REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION- MILIMANI

MISCELLANEOUS CAUSE NO.411 OF 2017

MONIQUE ORARO.....APPLICANT

-VERSUS-

AAR INSURANCE CO. LTD.....RESPONDENT

RULING

APPLICANT'S CASE:

The matter was brought forward by the Applicant through **Originating Summons** dated **10th October 2017** and filed on 13th October 2017 under **Section 12(3) (a) of the Arbitration Act, 1995, Rule 3(1) of the Arbitration Rules, 1997 and Section 3A of Civil Procedure Act.** The Originating Summons sought that upon service of the (OS) to the Respondents within 15 days of the same to enter appearance the Court to grant orders appointing **Muindi Brian Mailu**; an Advocate of High Court of Kenya with wide experience in Insurance law and an Arbitrator as a sole arbitrator to hear and determine a dispute that arose between the parties under a Sales Agency Agreement dated 15th December 2016 and/or any other order The Court may deem fit.

The application is grounded on the following facts as per the Applicant;

The Applicant served the Respondent as Unit Manager & Business Development Manager from **2015-2016** on yearly contracts.

The Applicant's contract was renewed from 1st January 2017 – 31st December 2017.The Respondent renewed the Applicant's contract on 15th December 2016 by way of a Sales Agency Agreement which was valid from 1st January 2017 to 31st December 2017. As part of the Sales Agency Agreement, the Applicant signed a separate agreement dated 7th December 2016 which indicated that the Respondent would pay her on a monthly basis as consideration for her agency role.

The Respondent abruptly with immediate effect and without requisite notice, terminated the Applicant's contract by a letter of 2nd May 2017 from the Respondent. The Applicant argued that she had not received any warning or notice of termination of contract yet the contract was to lapse on the 31st December 2017.

The Applicant claims that the letter of termination was in breach of **Clause 21 of the Sale Agency Agreement** which consequently caused the Applicant to suffer wrongful termination. She also claims non-payment of monies owing for that month.

In line with **Clause 25 of the Agreement,** it provides that;

> ***"Any difference or claim arising out of or relating to this agreement or the breach thereof shall be settled by arbitration. Each party shall within 14 days of either party requesting that a dispute proceed to arbitration appoint in writing one arbitrator and the arbitrators so appointed shall jointly appoint in writing an umpire."***

The Applicant instructed her advocates to write to the Respondent notifying them that a dispute had arisen and that they had wished to refer the dispute to arbitration as seen in letters dated 9th May 2017, 31st May 2017, 2nd June 2017, 12th June 2017 and 27th July 2017. The Respondent unequivocally displayed unwillingness to resolve the matter by reference to arbitration despite clear stipulations made in Clause 25 of the Agreement. The Applicant was left with no other option but to approach the Court for appointment of Arbitrator.

The Respondent did not reply to the letters until 31st July 2017 when they indicated that they were not amenable to arbitration proceedings. There being a dispute and the Respondent unwilling to resolve the matter by reference to Arbitration as per the Sales Agency Agreement, the

Applicant sought to appoint an arbitrator relying on **Section 10 of the Arbitration Act** that states that the court shall not intervene in the arbitration process except as provided in the Act and on the principle of party autonomy as reiterated in the case of ***Kenya Oil Co. Ltd vs Kenya Pipeline Civil Appeal No. 13[2010] eKLR***. The case held that;

> ***"The principle of party autonomy underpinning arbitration is premised on the platform that provided it does not offend structures imposed by law, parties in a relationship have the right to choose their own means of resolving disputes without recourse to the courts or by limiting the circumstances under which recourse to the courts may be had."***
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> ***"If the parties choose to exclude the court in their agreement then they should honour it".***

Ms Kabage informed the Court in oral submission that the Applicant relied on **Article 159 COK 2010** that provides for alternative dispute resolution processes and **Section 3,4 & 16 of Arbitration Act 1995** to support the fact that the particular case there is a dispute; the Applicant is contesting unlawful termination of contract and relies on the Sales Agency Contract marked '**MAO1**'annexed to the application. The Applicant relies on the Contract for Provision of Sales Services.

