



**Ondimu v Lake Turkana Wind Power Ltd (Cause E001 of 2024)
[2024] KEELRC 1162 (KLR) (3 May 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1162 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E001 OF 2024**

SC RUTTO, J

MAY 3, 2024

BETWEEN

SILAS BIYOGO ONDIMU CLAIMANT

AND

LAKE TURKANA WIND POWER LTD RESPONDENT

RULING

1. What comes up for determination is the Respondent/Applicant's Chamber Summons Application dated 22nd January 2024 seeking the following orders:
 1. Spent.
 2. That pending the hearing and determination of the Application herein, the proceedings be and are hereby stayed.
 3. That the proceedings be stayed, and the dispute herein be referred to Arbitration in accordance with clause 10 of the Deed dated 30/06/2022 between the Claimant and the Respondent.
 4. That the costs of this Application be borne by the Claimant.
2. The grounds in support of the Application are set out therein and the Affidavit of Phylip Leferink, the Applicant's Chief Executive Officer. Mr. Leferink deposes that the Claimant was an employee of the Applicant, from 17th October 2022 and was mutually terminated on 30th June 2022. It is his deposition that the Claimant and the Applicant signed a Mutual Separation and Confidentiality Deed dated 30th June 2022 by which the Claimant's employment was terminated by mutual consent in accordance with clause 2 of the Deed. He is aware that pursuant to the Deed, the Claimant received Kshs 5,000,662.00 as full and final settlement of the mutual and amicable separation.



3. He further asserts that the Claimant has not expressed any indication that he intends to return the settlement amount to the Applicant since he has preferred instituting legal proceedings and has sought to declare the Deed null and void.
4. He has been advised by the Applicant's advocates on record that the Claimant cannot claim that the Deed is null and void, yet he benefitted from the "fruits" of the Deed. This amounts to approbating and reprobating the Deed and the Court should not entertain his conduct.
5. Mr. Leferink further avers that clause 10 of the Deed expressly provides that parties are to engage in amicable settlement in case of a dispute, and in the event an amicable settlement fails, the dispute should be referred to arbitration to be held in Kenya. He contends that the parties expressly ousted the jurisdiction of any other forum.
6. He further deposes that Section 6 of the Arbitration Act bestows power to this Honourable Court to stay proceedings and refer a matter to Arbitration where the matter is subject to an Arbitration Agreement. In Mr. Leferink's view, it is only proper for this suit to be stayed and the dispute to be referred to arbitration.
7. Upon being served with the Application, the Claimant responded by filing a Replying Affidavit sworn on 11th February 2024. The Claimant deposes that the prayer for stay of proceedings pending arbitration is affected by laches since it was not filed contemporaneously with the Memorandum of Appearance as per Section 6(1) of the Arbitration Act. He maintains that the Application should be dismissed "in limine" as it offends Section 6(1) of the Arbitration Act.
8. The Claimant further deposes that there was no Deed that had been formalized between himself and the Applicant as at 30th June 2022. He further avers that the 'Mutual Separation Agreement' is illogical, irregular and a misguided choreography by the Applicant to attempt to regularize and sanctify its coercive actions against him.
9. He contends that the Applicant coerced him to exit its employment before materialization of a mutual separation.
10. It is the Claimant's contention that the settlement amount he received from the "Mutual Separation and Confidentiality Deed" was contractual and statutory. That he would have been entitled to the same even if there was no "Mutual Separation and Confidentiality Deed". He argues that a refund to the Applicant can only ensue if the settlement amount to him was not contractual and not statutory. That the settlement amount cannot be the pretext by the Applicant to negate his right to fair dismissal.
11. According to the Claimant, the mere reference to the arbitration clause is not an end in itself and the mutual separation process has to be interrogated to ascertain its validity.
12. The Claimant has further stated that in determining whether to grant a stay of proceedings, the Court is called upon to consider the validity of the arbitration agreement.
13. It is the Claimant's position that the "mutual separation agreement" despite making reference to arbitration, is null and void as it was procured through coercion and undue influence by the Applicant.
14. In response to the Claimant's Replying Affidavit, the Applicant filed a Further Affidavit sworn on 26th February 2024 by Mr. Leferink in which he avers that among the discussions surrounding the signing of the Deed, was that the date of the Deed was to be backdated and that his final date of employment would be 30th June 2022, a fact that the Claimant was well aware of when he proceeded to sign the Deed.



