Alubala v Zhongiao Third Highway Engineering EA Company limited (Cause E895 of 2023) [2024] KEELRC 2072 (KLR) (31 July 2024) (Ruling)

Neutral citation: [2024] KEELRC 2072 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E895 OF 2023

JK GAKERI, J

JULY 31, 2024

BETWEEN

DICKSON ALUBALA ..... CLAIMANT

AND

ZHONGIAO THIRD HIGHWAY ENGINEERING EA COMPANY LIMITED ..... RESPONDENT

RULING

1. Before the Court for determination is the Respondent's Chamber Summons dated 8th May, 2024 seeking Orders That:-

    a. The dispute herein be referred to Arbitration in accordance with the Service Level Agreement dated 23rd June, 2021.

    b. The instant suit between the Claimant and the Respondent be struck out with costs to be borne by the Claimant.

2. The Chamber Summons is expressed under the provisions of Article 159(2) (c) of the *Constitution* of Kenya, Section 6(1) and 7(1) of the *Arbitration Act*, and Rule 3 of the *Arbitration Rules, 2020* and is based on the grounds set forth on its face and the Supporting Affidavit of Martin Kaindi sworn on 8th May, 2024 who deposes that the Court has no jurisdiction to hear and determine the suit between the parties by virtue of the arbitration clause in the Service Level Agreement dated 23rd June, 2021 under which the parties chose arbitration as the forum applicable.

3. The affiant deposes that the Service Level Agreement is binding on the parties and the court lacks jurisdiction and the suit ought to be struck out.

Response

4. On 27th May, 2024, counsel for the Respondent intimated that they had filed an application to have the dispute referred to arbitration in consonance with the provisions of the Service Level Agreement between the parties.

5. Counsel for the Claimant indicated that the application is opposed vide a Replying Affidavit dated 16th May, 2024 and prayed for dismissal of the Respondent's application.

6. On the morning of 24th July, 2024, the court confirmed with the Judiciary Case Tracking System (CTS) that the purported Replying Affidavit was not in the system.

7. In the spirit of fairness and having indicated that they had filed a Replying Affidavit, the court deemed it fit to notify counsel to refile the Affidavit by email.

8. At 11.37 am on 24th July, 2024, the Claimant's counsel filed a 3 (three) page document whose contents are indecipherable as it is not a Replying Affidavit.

9. In sum, the Respondent's Chamber Summons dated 8th May, 2024 is unopposed.

Applicant's submissions

10. As to whether the dispute is subject to arbitration, counsel for the Applicant relied on the provisions of Section 4 of the *Arbitration Act* to urge that Service Level Agreement in question met the requirements of Section 4 of the Act as it provides that "ALL" disputes arising thereunder be resolved by arbitration.

11. Reliance was made on the sentiments of the court in *Euromec International Ltd v Shandong Taikai Power Engineering Co. Ltd* [2021] KEHC 93 (KLR) on the freedom of the parties to a contract to determine the scope of arbitrability of their agreement.

12. As to whether the dispute should be referred to arbitration, counsel for the Applicant cites Section 10 of the *Arbitration Act* to urge that the provision imbues certainty and predictability in arbitration and submits that by filing the instant suit, the Claimant was attempting to rewrite the employment contract.

13. Reliance was also made on the provisions of Article 159 (2) (c) of the *Constitution* of Kenya on promotion of alternative dispute resolution mechanisms and alternative justice systems in the resolution of disputes.

14. Reliance was made on the sentiments of the court in *Niazsons (K) Ltd v China Road & Bridge Corporation Kenya* [2001] eKLR on the requirements of Section 6(1) of the *Arbitration Act*.

15. The decision in *National Bank of Kenya Ltd v Pipelastic Samkolit (K) Ltd & another* [2001] eKLR was also cited to submit that a court of law cannot re-write a contract between the parties to the dispute.

16. Similarly, the decisions in *Wringles Company (East Africa) v Attorney General & 3 others* [2013] eKLR, *Heather Hayes v African Medical & Research Foundation* [2014] eKLR and *Okanya v Woodrow Communications Ltd* [2023] KEELRC 2674 (KLR) were relied upon to urge that the dispute be referred to arbitration.

Claimant's submissions

17. On reference of the matter to arbitration, counsel submits that the Respondent unilaterally terminated the Claimant's employment and did not invoke the arbitral clause it seeks to rely on in the instant

Chamber Summons, thus, both parties have demonstrated unwillingness to abide by the terms of their contract.

18. Reliance was made on the decisions in *Muthoni Mukuna v Fsi Capital Ltd* [2015] eKLR, *Sammy Onyango Ochieng v Abno Softwares International Ltd* [2020] eKLR and *Charles Njogu Lofty v Bedouin Enterprises Ltd* CA No 253 of 2003.

19. Counsel urges that the Applicant's counsel entered appearance vide Notice of Appointment dated 28th February, 2024, 3 months before the instant application was filled and the court had already given directions on the filing of a response and hearing to urge that the Respondent has not shown an intention to refer the dispute to arbitration.

20. As to whether the claim ought to be struck out, counsel urges that Order 2 Rule 15 of the *Civil Procedure Rules, 2010* gives the court discretion to strike out pleadings in certain circumstances and the instant suit is not one of them.

21. Reliance was made on the sentiments of the court in *Kivanga Estates Ltd v National Bank of Kenya Ltd* [2017] eKLR to urge that the jurisdiction of a court to strike out pleadings ought to be exercised sparingly and as a last resort as it is not only harsh or drastic but draconian.

