



**Chepkwony v Protective Custody Limited (Appeal E020 of 2023)
[2024] KEELRC 2174 (KLR) (4 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2174 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
APPEAL E020 OF 2023
DN NDERITU, J
JULY 4, 2024**

BETWEEN

FRED CHEPKWONY APPELLANT

AND

PROTECTIVE CUSTODY LIMITED RESPONDENT

(Being an appeal from the ruling and order of the Senior Resident Magistrate (Hon E. S. Soita) delivered on 27th June, 2023, in Nakuru CMCC (ELRC) No. E229 of 2021)

JUDGMENT

I. Introduction

1. The appellant herein (the claimant in the lower court) commenced Nakuru CMCC (ELRC) No. E229 of 2021 by way of a plaint dated 21st December, 2022 filed through Maragia Ogaro & Co. Advocates, claiming the following –
 - a. Notice Pay
 - b. Overtime
 - c. Underpayment
 - d. Off duties
 - e. Public Holidays
 - f. Leave
 - g. Compensation
 - h. Certificate of service



2. The memorandum of claim was accompanied with a verifying affidavit and a list of one witness, the claimant. No list or bundle of documents was filed.
3. The claimant pleaded that he was engaged by the respondent as a day-guard in June, 2018 but he was allegedly unfairly and unlawfully terminated on 12th July, 2020. He did not plead or mention that there existed a written contract of employment or a letter of appointment between himself and the respondent.
4. Once served with the summons, the respondent entered appearance on 31st January, 2023. On 8th February, 2023 the respondent filed a chamber summons dated 2nd February, 2023 seeking the following orders –
 1. The cause filed herein be stayed and the dispute be referred to Arbitration in accordance with the Agreement of the parties as set out in the Appointment Letter dated 1st January 2022.
 2. The costs of this application be borne by the claimant.
5. Annexed to the supporting affidavit to the application is a purported letter of appointment allegedly executed between the parties herein which is alleged to be the contract of employment between the claimant and the respondent. The letter was allegedly executed by the parties on 1st January, 2022.
6. The contention by the respondent is that clause 7 of the said letter of appointment/contract provided that any dispute(s) relating to the employment relationship created between the parties is to be referred to arbitration for adjudication.
7. In his replying affidavit to the application the appellant disowned the said letter of appointment/contract and vehemently denied ever executing the same. He refers to the document as a forgery and fraudulent.
8. It is important to note that to this day the respondent has not filed a response/defence to the claim. This fact has a significant effect on the proceedings as shall be noted hereunder.
9. In a ruling delivered on and dated 27th June, 2023, the trial lower court issued the following orders –
 - a. The court has no jurisdiction in this claim.
 - b. The claim is struck out with no orders as to cost.
10. This appeal is against the above ruling and orders and the appellant has raised the following grounds in the memorandum of appeal dated 24th February, 2023 –
 1. That the learned trial magistrate court erred in law and in fact in granting the prayers that were not sought by the Respondent in the respondent’s application dated 2.2.2023.
 2. That the learned trial magistrate erred in law and in fact in failing to note and take cognizance of the fact that the Appellant had denounced in whole the purported Appointment Letter that the Respondent had alleged that it was signed by the Appellant.
 3. That the learned magistrate erred in law and in fact in failing to address valid questions and issues that were raised in the said Appointment Letter.
 4. That the learned trial magistrate erred in law and in fact in failing to note that the respondent who had propagated the question of “Reference to Arbitration” failed to refer the matter to Arbitration and or initiate the said process but opted to wait for the claimant to lodge the



dispute in court for it to raise the issue of Arbitration. This casted doubt and faith to the authenticity of the purported Appointment Letter.

5. That the learned trial Magistrate erred in law and in fact in failing to note that the Employment and Labour Court under Article 162(2)(a) of *the Constitution* is clothed with original and exclusive jurisdiction as read with the provision of Section 87 of the *Employment Act*.
6. That the learned trial magistrate erred in law and in fact in failing to note that the Arbitration does not have the requisite jurisdiction to hear and determine a dispute and especially the reliefs that were sought the Appellant given that the said reliefs are anchored under the numerous Section of the *Employment Act*, *Labour Institutions Act* and the Wages Order which clothes and guides the Employment and Labour Court with clear tabulation mechanisms.
7. That the learned trial magistrate erred in law and in fact in failing to consider the submission filed on behalf of the Appellant then claimant.
8. That the learned trial magistrate erred in law and in fact in failing to note that the subject clause (that is Clause 7 of the purported Appointment Letter) failed to meet the authentic test in that it only compelled the Employee to subject himself or herself to the whims of the Employers Board and if not, be subjected to the Arbitration Process for which the Employee has no easy access as is the Employment and Labour Relations Court.
9. That the learned magistrate erred in law and in fact in failing to note that the subject Clause had excluded the Appellant or any employee the initial access to the Employees Union or Representative, thus the said Clause cannot override the powers of the Employment and Labour Relations Court to hear and determine disputes emanating from unlawful termination.
10. That the learned magistrate erred in law and in delivering a Ruling that was and will remain oppressive, wanting in law and logic, tilting to one side of the divide and biased in fairness.
11. On 15th November, 2023 the court directed that the appeal be canvassed by way of written submissions. Mr. Maragia for the appellant filed his written submissions on 14th November, 2023, while Miss Kinoti for the respondent filed on 29th November, 2023. With the leave of the court, Mr. Maragia for the appellant filed supplementary submissions on 13th December, 2023.

