and paragraphs 4 to 8 of the affidavit in rejoinder are wordy, argumentative and repetitive hence should be expunged off the record.

Order 19 rule 3 of the Civil Procedure Rules stipulates that:

> *"(1) Affidavits shall be confined to such facts as the deponent is able of his or her own knowledge to prove, except on interlocutory applications, on which statements of his or her belief may be admitted, provided that the grounds thereof are stated.*
>
> *(2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter or copies of or extracts from documents shall, unless the court otherwise directs, be paid by the party filing the affidavit."*

In the case of ***Male. H. Mabirizi K Kiwanuka Vs Attorney General Misc. Application No.7 of 2018 (Arising out of Constitutional Appeal No.2 of 2018),*** the Supreme Court stated that:

> "*An affidavit as we understand it is meant to adduce evidence and not to argue the application… An affidavit should contain facts and not arguments or matters of law.*"

I have carefully examined both the Applicant's affidavit in support of the application and the affidavit in rejoinder thereto and observed that; paragraphs 6 to 21 of the affidavit in support do not contain any arguments. On the other hand, I do find paragraphs 5 to 7 contained in the affidavit in rejoinder lengthy though not argumentative; as such

whereas paragraphs 4 and 8 of the same are not argumentative nor are they repetitive as is alleged by the Respondent. They set out the facts of the case and the source therein hence in compliance with **Order 19 rule 3 of the Civil Procedure Rules**. In the circumstances, the same shall not be expunged from the record. I shall now proceed to consider the merits of the application.

Section 2 (1) (c) of the Arbitration and Conciliation Act, defines an arbitration agreement as 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.

Section 3 (1) of the Arbitration and Conciliation Act also provides that an arbitration agreement may be in the form of an arbitration clause in a contract. In the case of ***Heyam and Another Vs Darwins Ltd [1942] 1 All ER 337*** at **page 342**, **Viscount Simon L.C** defined an arbitration clause as a written submission agreed to by the parties to the contract and, like other written submissions to arbitration, must be construed according to its language and in light of the circumstances in which it was made.

It is therefore trite that an arbitration agreement may cover not only "disputes" but also "disagreements" and "differences of opinion." The existence and the validity of an arbitration agreement should be determined primarily in light of the common intent of the parties, the requirement of good faith and the belief that the person who signed the clause had the power to bind the company. (See: ***Premium Nafta Products Ltd and Others Vs Fili Shipping Company Ltd and Others***

[2007] UKHL 40; Fiona Trust and Holding Corporation Vs Privalov [2008] 1 Lloyd's Rep 254, [2007] 4 All ER 951).

The construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed under this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. This type of presumption provides that a valid arbitration clause should generally be interpreted expansively and, in cases of doubt, extended to encompass disputed claims.

In the case of ***Omugabe Mbabazi Sam Vs Tumwesigye Dan HCMA No.10 of 2023***, **Hon. Justice Vincent Wagona** held that:

> "*Section 5 of the same Act provides that when a matter is presented to Court and there is a valid and enforceable arbitral clause in the transaction documents between the parties, then Court is required to stay proceedings and refer the parties for arbitration.*"

In the instant case, and for proper appreciation, I shall reproduce the clause in issue as stipulated in the Memorandum of Understanding between the parties. **Clause 11** of the Memorandum of Understanding stipulates that:

> "*Any dispute arising out of this Memorandum shall first be resolved amicably between the parties themselves and failure of which the same shall be referred to an arbitrator jointly agreed upon and or in accordance with the laws of Uganda."*

In my view, from the above, it is evident that there is an arbitration clause that provided for amicable settlement and failure of which, the parties were to refer the dispute to an arbitrator. Therefore, it can be concluded that the parties in this matter intended to refer any dispute arising from this Memorandum of Understanding to arbitration, upon failure to resolve the dispute amicably.

The arbitration clause is explicit in its wording as to the resolution of any dispute arising from the Memorandum of Understanding vide arbitration as a mode of dispute resolution upon failure to resolve the same amicably. However, the Respondent disputes the above clause contending that the clause is null and void, inoperative or incapable of being performed as the Applicant waived its right to arbitrate and that this Court has unlimited original jurisdiction to handle this matter as provided for under **Article 139 (1) of the Constitution of the Republic of Uganda and Section 14 (1) of the Judicature Act**.