22. Counsel urges the court to dismiss the Respondent's Chamber Summons.

Analysis

23. It is common ground that the Claimant and the Respondent had a Service Level Agreement (herein after SLA) dated 28th June, 2024 which provided inter alia;

> " That All disputes arising from this agreement shall be solved in arbitration process".

24. It is not in dispute that both parties are aware of the clause.

25. Documents on record reveal that by letter dated 20th August, 2023, under reference "Discharging of Service Level Contract for Healthy and Safety Manager Mr. Dickson Alubala", the Respondent accused the Claimant of breach of contract for having failed to compile and submit the HSE daily reports in time as required, absconding duty on 8th August, 2023 and neglecting to attend general site meetings for 8th, 14th, 15th, 22nd and 23rd August, 2023 to report on HSE matters.

26. The letter terminated the Claimant's services effective 31st August, 2023.

27. Evidently, there was a dispute between the parties in August 2023 but the Respondent opted to terminate the Claimant's employment.

28. As to whether the dispute herein should be referred to arbitration, counsels have adopted opposing positions with the Applicant urging that the SLA is binding on both parties to refer the dispute to arbitration.

29. As correctly submitted by the Applicant's counsel, an arbitration agreement must be in writing and may take the form of a separate agreement between the parties or an arbitral clause in the agreement between the parties as in this instance.

30. Arguably, and as submitted by counsel for the Applicant, both parties are bound by the arbitral clause to refer all disputes to arbitration including the instant dispute when it arose as held in *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* (*supra*) and *Wringles Co. (EA) Ltd v Attorney*

General (*supra*), *Njuguna Ngugi v Ahmed Noor and Martin Sheikh & another* [2018] eKLR among others.

31. However, as correctly submitted by the Claimant's counsel, the Respondent has not demonstrated any inclination to arbitration before the Claimant filed the instant suit on 2nd November, 2023.

32. Indeed, the Respondent/Applicant had the best opportunity to invoke the arbitral clause on the concerns it had about the Claimant's discharge of the SLA in August 2023.

33. The fact that it took action before subjecting the dispute to arbitration would appear to suggest it did not consider itself bound by the arbitral clause and is estopped from relying on it after the Claimant opted to file a suit in court.

34. In effect, the Respondent desires to have it both ways which is patently inequitable, in the court's view.

35. The Court is further guided by the sentiments of the court in *Jane Muthoni Mukuna v Fsi Capital Ltd* (*supra*) thus:-

> "The Claimant also has another very valid argument that the employment relationship having been terminated there was nothing to refer to arbitration. That the Respondent having had a dispute with the Claimant, should have referred the dispute to arbitration before termination of the contract. After its termination, and taking into account the fact that the Claimant is not suing for reinstatement, but terminal dues, there is no contract to be referred to arbitration . . ."

36. These sentiments apply on all fours to the circumstances of this case.

37. It is unconscionable for the Respondent/Applicant to insist on observance of terms of an agreement by the Claimant yet it unilaterally terminated the contract in total disregard of the arbitration clause.

38. Although the Applicant has cited Section 6(1) of the *Arbitration Act* as part of the preamble to the Chamber Summons, the substantive provision is not cited elsewhere.

39. This is because it is inapplicable for the simple reason that the Applicant has not sought a stay of proceedings under Section 6(1) of the *Arbitration Act*.

40. Instructively, on 19th March, 2024, the counsel holding brief for the Respondent's Advocate informed the court that the law firm had come on record and filed a notice of appointment but the Managing Director of the Respondent was then out of the Country and prayed for 14 days to file a response. Counsel for the Claimant had no objection and the court granted 14 days to the Respondent and hearing was scheduled for 27th May, 2024 on which date Mr. Kibet informed the court that they had filed the instant application.

41. Typically, applications for reference to arbitration are grounded on Section 6(1) of the *Arbitration Act* and the salient relief sought at that stage is stay of the suit for the dispute to be referred to arbitration.

42. However, in the instant suit, the Respondent had already acknowledged the suit and was in the process of complying with the court's directions on 19th March, 2023 when it abruptly changed its mind and now wants the termination of the Claimant's employment referred to arbitration, while it had the opportunity to do so to nip the dispute in the bud but opted to terminate the Claimant's employment.

43. In sum, it is discernible that the Applicant's Chamber Summons is unsustainable under the Provisions of Section 6(1) of the *Arbitration Act* or under the Service Level Agreement as the latter does not exist.

44. As regards the striking out of the Claimant's suit, the Applicant has not provided any justification for the order sought and as correctly submitted by the Claimant's counsel, the Respondent has not demonstrated under what provision of the Civil Procedure Rules, 2010 it is relying on as the grounds for striking out any pleading are clearly articulated under Order 2 Rule 15 of the Civil Procedure Rules, 2010.

45. Equally, and as contended by the Claimant's counsel, striking out a suit is a draconian step and must be justifiable wholesomely and justification has been provided in this case to warrant the exercise of the court's jurisdiction favourably.

46. See *Kiranga Estates Ltd v National Bank of Kenya Ltd* (*supra*).

47. Notwithstanding the fact that the Chamber Summons is unopposed, the court is not persuaded that a sustainable case has been made for reference of the dispute to arbitration.

48. Flowing from the foregoing, it is decipherable that the Respondent's Chamber Summons dated 8th May, 2024 is for dismissal and it is accordingly dismissed.

49. Costs shall abide the outcome of the suit.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 31ST DAY OF JULY 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 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 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