Okeyo v Board of Directors HHI Management Service Ltd & another (Cause E970 of 2023) [2024] KEELRC 1006 (KLR) (6 May 2024) (Ruling)

Neutral citation: [2024] KEELRC 1006 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E970 OF 2023

JK GAKERI, J

MAY 6, 2024

BETWEEN

STEVE OKEYO ..... CLAIMANT

AND

BOARD OF DIRECTORS HHI MANAGEMENT SERVICE LTD ..... 1ST RESPONDENT

HHI MANAGEMENT SERVICE LTD ..... 2ND RESPONDENT

Arbitration clauses in employment contracts do not negate the jurisdiction of the Employment and Labour Relations Court.

Reported by John Ribia

Jurisdiction *– jurisdiction of the Employment and Labour Relations Court – jurisdiction to determine employment disputes – where an employment contract referenced arbitration as the dispute resolution mechanism – whether the Employment and Labour Relations Court had the jurisdiction to determine an employment dispute where the employment contract contained an arbitral clause – Constitution of Kenya, article 162(2); Employment and Labour Relations Court Act (cap 8E) sections 4, 12, 15(1) and (4); Arbitration Act (cap 49), section 6(1) and (3); Employment Act (cap 226) sections 26, 40, and 41(1)(b).*

Statutes *– interpretation of statutes – interpretation of section 6(1) of the Arbitration Act – effect of arbitration clause in an employment contract on the jurisdiction of the Employment and Labour Relations Court - whether section 6(1) of the Arbitration Act ousted the jurisdiction of the Employment and Labour Relations Court to determine a suit involving a contract with an arbitral clause – Constitution of Kenya, article 162(2); Employment and Labour Relations Court Act (cap 8E) sections 4, 12, 15(1) and (4); Arbitration Act (cap 49) section 6(1) and (3); Employment Act (cap 226) sections 26, 40, and 41(1)(b).*

Brief facts

The claimant was employed by the 2nd respondent as the Group Chief Executive Officer (CEO) under a written contract whose clause on dispute resolution referred disputes to mediation, and should mediation fail to arbitration. The claimant was apprehensive that the arbitral process was expensive for him and bearing in

mind that the parties would jointly appoint the sole arbitrator, both were obligated to pay the arbitrator. The 2nd applicant argued that arbitral clause ousted the court's jurisdiction while the claimant submitted that it did not.

Issues

i. Whether section 6(1) of the Arbitration Act ousted the jurisdiction of the Employment and Labour Relations Court to determine a suit involving a contract with an arbitral clause.

ii. Whether the Employment and Labour Relations Court had the jurisdiction to determine an employment dispute where the employment contract contained an arbitral clause.

Relevant provisions of the Law

Arbitration Act (cap. 49)

Section 6 - Stay of legal proceedings

(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—

(a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or

(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

(3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.

Held

1. The Employment and Labour Relations Court (ELRC) had exclusive jurisdiction to hear and determine disputes relating to employment and labour relations pursuant to article 162(2) of the Constitution read with section 12 of the Employment and Labour Relations Court Act (the Act). Section 15 of the Act conferred upon the court jurisdiction to refer a dispute to alternative dispute resolution mechanisms *suo motu* or on application or request of the parties, or at any stage of the proceedings if it was apparent that the dispute ought to be referred to other methods of dispute resolution, the provision was silent on arbitration.
2. Prospective employees were seldom involved in the negotiation of the terms of employment other than salary and allowances. The document was drawn by the employer in its language and inserted terms and clauses formulated in its words and prospective employees were in most of the cases eager to sign the dotted line to secure employment to return the favour.
3. The arbitral clause in any contract bound the parties. Although section 6(1) of the Arbitration Act was couched in a mandatory tone, section 6(3) of the Act addressed instances in which a stay of proceedings was not granted under section 6(1).
4. The Arbitration Act was principally intended to resolve commercial disputes, as opposed to employment disputes. Incorporation of arbitral clauses in employment contract was a atypical and underlined the reality of the unequal bargaining power between the employer and the employee. Such clauses were imposed on employees by employers.
5. Part V and Part VI of the Employment Act prescribed the minimum conditions of employment and the latter part addressed termination and dismissal. Under section 26 of the Employment Act, the minimum conditions of employment applied in all cases where the terms and conditions of employment agreed upon by the parties or prescribed by regulations or other written law or collective agreement or decreed by the court were less favourable.
6. Reference of an employment dispute to arbitration was not more favourable than litigation which was an integral part of Part VI of the Employment Act.

