



Mutai v Chepkorir aka Toto Women Representative & another (Employment and Labour Relations Cause E011 of 2023) [2024] KEELRC 1629 (KLR) (26 June 2024) (Ruling)

Neutral citation: [2024] KEELRC 1629 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
EMPLOYMENT AND LABOUR RELATIONS CAUSE E011 OF 2023**

**HS WASILWA, J
JUNE 26, 2024**

BETWEEN

KIPKIRUI DOMINIC MUTAI CLAIMANT

AND

**LINET CHEPKORIR AKA TOTO WOMEN REPRESENTATIVE 1ST
RESPONDENT**

**OFFICE OF THE WOMEN REPRESENTATIVE BOMET
COUNTY 2ND RESPONDENT**

RULING

1. Before this Court for determination is the Respondents/ Applicants' Notice of Motion dated 19th September, 2023, filed pursuant to section 6 of the *Arbitration Act* No. 4 of 1995 and all other enabling provisions of the Law, seeking for the following Orders; -
 1. That all further proceedings herein be stayed and the matter be referred to Arbitration.
 2. That the costs of and occasioned by this application be provided for.
2. The basis upon which the Application is made is that the dispute herein arises from a Contract between a Member of Parliament and a Member of staff of the County or Constituency office, which contract of employment is captured in the standard contract form provided by the Parliamentary Service Commission for use by all Members of Parliament. That the subject contract herein is between the claimant and the 1st Respondent dated 3rd October 2022.
3. It is stated that in the Contract, the parties agreed to resolve all disputes by way of Arbitration in accordance with Clause 9 of the Contract which provides that:-

‘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.’



4. Accordingly, that this Court lacks the jurisdiction to entertain and determine this dispute.
5. It is averred that the claimant has filed this suit in complete disregard of the said provision and it is highly improper to have instituted these proceedings in contravention of the Contract.
6. The Applicant maintains that the Arbitration Clause in the aforementioned Contract is operative and capable of being performed and the Respondents are ready and willing to have the dispute herein determined by way of Arbitration.
7. She stated that the the parties herein are contractually bound to refer any disputes between them to Arbitration in accordance with the Contract, while this Honourable Court is enjoined to hold parties to their agreement.
8. It is also stated that the contract was entered into freely by the parties herein with full knowledge of its terms and particularly, the dispute resolution clauses. Therefore, that there exist no justifiable reasons to warrant a departure from the terms of the Contract.
9. It is her case that she is alive to the provisions of Article 159 (2) (c) which encourages the Court to consider alternative forms of dispute resolution including arbitration and and as such, this Honourable Court ought to order the parties to pursue arbitration which was agreed on, is beneficial, saves the court's judicial time and resources, and is in the interests of justice.
10. On that basis, she urged this Court in the interest of justice to stay of proceedings and referral the matter to Arbitration as provided for in the contract of employment.
11. The Application is further supported by the affidavit of the 1st Respondent/ Applicant sworn on 19th September, 2023. She reiterated the grounds of the Application.
12. The Application herein is opposed by the Claimant who filed grounds of Opposition dated 27th March, 2024 ad based on the following grounds; -
 1. That this matter is purely a matter under *employment act* as the Applicants/Respondents herein unlawfully and without any justifiable cause terminated the Claimant's contract of service without any notice as required under the law.
 2. This matter has been referred to the Court Annexed Mediation wherein the Applicants/ Respondents frustrated efforts to settle this matter in good faith for the Claimant, but only gave a mere offer to pay gratuity only and other matters to be sorted under terms that could not be reduced in writing.
 3. That the Arbitration process is similar to the Court Annexed Mediation system and the mere demand to have this claim to undergo arbitration in accordance with the *Arbitration Act*, No 4 of 1995 is a mere delay tactic by the Applicants/Respondents since the same shall not elicit any different results as was the case with the Court annexed Mediation.
 4. That the Applicants/Respondents being the Employers of the Claimant failed to exercise their right to refer this matter to arbitration and or utilize the provisions in the contract of Employment the moment the Claimant served them with the demand notice dated 30 May 2023.
 5. That Clause 9 of the Contract of Employment envisages a situation where parties are still within the employment hence under the terms of the subsisting contractual relationship the arbitral process can kick-in. His is informed by the following facts apparent on the face of the contract.



