



**Kalaine v Mobile Consultations Africa Limited t/a Tibu Health (Cause E449 of 2023) [2025] KEELRC 1640 (KLR) (30 May 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1640 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E449 OF 2023**

**SC RUTTO, J**

**MAY 30, 2025**

**BETWEEN**

**NKIROTE KALAINÉ ..... CLAIMANT**

**AND**

**MOBILE CONSULTATIONS AFRICA LIMITED T/A TIBU  
HEALTH ..... RESPONDENT**

**RULING**

1. What comes up for determination is the Respondent/Applicant's Chamber Summons Application dated 5<sup>th</sup> July 2023 seeking the following orders:
  1. That any further proceedings in this matter be and are hereby stayed.
  2. That the dispute between the parties herein is referred to Arbitration in accordance with clauses 11 and 19.2 of the employment contract between the Claimant and the Respondent.
  3. The costs of this application be borne by the Claimant.
2. The grounds in support of the Application are set out therein and the Affidavit of Jason Carmichael, the Applicant's Chief Executive Officer.
3. Grounds in support of the Application are that there exists an arbitration agreement which is valid and enforceable under clauses 11 and 19.2 of the employment contract between the Claimant and the Respondent. That the instant dispute between the Claimant and the Respondent falls within the scope of the Arbitration Clauses.
4. That there are no special circumstances that would warrant the exemption of this dispute from arbitration proceedings.



5. It is further averred that the Respondent has not taken any steps in these proceedings to answer the substantive claim and that the Claimant and the Respondent freely and willingly ousted the jurisdiction of the court when they provided for an arbitration clause in the employment contract.
6. That it is not the duty of a court to rewrite the agreement of the parties but rather to give effect to the agreed terms.
7. Upon being served with the Application, the Claimant responded by filing a Replying Affidavit sworn on 28<sup>th</sup> February 2024. The Claimant deposes that she is advised by her Advocates on record, which advise she believes to be true, that the dispute before this Court falls within the exception provided in the *Arbitration Act* Cap 4 of 1995, specifically Section 6 (1) of the Act.
8. She further avers without prejudice to the foregoing, that the clause the Applicant relies upon makes reference to mediation before arbitration yet the Applicant has never made any attempt to mediate the issue before making the instant application for Arbitration.
9. That her Advocates on record inform her that they wrote to the Applicant severally to attempt to settle her claim out of court but all attempts fell on deaf ears as they were blatantly ignored and disregarded.
10. She is further advised by her Advocates on record which advise she believes to be true that she has the right enshrined in *the Constitution* of Kenya, to access justice which should be cost-efficient.
11. That no prejudice will be borne by the Applicant should this Honourable Court hear the Claimant's claim on merit as they will be given ample time to defend the same.

#### **Submissions.**

12. The Application was canvassed by way of written submissions. It is worth pointing out that the Claimant did not file written submissions, since the submissions uploaded on the online portal by the Claimant's Advocate relate to another case and even so, were not duly paid for.
13. On the part of the Applicant, it has been submitted that the arbitration agreement is valid, operative and capable of being enforced. In support of this position, the Applicant cited the case of John Hari Gakinya v Paul Kibugi Muite & 2 others (2007) eKLR.
14. The Applicant further submitted that the dispute herein does not fall under any of the exceptions of Section 6(1) of the *Arbitration Act*.
15. It was the Applicant's further position that the Court is under the obligation to honour and give effect to the agreement by the parties.

#### **Analysis and Determination.**

16. I have considered the Application, the Claimant's Replying Affidavit, as well as the submissions by the Applicant. In my view, the singular issue that arises for determination is whether the Court should stay the proceedings herein and refer the dispute to arbitration in accordance with the contract of employment between the Claimant and the Applicant.
17. It is evident that the Application is anchored on Clauses 11 and 19.2 of the contract of employment which provide for the settlement of disputes arising out of or in connection with the contract by way of arbitration.
18. It is not lost to the Court that the relationship between an employer and an employee is a relationship between two unequals. The inequality of bargaining powers in employment relationships manifests in



various ways, including the use of standard form contracts of employment. In this regard, the employer which is the dominant party in an employment relationship, sets the terms and conditions of the contract with little or no input from the employee, who is the weaker party.

19. It is therefore not in doubt that the use of standard form contracts of employment undermines the power of employees to negotiate the terms and conditions of employment. This includes the inclusion of arbitration clauses in employment contracts. The Court appreciated this position in the case of *Okeyo v Board of Directors HHI Management Service Limited & another* [2024] KEELRC 1006 (KLR) as follows:

“Incorporation of arbitral clauses in employment contract is atypical and underlines the reality of the unequal bargaining power between the employer and the employee. Such clauses are imposed on employees by employers.”

20. The Court further concurs with the decision of the Court in the case of *Okeyo v Board of Directors HHI Management Service Limited & another* [supra] that the arbitral law in Kenya was principally intended to resolve commercial disputes, as opposed to employment disputes. In so finding, the Court referenced the Supreme Court case of *Synergy Industrial Credit Ltd v Cape Holdings Ltd* [2019] KESC 12 (KLR) in which it was held as follows:

“In interpreting the arbitration law, therefore, one should never lose sight of the purpose of the enactment of the *Arbitration Act*, 1995 and in addition, the fact that *the Constitution* of Kenya, 2010 in article 159(2)(c) enjoins courts to be guided by the principles of alternative forms of dispute resolution such as arbitration. There is also no doubt that arbitration is an attractive way of settling commercial disputes by virtue of the perceived advantages it brings beyond what is generally offered by the normal court processes which are often characterised by formalities and delays. In addition, while it is quite clear that the arbitration regime is meant to ensure that there is a process distinct from the courts, of effectively and efficiently solving commercial disputes, the law also recognizes that such a process is not absolutely immune from courts intervention. This is because courts of law remain the ultimate guardians and protectors of justice and hence they cannot be completely shut off from any process of seeking justice.”

21. Further to the foregoing, it is evident from the Claim presented before the Court by the Claimant that she has cited the Applicant for discrimination and to this end, has made a separate claim for compensatory damages equivalent to Kshs 3,000,000/= on account of the alleged discrimination. This is besides the claim for compensatory damages for unfair termination under Section 49(1) (c) of the *Employment Act*.
22. Indeed, amongst the reliefs sought by the Claimant are declaratory orders that her termination was in violation of her constitutional rights, specifically Article 27(5) and Article 41(1) and (2) of *the Constitution* of Kenya, 2010.
23. Therefore, the issues to be resolved by the Court transcend the Claimant’s termination from employment as it is clear that the Court will have to address itself to the issues of the alleged discrimination of the Claimant and consequently, determine whether she is entitled to damages.
24. In a nutshell, the arbitrator if appointed, will not be in a position to determine all the issues in dispute, particularly the issues regarding the Claimant’s alleged discrimination.



25. On this score, I am guided and bound by the Supreme Court case in *Bia Tosha Distributors Limited vs Kenya Breweries Limited & 6 others* (Petition 15 of 2020) [2023] KESC 14 (KLR) (Constitutional and Judicial Review) (17 February 2023) where it was held that: -

“...Breaches, violations and infringements of *the Constitution* do not fall within the jurisdiction of arbitrators and such breaches cannot be the basis of setting aside arbitral awards. We asserted this position in the case of *Nyutu Agroviet Limited v Airtel Networks Kenya Limited*; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) SC Pet No 12 of 2016 [2019] eKLR:

“[76] Reading each of the above provisions, alleged breaches of *the Constitution* cannot be properly introduced by way of an application to set aside an arbitral award. Breaches of *the Constitution* are properly governed by articles 165(3) and 258 of the said Constitution and cannot by litigational ingenuity be introduced for adjudication by the High Court by way of invocation of section 35 of the *Arbitration Act*.” Underlined for emphasis

26. The Apex Court further expressed the following sentiments: -

“This court has insisted on the exhaustion of the local remedies...This, however, refers to remedies set out in statutory provisions...Where the dispute, however, transcends the commercial dispute, well into the constitutional sphere, as is the case before us, every person is free to access courts and have their day in court. As we see it, there is no tension between arbitration and enforcement of constitutional rights as distinct dispute resolution mechanisms. A court of law cannot turn a blind eye to alleged constitutional breaches in order to invoke the principle of party autonomy that binds parties to their agreements. This in itself does not mean that any person who sets out to petition the court alleging violation of fundamental rights and freedoms under the Bill of Rights must succeed, as cases are determined on their merits.” Underlined for emphasis

27. Against this background, the Court is inclined to disallow the Application dated 5<sup>th</sup> July 2023 with an order that costs shall be in the cause.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF MAY, 2025.**

**STELLA RUTTO**

**JUDGE**

In the presence of

For the Claimant/Respondent Ms. Kalaine

For the Respondent/Applicant No appearance

Court Assistant Millicent

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 had 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.

