

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT

MACHAKOS

ELRC CONSTITUTIONAL PETITION NO. E013 OF 2025

TIMOTHY MUTUA SOLAVEAPETITIONER

VERSUS

COUNTY GOVERNMENT OF MACHAKOS1ST RESPONDENT

THE SENATOR MACHAKOS COUNTY GOVERNMENT..... 2ND RESPONDENT

CORAM

Before Lady Justice Jemimah Keli

C/A Otieno

RULING

1. The 2nd respondent in response to the petition by her ex-employee, filed application vide Notice of Motion dated 25th September 2025 brought under Article 159(2)(c) of the Constitution of Kenya, Rule 19 of the Employment and Labour Relations Court, 2014, Section 6 of the Arbitration Act No. 4 of 1995, Rules 2 and 8 of the Arbitration Rules 1997 and all other enabling provisions of the law) for ORDERS:-
 - a) THAT this Application be certified as urgent and heard ex parte in the first instance.

- b) THAT this Honourable Court be pleased to stay the entire proceedings herein and refer the dispute herein for hearing and determination by way of arbitration.
- c) THAT this Honourable Court be pleased to grant any other Orders it may deem fit and just.
- d) THAT the costs of this Application be provided for.

2. Grounds of the Application

- a. THAT the 2nd Respondent has been served with the Petitioner's Petition.
- b. THAT vide the Petition, the Petitioner alleges that his employment was unfairly and unlawfully terminated by the Respondents contrary to the provisions of the Constitution of Kenya, County Governments Act and the Fair Administrative Action Act.
- c. THAT vide an Employment Contract dated 1st day of October 2022, the Petitioner herein was employed as a driver serving the 2nd Respondent.
- d. THAT the Petitioner's employment was terminated on 1st November, 2023 on grounds that the office of Machakos had gone through re-organization and his services were no-longer needed.
- e. THAT Clause 9 of the Employment Contract provides that disputes arising from Petitioner's employment shall be referred to Arbitration in accordance with the Arbitration Act No.4 of 1995.
- f. THAT Article 159(2) of the Constitution provides as follows: '(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles. justice shall be done to all, irrespective of status; b. justice shall not be

delayed; c. alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3); d. justice shall be administered without undue regard to procedural technicalities; and the purpose and principles of this Constitution shall be protected and promoted.’

- g. THAT by filing the instant suit before this Honourable Court the Petitioner breached Clause 9 of the Employment Contract and further violated Article 159(2) (c) of the Constitution.
- h. THAT it is trite law that parties are bound by the terms of their contracts and that a court of law cannot purport to rewrite a contract between the parties.
- i. THAT it is a clear abuse of the court process for the Petitioner to refer the dispute herein before this Honourable Court while the Employment Contract contains an arbitration clause.
- j. THAT the Petition herein is brought without undue delay and the 1st Petitioner has not taken any steps to further the proceedings filed in this Court save for the filing of a Notice of Appointment of Advocates.
- k. THAT this Honourable Court has the Constitutional obligation to promote alternative dispute resolution mechanisms, including arbitration especially where a valid Arbitration clause is demonstrated, and where the law so provides.
- l. THAT the ends of justice require that this Honourable Court stays the entire proceedings before it and refer this matter for settlement by Arbitration.
- m. THAT the grant of Orders sought herein will enable this Honourable Court to administer substantive justice.

- n. THAT the Petitioner herein does not stand to suffer any prejudice if the Orders sought herein are granted.
 - o. THAT it is in the interest of justice that this Application be heard and that the orders sought be granted.
3. The application was supported by affidavit of the 2nd respondent which annexed the employment contract and the termination letter.
4. The petitioner opposed the application through his replying affidavit dated 3rd October 2025 as follows- the instant Application has been filed to scuttle the Court process in order to ensure that the matter delays in Court. That whereas there is an Arbitration Clause in the Contract, the same does not oust the jurisdiction of the Honourable Court which is properly seized of the matter. That it is not true that he had breached the employment Contract by filing the instant petition since he was well within my rights and further, the said Contract does not state that he does not have a right to file a suit in Court. That he stood to be prejudiced if the Application is allowed since the same is made to delay justice.