- a. The seat of arbitration is parliament and the commission may provide secretarial services.
 - b. Clause 11 of the Contract provides for the arbitration panel which is limited to the persons appointed by the Chairperson of the Commission and no representation of the Claimant in the Arbitration is mentioned, hence the same leaves the Claimant under the mercy and intimidation of the Commission.
 - c. Clause 12 of the Contract provided an open and shut process without any recourse to the Claimant as the Arbitration Act sets the award rendered by the arbitration panel as final and binding to the parties.
6. That subjecting the Claimant who was unfairly bundled out of employment without any due legal process to an arbitration where the employer is the arbiter and the place of arbitration is in the employer's office shall not only be intimidating to the claimant, but shall further enhance the injustice meted against the Claimant.
 7. That to-date the Applicants/Respondents have not admitted that the Claimant was unfairly dismissed from employment hence the Courts are properly place to be fair and unbiased under the prevailing circumstances in which the Claimant was dismissed from employment.
 8. That the claimant prays that the Application be dismissed in the first instance and the matter be set down for hearing.
13. In addition to the grounds of opposition, the Claimant field a supporting affidavit sworn on 28th March, 2024, stating that he was employed in the Office of the 1st Respondent as the County Deputy manager on five(5) years contract by the Contract of Employment dated 3rd October, 2022, earning a gross salary of Kshs 165,000 per month.
 14. That on the strength of this contract, he took personal loans from a Sacco that is currently running in arrears and guarantors have been made to forfeit their savings and dividends.
 15. He stated that he executed his mandate diligently and meticulously as per Chapter Six of the Constitution. Nonetheless, that he was terminated from employment on 20th April 2023 without any warning and or notice.
 16. Prior, to the dismissal, he stated that he was subjected to abuse, threats, inhuman and degrading state wherein his salary was arbitrarily stopped with effect from April 2023. That he appealed the decision and asked the 1st respondent to re-consider her action to no avail, leading to the filling of this suit.
 17. He stated that he was surprised by the Respondent's Application of 19th September 2023 which, they are asking the Court to refer this matter for Arbitration wherein they had formed an opinion communicated by the response to demand letter of 8th June, 2023 that the Application and suit is frivolous and with no legal basis.
 18. He reiterated that the issues herein are purely employment related as they emanate from termination of the claimant's employment by the Respondent without reason and notice. Moreover, that this matter had been referred to the Court Annexed Mediation wherein the Applicants frustrated efforts to settle this matter in good faith but only gave a mere offer to pay gratuity only and other matters to be sorted under terms that could not be reduced in writing.
 19. The affiant stated that the Arbitration process is similar to the Court Annexed Mediation system and the mere demand to have this claim to undergo arbitration in accordance with the Arbitration Act,



No 4 of 1995 is a mere delay tactic by the Applicants/Respondents since the same shall not elicit any different results as was the case With the Court Mediation.

20. He stated that the Applicants being the Employers of the Claimant failed to exercise their right to refer this matter to arbitration and or utilize the provisions in the Contract of Employment the moment the Claimant served them with the demand notice dated 30th May, 2023.
21. He stated that the Arbitration Clause in the Contract of Employment envisages a situation where parties are still within the employment for the arbitral process to kick-in.
22. The Claimant stated that he is apprehensive that if he is subjected to the Arbitration, his employer has a lot of influence over the arbitration panel by virtue of her position in government, hence, he is likely to be intimidated, harassed and subjected to unjust process which is an end in itself.
23. He stated that he only has confidence that the proper place where he will get fairness, justice and unbiased determination of my claim is the Courts and not the arbitration process.
24. The Application was canvassed by written submission.

Respondent/ Applicant's Submissions.