7. In its notice of intent to terminate on account of redundancy to the claimant, the 2nd respondent notified the claimant that if he had any grievances regarding the process, he could raise them in accordance with the company's grievance procedures and the notice had been issued under section 41(1)(b) of the Employment Act as opposed to section 40 of the Act. The 2nd respondent's letter was explicit that the news would come to the claimant as a surprise. It was unclear to the court why the respondent could not engage its Group CEO without surprises and propose an amicable way of resolving his proposed exit.
8. The parties did not give court annexed mediation a chance as the claimant came to court seeking interim orders and the 2nd respondent took no active steps in furtherance of the process.
9. Although article 159(2)(c) of the Constitution included arbitration, section 15(1) of the Employment and Labour Relations Court Act, an Act of Parliament enacted after the promulgation of the Constitution conspicuously omitted the word.

Application dismissed.

Orders

No order as to costs.

Citations

Cases

Kenya

1. *Amuhaya, Kennedy v African Medical & Research Foundation* Cause 53 of 2014; [2018] KEELRC 720 (KLR) - (Mentioned)
2. *Dock Workers Union Ltd v Messina Kenya Ltd* Civil Appeal 109 of 2018; [2019] KECA 915 (KLR) - (Mentioned)
3. *Hayes, James Heather- v African Medical and Research Foundation (AMREF)* Cause 626 of 2013; [2015] KEELRC 992 (KLR) - (Mentioned)
4. *Kenya Pipeline Ltd v Kenol Kobil Ltd* Civil Case 695 of 2010 - (Applied)
5. *Kenya Tea Growers Association & 2 others v National Social Security Fund Board of Trustees & 13 others* Petition (Application) E004 of 2023 & Petition E002 of 2023 (Consolidated); [2023] KESC 42 (KLR) - (Applied)
6. *Nalyanya, Paul Chemunda v Messina Kenya Ltd* Cause 259 of 2014; [2015] KEELRC 504 (KLR) - (Mentioned)
7. *Ngugi, Martin Njuguna v Ahmed Noor Sheikh & another* Environment & Land Case 1131 of 2016; [2018] KEELC 3263 (KLR) - (Applied)
8. *Ochieng, Sammy Onyango v Abno Softwares International Ltd* Cause E374 of 2020; [2020] KEELRC 5 (KLR) - (Mentioned)
9. *Olela, Carol Adhiambo v Asterisk Ltd* Civil Application 90 of 2014; [2014] KECA 131 (KLR) - (Mentioned)
10. *Synergy Industrial Credit Ltd v Cape Holdings Ltd* Petition 2 of 2017; [2019] KESC 12 (KLR) - (Applied)
11. *Wanguhu v Sustainet Group Ltd* Cause E085 of 2021; [2022] KEELRC 1226 (KLR) - (Mentioned)

Statutes

Kenya

1. Arbitration Act (cap 49) section 6(1)(3) (Interpreted)
2. Civil Procedure Act (cap 21) In general - (Cited)
3. Civil Procedure Rules, 2010 (cap 21 Sub Leg) order 21 rule 1- (Interpreted)
4. Constitution of Kenya articles 159(2)(c); 162(2)(a) - (Interpreted)
5. Employment Act (cap 226) sections 26, 40, 41(1)(b); parts V, VI - (Interpreted)
6. Employment and Labour Relations Court Act (cap 8E) sections 4, 12, 15(1)(4) - (Interpreted)

Advocates

None mentioned

RULING

1. Before the court for determination is the 2nd respondent's chamber summons dated November 27, 2023 seeking orders that:-

    1. The claim filed against the 2nd respondent herein be stayed and the dispute be referred to arbitration in accordance with the contract of the parties as set out in the employment contract dated May 30, 2021.

    2. This application be heard and determined before the hearing and determination of the claimant's notice of motion dated November 23, 2023.

    3. The costs of this suit and this application be borne by the claimant.

2. The chamber summons is expressed under section 6(1) of the *Arbitration Act*, article 159(2) of the *Constitution of Kenya, 2010* and section 15(1) and (4) of the *Employment and Labour Relations Court Act, 2011* and is based on the grounds set forth on its face.

