Direct Pay Limited v Chartered Institute of Arbitrators (Kenya Branch); Kibore (Interested Party) (Judicial Review Application E042 of 2022) [2023] KEHC 22803 (KLR) (Judicial Review) (27 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22803 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW APPLICATION E042 OF 2022

JM CHIGITI, J

SEPTEMBER 27, 2023

N THE MATTER OF THE ADMINISTRATIVE ACTIONS OF THE RESPONDENT

CULMINATING IN THE DECISION OF 3RD MARCH 2022 AND

IN THE MATTER OF SECTION 8 (2) OF THE LAW REFORM ACT, ORDER 53 OF

THE CIVIL PROCEDURE RULES AND SECTION 7 AND 11 OF THE FAIR

ADMINSTRATIVE ACTION ACT NO. 4 OF 2015

AND IN THE MATTER OF AN APPLICATION BY

BETWEEN

DIRECT PAY LIMITED .... APPLICANT

AND

THE CHARTERED INSTITUTE OF ARBITRATORS (KENYA BRANCH) .... RESPONDENT

AND

JULIA NJOKI KIBORE .... INTERESTED PARTY

RULING

1. What is before me are the Notices of Preliminary Objections dated 31st May, 2022 and 3rd October 2022 challenging the Ex parte Applicant's Notice of Motion dated 11th April 2022 wherein the Applicant is seeking an order:

a. That an order of Certiorari do issue to remove into the High Court and quash the Respondent's administrative action of 3rd March 2022 which resulted in the unprocedural appointment of a sole arbitrator in the dispute between the applicant and the interested party with directions to the Respondent to formally notify the appointed arbitrator of the quashing of the Respondent's administrative action appointing the arbitrator.

2. The one dated 31st May, 2022 raises the grounds that:

i. The jurisdiction of this Honourable Court to entertain the matter has not yet crystallized for the following reasons:

The applicant has not yet exhausted the existing statutory dispute resolution mechanisms provided for under Section 14 of the *Arbitration Act* before invoking judicial review proceedings against the respondent.

ii. In view of the foregoing, the instant application offends Section 9(2) of the Fair Administrative Actions and the doctrine of exhaustion as it has been filed prematurely.

3. The Notice of Preliminary Objection dated 3rd October 2022 raises the following grounds:

a. This Honourable Court lacks the jurisdiction to entertain the application dated 7th April 2022 for the following reasons:

b. That Section 10 of the *Arbitration Act* clearly stipulates that no court can intervene in matters governed by the Act except as expressly provided by the Act.

c. The applicant has not exhausted the existing statutory dispute resolution mechanisms provided for under Section 14 of the *Arbitration Act* before invoking judicial review proceedings against the respondent.

d. In view of the foregoing, the instant application offends Section 9(2) of the Fair Administrative Actions and the doctrine of exhaustion as it has been filed prematurely.

e. That these proceedings in their entirety are fatally defective, incompetent, and an abuse of court process.

The Applicant's' case:

4. The applicant and the interested party are parties to an employment contract dated 21st February, 2020 that is marked "AM 1". Clause 24 provides as follows:

> " 24.1 Should any dispute arise between the parties hereto with regard to the interpretation, rights, obligations and/or implementation of anyone or more the provisions of this agreement then, the parties to such dispute shall in the first instance attempt to resolve such dispute by amicable negotiations and should such negotiations fail to achieve a resolution then either party may declare a dispute by written notification to the other, whereupon such dispute shall be referred to arbitration under the following terms:
>
> 24.1.1 Such arbitration shall be resolved under provisions of the Kenya *Arbitration Act* (Act 4 of 1995) as amended by the Arbitration (Amendment) Act 2009 (or in accordance to Acts in Kenya in relation to Arbitration as may be enacted or amended from time to time

24.1.2 the Arbitral Tribunal shall consist of one (1) Arbitrator to be agreed upon between the parties failing which such Arbitrator shall be appointed by the Chairman of the time being of the Chartered Institute of Arbitrators (Kenya Branch) upon the application of either party.