Much as I agree with Counsel for the Respondent's submission that this Court has unlimited original jurisdiction in all matters as set out under **Article 139 (1) of the Constitution of the Republic of Uganda and Section 14 of the Judicature Act**, it is trite that this jurisdiction has to conform with other written laws and procedures. Therefore, it is a cardinal principle of the law that jurisdiction is a creature of statute as emphasized by the Supreme Court in the case of ***Baku Raphael Obudra & Another Vs Attorney General S.C.C.A No.1 of 2005***, which held that:

> *"It is trite that the Courts are established directly by the Constitution or indirectly under it, and that their respective jurisdictions are accordingly derived from the Constitution or other law made under the authority of the Constitution."*

The Supreme Court held in the case of ***Uganda Revenue Authority Vs Rabbo Enterprises (U) Ltd & Another S.C.C.A No.12 of 2004***, that the High Court exercises its unlimited jurisdiction subject to other provisions of the Constitution. In the case of ***Lakeside Dairy Limited Vs International Centre for Arbitration and Mediation Kampala and Midland Emporium Limited Misc. Cause No.21 of 2021,*** **Hon. Justice Stephen Mubiru** stated that:

> "*By stating that "except as provided in this Act, no Court shall intervene in matters governed by this Act," Section 9 of the Arbitration and Conciliation Act seeks to restrict the Court's role in arbitration. The section, clearly in mandatory terms, restricts the jurisdiction of the Court to only such matters as provided for by the Act. The provision epitomises the recognition of the policy of parties' autonomy which underlies the concept of arbitration*, (emphasis mine*). Consequently, there are only three categories of measures under the Act which involve Courts in arbitration namely; (i) such measure as involves purely procedural steps and which the arbitral tribunal cannot order and/or cannot enforce, e.g. issuing witness summons to a third party or stay of legal proceedings commenced in breach of the arbitration agreement; (ii) measures meant to maintain the status quo like granting of interim injunctions or orders for preservation of the subject matter of the arbitration (interim measure of protection); and (iii) such measures as give the award the intended effect by providing means of enforcement of the award or challenging the same (See:* ***Coppee-Lavalin SA/NV Vs Ken-Ren Chemicals and Fertilizers Ltd [1994] 2 All ER 465****)*."

Section 5 (1) of the Arbitration and Conciliation Act, requires a Court before which proceedings are being brought in a matter which is the subject of an arbitration agreement, if a party so applies after the filing of a statement of defence and both parties having been given a hearing, to refer the matter back to arbitration unless the Court finds; - (a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or (b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration. The term "inoperative" covers situations where the arbitration agreement has become inapplicable to the parties or their dispute and "incapable of being performed" relates to situations where the arbitration cannot effectively be set in motion. As to whether the arbitration clause in issue is inoperative or incapable of being performed, the case of ***Broken Hill City Council Vs Unique Urban Built Pty Ltd [2018] NSWSC 825***, defined the term "inoperative" as "having no field of operation or to be without effect." It covers those cases where the arbitration agreement has ceased to have effect. The ceasing of effect of the arbitration agreement may occur for a variety of reasons, including;- where the parties have implicitly or explicitly revoked the agreement to arbitrate; where the same dispute between the same parties has already been decided in arbitration or Court proceedings (*principles of res judicata*); where the award has been set aside or there is a stalemate in the voting of the arbitrators; or the award has not been rendered within the prescribed time limit; where a settlement was reached before the commencement of arbitration, and so on.

On the other hand, the phrase "incapable of being performed" was considered in the cases of ***Lucky-Goldstar International (HK) Ltd Vs NG Moo Kee Engineering Ltd [1993] HKCFI 14*** and ***Bulkbuild Pty Ltd Vs Fortuna Well Pty Ltd & Others [2019] QSC 173***, where it was said to

relate to the capability or incapability of the parties to perform an arbitration agreement; the expression would suggest "something more than mere difficulty or inconvenience or delay in performing the arbitration." There has to be "some obstacle which cannot be overcome even if the parties are ready, able and willing to perform the agreement." It applies to cases in which; - the arbitration cannot be effectively set in motion; the clause is too vague or perhaps other terms in the Contract contradict the parties' intention to arbitrate; an arbitrator specifically named in the arbitration agreement refuses to act or if an appointing authority refuses to appoint; the parties had chosen a specific arbitrator in the agreement, who was, at the time of the dispute, deceased or unavailable, and so on. These are situations in which the arbitration agreement is frustrated or becomes incapable of being fulfilled or performed, due to unforeseen contingencies.

In his decision in the case of ***Lakeside Dairy Limited Vs International Centre for Arbitration and Mediation Kampala and Midland Emporium Limited*** **(supra), Hon. Justice Stephen Mubiru** explained that where the parties have evinced a clear intention to settle any dispute by arbitration, the Court should give effect to such intention, even if certain aspects of the agreement may be ambiguous, inconsistent, incomplete or lacking in certain particulars.

As quoted by the Court of Appeal in the case of ***National Social Security Fund Vs Alcon International Ltd CA No.2 of 2008***, **David St. John Sutton** in **Russel on Arbitration, (22nd Ed. Sweet & Maxwell) paragraph 2-119, page 80** states that:

> *"… a party may abandon its right to arbitrate for example by delay or inaction, or by commencing Court proceedings in breach of an*

arbitration agreement. However, the Courts are slow to find such repudiation or abandonment without very clear evidence of, an intention to abandon the right to arbitrate together with reliance by the other party to its detriment. Even if the right to arbitrate a particular dispute has been abandoned, that does not necessarily mean that the arbitration agreement itself has been abandoned."

