REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

MISC CIVIL CASE NO 290 OF 2012

JEAN MIANGO.. APPLICANT

VERSUS

AFRICAN MEDICAL AND RESEARCH

FOUNDATION (AMREF) ....RESPONDENT

R U L I N G

1. In the application constituting this case (**notice of motion dated 24th May 2012)** the Applicant, **JEAN MIANGO**, seeks against the Respondent, **AFRICAN MEDICAL AND RESEARCH FOUNDATION** (**AMREF**) the main order that the Court do appoint an arbitrator for the parties herein from the membership of the ***Chartered Institute of Arbitrators, Kenya*** specializing on employment matters. The application is brought under the **Arbitration Act, Cap 49** (without specifying any section thereof) and also under **sections 1A** and **1B** of the **Civil Procedure Act, Cap 21.**

2. The grounds for the application stated on the face thereof are –

(i) That the parties have failed to agree on an arbitrator in terms of the ***Service Agreement*** between the parties.

(ii) That the arbitration clause in the Service Agreement does not provide a mechanism of appointing an arbitrator in case of disagreement between the parties.

(iii) That the dispute between the parties cannot be resolved without an arbitrator in terms of the Service Agreement.

(iv) That it is in the interest of both parties that an arbitrator be appointed so that the dispute between the parties may be resolved.

3. There is a supporting affidavit sworn by the Applicant to which a ***Service Agreement dated 17th December 2009*** between the parties is annexed. There is a dispute resolution clause in the agreement (***Clause 22***). There are also various correspondences between the parties annexed to the affidavit. The correspondence demonstrate the existing stalemate between the parties regarding appointment of an arbitrator.

4. The Respondent has opposed the application by replying affidavit filed on 13th July 2012. It is

sworn by one NANCY MURIUKI, the Respondent's Director of Human Resources. The grounds of opposition emerging from the affidavit are –

> (i) That the Service Contract annexed to the supporting affidavit is not the correct contract. A copy of a Service Contract which the deponent says is the correct one signed by the parties is annexed.
>
> (ii) That while it is conceded that the parties are unable to agree on the appointment of an arbitrator, the application is nevertheless premature "as the parties have not attempted to consider arbitrators other than the ones suggested in the correspondence" exchanged between the parties. In this light the Respondent has suggested one other arbitrator.

5. In response to the replying affidavit the Applicant filed a **supplementary affidavit** (sworn by him) on 7th February 2013. He deponed, *inter alia*, -

> (i) That the copy of the Service Agreement annexed to the replying affidavit is a forgery.
>
> (ii) That the Applicant signed only one copy of the Service Agreement, the original of which he retained while the Respondent retained only a photocopy thereof.
>
> (iii) That in effect the Applicant is still agreeable to appointment of an arbitrator by mutual agreement and suggested five others.

6. The Respondent filed a **further replying affidavit** on 6th May 2013, sworn by the same Nancy Muriuki, in response to the Applicant's supplementary affidavit. She denied that the Service Contract annexed to the replying affidavit was a forgery.

7. I have considered the submissions of the learned counsels appearing including the authorities cited.

8. One issue that was not raised or canvassed by the learned counsels is jurisdiction of this Court to hear and determine the present application. The substantive dispute between the parties is actually one between an employer and employee. The Service Agreement in issue is an employment contract. The dispute arose out of the Respondent's refusal to renew the Applicant's contract of employment. That is a dispute that is within the exclusive jurisdiction of the ***Industrial Court*** by virtue of **Article 165(5)** of the **Constitution** and **section 12** of the **Industrial Court Act, No 20 of 2011**. The High Court has no jurisdiction in the dispute.

9. The immediate issue in the present application is whether the High Court has jurisdiction to deal with it. The Arbitration Act, Cap 49 does not define "Court". But the jurisdiction given to court in section 12 of the Arbitration Act is donated to the High Court. This is the jurisdiction that the Applicant has invoked in this application.

10. However, section 15 of **Industrial Court Act, No. 20 of 2011**, which is a later statute, saves the power of the ***Industrial Court*** to adopt or implement, on its own motion or at the request of the parties, any other appropriate means of dispute resolution. The section provides –

> "**15. (1) Nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion or at the request of the parties, any other appropriate means of dispute resolution, including internal methods, conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2)(c) of the Constitution.**

(2) The Court may refuse to determine any dispute, other than an appeal or review before the Court, if the Court is satisfied that there has been no attempt to effect a settlement pursuant to subsection (1).

(3) Subject to any other written law, a certificate issued by a conciliator accompanied by the record or evidence of the minutes of the conciliation meetings giving reasons for the decisions as arrived at by the conciliator, shall be sufficient proof that an attempt has been made to resolve the dispute through conciliation, but the dispute remains unresolved.

(4) If at any stage of the proceedings it becomes apparent that the dispute ought to have been referred for conciliation or mediation, the Court may stay the proceedings and refer the dispute for conciliation, mediation or arbitration.

(5) In the exercise of its powers under this Act, the Court shall be bound by the national wage guidelines on minimum wages and standards of employment, and other terms and conditions of employment that may be issued, from time to time, by the Cabinet Secretary for the time being responsible for finance."

11. Enforcement of arbitration agreements, where they exist, is certainly one such appropriate means of dispute resolution.

12. It is thus my considered view that the present application ought to have been filed before the ***Industrial Court***. In this day and age, the appropriate thing to do is not to strike out the application but to transfer it to the ***Industrial Court*** to be dealt with there. It is so ordered. Costs shall be in the cause.

DATED AND SIGNED AT NAIROBI THIS 10TH DAY OF OCTOBER 2013

H. P. G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 11TH DAY OF OCTOBER 2013