3. It is the applicant's case that the claim herein is premised on the contract of employment dated May 30, 2021 between the claimant and the 2nd respondent and clause 6.2 contains an arbitration clause. Reliance is made on the decisions in *Dock Workers Union Ltd Messing Kenya Ltd* [2019] eKLR and *Carol Adhiambo Olela V Asterisk Ltd* [2014] eKLR.

4. That it is in the interest of justice that the application be heard first and the claim stayed and referred to arbitration for hearing and determination.

Response

5. In his replying affidavit sworn on January 29, 2024, the claimantdeposes that the law governing employment is the *Employment Act* and the arbitration clause in the contract does not oust the court's jurisdiction and the Act permits the court to override the terms and conditions of employment where its provisions are more favourable to the employee.

6. The affiant deposes that arbitration is more expensive than the judicial process and he cannot meet the cost.

7. That parties must consent to the arbitration process.

8. It is the affiant's case that although the court had directed the matter to proceed to mediation, the respondent was not interested and terminated his employment on December 8, 2023.

9. The affiant depones that the 2nd respondent is acting in bad faith and has no intention of resolving the dispute using alternative dispute resolution mechanisms and it is in the interest of justice that the chamber summons dated November 27, 2023 be dismissed with costs.

Applicant's Submissions

10. As to whether the matter ought to be stayed and referred to arbitration, the 2nd respondent relies on section 6(1) of the *Arbitration Act, 1995* to urge that since the contract of employment between the parties has an arbitration clause, the matter should be referred to arbitration and cited the sentiments

of the court in *Carol Adhiambo Olela v Asterisk Ltd* (*supra*) as well as *James Heather – Hayes v African Medical and Research Foundation (AMREF)* [2014] eKLR and *Paul Chamunda Nalyanya v I Messina Kenya Ltd* (*supra*) among others to submit that the arbitral clause divests the court's jurisdiction to hear and determine the dispute and the court cannot rewrite the contract.

11. Reliance is also made on the provisions of article 159(2)(c) of the *Constitution of Kenya, 2010* and section 15(1) and (4) of the *Employment and Labour Relations Court Act, 2011*.

12. As to whether the issue was addressed in the ruling delivered on December 7, 2023, the 2nd respondent submits that the issue has already been dealt with as the court encouraged the parties to resolve the dispute through ADR and expressed the view that it was expeditious, efficient, cost effective and private as mandated by article 159(2)(c) of the *Constitution of Kenya, 2010*.

Claimant's Submissions

13. As to whether the proceedings ought to be stayed and the suit referred to arbitration, the claimant submits that the arbitration clause cannot oust the court's jurisdiction as it has original jurisdiction over the suit the arbitration clause notwithstanding and relies on the sentiments of the court in *Sammy Onyango Ochieng Abno Softwares International Ltd* [2020] eKLR, *Wanguhu v Sustainet Group Ltd* (2022) KEELRC 1226, *Kenya Pipeline Ltd v Kenol Kobil Ltd* [2013] eKLR and *Dr Kennedy Amuhaya Wanyonyi v African Medical and Research Foundation* [2014] eKLR, among others to urge that the court has jurisdiction to override the terms and conditions of employment and apply the provisions of the *Employment Act, 2007*, as it retains original jurisdiction. Similarly, consent of the parties is essential and arbitration may be expensive as deposed by the claimant.

Determination

14. The only issue for determination is whether the 2nd respondent's chamber summons dated November 27, 2023 is merited.

15. It is common ground that the claimant was employed by the 2nd respondent as the Group Chief Executive Officer (herein after CEO) on June 1, 2021 under a written contract dated May 30, 2021 whose clause 6.2 is on dispute resolution and provides that;

> If any dispute arises out of this contract of employment, the employer and employee (each a party) and jointly "the parties") will first attempt to settle it by mediation. If the dispute is not settled by mediation, it shall be referred to arbitration by a single arbitrator appointed jointly by the parties. The making of an arbitration award shall be a condition precedent to any right of action by one party against the other on the matter so arbitrated.

16. Both parties have cited judicial and other authorities to reinforce their respective positions. While the 2nd applicant argues that arbitral clause ousts that court's jurisdiction, the claimant submits that it does not.