II. Submissions By Counsel

12. On the one hand, counsel for the appellant identified the following issues for determination –
 - i. Whether the court acted erroneously in holding that the claimant had agreed and or had submitted himself to the Arbitration by reference to the clause in the Appointment Letter that the claimant questioned.
 - ii. Whether from the content of purported Appointment Letter, the claimant had no option but have the matter referred to Arbitration even on sight of the falsities pointed out by the claimant and steps taken by respondent.
 - iii. Whether the claimant contested the purported Letter of Appointment and if the court ignored the said contestation raised by the claimant
 - iv. Whether the court lacked jurisdiction to hear and determine the cause arising from termination in terms of Section 87 of the Employment vis-a-vis Article 162(2)(a) of *Constitution of Kenya*,



2010 on the one hand and the provision of the Appointment Letter vis-à-vis the provision of Section 4 of the Arbitration Act.

13. On the first issue, it is submitted that the lower court ignored the fact that the appellant contested, opposed, and denied the purported letter of appointment/contract and that the appellant denied signing and or thumbprinting the same. It is submitted that the lower court misdirected itself and went against the evidence on record when it ruled and held that the appellant had not denied executing and or thumbprinting the said document. It is submitted that the appellant was extremely categorical in his replying affidavit that he neither signed nor thumb-printed on the alleged document and as such his position is that the same is a forgery intended to mislead the court and that the lower court fell into the trap.
14. In the foregoing circumstances, counsel submits, there was no agreement and or consent between the parties that any dispute in regard to their employment relationship was to be arbitrated.
15. Further, it is submitted that the appellant, as per his claim, was engaged by the respondent in June, 2018 and terminated in July, 2020. Yet, the contract is alleged to have been executed in January, 2022, long after the appellant had been terminated. It is submitted that the above facts and evidence abundantly demonstrate that the alleged letter of appointment/contract is a forgery and fraudulent and the trial lower court gravely erred in its ruling by holding otherwise.
16. It is submitted that the subject matter of the claim is an employment dispute that properly lies within the jurisdiction of a court with jurisdiction over such matters and the trial lower court was properly seized of the matter but misdirected itself in holding and denying its jurisdiction to hear and determine the same. Counsel has cited Section 87 of the Employment Act (the Act) in support of the jurisdiction of the court.
17. It is submitted that the parties in their relationship did not invoke or subject themselves to the Arbitration Act as no such jurisdiction was expressly or otherwise implied in the terms and conditions of service.
18. On the other hand, counsel for the respondent identified two issues for determination – Whether there is a valid arbitration clause; and, Whether the trial court has jurisdiction over the subject matter.
19. On the first issue, counsel relied on the disputed letter of appointment/contract submitting that going by the same the parties agreed and consented to arbitration in case of a dispute. Counsel has submitted extensively on the extent to which arbitration clauses in contracts bind parties and cited several authorities on the same. For reasons that shall become clear in a moment, the court shall not engage in analyzing the submission by counsel from that angle.
20. On the second issue, counsel submitted along the same line of thought that once the parties consented to the arbitration clause in the alleged but disputed contract the jurisdiction of the court was ousted. Again, the court shall desist in interrogating the issue at this point but deal with the same in the succeeding parts of the determination.
21. The court is urged to dismiss the appeal with costs.
22. In the supplementary submissions, counsel for the appellant reiterated the position taken in the initial submissions. It is submitted that since the letter of appointment/contract is disputed the trial court made a grave error in relying on the same and arriving at the decision that it did - striking out the appellant's case in the most draconian and unfair manner.
23. The court is urged to allow the appeal with costs.



