



**Ngigi v Youth Dynamix Kenya Limited (Cause E258 of 2021)
[2024] KEELRC 1669 (KLR) (17 May 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1669 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E258 OF 2021**

SC RUTTO, J

MAY 17, 2024

BETWEEN

ANN WANJIRU NGIGI CLAIMANT

AND

YOUTH DYNAMIX KENYA LIMITED RESPONDENT

RULING

1. What comes up for determination is the Respondent/Applicant's Chamber Summons Application dated 14th November 2023 seeking the following orders:
 - a. That this Honourable Court be pleased to stay all proceedings between the Claimant and the Respondent herein pending arbitration.
 - b. That this Honourable Court do refer the dispute between the parties herein to arbitration.
 - c. That costs of the Application be provided for.
2. The Application is supported by the grounds on the face of it and the affidavit dated 14th November 2023 by David Ngaruiya, one of the Applicant's Directors and Shareholder. He avers that the Applicant is an independent and duly incorporated limited company under the Companies Laws by the Companies' Registrar within the Republic of Kenya since 23rd of June 2006 with three Directors/Shareholders, David Ngaruiya Githegi, Adam Anthony Nyakundi and Ann Wanjiru Ngigi.
3. That upon the establishment of the Applicant, the Directors/Shareholders agreed to have the Claimant herein as the Managing Director of the Applicant as per Articles 15, 16 and 17 of the Company's Articles of Association.
4. Mr. Ngaruiya further deposes that following the above appointment, the Claimant was tasked with the day-to-day management of the business on behalf of the Applicant. This arrangement was reached specifically in accordance with Article 17 of the Company's Articles of Association.



5. In or around 2015, issues arose as to the financial management of the Applicant in terms of diminishing profit margin despite the continuous growth of the company, the manner of handling dividends and the participation in the Applicant's profits.
6. Subsequently, the Directors called for a board meeting on 25th March 2019, wherein it was resolved that the Claimant step aside as Managing Director as well as relinquishing her signatory rights of the company's bank accounts to allow for the continuation of the company's operation, pending investigation and final determination of the impugned financial, operational and management issues.
7. The present matter oscillates on the issue of the Claimant seeking compensation from the Applicant by virtue of her being a Managing Director.
8. That flowing from the above claim, the Claimant acknowledges her appointment as the Managing Director per Articles 15, 16 and 17 of the Company's Articles of Association and proceeds to claim for amounts accruing from specifically Article 16 of the Articles of Association.
9. He is advised by the Applicant's Advocates on record that in absence of any amicable settlement, after the Claimant issued her demand for compensation from the Applicant, it is automatic that commencement of Arbitration proceedings should be the next step under Article 31 of the Articles of Association.
10. Mr. Ngaruiya deposes that the Claimant has proceeded to by-pass the Arbitration stage specified under the MEMARTS between the parties herein hence the present proceedings should be stayed pending reference to and the completion of the Arbitration.
11. It is Mr. Ngaruiya's assertion that the impugned subject matter is arbitrable hence falls within the purview of arbitration. That the Arbitration Clause has not been rendered nugatory, and this Honourable Court is not the first port of call to have the dispute settled.
12. He further avers that this Honourable Court has the jurisdiction to refer the matter to arbitration at any stage of the proceedings if it becomes apparent that the dispute ought to have been referred for arbitration.
13. In response to the Application, the Claimant filed a Replying Affidavit dated 14th February 2024. She avers that the Applicant was incorporated in the year 2006 as part of Teenwise Media Group of Companies which was also comprised of Teenwise Media Ltd incorporated in 2001 and Centrestage Marketing Limited incorporated in 2003.
14. By a resolution passed in the year 2006, she was appointed as Managing Director of the Applicant. The resolution further allocated Teenwise Media Ltd to David Ngaruiya and Centrestage Marketing Ltd to Adam Nyakundi who were co-directors with her in the Applicant company. This was geared towards enhancing business specialization to enable the growth of the different individual companies.
15. Although she was a Director and Shareholder with 333 shares in the company, the other Directors, David Ngaruiya and Adam Nyakundi jointly held majority shares in the Applicant company.
16. That her appointment as Managing Director of the Applicant company was, pursuant to Article 15 of the Articles of Association and it was agreed, pursuant to Article 16 of the Articles of Association, that she would receive remuneration by way of a salary.
17. Upon taking up the position of Managing Director, she carried out her duties diligently and ensured that the Applicant was operating profitably despite facing challenges at the beginning, having gone three (3) years without business.



