Ahoya v Kavle t/a Kavle Consulting LLC & another (Cause E617 of 2023) [2024] KEELRC 1025 (KLR) (16 April 2024) (Ruling)

Neutral citation: [2024] KEELRC 1025 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E617 OF 2023

NZIOKI WA MAKAU, J

APRIL 16, 2024

BETWEEN

BRENDA MAXINE AHOYA ..... CLAIMANT

AND

DR JUSTINE KAVLE T/A KAVLE CONSULTING LLC ..... 1ST RESPONDENT

KAVLE CONSULTING LLC ..... 2ND RESPONDENT

RULING

1. The 1st and 2nd Respondents/Applicants filed a Notice of Preliminary Objection dated 22nd August 2023 on the grounds that this Honourable Court lacks jurisdiction to hear the matter in view of the ouster provisions of clauses 15 and 16 of the Subcontract Agreement between the Claimant herein and the Respondents. That there is also need to consider the doctrine of exhaustion of dispute resolution mechanisms as provided for in clause 16 of the said Subcontract Agreement. Finally, that the Claim is void of merit and solely intended to circumvent various contractual provisions laid out in the Subcontract Agreement and that as the Claim is in gross abuse of the court process, it ought to be struck out in limine.

2. In response, the Claimant/Respondent swore a Replying Affidavit on 4th September 2023 averring that the objections are meant to delay the course of justice. That there is no good cause to seek and refer the matter to arbitration as the matter is before the proper court with competent jurisdiction. She asserted that since the Subcontract Agreement was fully being performed in Kenya, the *Employment Act* applies. She argued that the said Subcontract Agreement fails to meet the requirements of a foreign contract as provided for in sections 83 and 84 of the *Employment Act* and as such, the Respondents cannot rely on it to raise the issue of jurisdiction. That furthermore, clauses 15 and 16 of the Subcontract Agreement offend the provisions of section 3(1) of the *Employment Act*, which empowers the court to hear and determine matters that arise from a contract of service. That it is in

the interest of justice and fairness, the Court in its inherent powers should assert its jurisdiction and dismiss the Respondents' objections.

3. The Claimant/Respondent further averred that the arbitration clause in the said Agreement was meant as an internal dispute resolution mechanism and does not oust the application of the law. That if the Court were to consider arbitration as operational, such would be untenable because section 26 of the *Employment Act* mandates the Court to override the terms and conditions of an employment contract and apply those in Part V and VI of the *Employment Act* to the extent that the terms and conditions under the *Act* are more favourable to the employee. She also noted that clause 16 of the Subcontract Agreement is untenable, as it demands that the venue be in the United States of America (USA) and the international rules of arbitration do apply whereas the Contract was being performed in Kenya as a local contract of service. That the process of arbitration is costly than the judicial process since parties are expected to meet costs of the advocate, the venue and the arbitrator and the balance of convenience favours the judicial system.

4. The Claimant/Respondent's position was that the Claim is one for breach of employment contract for non-payment of salary because she was seen as the villain in the Respondents' quest to perpetuate a culture of corporate malfeasance and nonfeasance. She asserted that tax evasion is rampant in both the public and private sectors and that it is in the public interest that judicial organs exercise judicial authority to protect employees from victimization by companies keen to perpetuate corrupt practices. That therefore the Court has jurisdiction to hear and determine the matter and there are no justifiable grounds by the Respondents why the matter should not be heard by judicial system in place.

5. Respondents/Applicants' Submissions

   The Respondents/Applicants submitted that jurisdiction is everything and without it, any court of law must down its tools. That if a court therefore proceeds to hear a dispute without jurisdiction, the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae. The Applicants note that the Employment and Labour Relations Court derives its jurisdiction from section 12(1) of the *Employment and Labour Relations Court Act*, Cap 234B, which states that the Court shall have exclusive original and appellate jurisdiction to hear and determine disputes relating to or arising out of employment between an employer and an employee. Furthermore, that the *Employment Act*, Cap 226 connotes the importance of distinguishing a contract for service and a contract of service and envisages that the employer-employee relationship be governed by a 'contract of service'. That this distinction is what gives the Employment and Labour Relations Court the jurisdiction as it is only once the contract of service is categorized that the Court can hear and determine the matter at hand. The Applicants cited section 2 of the *Employment Act* which defines a 'contract of service' as an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership. That on the other hand, a 'contract for service' is one by which a person, contractor or service provider makes a commitment to another person, the client, to carry out material or intellectual work or to provide a service for a price or fee. The Applicants submitted that the Contract governing their relationship with the Claimants clearly states that it is one of a subcontractor relationship, meaning it falls under the category of a Contract for Service and which would therefore oust the jurisdiction of this Honourable Court.

