MEDIATION

A PAPER PRESENTED BY:

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REGISTRAR, ALTERNATIVE DISPUTE RESOLUTION

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AT COLLINE HOTEL, MUKONO

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INTRODUCTION

It gives me great pleasure to present this paper at your induction/orientation training of newly appointed judicial officers. I congratulate you all once again on your appointment and wish you a successful career in the Judiciary.

CONT'D

- Section 9 of the Judicature (Mediation) Rules, 2013 confers authority to you to conduct mediation. Other officers authorized to conduct mediation include Judges of the High Court, Registrars, and Magistrates
- Mediation is a versatile process that can be used as a rapid first intervention to prevent the escalation of a dispute or to repair a working relationship. This provides an alternative, confidential process whereby a third party (Mediator) facilitates and negotiates a mutually beneficial agreement.

1.1. DEFINITION OF MEDIATION

There are many definitions of mediation as one may think about: -

Mediation is defined as the intervention in conflict by an acceptable third party who has limited or no authoritative decision-making power, who assists the involved parties to voluntarily reach a settlement (Moore Christopher, 2003 “The Mediation process” San Francisco)

It is a form of alternative dispute resolution (ARD) which aims to assist two (or more) disputants in reaching and agreement.

Mediation is where a third party, the Mediator (s) helps two or more people in a dispute attempt to reach an agreement

Mediation means a process by which a neutral third person facilitates communication between parties to a dispute and assists them in reaching a mutually agreed resolution of the dispute (The Judicature (Mediation) Rules 2013 SI No. 10 of 2013)

2.0 ADVANTAGES OF MEDIATION

1. Mediation is speedy, efficient and economical. It takes less time and costs compared to adjudication
2. The procedure is simple and flexible. It can be modified to suit the demands of each case. Flexible scheduling allows parties to carry on work with their day-to-day activities
3. the process is conducted in an informal, cordial, and conducive environment.
4. It is confidential. While court hearings are generally in public, whatever, happens in mediation remains strictly confidential.

CONT'D

5. Mediation helps to maintain or improve or restore relationships between the parties.
6. The process facilitates better and effective communication between the parties which is crucial for a creative and meaningful negotiation
7. Mediation is participatory. Parties get an opportunity to present their cases in their own words and to directly participate in the negotiation
8. The process is voluntary and any party can opt out of it any state if he or she feels that it is not helping him or her. The self-determining nature of mediation ensures compliance with the settlement reached.

3.0 MATTERS WHICH ARE NOT MEDIATABLE

- While mediation has several advantages, there are matters which are not mediatable:

1. Challenging a Statute
2. When parties have no faith in mediation
3. Cases where the law is to be laid down
4. Where parties refuse to negotiate
5. Instances where the Government is a party and the representative(s) lack authority to enter into a settlement
6. Cases where parties do not have sufficient authority to negotiate
7. Cases where parties have inadequate information about the dispute
8. Cases where parties would prefer the court process to take place
9. Cases where all interested parties are not present in mediation, in other words, there is no ex-parte mediation (s)
10. Matters of public interest
11. Cases where the party's state of mind is not stable
12. Matters which have a criminal element

4.0 STYLES OF MEDIATION

- While all Mediators work to help parties resolve conflict, they use a variety of styles and approaches to do this. Much like other professionals such as Doctors, Engineers, Counselors use different strategies to achieve the desired results, so do mediators use different techniques or styles.
- There are three main styles used of mediation but the Mediator may use a combination of styles in resolving a conflict: -

(1) Evaluative
(2) Facilitative
(3) Transformative

CONT'D

- **Evaluative Mediation**

In Evaluative Mediation, the Mediator plays an advisory role to the parties. He/She evaluates the weaknesses and strengths of each side's case and predicts the outcome if litigation is to be preferred. In addition, focuses on legal rights as opposed to the interests and needs of the parties

Evaluative Mediators are especially useful when time is short and the problem is relatively concrete, when it seems likely that the case may otherwise end up in court or when the parties want recommendations from the neutral party.