15. He contends that if the Claimant was aggrieved and did not agree with the purpose and terms of the Deed, as a duly admitted Advocate of the High Court of Kenya, he had ample knowledge and time to approach the Court and even seek conservatory orders to "safeguard" his employment. He argues that the Claimant proceeded to review and sign the Deed and accept the settlement amount in the Deed.
16. Mr. Leferink maintains that acceptance of the Deed was done in the Claimant's own volition and therefore he cannot claim that the Deed is null and void.
17. He further states that the allegation by the Claimant that he was coerced to sign the Deed has not been substantiated by any evidence. That the gravity of the allegations adduced by the Claimant would have warranted him to seek legal redress with immediate effect but surprisingly, he has brought this suit two years later.
18. In response to the Applicant's Further Affidavit, the Claimant filed a further Replying Affidavit which I have considered.

Submissions

19. The Application was canvassed by way of written submissions. Both parties complied and the Court has considered their respective submissions.
20. The Applicant while acknowledging that this Court has jurisdiction to hear and determine employment matters, submits that this jurisdiction is barred from being exercised where the parties in the suit had mutually agreed on arbitration as their preferred dispute resolution mechanism.
21. Submitting along the same lines, the Applicant argues that the tenor and import of Section 6 of the *Arbitration Act* is that this Court cannot exercise its jurisdiction where the parties to a suit have agreed on arbitration as their preferred dispute resolution. In this regard, the Applicant contends that this is clearly evidenced by the Deed duly signed by both parties to signify their acceptance of the terms and conditions therein.
22. The Applicant further submits that the parties are therefore bound by the provisions of the Deed. To buttress this argument, the Applicant has placed reliance on the case of *Blue Limited v Jaribu Credit Traders Limited Nairobi* (Milimani) HCCS NO. 157 of 2008.
23. It is the Applicant's further submission that by entering an appearance "under protest" the jurisdiction of this Honourable Court was already challenged and it was clear that it does not submit to the jurisdiction of the Court in this matter. On this score, the Applicant sought to rely on the case of *Prabhadas (N) & Co. v Standard Bank* [1968] EA 679.
24. It was further submitted that the Applicant has met all the requirements of Section 6 of the Act, and it has followed the due process as laid out in law, and it can conclusively be said that the court has no jurisdiction to entertain this matter. In this regard, the Applicant cited the case of *The Owners of the Motor Vessels "Lilian S" v Caltex Oil Kenya Ltd* [1989] KLR.
25. Referencing the case of *Kenya Pipeline Company Limited vs Datalogix Limited and Another* Nairobi HCCC No. 490 of 2004 (2008) 2 EA 193, the Applicant posits that Courts of Law are bound to respect the decisions and intentions of parties in an agreement.
26. The Applicant has further submitted that this Honourable Court does have a duty to stay the proceedings of the suit and refer the matter to arbitration. On this issue, reliance has been placed on the case of *Wringles Company (East Africa) v Attorney General & 3 others* [2013] eKLR.



27. It is the Applicant's contention that if it is true that the Claimant was forced to sign the Deed, he would have refused to accept the settlement amount and sought legal redress.
28. It is the Applicant's further submission that the Claimant's allegations that he was coerced into signing the agreement are contrary to his actions of accepting the Kshs 5,000,662.00 that was paid out by virtue of the same agreement he claims is void. According to the Applicant, this goes against the legal doctrine of estoppel by conduct and his actions preclude him from asserting that the Deed is void.
29. The Applicant has further submitted that the Deed was signed on or about July 2022 whereas the Claimant's claim was filed on January 2024 almost two years later. In the Applicant's view, this delay is unreasonable and inordinate considering the nature of the allegations levelled by the Claimant.
30. Citing the case of *Lindsay Petroleum Co. v Hurd* [1874] L.R 5 P.C 221, the Applicant has further submitted that there is no plausible explanation from the Claimant as to why it took him a whole year to realize that he was coerced to enter into the Deed.
31. The Claimant on the other hand submits that he has made a separate claim on discrimination, infringement and violation of his right to human dignity, rights to fair labour practices and right to reasonable working conditions. In this regard, he has argued that breaches, violations and infringements of the *Constitution* do not fall within the jurisdiction of an arbitrator for this Honorable Court to refer the matter to arbitration. In support of this position, the Claimant has sought to rely on the cases of *Atandi v African Medical and Research Foundation (AMREF) Flying Doctors* (Cause E900 of 2021) [2023] KEELRC 991 (KLR) (28 April 2023) (Ruling) and *Miriam Nzilani Mweu v Kiptinness & Odhiambo Associates* (2019) eKLR, Petition No. 132 of 2019.
32. In the same breath the Claimant has submitted that this Court is the appropriate forum as it possesses original jurisdiction to hear the matter given that it raises fundamental constitutional issues touching on discrimination, human dignity, fair labour practices, and fair administrative action. He argues that the same cannot be ousted by dint of clause 10 of the Mutual Separation and Confidentiality Deed.
33. The Claimant has stated in further submission that that this Court cannot enforce a "mutual separation agreement" procured by the Applicant through coercion and undue influence which he pleaded and proved. On this issue, the Claimant has invited the Court to consider the determination in the case of *Sagoo v Thika Cloth Mills Limited* (Cause 372 of 2019) [2023] KEELRC 2697 (KLR).

