



REPUBLIC OF KENYA



**KENYA LAW**  
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**Maina v Kenya Commercial Bank PLC & another (Constitutional Petition E003 of 2023) [2024] KEELRC 2287 (KLR) (26 September 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2287 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CONSTITUTIONAL PETITION E003 OF 2023**

**BOM MANANI, J**

**SEPTEMBER 26, 2024**

**IN THE MATTER OF A PETITION SEEKING REDRESS FOR THE DENIAL, VIOLATION AND INFRINGEMENT OF THE PROTECTION OF FUNDAMENTAL RIGHT TO FAIR LABOUR PRACTISES AS GUARANTEED IN ARTICLE 41(1) OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF A PETITION SEEKING REDRESS FOR THE DENIAL, VIOLATION AND INFRINGEMENT OF THE PROTECTION OF FUNDAMENTAL RIGHT TO FAIR ADMINISTRATIVE ACTION AS GUARANTEED IN ARTICLE 47(1) AND (2) OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF A PETITION SEEKING REDRESS FOR THE DENIAL, VIOLATION AND INFRINGEMENT OF THE PROTECTION OF THE FUNDAMENTAL RIGHT TO FAIR DISPUTE RESOLUTION PROCESS AS GUARANTEED IN ARTICLE 50(1) OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS) PRACTICE AND PROCEDURE RULES UNDER RULES, 2013**

**AND**

**IN THE MATTER OF SECTIONS 3, 4, 5, 6, 7, 8, 9, 10, 11 AND 12 OF THE FAIR ADMINISTRATIVE ACTIONS ACT**

**AND**

**IN THE MATTER OF SECTIONS 4, 12 AND 20 OF THE EMPLOYMENT AND LABOUR RELATIONS COURT ACT**

**AND**



**IN THE MATTER OF SECTIONS 40, 43, 45, 47,  
49 AND 50 OF THE EMPLOYMENT ACT, 2007**

**BETWEEN**

**JOSEPH KAMAU MAINA ..... PETITIONER**

**AND**

**KENYA COMMERCIAL BANK PLC ..... 1<sup>ST</sup> RESPONDENT**

**CENTRAL BANK OF KENYA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Background**

1. The Petitioner has instituted these proceedings to challenge the 1<sup>st</sup> Respondent's decision not to renew his contract of service. At the same time, he has accused the 2<sup>nd</sup> Respondent of having turned a blind eye to the events that resulted in the loss of his employment by allegedly failing to discharge its regulatory function with respect to the 1<sup>st</sup> Respondent.
2. The Petitioner asserts that he was first employed by Kenya Commercial Bank as its Company Secretary on 1<sup>st</sup> July 2013 on a fixed term contract of five years. He contends that when the 1<sup>st</sup> Respondent was incorporated, his services were transferred to it under a new five year contract with effect from 1<sup>st</sup> January 2016.
3. He contends that when his contract was drawing to a close, he applied for its renewal in accordance with the renewal clause in the contract. He avers that he had legitimate expectation that the 1<sup>st</sup> Respondent would renew the contract.
4. He asserts that this expectation was aroused by the fact that the 1<sup>st</sup> Respondent's Board deliberated on his request to renew the contract during its meeting of 12<sup>th</sup> August 2020 and signified its approval for the request. As such, he contends that the 1<sup>st</sup> Respondent's subsequent failure to issue him with a renewed contract violated his right to fair labour practice.
5. The Petitioner further contests the suggestion that his position was lost as a result of restructuring of the 1<sup>st</sup> Respondent. He contends that the purported restructuring was a sham intended to facilitate the unfair closure of his contract of service.
6. He contends that the purported reorganization of the 1<sup>st</sup> Respondent did not comply with the various regulatory procedures prescribed in a series of legislations. Yet, the 2<sup>nd</sup> Respondent turned a blind eye to these lapses. As such, he accuses the 2<sup>nd</sup> Respondent of having been complicit in the alleged irregular process which resulted in the loss of his employment.
7. The Petitioner further accuses the 1<sup>st</sup> Respondent of discrimination in the manner in which it processed his release from employment. He contends that out of the several senior employees whose contracts came up for renewal in 2020, only his contract was not renewed. This is despite his exemplary performance. Further, he accuses the 1<sup>st</sup> Respondent of having failed to offer him counselling services following his job loss despite this being an entitlement for all employees under the 1<sup>st</sup> Respondent's