24.1.3 The place and seat of Arbitration shall be in Nairobi. The language used shall be English.

24.1.4 The award of the arbitral tribunal shall be final and binding upon the parties to the extent permitted by law and any party may apply to a Court of competent jurisdiction for enforcement of such award.

24.1.5 Notwithstanding the above provisions of this clause, a party is entitled to seek preliminary injunctive reliefs or interim or conservatory measures from any court of competent jurisdiction pending the final decision or award of the Arbitrator."

5. According to clause 24 of the contract, the applicable procedure on appointment was as follows;

   i. the parties were to agree on one (1) Arbitrator; and

   ii. in default of such agreement, the Arbitrator was to be appointed by the Chairman of the time being of the Chartered Institute of Arbitrators (Kenya Branch) upon the application of either party.

6. A dispute arose between the parties after the interested party's employment was terminated. In order to resolve the dispute, the applicant wrote to the interested party's advocates on 5th August, 2021 requesting for a list of nominees for purposes of their appointment as sole arbitrator as set out in annexures "AM 2".

7. A list of nominees was shared with the applicant on 21st October, 2021 and again on 29th October, 2021 as set out in annexure "AM 3". The applicant's advocates acknowledged receipt of the said list of nominees on 3rd November, 2021 and sought the applicant's instructions in that regard.

8. On 19th November, 2021 the applicant through his advocates communicated that he was agreeable to the appointment of Mr. Calvin Nyachoti per annexure "AM 4".

9. On 8th February, 2022, the applicant received communication from the respondent indicating that at the Interested Party's instigation it proceeded with the nomination of a sole arbitrator per annexure "AM 5".

10. Despite being duly advised that there was no default in consensus between the parties, the respondent proceeded to nominate a sole arbitrator contrary to the provisions of the contract between the parties.

11. It is the ex-parte applicant's contention that the respondent appointed one Mr. Kamau Karori FCIArb. as an arbitrator on 3rd March 2022, contrary to the provisions of the contract between the parties.

The Respondent's case

12. According to the Respondent, the subject of dispute between the Interested Party and the Applicant was with respect to the Employment Contract dated 24th February 2020 between the two parties,

which contract contained an Arbitration Clause therein which set out that any dispute arising from the contract shall be settled as follows: -

> "24.7. Should any dispute arise between the parties hereto with regard to the interpretations, rights, obligations and/or implementation of anyone or more of the provisions of this agreement then, the parties to such dispute shall in the first instance attempt to resolve such dispute by amicable negotiations and should such negotiations fail to achieve a resolution, then either party may declare a dispute by written notification to the other, whereupon such dispute shall be referred to arbitration under the following terms:
>
> 24.1.1. Such arbitration shall be resolved under the provisions of the Kenya Arbitrations Act (Act 4 of 1995) as amended by the Arbitration) Amendment, 2009 (or in accordance to Acts in Kenya in relation to Arbitration as may be enacted or amended from time to time).
>
> 24.1.2. The Arbitral Tribunal shall consist of One (1) Arbitrator to be agreed upon between the parties failing which such Arbitrator shall be appointed by the Chairman of the time being of the Chartered Institute of Arbitrators (Kenya Branch) upon application of either party.
>
> 24.1.3. The place and seat of arbitration shall be in Nairobi. The language used shall be English.
>
> 24.1.4. The award of the arbitral tribunal shall be final and binding upon the Parties to the extent permitted by the law and any party may apply to a court of competent jurisdiction for enforcement of such award.
>
> 24.1.5. Notwithstanding the above provisions of this clause, a party is entitled to seek preliminary injunctive reliefs or interim or conservatory measures from any court of competent jurisdiction pending the final decision or award of the Arbitrator."