25. The Applicant submitted from the onset that they entered Conditional Appearance in the matter vide a Memorandum of Appearance dated 15th September 2023, only for the purposes of filing a Notice of Motion application dated 19th September 2023, seeking to stay the proceedings herein and refer the matter to arbitration.
26. He submitted that in response to the Application, the claimant filed grounds of opposition, supported by an affidavit, when grounds of opposition cannot be supported by an affidavit. He thus argued that the affidavit is incompetent and is for striking out and the application stands unopposed. To support this, they relied on the case of Faustina Njeru Njoka v Kimunye Tea Factory Limited [2022] eKLR, where the court held that the mode of opposition to the application chosen by the Claimant, being grounds of opposition, renders the averments in the Application and sworn affidavit as uncontroverted and unchallenged. In that matter, the Honourable Court stated and held that:

“From the authorities I have cited above, grounds of opposition are to be deemed as general averments and do not deny or respond to issues in an application. A preliminary objection and grounds of opposition though means of opposing an application they are not to be used when one intends to deny allegations in an application. In my view a replying affidavit would best serve to deny issues raised in an application. It has been held that where a replying affidavit is not filed then in essence the averments in an application are deemed as uncontroverted and unchallenged. In considering the mode of opposition opted to by the respondents and the averments therein find that the issues in the application are not rebutted and the application stands unopposed.”

27. Based on the foregoing, the Applicant submitted that the the only issue that falls for determination by this court is whether the matter should be referred to arbitration. On that note, it was argued that the dispute herein arises from the contract between a member of parliament and a member of staff of the county or constituency office, in which contract provides for arbitration clause, therefore any dispute between the parties herein has to be subjected to arbitration in line with the employment Contract.



28. To support this, they relied on the decision by Justice Okwany in *Burn Manufacturing USA LLC v Sage South Africa (PTY) Limited* [2020] eKLR where she held that; -

“The parties herein having voluntarily agreed to subject their disputes to arbitration, cannot be seen to run away from the terms of their agreement. Needless to say, it is trite that parties are bound by the terms of their agreement.”

29. He also relied on the Supreme Court decision in *Nyutu_Agrovet Limited Vs Airtel Networks Kenya Limited*; *Chartered Institute of Arbitrators-Kenya Branch (Petition 12 of (2016)[2019]KESC 11 (KLR)* where it was held that;-

“... arbitration was intended as an alternative way of solving disputes in a manner that is expeditious, efficient and devoid of procedural technicalities. Indeed, our Constitution in Article 159(2)(c) acknowledges the place of arbitration in dispute settlement and urges all Courts to promote it.”

30. The Applicant also cited the Court of Appeal case of *Adrec Limited v Nation Media Group Limited* [2017] Eklr, which held that;-

“*the Constitution* of Kenya 2010 recognizes alternative dispute resolution mechanisms including arbitration. Parties have the freedom of contract and even to resolve their disputes away from the courts subject to supportive court intervention in specific areas of law to ensure fairness in the arbitral process. The respondent was perfectly entitled to seek and obtain stay of the suit as it did.”

31. With regard to Arbitration clause, the Applicant submitted that section 6(1) of the *Arbitration Act*, provides that 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; the arbitration agreement is null and void, inoperative or incapable of being performed; or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

32. Accordingly, that the Arbitration Clause in the aforementioned Contract is operative and capable of being performed and the Respondents are ready and willing to have the dispute herein determined by way of Arbitration. In support of this, they relied on the case of *Euromec International Limited v Shandong Taikai Power Engineering Company Limited (Civil Case E527 of 2020)* [2021] KEHC 93 (KLR) which court stated that;-

“there is nothing before me to show that the arbitration clause is inoperative, null or void. Commercial arbitration is a private form of binding dispute resolution, conducted before an impartial tribunal, which emanates from the agreement of the parties. The law requires the parties to honour their contractual obligation to arbitrate. The law also provides for limited judicial intervention in arbitral proceedings, and supports the enforcement of arbitral awards in a manner similar to that for national court judgments. National laws generally recognize and support arbitration as a mutually exclusive alternative to litigation as a means of finally resolving disputes.”