RESPONDENT'S CASE:

The Respondent submitted their **Grounds of Opposition** dated 13th November 2017 and filed on 4th December 2017 in response to the Applicant's Originating summons claiming that there was no dispute for reference to Arbitration. In their letter dated 31st July 2017, the Respondent replied to the Applicant's letters dated 31st May 2017 and 2nd June 2017 stating that they were not amenable to arbitration proceedings.

Mr.Mbichire for the Respondent claimed that there was no dispute which is capable of reference to arbitration under the Arbitration Act. The Respondent alluded to the fact that the agreement of the parties cannot oust the jurisdiction of the Court to hear and determine the matter; adopting **Clause 25** does not exclude determination by the Court. The Respondent was of the view that arbitration cannot be compelled in the circumstances of the case but only on mutuality of agreement by parties.

They relied on **Section 6(1) (b) of the Arbitration Act** that provides that;

> ***"(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds;***
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> ***b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration."***

The Respondent claims that there was no dispute to be referred to arbitration and that **Article 165 of the Constitution of Kenya** gives supervisory and unlimited original jurisdiction to the High Court to hear criminal and civil matters. The assertion is based on the fact that the Applicant only contests lack of **14 days'** notice and the Respondent issued notice as provided by **Clause 21a) c) & e)** of the Agreement; notice was issued accordingly. As to the money owed to her, the cheque was prepared and she refused to pick it. Thirdly, the Applicant relies on **2 Agreements**; the 1st Agreement she claims14days 'Notice and May 2017 salary. This is the Agreement with the Arbitration Clause. There is also a 2nd Agreement which has no arbitration clause and cannot be part of the Arbitration proceedings. The Respondent stated that the arbitration proceedings are too expensive and the matter ought to be heard in Court.

DETERMINATION

The Court considered the oral and written submissions and pleadings filed by parties and the following are the issues to be determined by the Court:-

1. Is there a dispute for determination between the Applicant and Respondent?

2. Should the matter be referred to arbitration?

3. Is the Court to appoint the Arbitrator proposed by the Applicant?

1. Is there a dispute for determination between the Applicant and Respondent?

In the case of ***Nanchang Foreign Engineering Company (K) Limited v Easy Properties Kenya Limited [2014] eKLR;*** the judge observed that:

> ***"The Defendant's argument was really that since there was an arbitration clause, the matter should be referred to arbitration. Such referral is not automatic. As has been seen in Section 6 (1) (b) of the Arbitration Act, 1995, it is a condition precedent that there be a dispute capable of being referred to arbitration****…"*

In the case ***Addock Ingram East Africa Ltd vs Surgilinks Ltd;*** Musinga J (as he then was) held as follows;

> ***"Before a court can order parties to go to arbitration it has to be satisfied that there is indeed a dispute over the claim in issue…"***

In the case of ***Health & Water Foundation Vs Care International In Kenya [2014] eKLR*** ***Gikonyo J*** *stated as follows;*

> ***"According to the Applicant several issues arose out of the contract which it was seeking settlement of which signifies that there exists a dispute between them on the said Audit Report and has annexed some correspondences to demonstrate the dispute. But what I find to be surprising is that the Applicant…chose not to provide details of dispute; instead annexed correspondences... The Applicant has not clearly stated the dispute in question; it has only made broad statements which are at a very high level of generalization such as...various issues arising out of the contract***
>
> ***The Applicant does not agree with the Final Report…***
>
> ***Apart from lack of any demonstration of the dispute, the Applicant seems to have left to the Court to discern the dispute therein. That is quite undesirable approach in any judicial proceeding and can only be exhibited by an indolent suitor.''***

Let the Court consider what parties presented to Court; the Plaintiff/Applicant in her Supporting Affidavit to the (OS) stated that she was engaged by the Defendant on terms detailed in the following agreements;

a) As Unit Manager vide Agreement dated 1st January 2015;

b) Renewed contract on 1st January 2016 and she was now Business Development Manager;

c) Renewed contract on 15th December 2016 for period 1st January 2017- 31st December 2017 as Business Development Manager; The instant agreement is annexed as 'MAO'-1 to the application;

d) An Agreement of 7th December 2016 by the Defendant to pay office disbursements commission on production of new and renewal business;

e) Annexed are copies of pay-slips from 16th January 2017- 30th April 2017;

f) Annexed letter of termination of 2nd May 2017;

g) Annexed are letters from Plaintiff's advocate to the defendant to refer the matter for arbitration vide Clause 25 of the Agreement.