In the instant case the Respondent's argument is that the arbitration clause is inoperative or incapable of being performed since the Applicant failed to participate in any amicable settlement discussions and that this was the first option of dispute resolution according to **clause 11** of the Memorandum of Understanding reproduced hereinabove. That this also portrays that the Applicant waived its right to arbitrate. The Respondent also argued that since the Memorandum of Understanding was terminated, the Applicant cannot rely on the clause therein. On the other hand, Counsel for the Applicant insisted that this Court does not have jurisdiction to handle the Civil Suit instituted by the Respondent. That the clause is still operative given the fact that the Memorandum of Understanding was the basis of the Respondent's suit although it was terminated.

I have carefully read the pleadings in the main suit and this application and my considered view is that the dispute between the Applicant and the Respondent arises from the Memorandum of Understanding executed by the parties. According to paragraph 4(b) of the plaint, the Plaintiff avers that the parties agreed on certain terms which culminated into execution of the Memorandum of Understanding on 27th January, 2022. The Plaintiff further averred under paragraph 4(k) of the plaint that the Defendant was in breach and no longer interested in the Memorandum of Understanding.

In its defence, the Defendant under its written statement of defence denied any breach of the Memorandum of Understanding and further provided its position on the same. In light of the above, my considered view is that the cause of action in Civil Suit No.1466 of 2023 arises from the Memorandum of Understanding executed between the parties on 27th January, 2022 and thus **clause 11** of the Memorandum of Understanding is still applicable. Further, the Memorandum of Understanding forms the basis of the claims by the Respondent as averred in the main suit for breach of contract and recovery of the stated sums.

My understanding of **clause 11** is that the parties agreed that any dispute arising from the Memorandum of Understanding shall first be resolved amicably between the parties and failure of which; the same shall be referred to an arbitrator. I respectfully disagree with the submission of the Respondent that the fact that the Applicant did not respond to the requests for amicable settlement meant that arbitration could not be considered. Amicable settlement simply refers to parties resolving the dispute themselves on their own terms. Given the fact that the parties did not succeed in settling the matter amicably confirms that this dispute resolution method failed and an arbitrator should have been appointed thereafter in accordance with the provisions of the Memorandum of Understanding.

In addition, there is a clear intention in the Memorandum of Understanding for the parties to explore arbitration, which has numerous benefits as a dispute resolution mechanism as opposed to litigation.

The Respondent contended that it is not responsible for violating the arbitration clause since it is the Applicant who violated the process leading to arbitration. The failure by the Applicant to amicably settle or even

participate in the discussions for amicable settlement meant that this mode had failed and the next step should have been for the parties to proceed with arbitration.

It is also evident that the Applicant is interested in the operation of the arbitration clause. The Respondent has not adduced any evidence of the Applicant's intention to abandon/waive the right to arbitrate, to render the same inoperative or incapable of being performed.

Further, the Applicant in its written statement of defence clearly stated under paragraph 4 that it would raise a preliminary objection as to the jurisdiction of this Court to handle the matter arising from the Memorandum of Understanding which provides for arbitration as a means of resolving disputes.

Since arbitration agreements are purely matters of contract, and the effect of **Section 5 (1) of the Arbitration and Conciliation Act** is to make contracting parties live to their agreement by disallowing any of them to refuse to perform part of their contract when it becomes disadvantageous to them, in the instant case, the parties in my considered view negotiated the arbitration clause and included the same for good reasons. It would not be fair for the Court to disregard the parties' intention especially where no waiver or inoperation of the arbitration clause has been proved.

Accordingly, I am inclined to invoke **Section 5 (1) of the Arbitration and Conciliation Act**, which requires this Court before which these proceedings have been brought in a matter which is the subject of an arbitration agreement, to refer the matter back to arbitration.

This Court shall therefore refer the matter to arbitration to enable the contracting parties to live up to their agreement as stipulated under **clause**

11 of the Memorandum of Understanding. Arbitration cannot proceed along with litigation, save within the necessary statutory exceptions. Stay of the suit serves no purpose since the parties can only come back to Court in the manner provided for in the Arbitration and Conciliation Act.

Issue No. 2: What remedies are available to the parties?

Having found as I have above, I find that the best remedy is a referral of the suit to arbitration and dismissing the same. Given the circumstances of the case and the above finding, each party shall bear their own costs for the application and the main suit.

In the premises, I therefore make the following orders:

1. The dispute between the parties herein is referred to arbitration. The parties should jointly appoint an arbitrator within thirty (30) days from the date of this Ruling. In the event of failure, either party shall refer to an appointing authority under the Arbitration and Conciliation Act to appoint an arbitrator.
2. High Court Civil Suit No.1466 of 2023 is hereby dismissed with each party bearing their own costs.
3. Each party shall bear their own costs of this application.

I so order.

Dated, signed and delivered electronically this **27th** day of **June**, **2024.**

Patience T. E. Rubagumya

JUDGE

27/06/2024

7:45am