18. Out of her prudent management, the Applicant company grew into a successful enterprise that was able to purchase assets, pay Directors monthly remuneration of approximately Kshs.1,500,000.00 in the years 2015, 2016, 2017 until September 2018, and achieve an exemplary turnover of Kshs.560,000,000.00.
19. The other two companies had been running at losses from the year 2010 to 2017 and the Applicant company which she managed, had to bear the burden of taking care of their financial obligations. That as confirmed at a meeting held on 28th January 2019, one of the companies, Centerstage Marketing Limited had a "liquidity gap."
20. At the board meeting held on 25th March 2019, the other Directors raised unfounded allegations.
21. Based on these unfounded allegations, the other Directors of the Applicant resolved that she should temporarily step down as Managing Director to allegedly enable a forensic audit of the Applicant company.
22. The Company Secretaries present in the meeting cautioned that she should have been given reasons for the decision to have her step aside and that she should have been allowed ample time to respond before the said meeting.
23. On 25th April 2019, another meeting was convened and the other two (2) Directors of the company resolved to revoke her appointment as the Managing Director of the Applicant with immediate effect and with no valid reasons given.
24. It was also resolved by the majority Directors that she would continue enjoying her privileges and benefits as an employee of the company.
25. Upon enquiring what would happen to her job and her salary, she was directed to the Human Resource Manager for further action.
26. Her claim for compensation before this Honourable Court is based on the failure of the Applicant to conduct proper investigations and stems from the unfair, unlawful and wrongful termination of her employment with the Applicant as Managing Director, following the resolution of the majority directors of the Applicant company in the meeting held on 25th April 2019, in which meeting it was acknowledged that she was an employee of the Applicant.
27. She is advised by her Advocates on record, which advice she verily believes to be true, that the provisions of Article 31 apply to a dispute between the Applicant and its members touching on the construction of or anything done in the pursuance of the said Articles.
28. The Claimant contends that the instant dispute is between her and the Applicant, not in her capacity as a member of the company, but as an employee of the company. She maintains that the dispute herein is not arbitrable but subject to the jurisdiction of this Honourable Court.
29. She is advised by her Advocates on record, which advice she verily believes to be true, that without prejudice to the foregoing and contrary to the contention that this Honourable Court has jurisdiction to refer the matter to arbitration at any stage of the proceedings, having entered appearance and subjected itself to the proceedings before this Honourable Court by filing a Response to the claim and witness statement, the Applicant is estopped by the provisions of Section 6(1) of the Arbitration Act from seeking to stay the instant proceedings and refer the matter to arbitration.
30. She termed the Application an abuse of the court process and the latest ploy by the Applicant to scuttle the hearing of the claim before the Court.



31. The Applicant through Mr. Ngaruiya, filed a Further Affidavit dated 27th February 2024, in response to the Claimant's Replying Affidavit. He deposes that the matter falls within the ambit of Article 31 since the said dispute arose from the Directors revoking the Claimant's position pursuant to Articles 15 to 17 of the Applicant's Articles of Association.
32. That it's an admitted fact that there is neither an employment contract, Director's contract, Board Charter nor a shareholders' agreement indicating the employment of the Claimant as the Managing Director.
33. Mr. Ngaiya further avers that in her Memorandum of Claim, the Claimant has not explicitly asserted her status as an employee but has acknowledged being appointed as the Managing Director of the Applicant as per Articles 15 to 17 of the Articles of Association.
34. He reiterated that Article 31 is an all-inclusive arbitration clause and as such, it takes care of all matters between the Directors and Shareholders against the company.

Submissions

35. The Application was canvassed by way of written submissions. Both parties filed written submissions and I have considered the same.

Analysis and Determination

36. 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.
37. The instant Application is anchored on Article 31 of the Applicant's Articles of Association which provides as follows:

“Whether any difference arises between the company on the one hand and any of the members, their executors, administrators, or assigns on the other hand, touching the true intent or construction, or the incidents, or consequences of these Articles, or of the statutes, or touching anything then or thereafter done, executed, omitted, or suffered in pursuance of these Articles, or of the statutes or touching any breach, or alleged breach, or alleged breach of these Articles or any claim on account of any such breach or alleged breach, or otherwise relating to the premises, or to these Articles or to any statutes affecting the company, or shall be referred to the decision of an arbitrator, to be appointed by the parties in difference, or if they cannot agree upon a single arbitrator to the decisions of two arbitrators of whom one shall be appointed by each of the parties in difference. Arbitration shall be subject to the *Arbitration Act.*”

38. According to the Applicant, Article 31 is an all-inclusive arbitration clause and takes care of all matters between the company and any of the members. The Applicant further contends that the dispute is between the Claimant as a member of the company and the Applicant as the company. It is the Applicant's submission that referring the matter to arbitration is in consonance with the principle of party autonomy as recognised in *Meshack Kibunja & 3 others vs Kirubi Kamau & 5 others (2021) eKLR*.
39. On her part, the Claimant avers that she has brought the claim in her capacity as an employee of the company and not as a member of the company. The Claimant contends that the provisions of Article 31 apply to a dispute between the Applicant and its members and not the Applicant and its