Analysis and Determination

34. I have considered the Application, the grounds in support thereof, the response thereto as well as the submissions raised by the parties together with cited statutory and case law. In my view, the singular issue that arises for determination is whether the Court should stay the proceedings herein and refer the dispute to arbitration in accordance with clause 10 of the Mutual Separation and Confidentiality Deed (Deed).
35. It is evident that the Application is anchored on clause 10 of the Deed which provides that parties are to endeavour to resolve any dispute arising out of or in connection with the Deed amicably and in the event this fails, the dispute is to be referred to arbitration.
36. The Claimant has contended that there was never a mutual agreement with the Applicant. According to him, the Applicant used coercion and undue influence to procure the mutual separation agreement which he argues, invalidates the Deed and reference of the matter to arbitration.
37. On the other hand, the Applicant has argued that the Deed is binding on the parties who it contends, had capacity to enter into the said agreement at the time of execution.



- 38. Needless to say, the parties are not on the same page with regards to the validity and enforceability of the Deed.
- 39. Revisiting the record, it is quite clear that the Claimant has sought to challenge the validity of the Deed. Indeed, the thread running through the Claimant’s Memorandum of Claim is that the Applicant unilaterally terminated his employment and that there was no mutual separation. Indeed, it is worth noting that in the Memorandum of Claim, the Claimant seeks inter alia the following declaratory orders:
 - a. A declaration that the Claimant was dismissed by the Respondent and coerced into signing the mutual separation agreement which in any event was not mutual.
 - b. A declaration that the so called “Mutual Separation and Confidentiality Deed” was an after the fact, procured through coercion and undue influence thus tainted the malice and illegality thus rendering it enforceable, null and void.
 - c. A declaration that the so called “Mutual Separation and Confidentiality Deed” amounted to unfair termination and/or wrongful dismissal and that to the extent that the so – called mutual separation agreement sought to oust reliefs accruing to the Claimant for wrongful termination guaranteed by stature, the same is invalid and/or enforceable, null and void.
- 40. In light of the foregoing, it is apparent that the validity and enforceability of the Deed have been called into question. Indeed, this is one of the pertinent issues the Court will have to apply its mind to, in determining the main suit. It is therefore logical that any clause contained in the Deed can only be enforced upon a determination of its validity.
- 41. As it is, the arbitration clause is inbuilt in the Deed hence it follows that an order staying the proceedings and referring the matter to arbitration is analogous to enforcing the very same Deed the Claimant is seeking to void through the main suit.
- 42. As such, prudence demands that the Court first determines the validity of the Deed prior to making any finding regarding the enforceability of the arbitration clause.
- 43. What’s more, under Section 6 (1) (a) of the *Arbitration Act*, it is evident that referral of a matter to arbitration is not automatic. There is a condition precedent that that the agreement is not null and void, inoperative or incapable of being performed.
- 44. Therefore, as the Claimant has sought to declare the Deed null and void, it goes without saying that the Court may only refer the matter to arbitration upon finding that the same is not null and void as alleged.
- 45. In light of the foregoing, the Court cannot at this juncture stay proceedings and refer the dispute to arbitration when there is an unresolved issue regarding the validity of the Deed and by extension, the arbitration clause.
- 46. To this end, I am inclined to decline the Application dated 22nd January 2024.
- 47. Costs shall be in the cause.

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

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STELLA RUTTO
JUDGE



In the presence of:

For the Claimant/Respondent In person

For the Respondent/Applicant Mr. Gakure

Court Assistant Millicent Kibet

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

