



**Karuku & another v Gichuki (Cause E023 of 2023)  
[2024] KEELRC 128 (KLR) (30 January 2024) (Ruling)**

Neutral citation: [2024] KEELRC 128 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
CAUSE E023 OF 2023  
ON MAKAU, J  
JANUARY 30, 2024**

**BETWEEN**

**HANNAH NYAMBURA KARUKU ..... 1<sup>ST</sup> CLAIMANT**

**JOSHUA MAINA ..... 2<sup>ND</sup> CLAIMANT**

**AND**

**HON EDWIN MUGO GICHUKI ..... RESPONDENT**

**RULING**

1. By a Memorandum of Claim dated 21<sup>st</sup> June 2023, the claimants sued the respondent for unfair termination of employment, discrimination, harassment, unfair labour practices and prayed for damages. The respondent entered appearance, and simultaneously filed Notice of Preliminary Objection against the suit. He also filed a defence to the suit the same day.
2. The preliminary objection stands on the ground that the court lacks jurisdiction to hear and determine the suit pursuant to an arbitration clause contained in clause 9, 10, 11, 12, 13 and 14 of the contract of employment dated 1<sup>st</sup> October, 2022.
3. I have considered the submissions filed by the two sides. The main question that begs for answer is whether the court should decline jurisdiction and give effect to the arbitration agreement between the parties.
4. The contract of employment provides for dispute settlement as follows:
  - a. “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.
  - b. Unless otherwise agreed upon by the parties, the seat of arbitration shall be in the precincts of Parliament and the Commission may provide secretarial services for the arbitration.



- c. Whenever the need for arbitration under this agreement arises, the chairperson of the Commission shall appoint an arbitration panel comprising the following three members of the Commission;
  - a. One member appointed under Article 127 (2) (c) (i) of the Constitution;
  - b. One member appointed under Article 127 (2) (c) (ii) of the Constitution;
  - c. One member appointed under Article 127 (2) (d) of the Constitution.
  - d. An arbitral award rendered by the arbitration panel herein is final and binding upon the parties, and no recourse shall be available against the award otherwise than in the manner provided for under the Arbitration Act No.4 of 1995.
  - e. An arbitral award rendered by the arbitration panel shall be recognized as binding, and upon application in writing, shall be enforced in any court having jurisdiction in Kenya.”
5. The above excerpt from the contract is an agreement between the parties herein that they shall refer disputes arising from the contract to arbitration. The arbitrator and the process of appointment is expressly provided for in the said agreement.
6. Article 159 (2) of the Constitution commands courts in Kenya to be guided by, and to promote Alternative Dispute Resolution Mechanism. Section 6(1) and (2) of the Arbitration Act provides that:-
  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.”
7. The above provision provides for the mandate of the court with respect to a suit filed contrary to an arbitration agreement. It also provides for the procedure to be followed to move the court. The mandate of the court is to stay the court proceedings and refer the parties to arbitration unless the following is demonstrated;
  - a. The arbitration agreement is null and void, inoperative or incapable of being performed; or
  - b. There is no dispute with regard to the matters agreed to be referred to arbitration.
8. The procedure provided by the said provision is an application for stay of proceedings to be filed not later than the time when the objecting party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought. There is no provision for filing Notice of Preliminary Objection or striking of the suit, and I think that is for a good reason. Preliminary objection is on pure points of law while an application addresses both points of law and facts. An application is the proper procedure where the validity of the arbitration is impugned.



9. Since in this, the validity of the arbitration agreement has not been challenged and the objection was filed simultaneously with memorandum of appearance, the court is bound to give effect to the same by staying the proceedings herein and referring the parties to arbitration as agreed between them in their contract of employment.
10. In conclusion, I allow the preliminary objection and stay the proceedings in this suit and refer the parties to arbitration under their arbitration agreement. Costs shall follow the outcome of the arbitral proceedings.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 30<sup>TH</sup> DAY OF JANUARY, 2024.**

**ONESMUS N MAKAU**

**JUDGE**

**ORDER**

This ruling has been delivered to the parties via Teams video conferencing with their consent, 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.

**ONESMUS N MAKAU**

**JUDGE**