III. Issues For Determination

24. The court has carefully gone through the memorandum of appeal and the written submissions by counsel for both parties. In my comprehensive understanding of the issues raised in the memorandum of appeal and upon reading the ruling/order that gave rise to the appeal, the learned trial magistrate struck out the suit on the ground that the court lacked jurisdiction over the subject matter.
25. It is important to note and state that striking out of the suit is not one of the prayers that the respondent had sought in the application. What was sought in the application was for stay of the proceedings pending referral to and determination of the matter on arbitration.
26. The following issues commend themselves for determination –
 - a. Is there a proved and accepted letter of appointment/contract of employment between the parties wherein arbitration was agreed as the method of resolving any dispute(s) arising therefrom hence ousting the jurisdiction of the court?
 - b. Depending on the outcome of issue (a) above, what are the appropriate orders for this court to make?
 - c. Costs.
27. The answer to issue (a) above is fairly straightforward. As noted elsewhere in this judgment, the appellant did not plead or allude to a letter of appointment or a written contract between him and the respondent. It is the respondent who introduced an alleged letter of appointment and only did so by way of an application. To this point, and the record confirms this, the respondent has not filed a defence or a response to the claim. Had a response or a defence been filed, the appellant should have had an opportunity to respond thereto.
28. Be that as it may, the impugned letter of appointment is vehemently denied and opposed by the appellant. The court notes that the page allegedly executed by the parties is separate from the other part of the document. The first page is not signed or initialed by the parties. Contrary to what the counsel for the respondent alleges, it is the respondent who introduced the document into the proceedings and hence bore the burden of proving that indeed the same is genuine, more so, when the appellant disputed the same.
29. Under Sections 10 and 74 of the *Employment Act* it is the duty and obligation of the employer, the respondent, to keep records of employment and as such it is the employer who bears the burden of proving their authenticity. The court finds and holds that under Section 107 of the *Evidence Act* the burden of proof into the authenticity and genuineness of the said document lies with the respondent.
30. However, the required proof may only be achieved in a trial where the document is introduced as an exhibit and challenged for the court to determine its authenticity, genuineness, and admissibility in evidence. As it stands now, there is no evidence that the appellant executed the same as alleged by the respondent through an application. As far as I understand the appellant's case in the lower court, his position is that there was no written contract or letter of appointment issued to him.
31. Further, the appellant states that the letter of appointment reads that it was executed in January, 2022, long after he had been terminated. This is one of the reasons that the appellant termed the document a forgery and hence fraudulent.
32. In my considered view, it was wrong, erroneous, and misleading for the lower court to rely on a contested document, which in any event had not been produced as an exhibit, to make such final and



draconian orders against the appellant. Striking out a cause or suit is so draconian and should only be applied in the most obvious and clear circumstances.

33. The respondent did not file and has not filed a defence or response to the claim; the contested document has not even been listed as one of those that the respondent shall be relying on during the trial; the appellant has not had the opportunity of responding to the expected defence; the impugned document is contested and the same has not been produced and admitted in evidence as an exhibit.
34. In the foregoing circumstances, it was misleading, premature, prejudicial, erroneous, and wrong for the trial lower court to have relied on the said document to strike out the cause. The court denied the appellant a right to be heard as envisaged under Articles 47 & 50 of *the Constitution*.
35. The multitude of cases cited by counsel is irrelevant at this stage. The appellant contested the impugned document and termed it a forgery and fraudulent. The trial court ought to have proceeded with the trial and allowed the parties to contest the document in the trial. The lower court wrongfully and unlawfully shifted the burden to the appellant to disapprove the authenticity and genuineness of a document that had not been, in the first place, produced as an exhibit.
36. Further, the order of striking out the suit was not one of those sought by the respondent. The prayer sought was for stay of proceedings pending the arbitration process. Again, the trial court was too enthusiastic in striking out the cause which I find hasty and prejudicial to the appellant. Even if the lower court were to find, in a trial properly conducted, that the contested document was genuine, it ought to stay the proceedings and the parties directed to commence the arbitration.
37. In answer to issue one, therefore, the court returns that so far there is no evidence of a binding letter of appointment/contract that demands that the parties refer the subject matter for arbitration. This is so because there is no such document on record properly produced in the trial. Further, the document that has been alluded to by the respondent in the application has been contested and denied by the appellant. The contest over the document may only be settled in a properly conducted trial.
38. For all the foregoing reasons, therefore, the appeal is allowed and the court orders that the suit in the lower court be and is hereby reinstated to be heard by a magistrate, other than Hon. E. Soita, to its logical conclusion.
39. The appellant is awarded the costs of the appeal.

IV. Orders

40. In allowing the appeal, the court issues the following orders -
 - a. The order of the lower trial court striking out the suit for purported want of jurisdiction be is hereby set aside and the suit is reinstated for hearing on merits to logical conclusion.
 - b. The suit shall now be heard on merits by any other magistrate, other than Hon. Mr. E. Soita (SRM), to its logical conclusion.
 - c. The appellant is awarded the costs of the appeal and those of the application in the lower court.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 4TH DAY OF JULY, 2024.

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DAVID NDERITU

JUDGE