- employees. It is the Claimant's contention that the dispute herein is an employment dispute brought in her capacity as an employee of the company and not as a member of the company and therefore does not fall under the arbitrable dispute as provided for under Article 31.
40. My understanding of Article 31 aforementioned, is that the disputes contemplated to be referred to arbitration are those involving the company and its members.
 41. As the Applicant rightly points out, under Section 92 of the *Companies Act*, a person becomes a member of a company by subscribing to that company's Memorandum and Articles of Association.
 42. This being the case and there being no contest that the Claimant was a member of the Applicant, it follows that Article 31 as crafted, was intended to take care of such disputes arising from the relationship of a member and the company.
 43. Revisiting the Memorandum of Claim, it is apparent that the Claimant has brought the instant dispute in her capacity as a Managing Director of the Applicant. Her claim is for unfair termination and notably, the reliefs she is seeking are those that ordinarily flow from an employment contract. The Claimant has further annexed a copy of a payslip to her claim in which she is referred to as an "Employee".
 44. What I can deduce from the foregoing, is that the Claimant was wearing two hats at the Applicant company, that of a member and Managing Director. These were distinct relationships in my view.
 45. In this regard, I am inclined to agree with the Claimant that the dispute has been brought in her capacity as the Managing Director of the Applicant as opposed to her capacity as a member of the Applicant.
 46. This being the case, the dispute herein is not arbitrable under Article 31 of the company's Articles of Association.
 47. The other issue that comes to the fore is the timing of the Application. On her part, the Claimant contends that the Application has not been promptly filed and is an afterthought calculated to scuttle the hearing of the Claim as the Applicant entered appearance and subjected itself to the proceedings before this Court including taking a hearing date. In the same vein, the Claimant posits that by filing a defence, the Applicant fully submitted itself to the jurisdiction of this Court. In support of this position, the Claimant has sought to rely on the case of *Africa Spirits Limited vs Preva Enterprises Limited (2014) eKLR*.
 48. On this issue, the Applicant has submitted that this Court's powers under Section 15 (1) and (4) of the Employment and Labour Relations Court (ELRC) Act are not subject to any conditions and that the Court can exercise its discretion at any stage of the proceedings as long as it becomes apparent that the dispute should be referred to arbitration. In this regard, the Applicant has placed reliance on the case of *Blue Limited vs Jaribu Credit Traders Limited Nairobi (Milimani) HCCS No. 157 of 2008*.
 49. Section 6(1) of the *Arbitration Act* which is significant herein, provides as follows:
 - 6 (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—
 50. The aforementioned statutory provision presupposes that a party who is desirous of invoking an arbitration clause and seeking to refer the matter to arbitration should do so promptly at the time of entering appearance.



51. This position was reaffirmed by the Court of Appeal in Mt. Kenya University vs Step Up Holding (K) Ltd [2018] eKLR, where it was held as follows:

“We reiterate that in order to succeed, the law obligated the appellant to file the application seeking reference to arbitration simultaneously with the entry of appearance and thereafter take no further procedural steps in the matter. The appellant herein entered appearance, and then responded to the respondent’s application for injunction before filing the application seeking an order for reference to arbitration. Critically the appellant’s response to the respondent’s application for injunction amounted to the taking of a procedural step in the matter before the initiation of the reference process. We therefore find no error in the Judge’s findings. They are accordingly affirmed.” Underlined for emphasis

52. And further, in Adrec Limited vs Nation Media Group Limited [2017] eKLR, the Court of Appeal held that any party who wishes to take advantage of the arbitration clause in a contract should either at the time of entering appearance or before the entry of appearance, make the application for reference to arbitration.

53. In this case, the Applicant filed a Defence to the Claim on 15th August 2022 and a witness statement dated 1st July 2023. Indeed, as at 6th March 2023, it was all systems go and the matter was scheduled for hearing on 3rd May 2023. What followed were three adjournments. On 4th December 2023, when the matter was to come up for hearing, the Applicant introduced the instant Application.

54. In light of the chronology of events herein, I find the timing of the Application not suitable. Indeed, one wonders why it took the Applicant close to three years and three adjournments later, to figure out that the dispute was arbitrable. On that ground alone and in light of the provisions of Section 6(1) of the *Arbitration Act*, the Application fails.

55. With regards to Section 15 of the ELRC Act, it is my respectful view, that the same is only applicable where it becomes apparent that the dispute ought to have been referred for conciliation mediation, or arbitration in the first place.

56. Having found that the arbitral clause sought to be relied upon by the Applicant does not cover the dispute herein, it follows that Section 15 does not apply in this instance.

57. As I pen off, I also note that in its Response to the Memorandum of Claim dated 15th August 2022, the Applicant admitted the jurisdiction of this Court at paragraph 7. Thus, one wonders why it had a change of heart. Needless to say, the instant Application comes across as an afterthought.

58. In light of the foregoing reasons, the Chamber Summons Application dated 14th November 2023 is declined with costs to the Claimant.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MAY 2024.

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STELLA RUTTO

JUDGE

In the presence of:

Mrs. Ahomo for the Claimant /Respondent

Mr. Kivindyo 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