13. It is the Respondents case that the Applicant and the Interested Party had a valid binding contract between them and it is where the Respondent derived the power to appoint an arbitrator from.

14. It submits that the *Arbitration Act* sets out the procedure for challenging the appointment of an arbitrator at Section 14 of the *Arbitration Act* as follows:

> Subject to subsection (3), the parties are free to agree on a procedure for challenging an arbitrator.
>
> Failing an agreement under subsection (1), a party who intends to challenge an arbitrator shall, within 15 days after becoming aware of the composition of the arbitral tribunal or after becoming aware of any circumstances referred to in section 13(3), send a written statement of the reasons for the challenge to the arbitral tribunal, and unless the arbitrator who is being challenged withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(3) If a challenge under agreed procedure or under subsection (2) is unsuccessful, the challenging party may, within 30 days after being notified of the decision to reject the challenge, apply to the High Court to determine the matter….

15. It argues that being dissatisfied with the appointment of an arbitrator, the Applicant had the option of invoking Section 9 (2) of the *Fair Administrative Actions Act* which provides that:

> "The High Court or a subordinate court under sub-section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted"

16. The Respondent submits that the principle of doctrine of exhaustion is further founded on the provision of Article 159 (2) (c) the *Constitution* which states that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

17. It argues that no evidence has been tendered by the Applicant to show that it exhausted the available statutory remedies available to it as set out in Section 14 (2) of the *Arbitration Act*

18. It relies on the case *Geoffrey Muthin'a & another v Samuel Muuna Hen & 1756 others* P015] eKLR, where the Court of Appeal held that:

> "It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first off all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of the *Constitution* which commands Courts to encourage alternative means of dispute resolution.
>
> We find and hold that the exhaustion doctrine applies even where, as was argued by the appellants herein, what is sought to be challenged is the very authority of the organs before whom the dispute was to be placed."

19. The Respondent argues that what the Applicant seeks this court to do is rewrite the terms of a validly binding arbitral clause, which would not only offend the doctrine of exhaustion but contravene the underlying principle of party autonomy and enforceability as set out in the case of *Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd* (2017) eKLR where the Court of Appeal further that: -

> "We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties, they are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved."

Analysis and determination:

20. I have carefully The Notices of Preliminary Objections dated 31st May, 2022 and 3rd October 2022 and respective parties' rival submissions and the issues falling for determination are;

Whether this court has jurisdiction

21. That Section 10 of the *Arbitration Act* clearly stipulates that no court can intervene in matters governed by the Act except as expressly provided by the Act.

22. A party who wishes to challenge the appointment of an arbitrator has recourse under Section 14 of the *Arbitration Act* which stipulates as follows:

    i. Subject to subsection (3), the parties are free to agree on a procedure for challenging an arbitrator.

    ii. Failing an agreement under subsection (1), a party who intends to challenge an arbitrator shall, within 15 days after becoming aware of the composition of the arbitral tribunal or after becoming aware of any circumstances referred to in section 13(3), send a written statement of the reasons for the challenge to the arbitral tribunal, and unless the arbitrator who is being challenged withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

23. According to Section 3 of The *Arbitration Act*, an "arbitral tribunal" means a sole arbitrator or a panel of arbitrators. It is the ex-parte applicant's contention that the respondent appointed one Mr. Kamau Karori FCIArb. as an arbitrator on 3rd March 2022, contrary to the provisions of the contract between the parties.

24. Section 9 of The *Fair Administrative Action Act* provides for the procedure for judicial review as follows: -

> "(1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the *Constitution* .
>
> (2) The High Court or a subordinate court under sub-section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.
>
> (3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).
>
> (4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

25. Section 9 (3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

26. Section 9 (4) stipulates that, notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

27. In the case of *Communication Commission of Kenya & 5 others v Royal Media Services Ltd & 5 Others* [2014] eKLR Supreme Court made a finding that the principle of avoidance means that a Court will not determine a constitutional issue when a matter may properly be decided on another basis. The doctrine interrogates whether there are other ways of resolving a dispute outside a constitutional petition.