6. As regards the Arbitration Clause in the Subcontractor Agreement, the Applicants acknowledge that the laws governing the Contract are those of the USA with binding arbitration set out to be in English, in USA and in accordance with the *International Rules of Arbitration*. They cited the case of *Wringles Company (East Africa) v Attorney General & 3 others* [2013] eKLR wherein the Court noted that the parties had agreed to subject to arbitration any arising dispute as to the validity of the agreement

and held that courts cannot re-write what has already been agreed upon by parties as set out in the agreement. The Applicants argued that the Claimant cannot choose which clauses to apply to their case and which ones not to. That it is evident that there is an Arbitration Clause that needs to be adhered to in case of a dispute such as this. It was the Applicants' submission that it is imperative that the Court downs its tools based on the reasons given hereinabove and in consideration of section 6 of the *Arbitration Act* that states as follows:

> 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.
>
> (2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.

7. Claimant/Respondent's Submissions

According to the Claimant/Respondent, the issues for determination are whether the Court has jurisdiction to hear and determine the Claimant's Claim and whether the doctrine of exhaustion of dispute resolution mechanism applies. The Claimant/Respondent submitted that the Claim herein falls under the category of an International Employment Contract because it involves her, a Kenyan National based in Kisumu, and an American employer based in New York, with her remuneration being subject to Kenyan tax laws. That the employment relationship is thus governed by the *Employment Act*, Cap 226, which confers the Employment and Labour Relations Court with geographical jurisdiction to hear and determine employment disputes. She argued that there was no intention for the parties to oust the jurisdiction of the Kenyan Court to determine disputes arising from the contract and that clause 15 of the Subcontract Agreement is just an indication on the choice of law. That the choice of law in an international contract is not the same as the jurisdiction though the same intertwine. She further submitted that the choice of USA law as the one applicable to the international contract herein does not mean that a Kenyan Court, where the contract was signed, wholly performed and also violated, cannot adjudicate over the claim simply because the applicable law is foreign to the Employment Court. In this regard, she relied on the analysis of the Court in the case of *Dorcas Kemunto Wainaina v IPAS* [2018] eKLR. It was the Claimant's submission that the Employment and Labour Relations Court therefore has jurisdiction to hear and determine this matter that and a contract executed and being performed in Kenyan territory cannot purport to be governed by the laws of another country.

8. As regards the doctrine of exhaustion, the Claimant/Respondent submitted that the alternative dispute resolution mechanism in clause 16 of the Sub-Contract agreement was meant to be applicable during the substance of the contract and not after it had terminated per the case of *Jane Muthoni Mukuna v Fsi Capital Limited* [2015] eKLR. That the said Arbitration Clause 16 further offends the provisions of section 87 of the *Employment Act* on the protection of the enforcements of employments rights by the courts. That the said clause would also be a violation of the spirit and the letter of Chapter

4 of the *Constitution* of Kenya, 2010 on the protection of fundamental rights and freedoms. She further submitted that considering she cannot afford the process of arbitration, justice will be defeated and she will be denied the right to access of justice. That the Respondents/Applicants will not suffer any injustice whatsoever by submitting to the jurisdiction of this Court while she stands to suffer irreparable damage in their hands if this Court does not grant her audience immediately and dismiss the Application herein with costs.

9. The Respondents assert the Court is sans jurisdiction and that this matter belongs to arbitration on account of an ouster clause in the agreement between the parties. The *Arbitration Act* makes provision for stay of proceedings under section 6. The Claimant on her part asserts there is nothing to refer to arbitration as proposed by the Respondents. The Claimant entered into a contract as a senior health consultant/advisor to the Respondent. In the *Employment Act*, section 2 defines a 'contract of service' as an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership. On the other hand, the definition of a 'contract for service' is one by which a person, contractor or service provider makes a commitment to another person, the client, to carry out material or intellectual work or to provide a service for a price or fee. In the contract exhibited by the Claimant, she is to offer consulting services which fall under the category of a contract for service which is outside the purview of the *Employment Act* and in essence, this Court. The contract made provision for reference to arbitration and as such the matter before me must be referred to arbitration in terms of clause 16 and 17 of the said agreement. The ouster clause is binding and limits the interposition of the Court to guiding the parties away from the litigation before me. As a consequence of my finding that the ouster clause is applicable, this matter is stayed in terms of section 6 of the *Arbitration Act* pending a reference to arbitration. There is no order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF APRIL 2024

NZIOKI WA MAKAU

JUDGE