- Human Resource policy. In the Petitioner's view, this treatment amounted not only to discrimination against him but also unfair labour practice.
8. In addition, the Petitioner has raised several other grievances against the 1<sup>st</sup> Respondent which he contends violated his rights. For example, he accuses the 1<sup>st</sup> Respondent of manipulating its records in order to justify termination of his contract. He also accuses the 1<sup>st</sup> Respondent of not supplying him with information relating to the process which resulted in the termination of his contract in violation of his right to information.
  9. After entering appearance in the matter, the 1<sup>st</sup> Respondent filed the application dated 24<sup>th</sup> March 2023. The application seeks to stay these proceedings and refer the dispute to arbitration in accordance with clause 22 of the contract of service between the parties. It is the 1<sup>st</sup> Respondent's contention that by this clause, the parties agreed to refer all disputes arising from the contract to arbitration.
  10. The 1<sup>st</sup> Respondent argues that parties are bound by the terms of their agreement. The court's role in this respect is only to enforce such agreement unless it (the agreement) has been impugned on grounds of fraud, mistake, coercion or undue influence.
  11. The 1<sup>st</sup> Respondent contends that the court cannot interpret the agreement so as to exclude the arbitration clause. It is this Respondent's contention that if the court were to do so, that will be tantamount to rewriting the contract between the parties, a matter which the law does not countenance.
  12. The 1<sup>st</sup> Respondent argues that the power to adjudicate on disputes arising from the employment contract has been vested in a private forum through arbitration. As such, the court has no jurisdiction to entertain the instant Petition.
  13. The application is opposed by the Petitioner. According to him, section 6 of the *Arbitration Act* requires an application of this nature to be lodged contemporaneously with the Memorandum of Appearance. He contends that the 1<sup>st</sup> Respondent filed the instant application more than two months after entering appearance in the suit in contravention of the aforesaid provision.
  14. The Petitioner further contends that the dispute between them is in the nature of a constitutional petition seeking to protect his constitutional rights. As such, it is not suitable for arbitration as questions regarding interpretation of *the Constitution* are not arbitrable.
  15. In any event, the Petitioner contends that the constitutional issues which he has raised in the Petition are not contemplated under the arbitration agreement either expressly or impliedly. As such and for this reason, the agreement is inoperative in respect of them (the issues).
  16. The Petitioner further contends that the 2<sup>nd</sup> Respondent is not a party to the impugned arbitration agreement. As such, the agreement cannot be invoked to refer issues between him and this Respondent to arbitration. Consequently, all matters which are raised against the 2<sup>nd</sup> Respondent should be determined by the court.
  17. The Petitioner also contends that the 1<sup>st</sup> Respondent ignored requests to negotiate the dispute between them in accordance with clause 22 of the employment contract prompting the decision to file the instant Petition. As such, it is estopped from asking that the dispute be referred to arbitration.

### **Issues for Determination**

18. The instant application presents two issues for determination. These are:-



- a. Whether an arbitration clause in a contract has the effect of ousting the jurisdiction of the court to entertain a dispute arising from the contract.
- b. Whether the instant dispute should be referred to arbitration.

## Analysis

19. The 1<sup>st</sup> Respondent contends that the parties to the present action agreed to refer disputes which may arise from their contract to arbitration. As such and by that agreement, the court's jurisdiction to entertain the instant dispute is ousted.
20. This position by the 1<sup>st</sup> Respondent appears incorrect. As a matter of public policy, parties to a transaction cannot agree to oust the jurisdiction of the court to adjudicate on disputes which may arise from the transaction. Any attempt to oust the jurisdiction of a court through private agreement is deemed as void (see the judgment of Tunoi JA in *Niazsons (K) Ltd v China Road & Bridge Corporation Kenya* [2001] eKLR and *Stratogen Limited v County Government of Kisii* (Civil Case 1 (E002) of 2021) [2023] KEHC 25071 (KLR) (8 November 2023) (Ruling)).
21. Consequently, arbitration agreements being contractual, are not considered as ousting the jurisdiction of a court. Otherwise, they will be deemed as null and void on account of violation of public policy. Expressing this view, Tunoi J in *Niazsons (K) Ltd v China Road & Bridge Corporation Kenya* (supra) stated as follows:-

“ Ordinarily, such an arbitration clause simpliciter does not oust the jurisdiction of the court. But, if it purportedly attempts to do so, it would be contrary to public policy.”
22. The foregoing is not peculiar to Kenya. In *Cargill Zimbabwe v Culvenbum Trading (Pvt) Ltd* (HC 5964 of 2005; HH 42 of 2006) [2006] ZWHHC 42 (28 March 2006), the court expressed itself on the subject as follows:-