The Respondent on the other hand, only raised Grounds of Opposition filed on 4th December 2017 and contested the issue of whether there is a dispute and in their view there was no dispute.

There are several issues that have arisen from the contract(s) of Plaintiff's engagement by the Defendant and the Plaintiff's termination from terms of engagement as evidenced by the various agreements mentioned and/or annexed. These issues constitute a dispute as signified by the various agreements and correspondences attached to the Applicant's (OS).

The issues range from whether she was employed by the defendant or was independent contractor and therefore agent of the defendant; what were the agreed terms of engagement, compliance of those terms, was termination legal & lawful under terms of engagement and whether the Applicant is or not entitled to redress and if so what remedy and in what amount if any.

From the defendant's end they contest whether the issues arising are from 1 Agreement or 2 agreements that the Applicant is relying on and that the issue of termination was resolved with the amount in lieu of notice and May 2017 salary being ready in form of a cheque for collection.

He who alleges must prove is stipulated in **Section 107 of the Evidence Act Cap 80**.The burden of proving that there existed a dispute lies with the Plaintiff and the Defendant to prove there is no dispute to be referred to arbitration. The plaintiff presented facts of engagement with the Defendant and contests termination and seeks redress. The defendant has not denied nor accepted the existence of its obligation to make payments due to the Applicant, as held in the case of ***TM AM Construction Group (Africa) Vs Attorney General [2001] 1 EA 282***.

This Court is alive to the fact that a matter will not automatically be referred to arbitration until the issue of whether there is a dispute is considered. From the above outlined facts and documents annexed and submissions by parties through Counsel, there exists a dispute between the Plaintiff and defendant for dispute resolution and as per the parties choice of forum they opted for arbitration.

2. Should the matter be referred to arbitration?

Section 3 of Arbitration Act defines an arbitration agreement as

> ***"an agreement by the parties to submit to arbitration all or certain disputes which have arisen or may arise between them in respect of a defined legal relationship whether contractual or not."***

In a contract between the parties they will decide on their choice of forum and choice of law with regard to dispute resolution. The parties by the Sales Agency Agreement of 15th December 2016 between the Plaintiff and the Defendant the choice of forum clause is the **arbitration clause at paragraph 25 of the Agreement** which reads;

> ***"Any difference or claim arising out of or relating to the agreement or breach thereof shall be settled by arbitration. Each party shall within 14 days of either party requesting that a dispute proceed to arbitration appoint in writing one arbitrator and the arbitrator so appointed shall jointly appoint in writing an umpire.''***

Which requires the parties to resolve their disputes through an arbitration process. The parties agreed to all or any claim arising out of or relating to the Agreement. The termination arises from the agreement and other claims of refunds, disbursements, commissions related to the claim are subject of dispute resolution.

In ***Nyutu Agrovet Limited Vs. Airtel Networks Limited [2015] eKLR*** **the Court of Appeal held:**

> ***"Arbitration as a dispute resolution mechanism is not imposed on parties. They choose it freely when they incorporate the arbitration agreement into their contract, and at times even include the finality clause as was the case here."***

The Court finds that parties agreed to the choice of forum on their own volition and integrated it in the **Sales Agency Agreement**. In fact it was /is mandatory by use of 'shall'. The Defendant submitted that the Arbitration clause does not oust the jurisdiction of the Court to hear and determine the matter. The Defendant further submitted that arbitration cannot be compelled in the circumstances and is only available on mutuality of parties.

With respect to Counsel for the defendant; the mutuality of agreement of parties on arbitration as the choice of forum is evidenced by contracting parties of the Sales Agency Agreement which was between both Plaintiff and Defendant duly executed hence there is privity of contract and both parties are bound by the terms of the contract more so **Clause 25** as is in issue in these proceedings.

The only issue rightfully raised by defendant's Counsel is whether a dispute for arbitration exists and as considered above it does exist.

Secondly, with regard to the claim that the arbitration clause does not oust the jurisdiction of the Court to hear and determine the matter is not true and not the legal position. By entering into an arbitration agreement, parties express their intention that all disputes between them be referred to and settled by arbitration. This choice of forum manifests the parties' dispute resolution mechanism. With respect to the parties' agreement, court proceedings cannot be brought to Court on merits of the disputes governed by the Arbitration clause.