CONT'D

- **Transformative Mediation**

In this kind of mediation, the Mediator looks at conflict as a crisis in communication and seeks to help resolve the conflict, thereby allowing people to feel empowered in them and better about each other. The agreement that arises from this type of mediation works as a natural outcome of the resolution of the conflict.

A Mediator with a transformative approach is likely to be appreciated for the time and space that he or she creates for all sides to really hear and understand one another.

Transformative mediators may create more space for emotions to be expressed through the process and to help support emotional healing along the solution

Transformative mediators are especially useful when conflicts are tied to more deeply personal issues including identities and relationships and when parties are seeking empowerment and recognition.

CONT'D

- **Facilitative Mediation**

This is the most popular or common style applied by Mediators. The Mediator focuses on party's interests by maintaining neutrality and facilitating parties to reach a mutually agreed settlement. Using a facilitative style, a mediator asks questions, normalizes perspective, and validates both party's point of view

5.0 MEDIATION PROCESS

Mediation is divided into three stages namely;

a) Pre-Mediation

This is the first stage of mediation

At this stage, the mediator ensures that:

i. He/she meets with the parties separately by phone, prior to mediation
ii. There is exchange of information about the mediation process with the parties in order to allow parties to familiarize themselves with the process.
iii. The Agreement to mediate is signed by all participants.
iv. The mediation room is well set e.g. enough chairs for the parties and well arranged, pen and paper for parties to take notes, soft drinks etc.

CONT'D

v. The parties will sit facing each other and not too far from the mediator.

vi. The mediator's chair is in between the chairs of the parties.

vii. The mediator reads the case material and understands it properly including background information.

viii. The mediator must be properly/decently dressed.

ix. The mediator should confirm the attendance of the parties or their authorized representatives.

CONT'D

b) Mediation

This is the second phase where the actual process of mediation takes place. ***The phase has 5 parts and they are as follows:***

PHASE 1: INTRODUCTION

The mediator has a big role to play in this part. It is this part that the mediator does the following: -

1. Welcomes the parties to the dispute to the mediation room.
2. He/she makes the parties to sit in their positions.
3. Advocates are also asked to sit next to their clients whom they represent.
4. Third parties, if present take their seats next to the advocates.
5. The mediator introduces himself/herself as a mediator.
6. The parties to the dispute introduce themselves.
7. Advocates representing their clients introduce themselves.
8. Third parties also introduce themselves.

CONT'D

9. The mediator explains the process of mediation and its advantages.
10. The mediator explains the role of a mediator, parties and their advocates.
11. The mediator affirms his neutrality in the process.
12. The mediator emphasizes that the process of mediation is confidential and all the parties including their advocates are bound by the principles of confidentiality.
13. The mediator sets the basic ground rules to be followed during the mediation process.
14. The mediator clears any doubt/questions that the disputants and the advocates may have.
15. The mediator asks the parties how they would like to be addressed.

PHASE 2: JOINT SESSION

It is during this session that the mediator meets with the parties to set the agenda.

The issues for determination are also addressed. It is an open discussion where each party is given an opportunity to tell his side of the story without being interrupted

- The first party or his/her advocate makes an open statement or speaks about the facts of his/her case or dispute.
- The mediator re-states the statement.
- Advocate for the first party may speak about the legal issues.
- The above procedure applies to the second party.

CONT'D

In this session, the mediator is expected to do the following: -

I. Study the body language of the disputants.
II. Exploit the information being provided by each party in order to understand the conflict.
III. Understand the perceptions and feelings of the parties.
IV. Control the environment of mediation and the entire process using different techniques of mediation.
V. Make a full list of critical issues for discussion and determination.
VI. Assist the parties to keep on negotiating.
VII. Brainstorm alternatives and possible solutions to be discussed by parties.