17. The 2nd respondent relies on the provisions of section 6(1) of the *Arbitration Act, 1995* which provides as follows;

> 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 –

a. that the arbitration agreement is null and void, inoperative or incapable of being performed; or

b. that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration."

18. It is not in dispute that the claimant filed this suit on November 23, 2023 under certificate of urgency and the respondents entered appearance on November 27, 2023 and filed a memorandum of appearance under protest on the same day as well as the instant chamber summons.

19. The salient issue for determination is whether section 6(1) of the *Arbitration Act, 1995* ousts this court's jurisdiction to hear and determine a suit based on a contract which contains an arbitral clause.

20. There are judicial authorities on both sides.

21. Needless to belabour, article 162(2)(a) of the *Constitution of Kenya, 2010* conferred upon Parliament power to establish the Employment and Labour Relations Court to hear and determine disputes relating to employment and labour relations and Parliament did so through by enacting the *Employment and Labour Relations Court Act, 2011* which established the court under section 4 and prescribed its composition and jurisdiction.

22. Section 12 of the *Act* provides as follows;

1. The court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with article 162(2) of the *Constitution* and the provisions of this Act or any other written law which extends jurisdiction to the court relating to employment and labour relations including – . . ."

23. The jurisdiction of this court has been elaborated on in legions of decisions of this Court, High Court, Court of Appeal and the Supreme Court of Kenya.

24. The latest being the Supreme Court decision in Petition No E004 of 2023 consolidated with Petition No E002 of 2023, *Kenya Tea Growers Association & others v National Social Security Fund Board of Trustees*, where the court inter alia restated the court's jurisdiction holding unlike that of the High Court its jurisdiction is limited in terms of the types of disputes and the parties.

25. However, only the Employment and Labour Relations Court has exclusive jurisdiction to hear and determine disputes relating to employment and labour relations pursuant to article 162(2) of the *Constitution of Kenya, 2010* read with section 12 of the *Employment and Labour Relations Court Act, 2011*.

26. Relatedly although section 15 of the *Act* confer upon the court jurisdiction to refer a dispute to alternative dispute resolution mechanisms *suo motu* or on application or request of the parties, or at any stage of the proceedings if it is apparent that the dispute ought to be referred to other methods of dispute resolution, the provision is silent on arbitration.

27. While the claimant admits that the contract of employment has an arbitral clause, he deposes that his consent is essential for the arbitration process to proceed in light of the unequal bargaining power between the parties. He deposes that it is expensive and the 2nd respondent had not been eager to proceed with mediation in the first instance.

28. It is common ground that prospective employees are seldom involved in the negotiation of terms of employment other than salary and allowances.

29. The document is drawn by the employer in its language and inserts terms and clauses formulated in its words and prospective employees are in most all cases eager to sign the dotted line to secure employment to return the favour.

30. No doubt the arbitral clause in any contract binds the parties thereto as held in *Martin Njuguna Ngugi v Ahmed Noor Sheikh & another* [2018] eKLR that;

> "... An arbitration agreement binds parties to the agreement not non-parties."

31. Relatedly, although section 6(1) of the *Arbitration Act, 1995* is couched in mandatory tone, section 6(3) of the *Act* addresses instances in which a stay of proceedings is not granted under section 6(1) as follows;

> "If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings."

32. In determining this issue, the court is guided by the sentiments of the Supreme Court of Kenya in *Synergy Industrial Credit Ltd v Cape Holdings Ltd* [2019] KESC 12 (KLR) as follows;

> "In interpreting the arbitration law, therefore, one should never loose sight of the purpose of the enactment of the *Arbitration Act, 1995* and in addition, the fact that the *Constitution of Kenya, 2010* in article 159(2)(c) enjoins courts to be guided by the principles of alternative forms of dispute resolution such as arbitration. There is also no doubt that arbitration is an attractive way of settling commercial disputes by virtue of the perceived advantages it brings beyond what is generally offered by the normal court processes which are often characterised by formalities and delays. In addition, while it is quite clear that the arbitration regime is meant to ensure that there is a process distinct from the courts, of effectively and efficiently solving commercial disputes, the law also recognizes that such a process is not absolutely immune from courts intervention. This is because court of law remain the ultimate guardians and protectors of justice and hence they cannot be completely shut off from any process of seeking justice."

