



Ocholla & 4 others v Construction House Company (Employment and Labour Relations Cause E665 of 2022) [2024] KEELRC 225 (KLR) (9 February 2024) (Ruling)

Neutral citation: [2024] KEELRC 225 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E665 OF 2022**

**AN MWAURE, J
FEBRUARY 9, 2024**

**BETWEEN
BRIAN OUMA OCHOLLA & 4 OTHERS CLAIMANT
AND
CONSTRUCTION HOUSE COMPANY RESPONDENT**

RULING

1. The respondent filed a preliminary objection dated 7th November 2022. They are seeking the following prayers:
 1. This court lacks jurisdiction to hear and determine claimant’s suit pursuant to clause 18 of their respective employment contracts
 2. The 1st, 2nd and 4th claimants and the respondent consequently signed employment contracts that directs parties to arbitration in any dispute, controversy or claim arising out of, or relating to their respective contracts or the breach, termination or invalidity thereof to arbitration a first avenue for legal recourse.
 3. Resultantly, section 6 of the *Arbitration Act* which empowers a court before which proceedings are brought in a matter which is subject to an arbitration agreement, to strike out and or stay proceedings and refer parties to arbitration.
 4. The claimants have instituted this suit in violation of both section 6 of the *arbitration act* No. 4 of 1995 (as amended) and clause 18 their respective employment contracts by not referring the dispute to arbitration as stipulated under clause 18 of their said respective contracts and are therefore improperly before this court.
 5. Parties hereto agree and are bound to proceed to arbitration on matters in dispute arising therefrom.



6. Tentatively, as held in Owners of the Motor vessels Lillian S vs Caltex Oil Kenya Ltd [1989]eKLR, where a court lacks jurisdiction, it must down its tools.
2. The respondent filed their submissions in support of the preliminary objection and aforesaid submissions are dated 12th October 2013. The court considered the aforesaid submissions.
3. Claimant's submission
The court did not find the claimant's submissions in the file or in the CCTV however.
4. Analysis and determination
The respondent submits that the 1st claimant 2nd and 4th claimants signed their respective contracts with the respondent and the said contracts contains an arbitration clause.
5. The respondent has not brought any submissions as relates to the 3rd and 5th claimants. The contracts of employment between Brian O. Ocholla 1st claimant, Jeff Nyamori Ochieng the 2nd claimant and Nelson Mandela Okumu the 4th claimants dated 19th September 2019 and 20th November 2020 and 30th November 2020 respectively are annexed thereto. The arbitration clause relates reads as follows:

Arbitration

In the interest of reaching a fair and prompt outcome for other parties, any dispute, controversy, or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof shall be settled by arbitration as a first avenue for legal recourse and shall be determined in accordance with the arbitration act (No. 5 of 1995). The appointing authority shall be the Chartered Institute of Arbitrators Kenya chapter. The place of Arbitration shall be Nairobi, Kenya.
6. The claimants Nos 1, 2 and 4 signed employment contracts with the respondent and the said contracts had therefore quoted arbitration clause as a first avenue. The claimants did not file any submissions to demonstrate that they were coerced or tricked to sign the aforesaid contract. The said contract must in the absence of any objection be taken to have been signed knowingly and willingly by the 1st, 2nd and 4th claimants.
7. Section 6(1) of Arbitration Act provides also as follows
 - (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.
8. The respondent filed a memorandum of appearance on 7th November 2022 and on the same date filed the preliminary objection for the suit to be referred for arbitration.
9. The court is satisfied this preliminary objection is merited as it touches on the matters of law as provided in the case of Mukisa Biscuit Manufacturers Ltd vs West End Distributors Ltd 1969 EA where court held:

” a preliminary objection consist of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of a suit. Examples are an objection to jurisdiction of the court or a plea of limitation or a submission that the parties are bond by the contract giving rise to the suit to refer the dispute to arbitration



10. In view of the foregoing the cases by the 1st, 2nd and 4th claimants is stayed and parties are referred to arbitration.”
11. This court however has been decrying the high cost of arbitration and so has been urging the parties to consider mediation under court mediation which costs parties nothing and is much faster as it should be concluded by or within 60 days. The parties have the prerogative to forgo arbitration and court can refer them for mediation.
11. However as per the preliminary objection the proceedings are stayed and parties have a choice to proceed for arbitration or mediation if they so choose as pertains to 1st, 2nd and 4th claimants.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 9TH DAY OF FEBRUARY, 2024.

ANNA NGIBUINI MWAURE

JUDGE

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 15th March 2020 and subsequent directions of 21st 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 has 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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

