Mureu v Ressourcethica Kenya Limited (Cause E463 of 2023)
[2024] KEELRC 1165 (KLR) (3 May 2024) (Ruling)

Neutral citation: [2024] KEELRC 1165 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E463 OF 2023

SC RUTTO, J

MAY 3, 2024

BETWEEN

JANE WANGARE MUREU ..... CLAIMANT

AND

RESSOURCETHICA KENYA LIMITED ..... RESPONDENT

RULING

1. The Respondent/Applicant has moved this Court vide a Notice of Motion Application dated 10th August 2023 seeking an order to stay the suit pending arbitration.

2. Grounds in support of the Application are that the contract of employment has an arbitration clause. That Section 11 of the *Arbitration Act* provides that the parties to an agreement are entitled to appoint an arbitrator and the process of appointment is provided for in Section 12 of the Act.

3. That further, Section 12 of the *Arbitration Act* recognizes party autonomy by giving each party an opportunity to participate in the appointment of the arbitrator, and Section 12(3) of the Act provides what happens when a party defaults, or does not participate in the appointment.

4. In response to the Application, the Claimant filed a Replying affidavit dated 9th February 2024. The Claimant avers that the Application is actuated by malice and bad faith. It is the Claimant's contention that at no point, following receipt of her demand letter did the Applicant attempt any negotiations or amicable resolution of her grievances. Rather, by a letter dated 1st February 2023, the Applicant's advocates informed hers that should she proceed to institute any proceedings and that they had instructions to accept service.

5. She is advised that the presence of an arbitration clause does not automatically qualify a matter to be referred to arbitration. Rather, section 6 of the *Arbitration Act*, 1995 and Order 46 Rule 3 of the Civil Procedure Rules, 2010 require that upon such application by a party on reliance of a clause in an agreement, it is incumbent upon the court to determine whether there is in fact an agreement capable

of enforcement and whether a dispute or difference has arisen as contemplated by the agreement which can be referred to arbitration. She is further advised that the Applicant has the burden to prove that these conditions have indeed been established.

6. That she is further advised that in respect of the agreement that the Applicant now seeks to rely on, this Honourable Court is obliged to consider whether there are any legal impediments to the validity, operation or performance of the said agreement; whether there is indeed a dispute agreed to be referred to arbitration; and should this Honourable Court establish that there is indeed an agreement that is operable, whether the Applicant is performing it in good faith within the dictates of Article 159 (3) of *the Constitution* of Kenya, 2010.

7. The Claimant further deposes she is advised that there is no discernible dispute that is capable of reference to arbitration, as required of any application for referral, as the Applicant has not adduced any facts to this Honourable Court upon which the Court may conclude the existence of such a dispute. According to the Claimant, this falls short of the standard under Section 6 of the *Arbitration Act* and Order 46 Rule 3 of the Civil Procedure Rules, 2010.

8. She further avers that the clause relied on, establishes actions that ought to take place before the requirement to arbitrate can be activated. She contends that there ought to be attempts at an amicable resolution. She believes this opportunity presented itself when the Applicant received her demand letter dated 23rd January 2023. However, the Applicant did not make such attempts. She believes that granting the Application will be inequitable in light of the Applicant's conduct.

9. She is further advised, which advice she believes to be correct that the clause relied on is incapable of being enforced as it does not specify the governing law, the manner in which the arbitrator is to be appointed, or the rules that shall apply to the arbitration. She therefore believes that the sole intent of this Application is to drive her from the seat of justice.

dSubmissions

10. The Application was canvassed by way of written submissions. On its part, the Applicant has submitted that no amicable settlement has been attempted and no arbitration has been started. The Applicant further submits that the tenor and import of Article 159(2) of *the Constitution* as read together with Section 6(1) of the *Arbitration Act* is that where parties to a contract consensually agree on arbitration as their dispute resolution of choice, the courts are obliged to give effect to the agreement. In support of the Applicant's position, reliance has been placed on the case of Zaidi v Lake Turkana Wind Power Limited (2023) KEELRC 3414 (KLR) and Salmin v Taz Technologies Ltd (2023) KEELRC 3281 (KLR).

