



Abwoga v Checkups Medical Centre Ltd & another (Cause E802 of 2023) [2024] KEELRC 123 (KLR) (2 February 2024) (Ruling)

Neutral citation: [2024] KEELRC 123 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E802 OF 2023
NZIOKI WA MAKAU, J
FEBRUARY 2, 2024**

BETWEEN

DR BERNARD ABWOGA CLAIMANT

AND

**CHECKUPS MEDICAL CENTRE LTD & ANOTHER & ANOTHER &
ANOTHER & ANOTHER RESPONDENT**

RULING

1. The Respondents/Applicants filed an Application dated 6th November 2023 seeking to be heard for Orders that there be a stay of all proceedings in this suit pending reference of the dispute between the parties to arbitration as stipulated in the parties' agreements and that costs of the Application be provided for. The Application was premised on the grounds set out on the face of the motion and further supported by the Affidavit of Dr. Hoffman Moka Lantum, who averred that the contested termination of agreements was not referred to Arbitration in accordance with the express provisions of the said Agreements. That specifically, clauses 34.6 and 34.7 of the Employment Contract dated 3rd January 2022 expressly stipulates as follows:
 - “ 34. If mediation fails or collapses, then the dispute shall be referred to arbitration
6. in accordance with Clause 24.7.
34.7. Any dispute, discontract or question which cannot be settled amicably as referred to in the Clauses above shall be referred to and finally resolved by arbitration in Kenya ...”
2. It was Dr. Lantum's averment that the Claimant is abusing the judicial process by instituting the current suit with the full knowledge that any dispute between the parties should be referred to arbitration. That the suit herein thus lacks merit, is unnecessary and an abuse of the Court process. He asserted that the period within which the Respondents/Applicants are required to file a Statement



of Defence was soon to lapse and they were apprehensive that unless the orders sought herein are issued, the Claimant is likely to proceed and obtain judgment to the prejudice and detriment of the Respondents/Applicants. That it would consequently only be fair and just to grant the orders sought especially in view of the Claimant's actions.

3. In response, the Claimant filed a Replying Affidavit he swore on 4th December 2023. He averred that the Respondent's Application herein was an attempt to derail and delay the wheels of justice from moving forward. That the issue of sending the matter for arbitration cannot arise as the Respondents were not willing to have negotiations or mediation on the issues in dispute at the time of employment, yet negotiations and mediation should have taken precedence before invoking arbitration as set out in the dispute resolution clause of the Contract. The Claimant further averred that the Respondents began unilaterally slashing his salary in April 2022 whilst he was still in employment and his efforts to talk to the CEO were futile. That consequently sometimes in March 2023, the Respondent unilaterally issued him with a one (1) month Notice of Redundancy dated 25th March 2023, which was not in accordance with the law or the Contract and that upon his departure, he was still not paid. According to the Claimant, the Respondents never invoked the dispute resolution clause when slashing his salary, changing the terms and addendum to the Contract and finally terminating his employment by redundancy. That the Respondents waived their rights and cannot at this point in time seek arbitration yet they were never interested in the same during the subsistence of employment.
4. It was the Claimant's further averment that after the termination, he thereafter sought intervention of the Labour Office whose officer acknowledged serious gaps on the part of employer. Further, he and four (4) former colleagues who had suffered the same fate as his consulted a lawyer that advised on mediation and upon them inviting the Respondent's CEO, they received no response. That they then engaged another lawyer M/s Wangira Okoba, who wrote a demand letter dated 29th May 2023 that the Respondents' lawyers responded to in a Response dated 4th July 2023. That in their Response, the Respondents never sought or requested the matter to be sent for mediation or arbitration and instead made various demands, threatened and denied his claims. The Claimant fronted that he consequently returned company items and his further quest for mediation with officials of the Respondents bore no fruit and that the General Manager, Mr. Munyasia, had in fact told him to withdraw the demand letter for payment. The Claimant then engaged his current lawyers who first wrote a Demand Letter dated 9th September that received no concrete response from the Respondents' lawyers thus necessitating filing of this suit. He averred that after service of summons, the Respondent's CEO agreed to a meeting in early November 2023 and his lawyers advised that it was okay to meet and resolve issues and that such resolution would be recorded in court as a consent. That he met the CEO who instead indicated he would only pay the Claimant after the company attains profitability and only if the Claimant withdrew his case from court. It was the Claimant's case that seeing there was no payment plan or concrete proposal on payment, he declined to withdraw the case.
5. The Claimant further argued that the Respondents having declared his position redundant, the Employment Act immediately came into play and this Honourable Court further has jurisdiction. In addition, that the dispute resolution clause under the Contract referred to where a dispute arises within the course of employment but his employment had since been terminated. He opined that the termination method was outside the scope of the Contract and he hence had a right to approach this Honourable Court. It was the Claimant's stance that in any event, arbitration is a very expensive exercise and having lost his job, paying the arbitrator, lawyers and the venue would be costly compared to the judicial process. That since the matter is squarely and properly in Court, he had no objection having it referred to Court Annexed Mediation in the event the Respondents are willing. He thus urged the Court to dismiss the Respondents' Application herein.



