

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI

ELRC CAUSE NO E737 OF 2025

**SAMUEL MULINGE
MUSYOKI.....CLAIMANT**

VERSUS

**AUTOCHEK KENYA
LIMITED.....RESPONDENT**

RULING

Background

1. The Claimant filed this cause to challenge the Respondent’s decision to terminate his contract of service. He contends that the decision was without justification.
2. On being served with the pleadings in the cause, the Respondent filed the application dated 25th August 2025 through which it seeks that the suit be stayed and the matter be referred to arbitration in accordance with the agreement between the parties. The application is supported by the grounds on the face thereof and the affidavit dated 25th August 2025.
3. The Respondent relies on the dispute resolution clause in the letter of appointment dated 20th October 2022 and section 6 of *the Arbitration Act* to anchor its contention. The aforesaid clause provides as follows:-

“If any dispute arises between the parties on any matter provided for or arising directly out of this agreement or in regard to the interpretation or termination of this agreement then that dispute shall be submitted to and decided by private arbitration. The dispute shall be referred to a single arbitrator to be agreed upon between the parties or failing such agreement within twenty eight (28) days after the dispute has arisen, nominated on the application of either party by the Chartered Institute of Arbitrators (“CI Arb”), Kenya Chapter and any such reference shall be deemed to be a submission to the arbitration of a single arbitrator in terms of the Arbitration Act as amended or any legislation passed in substitution thereof. The award of the arbitrator shall be final and binding upon the parties.

Notwithstanding this paragraph, either party shall be entitled to approach a court of competent jurisdiction for any urgent injunctive relief pending the outcome of any arbitration. Should the CI Arb for any reason not be in existence at the time that any dispute arises and in the absence of written agreement between the parties to the contrary, either party may request the chairman of the Law Society of Kenya to appoint an arbitrator and the arbitration will be conducted in terms of such rules as the parties agree in writing or the arbitrator

determines. The arbitration proceedings shall be conducted in Kenya.”

4. On the other hand, section 6 (1) of *the Arbitration Act* provides as follows:-

“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.”

5. The Respondent’s case is that since the parties agreed that any dispute that may arise from the contract between them should be resolved through arbitration, the instant dispute ought not to have been referred to court. As such, it prays that the matter be referred to arbitration.
6. The Respondent contends that the parties are bound by the contract between them. As such, they should honour the provision on arbitration in the contract.
7. The Respondent urges the court to respect the agreement between the parties by enforcing it as it is. In the

Respondent's view, any other approach to the matter will be tantamount to rewriting the contract which the law abhors.

8. On the other hand, the Claimant contends that the dispute between them should be resolved by this court as a specialized institution with exclusive constitutional mandate to adjudicate on employment and labour relations disputes. He contends that private arbitration will deprive him of the right to have the matter resolved by a specialized agency.
9. The Claimant contends that the contract between the parties was not freely negotiated. He avers that the contract was standard form and he was only asked to sign it. As such, he contends that it cannot be said that he had meaningful input in the instrument.
10. The Claimant contends that he lost his means of livelihood following the job loss. As such, he contends that he cannot afford to raise the arbitration fees which will be required in private arbitration. It is his case that this will impede enjoyment of his constitutional right to access justice.

Analysis

11. There is no doubt that the law recognizes arbitration as one of the mechanisms for dispute resolution. As a matter of fact, article 159 of *the Constitution* obligates the court to promote alternative dispute resolution mechanisms including arbitration.
12. The fact that an arbitration agreement is lawful was restated by the South African Supreme Court of Appeal in the case of ***VJ v VJ and Another (258/2023) [2024] ZASCA 92 (11***

June 2024), where it was observed that such agreement is not *contra bonos mores*. As such, absent factors which may vitiate the agreement, it is accepted as valid and binding.

13. The basis for giving effect to arbitration agreements is the contractual principle of party autonomy. This principle acknowledges the right of individuals to set the terms of their engagement. Courts of law are required to defer to this right by giving effect to the agreements (**VJ v VJ and Another** (supra)).
14. Nevertheless, there has been a raging debate regarding the suitability of arbitration as a mechanism for resolving employment disputes. Several reasons are cited to justify the exclusion of arbitration from resolving employment grievances. These include: the perceived imbalance of power between parties to a contract of service at the time of negotiation of the terms of the contract which is considered as an impediment to the employee's ability to objectively agree to all the clauses in the contract including on arbitration; the fact that employment law is a specialized area which requires specialized institutions such as the Employment and Labour Relations Court to interpret and apply it; the fact that the arbitration agreement may have been hidden in other clauses in a contract of service or in a separate employee handbook thus depriving the employee of the opportunity to discern and internalize it; and the fact that arbitration may in reality be more costly than litigation in court thus impeding the employee's right to access justice

(Maina v Kenya Commercial Bank PLC & another (Constitutional Petition E003 of 2023) [2024] KEELRC 2287 (KLR) (26 September 2024) (Ruling)).