11. In conclusion, the Applicant posits that arbitration issues are essentially contractual matters and the parties in dispute should be accorded the widest opportunity for seeking resolutions outside the procedure of the judicial process.

12. At the outset, the Claimant submits that the Application is incurably incompetent as it simply seeks a prayer staying the proceedings without a prayer seeking that the matter be referred to arbitration.

13. It has further been submitted by the Claimant that where parties agree to commit agreed disputes between them to arbitration, such clause or agreement should be so clear that any party wishing to invoke it is clear on what steps it ought to take, such as who the arbitrator or what the method of choosing the arbitrator will be. In this regard, the Claimant has sought to rely on the case of Danki Ventures Limited v Sinopec International Petroleum Services Limited ML HCCC No. 158 of 2014 (2014) eKLR.

14. Still on this issue, the Claimant argues that in the absence of an agreement between the parties, it is not in the power of this Court to rewrite the agreement and take upon itself the role of appointing an arbitrator. That consequently, the said clause is inoperable.

15. Citing the case of County Government of Kirinyaga v African Banking Corporation Ltd (2020) eKLR, the Claimant further submits that neither the grounds of the Application nor the Affidavit in support thereof sets out the existence of any dispute between the parties that is capable of referral to arbitration if at all.

16. The Claimant states in further submission that a proper reading of clause 17 of the Agreement discloses that it was a requirement that prior to the commencement of arbitration, parties to the dispute must have attempted to settle the matter amicably through reconciliation and in the event that the attempts were unsuccessful, then the right to commence arbitral proceedings would accrue. It is the Claimant's position that no such steps were taken. That further, the Applicant has not adduced any evidence indicating it tried to resolve any of the issues with the Claimant through reconciliation. To buttress this line of argument, the Claimant has referred the Court to the case of Nanchang Foreign Engineering Company (K) Limited v Easy Properties Kenya Limited (2014) eKLR.

17. The Claimant further submits that once she sent a demand letter dated 23rd January 2023, for the Applicant to make good her final dues, the Applicant purported to terminate her employment once again on account of absenteeism. That at no time between when the demand was made to when this claim commenced, did the Applicant attempt to seek an amicable resolution of the Claimant's grievances. The Claimant further contends that contrary to the requirements of the clause it now seeks to rely on, the Applicant has not engaged in any good faith efforts to resolve this matter whether in reconciliation or otherwise.

18. In closing the Claimant has submitted that the Applicant has not satisfied the prerequisites set out in Section 6(1) of the *Arbitration Act*.

Analysis and Determination

19. Arising from the Application, the response thereto and the rival submissions, it is evident that the singular issue for determination is whether the Court should allow the Application thereby staying the main suit and referring the matter to arbitration.

20. The instant Application is anchored on clause 17 of the Contract of Employment which provides as follows:

> "The parties shall seek to settle all differences arising out of or in connection with the implementation of this agreement in an amicable manner. However, should all attempts at amicable reconciliation fail, the same shall be referred for arbitration under the Laws of Kenya. The decision of the arbitrator shall be final."

21. A clear reading of the aforementioned clause reveals that it contains a condition precedent before the matter is referred to arbitration. In this regard, parties are required to seek to settle all differences in an amicable manner and it is only where such attempts fail that the matter is referred to arbitration.

22. From the record, there is no evidence that the parties have attempted to settle the dispute amicably. This is clearly demonstrated by the fact that through her Advocates, the Claimant issued the Applicant with a demand letter dated 23rd January 2023, seeking to be paid the sum of Kshs 4,963,948/= and in default thereof, threatened to commence legal proceedings. Despite the demand, the Applicant did not engage the Claimant with a bid to have the matter resolved one way or the other. Instead, the Applicant

through its Advocates, gave the Claimant's Advocate the green light to proceed with the matter as they confirmed instructions to accept service.

23. In light of the foregoing, I am inclined to agree with the Claimant's submissions that the Applicant has not engaged in any efforts to resolve her grievances.