Determination

5. The application was canvassed by way of written submissions.

6. The applicant submitted that this application has been brought under the Constitution of Kenya, the Employment and Labour Relations Act and the Arbitration Act, 1995. Article 159(2)(C) of the Constitution states; "In exercising judicial authority, the courts and tribunals shall be guided by the following principles; Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted. "That the parties to the contract of employment embraced this principle by providing for arbitration as the first mode of resolving any dispute arising out of the said employment. The applicant urged urge this Honourable Court to compel the Petitioner to abide with that clause. 16. Section 15 of Employment and Labour Relations Court Act embraces alternative dispute resolution. It states; "Nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion or at the request of the parties, any other appropriate means of dispute resolution, including internal methods, conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2)(c) of the Constitution." That Section 6 (1) of the Arbitration Act, No. 4 of 1995 states; "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 enter appearance or otherwise acknowledged 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." This application has been brought before this Honourable Court in line with the above provision. The Respondent filed the application together with the Notice of the

Appointment of Advocates. The 2nd Respondent has not yet filed any defence to the claim, hence the application has been filed at the earliest instance as envisaged under the Arbitration Act. In the case of Niazsons (K) Ltd vs. China Road 4 Bridge [2001] eKLR the Court of Appeal set out the obligations of a court upon being moved under the above provisions of the Arbitration Act. It stated inter alia, "All that an applicant for stay of proceedings under Section 6 (1) of the Arbitration Act of 1995 is obliged to do is to bring his application promptly. The court will then be obligated to consider the threshold things; a. Whether the Applicant has taken any step in the proceedings other than steps allowed by the Section; b. Whether there are any legal impediments on the validity, operation or performance of the arbitration agreement and c. Whether the suit intended concerned a matter agreed to be referred to arbitration. That in the instant case the 2nd Respondent has complied with the requirements set out in that case and there is no impediments to filing the application. In Adrec Limited vs. Nation Media Group Limited [2007] eKLR (Civil Appeal 75 of 2017) the Court of Appeal stated; "The suit brought in the High Court by the Appellant relates to a matter which is the subject of an arbitration agreement, vide clause 16 of the Distributorship Agreement. Consequently, in pursuance with section 6 (1) of the Arbitration Act, it was open to the Respondent to apply "not later than the time when the Respondent entered appearance or otherwise acknowledged the claim against which the stay of the suit was sought. The record shows clearly that the Respondent merely filed a Notice of Appointment of Advocates and proceeded to apply for stay of the suit. Once a Defendant, in a suit founded on a contract containing an arbitral clause, enters appearance or causes a Notice of Appointment of Advocates filed on its behalf and prior thereto or contemporaneously with such of the Notice of Appointment or entering of appearance files

an application for stay of proceedings, the court is statutorily obligated to stay the proceedings and to refer the parties to arbitration as provided I the arbitral clause in the Agreement unless the court makes such findings as are referred to in (a) and (b) of Section 6 (1) of the Arbitration Act. It should be emphasized that the right to seek and obtain stay of proceedings under Section 6 (1) of the Arbitration Act is lost the moment a Defence is filed in the proceedings. By dint of Defence, the party filing it subjects itself to jurisdiction of the court and cannot thereafter resile from that position." The 2nd Respondent has not filed any other pleadings after filing a Notice of Appointment of Advocates besides this instant application. In the Adrec case referred above the court made the final decision thus; "The Constitution of Kenya 2010 recognizes alternative dispute resolution mechanisms including arbitration. Parties have the freedom to contract and even to resolve their disputes away from the courts subject to supportive court intervention in specific areas of law to ensure fairness in the arbitral process. The Respondent was perfectly entitled to seek and obtain stay of the suit as it did. It is our finding that the learned judge was spot on her decision (in ordering stay). We uphold that decision."

