



**Sheffield Steel Systems Limited v Okumu (Cause E489 of 2023)
[2024] KEELRC 2034 (KLR) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2034 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E489 OF 2023**

**L NDOLO, J
JULY 25, 2024**

BETWEEN

SHEFFIELD STEEL SYSTEMS LIMITED CLAIMANT

AND

JANE ACHIENG ESHIWANI OKUMU RESPONDENT

RULING

1. By a Memorandum of Claim dated 15th June 2023, the Claimant used the Respondent for the sum of Kshs.146,085,932.15 alleged to have been lost as a direct consequence of supposed unlawful actions by the Respondent.
2. The Respondent filed a Response dated 6th September 2023 followed by a Notice of Preliminary Objection dated 12th February 2024. It is that Preliminary Objection which is the subject of this ruling.
3. The substance of the Objection is that:

“The Claimant’s suit is based on an appointment letter dated 1st November 2004 and appointment agreement executed on 4th September 2009 containing an arbitration clause (clause 16) therefore this Honourable Court lacks jurisdiction to determine the claim in the first instance’.

4. A Preliminary Objection was defined in the celebrated decision in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Co. Ltd* (1969) EA, 696 as one which:

“...consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”



5. The Respondent bases her Preliminary Objection on clause 16 of the employment agreement titled 'Arbitration' which provides as follows:

'Any dispute, difference or question which may arise at any time between the parties touching upon the construction of this Agreement or the rights and liabilities of either party with respect hereto or otherwise arising in respect of the matters the subject of this Agreement shall be referred to the decision of a single arbitrator to be agreed upon between the Parties or in default of agreement within fourteen (14) days to be appointed at the request of any or either of the them (as the case may be) by the Chairman- Institute of Chartered Arbitrators-Nairobi Branch in accordance with and subject to the provisions of the Arbitration Act No.4 of 1995 or any statutory modification or re-enactment thereof for the time being in force.'

6. The manner by which a party may invoke an arbitration clause in a claim such as the present one is codified in Section 6(1) of the Arbitration Act as follows:

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 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.
2. Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.
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.

7. As held by the Court of Appeal in Agip (K) Ltd v Kibutu [1981] eKLR an application for stay of proceedings under Section 6 of the Arbitration Act cannot be disguised as preliminary point of law.

8. In the more recent decision in Eunice Soko Mlagui v Suresh Parmar & 4 others [2017] eKLR the Court of Appeal confirmed that the foregoing remains good law, stating:

"After 2009, the provision still requires a party to apply for referral of the dispute to arbitration at the time of entering appearance or before acknowledging the claim in question. In our mind, filing a defence constitutes acknowledgement of a claim within the meaning of the provision. Be that as it may, to the extent that after amendment, Section 6(1) still requires a party to apply for referral of the dispute to arbitration at the time of entering appearance, the pre 2009 decisions of our courts on the application of section 6(1) are still good law to that extent. In Charles Njogu Lofty v Bedouin Enterprises Ltd, CA No 253 of 2003, this court considered section 6(1) and held that even if the conditions set out in paragraphs (a) and (b) are satisfied, the court would still be entitled to reject an application



for stay of proceedings and referral thereof to arbitration if the application to do so is not made at the time of entering appearance or is made after filing of the defence.”

9. In its written submissions dated 18th April 2024, the Claimant cites the decision in [Lipa Later Limited v Wanini](#) (Cause E750 of 2023) [2023] KELRC (KLR) (4 December 2023) (Ruling) where my brother Dr. Gakeri J stated the following:

“A plain reading of section 6(1) of the [Arbitration Act](#) reveals that an arbitration agreement does not deny a court jurisdiction to hear and determine a suit based on the agreement and as courts have maintained, it merely gives the Respondent a defense to the claim which must be exploited by way of an application for stay for the dispute to be referred to arbitration.”

10. In the present case, the Respondent broke every rule in the book. After receiving the Claimant’s pleadings, she filed a Notice of Appointment of Advocates dated 10th July 2023, a Response to Claim dated 6th September 2023, a Witness Statement dated 26th September 2023 and a List of Documents dated 31st January 2024.
11. The Respondent subsequently filed the Notice of Preliminary Objection dated 12th February 2024. Even as I write this ruling, there is no referral application on record. The Respondent, not only failed to keep the timelines set out in Section 6(1) of the [Arbitration Act](#), she also invoked a procedure that is unknown in law in a futile move to block these proceedings.
12. That said, the only conclusion to make is that the Respondent’s Preliminary Objection is ill advised and is therefore overruled with costs in the cause.
13. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 25TH DAY JULY 2024.

LINNET NDOLO

JUDGE

Appearance:

Ms. Maina for the Claimant

Ms. Saisi for the Respondent