> **Section 10 of the Arbitration Act provides for minimal and specific instances of intervention or no interference by courts in matters that concern arbitration unless provided for in the Act** as was reiterated in ***Kenyatta International Convention Centre (Kicc) v Greenstar Systems Limited [2018] eKLR*** Court held**:**
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> ***"Indeed, Section 10 of the Arbitration Act, No. 4 of 1995 expressly stipulates that: "Except as provided in this Act, no court shall intervene in matters governed by this Act."***

In the case of**;** ***Prof. Lawrence Gumbe & Another vs. Honourable Mwai Kibaki & Others, High Court Miscellaneous No. 1025 Of 2004,*** **Nyamu, J.** held that**:**

> ***"Our section 10 is based on the United Nations Model Law on arbitration and all countries who have ratified it recognize and enforce the autonomy of the arbitral process. Courts of law can only intervene in the specific areas stipulated in the Act and in most cases that intervention is usually supportive and not obstructive or usurpation-oriented..."***

The Act provides these instances as;

> **a) Section 6- stay of legal proceedings;**
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> **b) Section 7 –Interim measures by the Court;**
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> **c) Section 12- Appointment of Arbitrators;**
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> **d) Section 35- Setting aside Arbitral award;**
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> e) **Section 36 – Enforcement & recognition of arbitral award**;
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> f) **Section 37** – grounds for retrial of recognition or enforcement;
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> g) **Section 39** – Questions of law arising in domestic arbitration.

Therefore, hearing and determination of the instant dispute cannot be heard by the Court and ought to be heard and determined in arbitration proceedings.

Is the Court to appoint the Arbitrator proposed by the Applicant?

The Plaintiff/Applicant wrote through Counsel to the defendant letters dated 9th May 2017, 31st May 2017, 2nd June 2017, 12th June 2017 and 27th July 2017 on unlawful/ unfair termination of the contract and proposal for arbitration and appointment of Arbitrator. The defendant

replied by letter of 31st July 2017 and stated that the defendant was not amenable to arbitration proceedings.

The Plaintiff wrote on 14th August 2017 and notified the defendant that the application for appointment of arbitrator would be filed.

Section 12 (4) Arbitration Act provides;

> ***"If the party in default does not within 14 days after notice in Section 12 (3) has been given;***
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> ***a) Make the required appointment and***
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> ***b) Notify the other party that he has done so,***
>
> ***The other party may appoint his Arbitrator as sole Arbitrator and the award of that Arbitrator shall be binding on both parties as if he had been so appointed by agreement."***

There is evidence on record, that the Defendant was notified was in writing of the dispute particularized in the letter of 31 st May 2017 and finally replied that they were not amenable to arbitration.

This court from the evidence on record and submissions by respective Counsel of the parties, finds that there is a dispute for hearing and determination in arbitration proceedings. This is the choice of forum in the **Arbitration Clause** by the parties under the Sales Agency Agreement executed between the parties and therefore enforceable by the parties. The Arbitration Clause ousts the jurisdiction of the Court to hear and determine the matter.

DISPOSITION

> **1. There is a dispute between the plaintiff and Defendant evidence by the Agreements and correspondences annexed to Applicant's Application of Originating Summons (O.S) of 13th October 2017;**
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> **2. The matter shall be resolved in arbitration proceedings;**
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> **3. The Plaintiff and Defendant shall appoint the Arbitrator(s) as per Clause 25 of the Sale Agency Agreement within 60 days from today;**
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> **4. In default the plaintiff shall in compliance with Section 12 of Arbitration Act 1995 appoint Sole Arbitrator as per paragraph 1 of the OS of 13th October 2017;**
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> **5. If parties are in disagreement on the appointment of the arbitrator, the chairman of the Institute of Arbitrators shall appoint an arbitrator;**
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> **6. The Applicant's application is upheld and Costs shall be paid by Respondent to the Plaintiff.**
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> **7. Parties are entitled to exercise right of appeal.**

DATED, SIGNED & DELIVERED IN OPEN COURT ON THIS 11th MARCH 2019

M. W. MUIGAI

JUDGE

IN THE PRESENCE OF;

MS KABAGE FOR THE PLAINTIFF

MR MBICHIRE FOR THE DEFENDANT

COURT ASISSTANT JASMINE