7. Conversely, the respondent submitted as follows: Whether the Application lacks merit? The Respondent/Applicants in the instant Application have raised a Notice of Preliminary Objection attacking the jurisdiction of this Honourable Court on the grounds that the matter ought to be referred to Arbitration. It is trite law that a Preliminary Objection should be raised on only pure points of law as was held in the celebrated case of Mukisa Biscuits Manufacturing Company Limited V West end Distributors [1969] EA. The Defendant/Applicant contends that Clause 9 of the Employment Contract states as follows

with regard to Arbitration; "Dispute settlement 9. Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be referred to arbitration in accordance with the Arbitration Act, No. 4 of 1995." It is trite law that an applicant seeking to have a matter referred for Arbitration must fulfill the following three tests as indicated in the Court of Appeal in Civil Appeal 186 of 2013 Mt. Kenya University v Step Up Holding (K) Ltd:- a. Whether the applicant has taken any step in the proceedings other than the steps allowed by section 6 of the Act; b. Whether there are any legal impediments on the validity, operation or performance of the arbitration agreement; and c. Whether the suit intended concerned a matter agreed to be referred to arbitration. 7. That Clause 9 of the Employment Contract does not oust the jurisdiction of the Honourable Court as envisioned under Section 12 of the Employment and Labour Relations Court Act and this has the effect to wit parties are allowed to approach the Honourable Court for relief. The instant matter having not been resolved and the failure by the Respondent/Applicants to invoke Clause 9 of the Employment Contract, the Petitioner/Respondent opted to file the matter before this Honourable Court of competent jurisdiction and hence the instant Application is misguided and an abuse of the Court process befitting dismissal with costs. That the agreement does not oust the jurisdiction of the Honourable Court as such an action would be illegal. That it is trite law that where a party wishes to invoke an arbitration agreement, the same ought to be done at the point of entering appearance and before the filing of a Defence. That the Application is an afterthought and further there is delay in filing the same. The Defendant/Applicant having failed to exercise the option to refer the matter for Arbitration is estopped from asserting the contrary and we urge the Honourable Court to dismiss the Application with costs. .Reference is made to the

following case law in opposition to the Notice of Motion- Civil Appeal 186 of 2013 Mt. Kenya University v Step Up Holding (K) Ltd The Honourable court of Appeal stated as follows "All that an applicant for a stay of proceedings under section 6 (1) of the Arbitration Act of 1995 is obliged to do is to bring his application promptly. The court will then be obligated to consider the threshold things: (a) Whether the applicant has taken any step in the proceedings other than the steps allowed by the section; (b) Whether there are any legal impediments on the validity, operation or performance of the arbitration agreement; and (c) Whether the suit intended concerned a matter agreed to be referred to arbitration" The Court of Appeal held that the Appellant had taken substantial steps before filing the Notice of Preliminary Objection and hence the appeal was dismissed with costs .

Decision

8. The contract of employment and letter of termination of the employment of the respondent /petitioner were not in dispute. The said contract of employment provided the process of dispute resolution between the parties thereto. Clause No. 9 of the contract states; "Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be referred to arbitration in accordance with the Arbitration Act, No. 4 of 1995." The arbitration clause is not disputed.

9. Section 6 (1) of the Arbitration Act, No. 4 of 1995 states; '6 (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.

(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.”

10. In the instant case, the applicant filed a notice of appointment and filed the instant application for stay of proceedings. The court found that the applicant complied with the provision of section 6 of the Arbitration Act. The petitioner admitted the arbitration clause under contract of employment. The dispute before the court related to the termination of the employment contract thus within clause 9. Article 159 (2)c) of the Constitution states as follows- ‘(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);’ The court finds that the applicant has met the threshold for stay of proceedings under section 6 of the Arbitration Act. The parties are

bound by their contract, and it is not up to the court to rewrite the contract. The court is further guided by the case of National Assembly VS James Njenga Karume Civil Application No.92 of 1992 the court held as follows; “In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievances prescribed by the Constitution or an Act of parliament, the procedure should be strictly followed...” The court has a constitutional duty to respect the alternative dispute resolution mechanism under the contract of the parties, being arbitration.

11. The application is held as merited and is allowed. This Honorable Court is pleased to stay the entire proceedings herein and refer the dispute herein for hearing and determination by way of arbitration as provided for in the employment contract. Costs in the cause.

12. It is so Ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS ON THE 8TH MAY, 2026.

JEMIMAH KELI

JUDGE

IN THE PRESENCE OF;

C/A Otieno

Petitioner- Museve

Respondents-absent