33. From the foregoing and the totality of the judgement of the court, it is clear that the arbitral law in Kenya was principally intended to resolve commercial disputes, as opposed to employment disputes as is the case in the instant case.

34. The court's view is also clear under paragraph 156 where it makes direct reference to foreign investment.

35. Incorporation of arbitral clauses in employment contract is a atypical and underlines the reality of the unequal bargaining power between the employer and the employee.

36. Such clauses are imposed on employees by employers.

37. As demonstrated earlier in this ruling, this court's jurisdiction is traceable to article 162(2)(a) of the *Constitution of Kenya, 2010*.

38. As correctly submitted by the claimant, part V and part VI of the *Employment Act, 2007* prescribe the minimum conditions of employment and the latter part addresses termination and dismissal. Under section 26 of the *Employment Act, 2007*, the minimum conditions of employment apply in all cases

where the terms and conditions of employment agreed upon by the parties or prescribed by regulations or other written law or collective agreement or decreed by the court are less favourable.

39. The court is not persuaded that reference of an employment dispute to arbitration is more favourable than litigation which is an integral part of part VI of the *Act*.

40. The court is also guided by the sentiments of the court in *Sammy Onyango Ochieng v Abno Softwares International Ltd* (*supra*) and *Wanguhu v Sustainet Group Ltd* (*supra*) cited by the claimant to reinforce his submissions on the issue.

41. In its notice of intent to terminate on account of redundancy to the claimant dated November 10, 2023, the 2nd respondent notified the claimant that if he had any grievances regarding the process, he could raise them in accordance with the company's grievance procedures and the notice had been issued under section 41(1)(b) of the *Employment Act, 2007* as opposed to section 40 of the *Act*.

42. More significantly, the 2nd respondent's letter is explicit that the news would come to the claimant as a surprise.

43. It is unclear to the court why the respondent could not engage its Group CEO without surprises and propose an amicable way of resolving his proposed exit.

44. Strangely, although the court pleaded with the parties to have the matter mediated under the court annexed mediation, the parties did not give it a chance as the claimant came to court seeking interim orders and the 2nd respondent took no active steps in furtherance of the process.

45. The claimant is apprehensive that the arbitral process is expensive for him and bearing in mind that the parties will jointly appoint the sole arbitrator, both are obligated to pay the arbitrator.

46. The respondent has not responded to the claimant's apprehension which may be founded on the reality of arbitral practice in Kenya.

47. Finally, the court is also in agreement with the sentiments of Maureen Onyango J in *Dr Kennedy Amuhaya Manyonyi v African Medical and Research Foundation* (*supra*) on the import of section 15 of the *Employment and Labour Relations Act, 2011* on Alternative Dispute Resolution as follows;

> " Section 15(1) of the *Industrial Court Act* requires this court to promote appropriate means of dispute resolution including internal methods, conciliation, mediation and traditional dispute resolution mechanisms. This section specifically omits to mention arbitration as an alternative method of dispute resolution in the Industrial Court. In my mind, this was a deliberate omission as both the *Employment Act* and the Labour Relations Act provide for both internal dispute resolution mechanisms and conciliation . . .
>
> Section 15(1) of the *Industrial Court Act* recognizes this position when it requires that disputes be referred to other appropriate means of dispute resolution by the court on its own motion or by the parties. The Act does not refer to one party. This means that where the reference is made by the parties, it should be by consent of both parties . . .
>
> For the foregoing reasons, I find that both the *Industrial Court Act* and the *Employment Act* do not recognize arbitration as an appropriate means of dispute resolution in employment disputes."

48. The court is in agreement with the foregoing sentiments which are further fortified by the fact that although article 159(2)(c) of the *Constitution of Kenya, 2010* include arbitration, section 15(1)

of the *Employment and Labour Relations Court Act, 2011*, an Act of Parliament enacted after the promulgation of the *Constitution of Kenya, 2010* conspicuously omits the word.

49. For the foregoing reasons, it is the finding of the court that the 2nd respondent's chamber summons dated November 27, 2023 is unmerited and it is accordingly dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 6TH DAY OF MAY 2024.

DR. JACOB GAKERI

JUDGE

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 March 15, 2020 and subsequent directions of April 21, 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 has 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.

DR. JACOB GAKERI

JUDGE