Respondents/Applicants' Submissions

6. The Respondents/Applicants submitted that they rely on section 6(1) of the Arbitration Act, 1995 which provides as follows in mandatory terms:

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.
7. Further, that section 15 of the Employment Act and Article 159 of the Constitution of Kenya, 2010 adopt alternative dispute resolution which does not exclude this Court. They cited the case of James Heather – Hayes v African Medical and Research Foundation (AMREF) [2014] eKLR in which the Court, in agreeing and finding that the contract therein stipulated that issues in dispute shall be referred to arbitration, held that the claimant having entered into this contract on his will must accede and go by its provisions and that it was not the duty of the court to redraw agreements by parties.
8. It was the Applicants' submission that the valid agreement in the form of the Employment Contract dated 3rd January 2022, explicitly providing for arbitration, was wilfully entered into by both parties, a fact which the Claimant has not denied, and should therefore be upheld. That the arbitration clauses are indeed operational and capable of being performed and the Applicants have met the statutory requirements for referral of the dispute to arbitration. That this Honourable Court therefore lacks the jurisdiction to entertain and determine the suit in light of the aforementioned clear contractual provisions and the Claimant's arguments would be best placed before an arbitral tribunal as agreed by the parties. The Applicants thus urged this Honourable Court to grant the Orders sought, arguing that the Claimant will not suffer any prejudice if the same are granted.

Claimant/Respondent's Submissions

9. The Claimant/Respondent submitted that negotiations and mediation as dispute resolution methods were provided for in clauses 34.1 and 34.2 of the Employment Contract respectively. That the said clause aptly provides for mediation as a condition precedent to pursuing any other available legal or equitable remedy including litigation, but the Respondents were unwilling/refused to have negotiations and mediation. According to the Claimant, the ADR failed in totality due to the Respondents' conduct and that there was no express provision for arbitration as the Contract gave litigation and other legal remedies an option.
10. The Claimant argued that the arbitration clause 34.6 of the Contract was ambiguous as it stated that arbitration shall be in accordance with clause 24.7, which is a non-existent clause. That the said clause is thus null and void and incapable of being performed. He relied on the case of Halima Gababa Abdulabi v Lee Kinyanjui & another [2019] eKLR (Nakuru ELRC Petition No. 17 of 2018) in which the Court dismissed a similar application on grounds inter alia that the arbitration clause of the contract was ambiguous having made reference to a non-existent clause. The said Court went on to find that it retains its original jurisdiction to hear the matter, which cannot be removed from the jurisdiction of the court by dint of the ambiguous clause.



11. The Claimant further argued that since the dispute resolution clause referred to where a dispute arises within the course of employment and his contract having terminated on 25th March 2023, the termination by redundancy was outside the scope of the Contract and within the purview of the Employment Act. That he therefore had every right to approach this Honourable Court more so after the Respondents/Applicants refused to negotiate or engage in any form of dispute resolution and that the slashing of his salary is in breach of his constitutional rights and falls squarely under the jurisdiction of this Court. On this submission, the Claimant cited the case of Halima Gababa Abdulahi v Lee Kinyanjui (*supra*) in which the Court stated that the constitutional rights violated in the matter could not be addressed by arbitration. He nevertheless reaffirmed his willingness to be referred to Court Annexed Mediation.
12. The parties in their agreement which is the substratum of the claim herein, agreed at clause 34 in particular 34.2 to refer the matter to mediation failing which the Chairman/President of the Chartered Institute of Arbitrators Kenya Chapter would appoint a mediator upon application by any party. The Court being mindful that it has a mediation procedure housed within the Judiciary refers the matter to mediation. The parties to appear before the Hon. Deputy Registrar of this Court on 12th February 2024 to obtain directions on the mediation. There shall be no order as to costs on the motion before me.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF FEBRUARY 2024

NZIOKI WA MAKAU

JUDGE

