Nyakwara v Trivitron Healthcare Africa [Kenya] Limited (Cause E493 of 2023) [2024] KEELRC 1460 (KLR) (14 June 2024) (Ruling)

Neutral citation: [2024] KEELRC 1460 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E493 OF 2023

J RIKA, J

JUNE 14, 2024

BETWEEN

OMWANDO ABEL NYAKWARA ..... CLAIMANT

AND

TRIVITRON HEALTHCARE AFRICA [KENYA] LIMITED ..... RESPONDENT

RULING

1. The Respondent filed a Notice of Preliminary Objection, dated 27th July 2023.
2. Objection is founded on clause 18 [not 17] of the Parties' contract of employment, made on 3rd December 2020.
3. The clause is worded as follows: -

    18.1. Parties shall attempt to resolve any dispute arising, by way of mediation.

    18.2. Any dispute not settled in full by mediation, shall be referred to arbitration by a single Arbitrator, to be appointed by agreement between the Parties, or in default of such agreement, within 14 days of the notification of such dispute by either Party to the Chairman for the time being, of the Kenya Branch of the Chartered Institute of Arbitrators.

    18.3. Every award made under this clause, shall be subject to and in accordance with provisions of the *Arbitration Act* 1995 [Act No. 4, 1995] or other Acts for the time being in force in Kenya, in relation to arbitration.

    18.4. To the extent permissible by the law, the determination of the Arbitrator shall be final and binding upon the Parties.

    18.5 Any arbitration proceedings shall take place in Nairobi.

4. Objection is that, the Court is deprived of jurisdiction, under the dispute settlement mechanism clause, in the Parties' contract, shown above.

5. The Claimant filed a Replying Affidavit, sworn on 8th August 2023. His position is that his Claim touches of violation of his human rights under Article 41 of *the Constitution*. Section 6 of the *Arbitration Act*, does not allow the Court to dismiss the Claim on account of the arbitration clause; it allows the Court to stay its proceedings and refer the matter to arbitration. He states further that he does not have the money to finance arbitration, and declining his Claim would result in violation of his constitutional right to access of justice. He states that he did not author the contract of employment, and that the Respondent should be applying for referral to arbitration, instead of focusing on dismissal of the Claim.

6. Parties agreed to have the Objection determined on the strength of their Pleadings, Affidavits and Submissions. Submissions were confirmed to have been filed and exchanged at the last mention, on 20th February 2024.

The Court Finds__: -**

7. There is a valid alternative dispute resolution clause, in the Parties' contract of employment.

8. The clause entails mediation and arbitration. There is no room for adjudication before the Court. There is no room for the involvement of the Court. The Parties have positively rejected jurisdiction of the Court.

9. There is nothing in the Replying Affidavit and Submissions of the Claimant, which would justify the Court in departing from its view in *Paul Chemunda Nalyanya v. I. Messina Kenya Limited [2015]* e-KLR. The Court upheld objection made by the Employer, on the basis of the existence of an arbitration clause contained in the contract of employment. The Court declined jurisdiction, holding that it was not an Arbitral Institution, contemplated in the arbitration clause.

10. In the current dispute, it is clear under clause 18 that disputes under the contract of employment executed by the Parties, should be resolved through meditation and failing full settlement, by arbitration.

11. Mediation under reference is not the Court-annexed mediation. It is mediation initiated by the Parties, without the involvement of the Court, with the secondary mechanism being arbitration.

12. There is no room for the Court to stay its proceedings and refer the Parties to mediation or arbitration. Stay and referral by the Court, as proposed by the Claimant, would be contrary to clause 18 of their contract of employment.

13. It is the Parties' prerogative, to attempt settlement through mediation, and to refer the dispute to arbitration, failing mediation. It is not in the mandate of the Court to refer Parties to arbitration. It is not in the mandate of the Court to determine if Parties should refer the matter to arbitration. They agreed to positively reject the jurisdiction of the Court, and embrace private mechanisms of dispute resolution. The Court would be acting against the Parties' wish, by intervening as proposed by the Claimant. Any referral is a prerogative of the Parties, and the Court can only stay its proceedings, if it presently has jurisdiction, or is likely to have jurisdiction upon the occurrence of certain events contemplated by the Parties in their contract. The Court does not presently have jurisdiction, and none is contemplated in the future, under the contract executed by the Parties. Why in any event, did not the Claimant withdraw the Claim from the Court, and make the referral to mediation and arbitration, as soon as he was notified about the preliminary objection?

14. The issues raised by the Claimant, about the skewed authorship of the contract of employment and his inability to finance arbitration, are matters he ought to have foreseen, and raised, when he executed the contract. These are not matters that would confer jurisdiction on the Court. There is no violation of the Claimant's right of access to justice. The dispute resolution mechanisms Parties have elected, are themselves, avenues for exercise by the Parties, of their right of access to justice.

It is ordered:-

a. The Claim is declined for want of jurisdiction.

b. No order on the costs.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 14TH DAY OF JUNE 2024.

JAMES RIKA

JUDGE