24. Therefore, and as it stands, it would be premature to refer the dispute to arbitration as the condition precedent under clause 17 of the contract of employment has not been satisfied.

25. On this issue, my thinking aligns with the determination in Nanchang Foreign Engineering Company (K) Limited v Easy Properties Kenya Limited [2014] eKLR in which the Court observed as follows:

> "(22) It is very clear parties from the aforesaid clause cannot proceed for determination in an arbitral proceeding before an amicable settlement had been attempted. Attempt of an amicable settlement was a condition precedent before the dispute was referred to arbitration. Neither the Plaintiff nor the Defendant provided the court with any evidence to show that they had indeed attempted such amicable settlement. On this ground alone, the Defendant's application would automatically fail as referral to arbitration would be premature."

26. The other issue that springs to the fore is whether there is a dispute capable of referral to arbitration. In the Application, the Applicant did not state the extent to which it was challenging the Claim and hence the nature of the dispute it was desirous to refer to arbitration. In Nanchang Foreign Engineering Company (K) Limited v Easy Properties Kenya Limited [supra] eKLR, the Court had this to say when confronted with a similar issue: -

> " Whereas it was not required to file a defence before it could file the application herein, it was under a duty to satisfy the court that there would be value added if the matter was referred to arbitration or amicable settlement. It was not sufficient for it to contend that since there was a dispute resolution clause, the matter should as matter of course be referred to arbitration or amicable settlement...The court has arrived at the conclusion that it would not be in the interests of justice to stay the proceedings herein as had been sought by the Defendant for the reason that it did not demonstrate that there was indeed a dispute that was capable for referral to arbitration."

27. As rightly observed by the Claimant, neither the grounds of the Application nor the Supporting Affidavit sets out the existence of any dispute between the parties that is capable of referral to arbitration.

28. Needless to say, the Applicant has not satisfied its burden under Section 6(1) (b) of the *Arbitration Act* that there is in fact a dispute between the parties with regard to the matters agreed to be referred to arbitration.

29. The Claimant has further challenged the Application on the ground that the arbitration clause does not provide for the specific rules under which the arbitration would be carried out. With respect to this, the arbitration clause provides that "should all attempts at amicable reconciliation fail, the same shall be referred for arbitration under the Laws of Kenya."

30. As it is, the clause is quite unclear and does not provide how arbitration is to be administered and the manner in which the arbitrator is to be appointed. Indeed, the Applicant appears to be admitting this fact under ground 2 of the Application hence has resorted to the process stipulated under Section 12

of the *Arbitration Act*. In my considered view, the provisions of Section 12 only come into play where parties have agreed on the salient issues for instance the number of arbitrators and the mode of their appointment.

31. On this issue, I concur with the determination by the Court in the case of *Wanjala & 2 others v Registrar of Companies & 2 others; Okoa Finance Limited (Interested Party) (Petition E001 of 2021*) [2022] KEHC 48 (KLR) (Commercial and Tax) (31 January 2022) (Ruling) that Arbitration under the *Arbitration Act* is a consensual and party driven process where the parties are expected to provide for the appointment or mode of appointment of the arbitrator.

32. The Court proceeded in the aforementioned matter to hold that:

> " Hence section 12 of the *Arbitration Act* dealing with appointment of arbitrators, does not supplant the parties' right to appoint or prescribe the mode of appointment of the arbitrator but only sets out a default procedure for the court to intervene should the (sic) either fail to comply with the contractual provisions for appointment of an arbitrator."

33. I wholly ascribe to the position taken by the Court in the aforementioned case and hold that as framed, the arbitration clause is incapable of being enforced.

34. What's more, it is apparent that the Applicant has not expressly sought an order to have the matter referred to arbitration. As such, I cannot help but question the basis under which the Court would be staying the suit pending arbitration.

35. In light of the foregoing reasons, the Application is declined with costs to the Claimant.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF MAY, 2024.

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STELLA RUTTO

JUDGE

In the presence of:

Ms. Wanjiru for the Claimant /Respondent

Ms. Ndegwa for the Respondent/Applicant

Millicent Kibet Court Assistant

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE