



**Shikuku v Hamptons Hospital (Cause E002 of 2025)  
[2025] KEELRC 1704 (KLR) (12 June 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1704 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA  
CAUSE E002 OF 2025  
DN NDERITU, J  
JUNE 12, 2025**

**BETWEEN**

**DR. DORAH AWUOR SHIKUKU ..... CLAIMANT**

**AND**

**HAMPTONS HOSPITAL ..... RESPONDENT**

**RULING**

**I. Introduction**

1. The claimant filed a memorandum of claim dated 20<sup>th</sup> December, 2024 through Nechesa Maina & Associates Advocates, alleging breach of contract by the respondent and unreasonable working conditions.
2. The respondent entered appearance through Maruja & Amunga Advocates and filed a statement of defence dated 27<sup>th</sup> January, 2025 accompanied with the notice of preliminary objection (PO) of even date. The PO is based on the grounds that –
  1. Clause 19 of the contract signed between parties herein on resolution of disputes states as follows; “In the event of any dispute, controversy or claim arising out of or relating to this Agreement, the complaining party shall notify the other party in writing thereof, within Thirty (30) days of such a notice, both parties shall meet at an agreed location to attempt to resolve the dispute in good faith. Should the dispute not be resolved within Thirty (30) days after such a meeting, the complaining party shall seek remedies exclusively through Arbitration administered under the *Arbitration Act* of Kenya, 1995. The number of arbitrators, shall be one. The place of arbitration shall be in Kakamega, Kenya, Kenyan laws shall apply. The prevailing party shall have the right to collect from the other party its reasonable costs and necessary disbursements and attorney’s fees incurred in enforcing this Agreement.”
  2. That this Honourable court lacks jurisdiction in view of the above clause.



3. That if the honourable court assumes jurisdiction at this stage it will be usurping the powers abdicated to the parties herein as well as arbitration process.
4. That this suit is premature and as such should be referred to the said forum.
3. The claimant opposed the PO. By consent, the court directed that the PO be canvassed by way of written submissions. Counsel for the respondent did not file submissions. Counsel for the claimant Mr. Nechesa, filed his written submissions on 3<sup>rd</sup> March, 2025.

## **II. Submissions**

4. Counsel for the claimant submitted on a single issue – Whether the notice of preliminary objection before this honourable court meets the legal threshold required.
5. Counsel cited *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696*, asserting that the PO does not raise a pure point of law and thus does not meet the legal threshold.
6. It is submitted that under Section 6 of the *Arbitration Act* (1995) (the Act), the existence of an arbitration agreement does not preclude the filing of a suit in a court, and stay proceedings will only be granted if a party seeks for stay at the time of entering appearance or acknowledges the claim against which the stay proceedings are sought.
7. It is submitted that under Rule 2 of the Arbitration Rules, 1997, a party invoking an arbitration clause must make an application to satisfy the court that the matter deserves to be referred to arbitration.
8. It is submitted that in the instant case, a PO denies the court the opportunity to interrogate the factors which the court may use to either allow or deny an application for stay.
9. It is submitted that a PO is not provided for under Section 6 of the Act as a means to stay proceedings. It is submitted that in absence of an application and by filing a statement of defence, the respondent waived its right to refer the dispute for arbitration.
10. Citing *Mt. Kenya University v Step Up Holdings (K)Ltd [2018] eKLR* and *Agip (K) Ltd v Kibutu [1981] KECA 48(KLR)*, counsel asserted that the failure by the respondent to file an application and opting to file a PO estopped it from referring the matter to arbitration.
11. It is submitted that by filing a response to the claim before filing an application for stay of proceedings makes the PO unmerited and in any case, the window to file such an application has now closed.

## **III. Analysis & Determination**

12. The court has carefully read the PO and the written submissions by the counsel for the claimant, alongside the cited authorities. The following issue commends itself to the court for determination – Whether the court has jurisdiction to entertain the claim in light of the arbitration agreement.

## **IV. Jurisdiction**

13. Through the PO the respondent asserts that the arbitration agreement contained in the contract of service between the parties ousts the jurisdiction of the court to hear and determine the dispute as the parties abdicated such jurisdiction to the arbitral process. The respondent asserts that the court, in hearing the dispute, shall be usurping the powers of the arbitral process as agreed upon by the parties.
14. The claimant's counsel submitted that the respondent failed to file a substantive application seeking to stay the proceedings as contemplated under Section 6 of the Act, but rather opted to file a PO which



is not recognized way in seeking stay of proceedings under the Act. Counsel for the claimant submits further that by filing a defence to the claim, the respondent waived its right to refer the dispute for arbitration and thus the PO should be dismissed for lack of merits as it was filed in an already defended claim.

15. As per the sentiments of Nyarangi J. in Owners Of The Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KECA 48 (KLR) 1 –

Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction.

16. An objection to the court’s jurisdiction should be determined at the first instance before any further step is taken in the proceedings. The Employment and Labour Relations Court (ELRC) is established under Article 162(2) (a) of *the Constitution* as a superior court of record with the status of the High Court. It exercises jurisdiction throughout Kenya for the purposes of hearing and determining employment and labour relations disputes and the furtherance, securing, and maintenance of good employment and labour relations in Kenya. The jurisdiction of the ELRC is provided for under Section 12 of the Employment and *Labour Relations Act* (ELRC Act).

17. The court holds that where there exists an established and elaborate procedure for settlement of a dispute other than through the court, bypassing or ignoring such an elaborate procedure flies on the face of the constitutional provisions under Article 159 (2) (c) of *the Constitution* which obligates courts to promote alternative forms of dispute resolution mechanisms. Arbitration is one of the forms of alternative dispute resolution (ADR) promoted by courts and tribunals under Article 159 (2) (c) of *the Constitution*.

18. The claimant annexed a contract of service which was effective from 6<sup>th</sup> December, 2022 between her and the respondent in the list of documents accompanying the memorandum of claim. Clause 19 of the contract provides for an arbitration agreement which states–

“ 19. Resolution of Disputes

In the event of any dispute, controversy or claim arising out of or relating to this Agreement, the complaining party shall notify the other party in writing thereof, within Thirty (30) days of such a notice, both parties shall meet at an agreed location to attempt to resolve the dispute in good faith. Should the dispute not be resolved within thirty (30) days after such a meeting, the complaining party shall seek remedies exclusively through Arbitration administered under the *Arbitration Act* of Kenya, 1995. The number of arbitrators, shall be one. The place of arbitration shall be in Kakamega, Kenya, Kenyan laws shall apply. The prevailing party shall have the right to collect from the other party its reasonable costs and necessary disbursements and attorney’s fees incurred in enforcing this agreement.” (Emphasis added)

19. The claimant has not denied the existence of the arbitration clause; her contention is that the respondent has failed to file an application seeking to stay the proceedings and filed PO after filing a response/defence to the claim.

20. A close reading of the above arbitration agreement confirms that the court’s jurisdiction was ousted in the first instance, when the parties agreed that a complainant seeking any remedy arising from the



contract between the parties shall be addressed exclusively through arbitration. The jurisdiction of the court is a point of law which, when argued at the preliminary point, may dispose of the suit (see *Mukisa Biscuits Manufacturing Co. Ltd(supra)*).

21. The arbitration agreement is binding on the parties, and no objection as to its validity has been raised by the claimant. The court has not been called upon to determine any fact regarding the arbitration agreement, but to determine the jurisdictional aspect arising from the said clause. There is(are) no fact(s) that the court has been called upon to determine at this point as alleged by the claimant. The arbitration agreement obligates the parties to first refer any dispute arising from the contract for arbitration, rather than to this court.
22. While the court enjoys exclusive jurisdiction in disputes arising from employment and labour relations, parties are autonomous in agreeing on which forum they wish to settle their differences, should they arise. By its very nature an arbitration clause ousts the jurisdiction of the court unless and until the same is invoked at the appropriate stage either for interim measures (Section 7 of the Act) or enforcement of arbitral awards (Section 35 of the Act). Or later after the arbitral process fails to resolve the dispute.
23. The claimant relied on *Agip (K) Ltd v Kibutu (supra)* in support of the argument that by filing the PO instead of an application, the respondent failed to seek stay of proceedings and hence waived its right to refer the dispute for arbitration. In the above decision applicant therein had raised a PO on a point of law in their defence. The court therein found that an application for stay cannot be contained in a pleading and that an application for stay must be made before any step in the proceedings is taken. In *Agip (K) Ltd v Kibutu (supra)*, the applicant had filed a defence and a counterclaim which was in effect invoking the court's jurisdiction. The trial court did not give directions on whether the point of law raised in the pleading was an application for stay orders, but rather dismissed the application without directions on stay.
24. The PO in this cause raised a pure point of law on the court's jurisdiction. The dispute ought to have been referred for arbitration before being file in court.
25. Section 6 of the Act provides that –
  - “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 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.” (Emphasis added)
26. The respondent herein entered appearance and contemporaneously filed the PO accompanied by its statement of defence. No further proceedings have been taken as the PO intimated the respondent's willingness to ensure the dispute was referred for arbitration as per the agreement by and between the parties.
27. There is no intimation or argument by the claimant that the arbitration clause is null and void, inoperative, or incapable of being performed; nor is there any dispute between the parties with regard to the matters agreed to be referred to arbitration. The parties agreed that all disputes relating to



their engagement shall be referred for arbitration. An arbitral tribunal has the power to determine the dispute between the parties and the court cannot rewrite contracts between the two consenting parties.

28. Accordingly, the court upholds the PO by the respondent that this court lacks jurisdiction to hear and determine the claim dated 17<sup>th</sup> December, 2024 in the first instance as the same should be subjected to arbitration.
29. However, the court has to ask itself – Is striking out this cause the most appropriate, fair, and just way of disposal of the dispute between the parties?
30. The court poses the question for the reason that the arbitration clause in the contract did not provide that the outcome of the agreed arbitration was to be final. However, the Arbitration Act provides for the manner in which an award may be challenged by a dissatisfied party.
31. Filing the dispute afresh in court is not the remedy provided for in the Act for challenging the award made in arbitration. The claimant is bound by the contract that she voluntarily signed with the respondent.
32. Although the respondent denied in its response to the claim that the impugned contract was signed by and between the parties and even admitted the jurisdiction of this court to hear and determine the dispute, it turned around and filed the PO hence admitting existence and validity of the said contract. The said contract was filed by the claimant as her evidence and it is therein that the arbitration clause is contained.
33. Considering all the foregoing, the court arrives at the inevitable conclusion that this cause is improperly before the court and the dispute ought to have been referred for arbitration. The word “shall” is used in affirming the mandatory obligation on the parties to refer the dispute for arbitration.
34. The cause is hereby struck out.

#### **V. Orders**

35. The court makes the following orders –
  - a. The court lacks jurisdiction to hear and determine the claim as the same should first be subjected to arbitration proceedings as per the contract/agreement between the parties.
  - b. The cause is hereby struck out.
  - c. Each party shall meet own costs.

**DELIVERED VIRTUALLY, DATED, AND SIGNED AT KAKAMEGA THIS 12<sup>TH</sup> DAY OF JUNE, 2025.**

.....

**DAVID NDERITU**

**JUDGE**