28. The doctrine is at times referred to as the Constitutional-Avoidance Rule. *Black's Law Dictionary*, 10th Edition at page 377 defines it as:

> "The doctrine that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion".

29. The applicant and the interested party are parties to an employment contract dated 21st February, 2020 that is marked "AM 1". Clause 24 provides as follows:

24. 1 Should any dispute arise between the parties hereto with regard to the interpretation, rights, obligations and/or implementation of anyone or more the provisions of this agreement then, the parties to such dispute shall in the first instance attempt to resolve such dispute by amicable negotiations and should such negotiations fail to achieve a resolution then either party may declare a dispute by written notification to the other, whereupon such dispute shall be referred to arbitration under the following terms:

24.1.1 Such arbitration shall be resolved under provisions of the Kenya *Arbitration Act* (Act 4 of 1995) as amended by the Arbitration (Amendment) Act 2009 (or in accordance to Acts in Kenya in relation to Arbitration as may be enacted or amended from time to time).

24.1.2 the Arbitral Tribunal shall consist of one (1) Arbitrator to be agreed upon between the parties failing which such Arbitrator shall be appointed by the Chairman of the time being of the Chartered Institute of Arbitrators (Kenya Branch) upon the application of either party.

30. *Council of County Governors v Attorney General & 12 others* [2018] eKLR. Applying and exhausting alternative dispute resolution mechanisms, is a condition precedent to filing of court action by either of the units of government. Only after applying and exhausting the available dispute resolution mechanisms should parties resort to judicial intervention.

31. The doctrine of avoidance is primarily viewed by courts from the position that although a court could take up a matter and hear it, it would still decline to do so if there is another mechanism through which the dispute could be resolved.

32. What I have understood to be the gravamen of the suit is the fact that the Respondent appointed an arbitrator unilaterally. The Respondents case is that administrative decision and action of the appointment was within the framework of the *Arbitration Act*. Being aggrieved by this, the Applicant should have invoked the dispute resolution mechanism within the *Arbitration Act* before moving the court.

33. Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 (2020) eKLR; This case elaborately dealt with the doctrine of exhaustion. The Court stated as follows: -

> "The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring

that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of the *Constitution* ."

34. *Mohamed Ali Baadi & Others v The Attorney General & 11 others*; It was held that while our jurisprudential policy is to encourage parties to exhaust and honour alternative forums of dispute resolution where they are provided for by statute the exhaustion doctrine is only applicable where the alternative forum is accessible, affordable, timely and effective.

35. Thus, in the case of Dawda K. Jawara v Gambia, it was held that: "A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint [in its totality]…the Governments assertion of non-exhaustion of local remedies will therefore be looked at in this light …a remedy is considered available only if the applicant can make use of it in the circumstances of his case."

36. However, a party who has not exhausted the internal dispute resolution mechanisms can still approach the court with leave in certain unique or unusual cases. In *Jeremiah Memba Ocharo v Evangeline Njoka & 3 others* [2022] eKLR the Court dealt with the exceptions to the doctrine of exhaustion. It expressed itself as follows: -

> " 59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In Republic v Independent Electoral and Boundaries Commission [IEBC] Ex Parte National Super Alliance (NASA) Kenya & 6 Others [2017] after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:
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>> What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the *Constitution* or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also Moffat Kamau and 9 others v Aelous (K) Ltd and 9 others.)
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> 60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the *Constitution* or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others* [2018] eKLR.

62. In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court."

37. In the instant suit, the Applicant did not make any Application seeking any exemption orders as alleged. The Court has nothing before it that would enable it to grant the exemption order.