15. Because of these fears, a number of court decisions have rejected arbitration as a mechanism for resolving employment disputes. For example, in **Okeyo v Board of Directors HHI Management Service Limited & another (Cause E970 of 2023) [2024] KEELRC 1006 (KLR) (6 May 2024) (Ruling)**, the learned Judge was of the view that arbitration agreements are atypical to employment dispute resolution because of the perceived imbalance of power between the employer and the employee. The court expressed the view that arbitration was best suited for ordinary commercial disputes where the parties were presumed to enjoy equality of power.
16. In **Rono v Delish Nail & Beauty Ltd (Cause E038 of 2023) [2023] KEELRC 2996 (KLR) (23 November 2023) (Ruling)**, the learned Judge doubted the applicability of arbitration to employment disputes. She was of the view that *the Employment and Labour Relations Act* excludes arbitration as a mechanism for resolving employment disputes.
17. Conversely, there is sizeable case law which expresses the view that arbitration is applicable in resolving employment disputes as long as the parties to the employment contract have agreed on it. For example, in **Karunda v Keekorok Capital Ltd [2023] KEELRC 783 (KLR)**, the learned Judge

observed that parties to an employment contract would be bound to submit to arbitration if this was agreed on in the contract. He was of the view that the parties should not be allowed to evade obligations in their own agreement.

18. In ***Okanya v Woodrow Communications Limited [2023] KEELRC 2674 (KLR)***, the learned Judge acknowledged that she was obligated by article 159 of *the Constitution* to encourage parties to resolve disputes using alternative dispute resolution mechanisms, including arbitration. Consequently, she referred the employment dispute that was before her to arbitration.
19. In ***Changwony v Liberty Life Assurance Kenya Limited [2023] KEELRC 361 (KLR)***, the court invoked the arbitration clause in the contract between the parties to refer the employment dispute between them to arbitration. The court proceeded on the premise that section 15 of *the Employment and Labour Relations Court Act* permits it to refer employment disputes to forums which can invoke alternative dispute resolution procedures sanctioned by article 159 of *the Constitution* to resolve the disputes.
20. What emerges from the foregoing is that although there is controversy regarding the suitability of arbitration as a means for resolving employment disputes, it (arbitration) nevertheless has not been outlawed. As such, the fact that the dispute between parties arose from an employment relation does not automatically disqualify it from being resolved through arbitration.

21. That said, the reasons which militate against the use of arbitration in resolving employment disputes are compelling. As such, the court should have regard for them as it decides whether or not to refer a matter to arbitration.
22. A key pillar of the law of contract is that parties are bound by the terms of their agreement. As such, courts should enforce the contracts as agreed without infusing new terms or invalidating existing terms in them (***Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited [2017] KECA 152 (KLR)***). To do otherwise will be tantamount to re-writing the contract between the parties, a matter which the law abhors.
23. The court has looked at the contract between the parties. It has an acknowledgement clause by the Claimant which states as follows:-

“I, the undersigned, hereby acknowledge that I have read, understood and accepted the particulars of employment outlined above. I will therefore assume duty on 22nd October 2022.”
24. This clause implies that the Claimant consciously read, understood and accepted the terms of the contract between them including the one on arbitration. In the premises and absent cogent evidence to suggest the contrary, it will be speculative for the court to find that the Claimant did not appreciate what he was contracting into.
25. The court appreciates the fact that affordability is critical in ensuring enjoyment of the right of access to justice. The

court further acknowledges that court action as opposed to private arbitration would perhaps be more facilitative of this right on account of affordability. However, given that the Respondent has opted to invoke the arbitration clause in the agreement between them and having regard to the constitutional edict to promote alternative dispute resolution procedures, it (the court) is inclined to grant the request to refer the matter to arbitration conditional upon the Respondent shouldering 75% of the arbitration cost and the Claimant shouldering the balance.

Determination

26. The upshot is that the Respondent's plea to stay the matter and to refer it to arbitration is granted on condition that the Respondent will foot 75% of the cost of arbitration whilst the Claimant will foot the balance.
27. The Arbitrator shall be appointed in terms of the clause on arbitration in the contract of service.
28. Each party shall bear own costs for this application.

**Dated, signed and delivered on the 26th day of February,
2026**

B. O. M. MANANI

JUDGE

In the presence of:

.....for the Claimant

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI