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## Legal Alert: Referral to arbitration by formal application!

### NEW! ALP Dispute Resolution News

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High Court holds that referral of a dispute to arbitration requires evidence by way of a formal application and cannot be entertained in form of a preliminary objection on a point of law without such evidence.

### Evidentiary proof of agreement to arbitrate: *Busenvi Enterprise Ltd v Makindye Ssabagabo Municipal Council*, Civil Suit No 400/2019

In a suit involving a road construction, the Plaintiff sought against the Defendant remedies that included, among others, specific performance, damages, interest, and costs. When the suit came up for hearing, the Defendant raised a preliminary objection that the matter be referred to arbitration in light of the provisions of the General Conditions of Contract, and sections 5 and 9 of the *Arbitration and Conciliation Act*.

In a decision issued on July 1, 2022, the trial judge rejected the preliminary objection raised. Nambayo, J. ruled that *evidentiary proof* is necessary for a determination to refer the matter to arbitration, holding that section 5 of the *Arbitration and Conciliation Act* requires a party to "apply to court". The evidentiary proof requires there be "a formal application" for a court to determine, as a matter of law, that the matter be referred to arbitration. A preliminary objection on a point of law will not suffice. The judge ordered the matter proceed for hearing and left it to the Defendant to file a formal application on referral to arbitration.

The ruling in the matter underscores the principle that there must be an application in terms of section 5 of the Act, which serves as a basis of a hearing conducted by a court to ascertain voidness, inoperativeness, and incapability of performance of an arbitration agreement, or the absence of an arbitrable dispute. A court must ascertain the *prima facie* existence of an arbitration agreement and arbitrable dispute. This requires evidence before the court.

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### ALP East Africa

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