CONT'D

VIII. Invite offers and proposals from the parties.

IX. Get parties to be realistic about their case and its prospects.

X. Move the parties from their extreme positions to a common ground of settlement.

XI. Make parties to analyze the alternatives in terms of costs, time and damaged relationships available to them if a settlement is not reached.

Note that joint meetings enable parties to give their versions of the dispute and the opportunity to listen to that of the other side. The process then focuses on the parties and makes them participants in search of an equitable solution.

PHASE 3: PRIVATE SESSION

- This is also known as caucus i.e. separate confidential sessions with one party at a time. This is the stage where the mediator tries to discover what is hidden in the dispute.
- Confidential information is discussed to the mediator. Since the mediator has guaranteed confidentiality, a party should be free to disclose confidential information. The confidential information should not be shared with the other party without the consent of the other.
- It should be observed that a separate meeting by the parties with the mediator enables each party to speak freely with the mediator and examine the strengths and weakness of his case. A party can also voice his fears and concerns about the issues in dispute. The mediator should have private sessions with parties and their representatives in turns. He should spend equal time to remove doubt and bias.

PHASE 4: AGREEMENT

- At this stage, parties meet to finalize the agreement. The terms of the agreement should be clear and specific. The mediator should ensure that all the issues in dispute are captured. In summary, the agreement should contain the following: -
  1. What has been agreed
  2. Who is to do what
  3. Timelines of performance.
  4. How performance should be achieved
  5. Should be signed and stamped where necessary.

PHASE 5: CLOSING

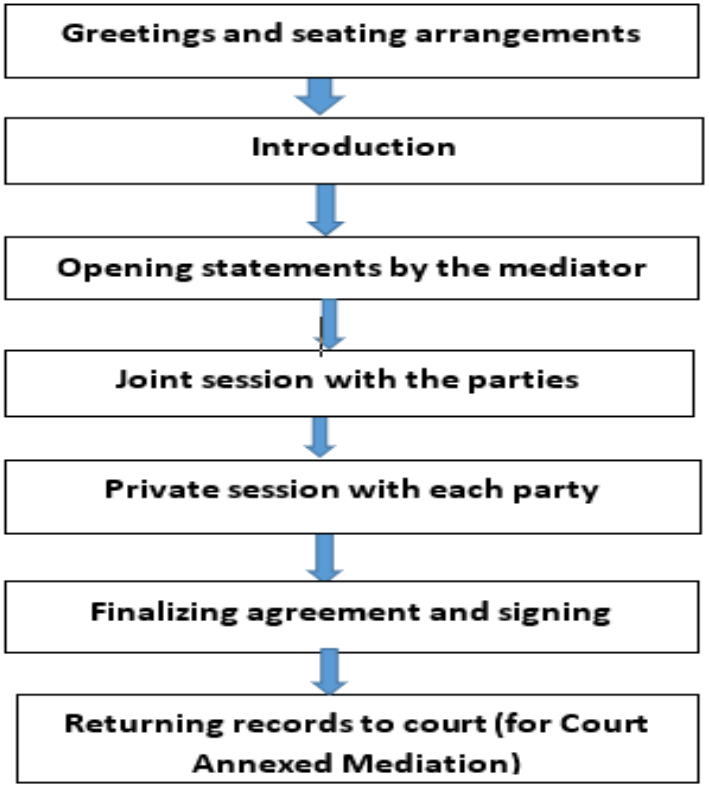
This is the stage which contains willingness by the parties to go ahead to implement the agreement or where the parties fail to reach an agreement at all.

In case parties agree for a settlement and upon signing the agreement, the mediator should:-

1. Congratulate and commend the parties on their hard work.
2. If parties do not reach an agreement, do a review of the discussion and terms of the agreement.
3. Ask the parties if they wish to meet again.
4. Thank the parties for their participation.
5. If an agreement is reached, a copy is sent to court or return the file to court with remarks that mediation failed.

6.0 CONCLUSION

The mediation process can be summed up using the following illustration;



THANK YOU