33. Similarly, that this Court is obligated to stay these proceedings and refer the matter to arbitration.



34. With regard to the grounds of opposition, it was argued that the same are incompetent and ill-advised as it is argumentative, proffer no arguable points of law, and are mere averments littered with unfounded fears and frivolous and vexatious accusations regarding the mediation process. He argued that the Applicant was reluctant to enter into mediation due to apprehension on seeming to accept the jurisdiction of the court having filed the instant application to refer the matter to arbitration. He added that contrary to the assertion by the Claimant, the Applicants' entered the mediation process in good faith and proposed settlement terms after multiple meetings and discussions between the parties' consequent to which the Applicants shared a proposed consent agreement which the Claimant rejected, despite having discussed the issues at length, without offering any counter-proposal. Hence the failure to reach any mutual mediation agreement was fully the responsibility of the Claimant.
35. It was argued that the assertion by the Claimant that arbitration is similar to mediation and that failure to reach a mediation agreement will lead to the same result in arbitration is misguided and a misapprehension of the differences in the two processes. Further that the claimant's fears that he will be at the mercy and intimidation of the commission if the matter is referred to arbitration are unfounded. In any event that the doors of justice in this Court are not shut to the Claimant in the event his fears become justified.
36. Therefore, that the grounds of opposition as filed is not a competent response and urged this Court to allow the Application as prayed.

Claimant/ Respondent's Submissions

37. The claimant submitted from the onset that arbitration clause at section 11 envisages that disputes can be referred to arbitration in instances where the employee is still in employment and not after such employment ties have been severed.
38. The claimant submitted further that since, he has been dismissed from employment, it would be unfair if his employer subjects him to the terms of a terminated contract and the Arbitration agreement. He stated that Arbitration agreement in Clause 11 of the contract of employment clearly lays out the process of arbitration , which is unacceptable as it favors the Respondents for the reason that; Firstly, clause 10 provides that the seat of arbitration is parliament and the commission may provide secretarial services; Secondly that clause 11 of the contract provide for the arbitration panel which is limited to the persons appointed by the Chairperson of the Commission and no representation of the Claimant in the Arbitration is mentioned, hence the same leaves the Claimant under the mercy and intimidation of the Commission and Thirdly, that Clause 12 of the Contract provided an open and shut process without any recourse to the Claimant as the Arbitration Award is final and binding to the parties.
39. The Claimant submitted that in line of the clauses laid out above, he might not get justice if he is subjected to the Arbitration Agreement considering that he was fired without notice and the fact that his employer is a member of parliament who has influence.
40. It was argued further that the Claimant had previously been intimidated, harassed and subjected to dehumanizing and unjust process and since the composition of the Arbitration panel is lopsided in favour of the ,a referral of this matter will be unfair and unjust to him.
41. It was argued that though Section 6 of the *Arbitration Act*, 1995 provides that a court may stay proceedings and refer parties to arbitration, the law further makes a proviso in instances where; the arbitration agreements is null and void, inoperative or incapable of being performed or where there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.



42. The Claimant submitted that this court has Jurisdiction bestowed under Article 162 (2) of *the Constitution* and Section 12 of the Employment and *Labour Relations Act*, 2011 to hear and determine the issues raised herein. To support this, he relied on the case of Samuel Kamau Macharia & Another Vs Kenya Commercial Bank & Another [2012] eklr , where it was held that ;-

“ A Court’s Jurisdiction flows from either *the Constitution* or legislation or both, Thus a court of law can only exercise jurisdiction as conferred by *the Constitution* or any written law. It cannot arrogate to itself the jurisdiction exceeding that which is conferred upon it by the law,”

43. Accordingly, the claimant urged this Court to take judicial notice of his unwillingness to participate in a process marred with abuse, harassment and inequality which will result in an improvident arbitral award. Additionally, that the arbitration agreement is unconscionable and invalid as it favour the Respondent. On that basis, he urged this Court to find that the arbitration agreement in the contract of employment is invalid and thus decline the invitation to stay these proceedings.

44. He argued that the Respondents have had two opportunities to settle this matter, but in both occasions the Respondents have frustrated the Claimant's proposals. Moreover, that the contract of employment is solely the product of the Applicants and thus he cannot be subject to a flawed arbitration agreement as contained in the letter of the contract. In support of this, the claimant relied on the case of James Heather-Hayes V s Africa Medical and Research Foundation [2014] eklr where the court held that;-

“ contracts are normally commenced by sober and willing parties and the contract of employment is a standard form contract and a product of the employer which did not give the employee a chance to precipitate in its making.”

45. He reiterated that referring the matter to arbitration is an exercise in futility given that the Respondents refused to accommodate the Claimant’s request for an out of court settlement before and after the claim filed this case and also that the Respondent failed and evasively refused to formally state the terms of settlement under the Court Annexed Mediation.