38. The court has not been invited to apply its mind to any application to exempt the Applicant from the Application of Section 7 of the *Fair Administrative Action Act*. The applicant did not even attempt to advance an oral application nor seek the leave of the court to allow him to amend the Application so as include a relief for leave.

39. The court can only grant orders that have been sought by litigants. The decision to grant or not to grant a party leave to be exempted from the obligation to exhaust the available alternative dispute resolution mechanisms before approaching this court rests with the court under the *Fair Administrative Action Act* can only be arrived at after a court has been moved appropriately.

40. The Applicant must furnish the court with reasons as to why they are seeking to be exempted before the court grants such leave for obvious reasons. In order to exercise discretion judiciously, the court must be satisfied that the Applicant has made out a compelling case. The Respondent must no doubt be given a chance to state its case.

41. It is my finding that the Applicant did not make any application for exemption from Section 9 of The FAAA and the Applicant remains bound by Clause 24.1.1. of the employment contract which stipulates that such arbitration shall be resolved under the provisions of the Kenya Arbitrations Act (Act 4 of 1995) as amended by the Arbitration) Amendment, 2009 (or in accordance to Acts in Kenya in relation to Arbitration as may be enacted or amended from time to time). And Section 14 of the *Arbitration Act* which stipulates as follows:

    1. Subject to subsection (3), the parties are free to agree on a procedure for challenging an arbitrator.

    2. Failing an agreement under subsection (1), a party who intends to challenge an arbitrator shall, within 15 days after becoming aware of the composition of the arbitral tribunal or after becoming aware of any circumstances referred to in section 13(3), send a written statement of the reasons for the challenge to the arbitral tribunal, and unless the arbitrator who is being challenged withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

42. He has not furnished the court with an order granting him the exemption. Litigants who want the court to exempt them from the available alternative disputes resolution mechanisms must first seek the leave of court.

43. Approaching the court directly negates and waters down the contractual obligations that parties to a disputes agreed to be bound by. The court cannot ignore nor allow parties to walk away from contractual terms that they voluntarily agreed to live by.

44. A litigant who genuinely believes that it will not get justice if they pursue the available alternative dispute resolution mechanisms has the liberty to file an urgent application for leave.

45. Having made a finding that the Applicant has not exhausted the available alternative dispute resolution mechanisms, this court has no jurisdiction to determine the suit.

Disposition:

46. I uphold the 2 Notices of Preliminary Objection. The applicant has not exhausted the alternative dispute resolution mechanism as a result of which this Court lacks jurisdiction to hear the substantive suit and I so hold.

47. The applicant has not exhausted the existing statutory dispute resolution mechanisms provided for under section 14 of the *Arbitration Act* before invoking judicial review proceedings against the respondent.

48. In view of the foregoing, I hold that the instant application offends Section 9(2) of the Fair Administrative Actions and the doctrine of exhaustion as it has been filed prematurely. This court lacks jurisdiction.

49. I am bound by the Supreme Court Case of *Dickson Ngigi Ngugi v Commissioner of Lands* S.C Petition No. 9 of 2019 [2019] eKLR, [36] Jurisdiction goes to the root of any cause or dispute before a court of law. A court must exercise restraint to avoid overstepping its constitutional role in order to maintain its legitimacy. If a court has no jurisdiction, a judgment rendered therein does not adjudicate the dispute. It does not bind the parties, nor can it be made the foundation of any right. It is a nullity without life or authority. In short, it is coram non judice and amounts to a nullity because, as Nyarangi, JA famously said in the locus classicus, *Owners of the Motor Vessel "Lillian S" v Caltex Oil, (Kenya) Ltd* [1989] KLR 1, "jurisdiction is everything. Without it, a court has no power to make one more step".

    Order:

    1. The Notices of Preliminary Objections dated 31st May, 2022 and 3rd October 2022 are upheld.

    2. The Notice of Motion dated 11th April 2022 is struck out with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF SEPTEMBER, 2023.

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JOHN CHIGITI (SC)

JUDGE