46. Further that referring the matter to arbitration is a mere delaying tactic and the Claimant is well aware that the arbitration agreement is incapable of being performed owing to the past conduct of the Respondents.

47. It was submitted that Court’s inherent jurisdiction and discretion provided for under section 12 of the *Employment and Labour Relations Court Act* cannot be ousted by an arbitration clause which is flawed on the face of record. In support of this, he relied on the case of Wanguhu S Sustained Group Limited (2011) KEELRC [1226 (KLR).

48. In conclusion, the claimant urged this court to dismiss the application referring this matter to arbitration and prayed for the same to be heard to is conclusion in this court.

49. I have examined all the averments of all parties herein. The Applicant contends that the contract of employment between them and the Claimant had an arbitration clause which mandated parties to resolve any dispute through arbitration.

50. I have looked at contract between the Claimant and Respondent dated 3rd October 2022 which states as follows:

“ Re: Appointment To Cotract Terms



I am pleased to convey the decision of the Office of Bomet County Women Representative that you have been offered a contract appointment as County Deputy Manager for a period of (5) years contract with effect from 3rd October 2027.

The salary entry point to this job is gross pay of Kshs. 165,500 (one hundred and sixty-five, five hundred shillings only).

You will be entitled to annual leave (30) days per year which you are expected to utilize by 30th June of every year.

Upon expiry of your contract, you will be eligible for servicing gratuity at the rate of 30-one percent (31%) of your gross pay for the duration of the period of service.

The appointment maybe terminated by either party giving one (1) month notice in writing or in payment of one (1) month basic wage in lieu of notice.

If you accept this offer with terms and conditions stipulated herein, please sign the duplicate copy of this letter to signify your acceptance, then retain the original and return the duplicate copy of the undersigned.

I take this opportunity to congratulate you on this well-deserved appointment.

51. The applicant contends that there was an arbitral clause in this contract which is found in the main contract dated 3rd October 2022 inclusive of a dispute settlement.
52. After this claim was filed the Respondents entered a conditional appearance on 15th September, 2023 on the same ground.
53. It is for this reason that the Respondents want proceedings in this claim stayed so that the claim can be referred to arbitration as per the contract.
54. It is however worth noting that in the cause of the proceedings the parties intimamated to the court that they wished to be referred to arbitration.
55. The court directed them to try an out of court settlement. The court also asked them to try mediation. The Claimant averred that the Respondent failed to attend and so mediation failed also.
56. My take on this is that the issues on this claim are not serious. They can be resolved through the Alternative Justice System (AJS) which this court is obligated to refer parties to under Section 15 of the [Employment and Labour Relations Court Act](#) which states as follows:-

15. Alternative dispute resolution

“(1) Nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion or at the request of the parties, any other appropriate means of dispute resolution, including internal methods, conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2)(c) of [the Constitution](#).

(2) (Deleted by Act No. 18 of 2014, Sch.)

(3) (Deleted by Act No. 18 of 2014, Sch.)

(4) If at any stage of the proceedings it becomes apparent that the dispute ought to have been referred for conciliation or mediation, the Court may stay the proceedings and refer the dispute for conciliation, mediation or arbitration.



- (5) In the exercise of its powers under this Act, the Court may be bound by the national wage guidelines on minimum wages and standards of employment, and other terms and conditions of employment that may be issued, from time to time, by the Cabinet Secretary for the time being responsible for finance.
- (6) Nothing in this section shall preclude the Court from making reference to the guidelines as may be published from time to time by the Salaries and Remuneration Commission to the extent to which they may be relevant to the dispute”.
57. The parties having already tried the arbitration and mediation and having not agreed, referring them to arbitration as per the application will be a duplication of roles and also lead to delay in resolving the issue.
58. I will therefore exercise my discretion under section 15 of the [Employment and Labour Relations Court Act](#) and refer this claim to AJS guided by the Deputy Registrar Employment and Labour Relations Court. Costs in the cause.

RULING DELIVERED VIRTUALLY THIS 26TH DAY OF JUNE, 2024.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of: -

Muge for Respondents – Present

Applicant –

Court Assistant - Fred