“An arbitration clause does not have the effect of ousting the jurisdiction of the court. It merely seeks to compliment the court process in resolving disputes by engaging in an alternative dispute resolving process but remains under the control of the courts.”
23. In *VJ v VJ and Another* (258/2023) [2024] ZASCA 92 (11 June 2024), the South African Supreme Court of Appeal expressed itself on the subject as follows:-

“It is trite that an agreement to have a dispute resolved by way of arbitration is not in itself inherently contra bonos mores. In *Telecordia Technologies Inc v Telkom SA Ltd*, this Court stressed the need, when courts have to consider the confirmation or setting aside of arbitral awards, for the adherence to the principle of party autonomy, which requires a high degree of deference to arbitral decision and minimizes the scope of intervention by the courts..... In the same breath, it is well established that arbitration does not oust the jurisdiction of courts.”
24. The foregoing leaves no doubt in my mind that the presence of an arbitration clause in a contract does not operate so as to oust the court's jurisdiction to adjudicate on disputes which may arise from such contract. That notwithstanding, the court is required to show deference to the principle of party autonomy by allowing the parties the opportunity to resolve such disputes through arbitration. That is why the law requires proceedings in respect of such disputes to be stayed pending arbitration as opposed to being struck out.



25. Whether arbitration should be invoked to resolve employment disputes continues to be the subject of intense debate across the globe. Whilst some jurisdictions have cautiously embraced this mechanism to resolve employment disputes, others have expressly outlawed it (see *Arbitration of Employment Disputes in Kenya: Challenges & Opportunities*, Law Society of Kenya Journal Volume 16 (1) 2020 pg. 119). This state of affairs may be accounted for by both historical and philosophical factors.
26. A key pillar of arbitration as a mechanism for dispute resolution is the principle of party autonomy. The principle emphasizes the significance of freedom of parties to a commercial transaction to determine the procedure to be applied in resolving disputes that arise from the transaction.
27. Party autonomy is anchored on the notion of freedom of contract. The notion underscores the liberty of individuals to freely agree on terms of their engagement. Once agreed, the terms become binding on the parties and are to be respected by all and sundry including courts of law.
28. Freedom of contract is undergirded by the concept of equality of arms. The concept presupposes that those who enter into contracts enjoy some form of balance of power. As such, they are presumed to be in a position to negotiate freely from a position of equality.
29. The foregoing assumption works well in situations of private commercial transactions where parties enjoy equal bargaining power. However, it does not sit pretty in situations where there is perceived inequality between parties to a transaction.
30. Employment relations have historically been considered as steeped in imbalance of power with the employer considered as standing in a position of strength as compared to the employee. As such, it is sometimes feared that the employer may use this advantage to impose on the employee terms of engagement that are disadvantageous to him (the employee). It is because of this reality that the principles of freedom of contract and party autonomy are applied sparingly to these relations.
31. Because of the perceived ability by the employer to manipulate the terms of the employment contract to the disadvantage of the employee, most jurisdictions have embraced interventionist legislation through which they seek to protect employees from the risk of exploitation. And hence the nomenclature of minimum terms and conditions of service below which parties to an employment contract are not allowed to negotiate. This interventionist approach is a matter of public policy intended to protect the weaker party to an employment relation from exploitation.
32. As indicated earlier, arbitration as a mechanism for dispute resolution is anchored on party autonomy which is at cross-purposes with the interventionist public policy legislation in the realm of employment relations. This explains why this mode of dispute resolution is not wholesomely embraced as a means of resolving employment disputes.
33. A number of factors work against embracing arbitration as a method of resolving employment disputes. First, it is suggested that at the time of entering into the employment contract, the prospective employee is usually in a position of disadvantage. At that time, all that he (the prospective employee) desires is to secure employment. Therefore, he is likely to append his signature on the contract of service even if it has an arbitration clause which he considers unfavourable to him.
34. Second, an arbitration clause may sometimes be embedded deep in the contract or in a standalone employee handbook. As such, the employee may not get the opportunity to review and appreciate its ramifications.
35. Third, although perceived as relatively cheap, the cost of arbitration may be high for an individual who has lost employment and has no other means of income. As such, court proceedings may be the cheaper option in the circumstances.



36. Fourth, an arbitrator may lack specialized knowledge of the applicable employment law. For instance, he may not appreciate that employment law sometimes applies the reverse burden of proof to adjudicate certain employment disputes. This may lead to a distorted arbitration process with flawed results to the detriment of the parties since arbitral awards are usually not open to review on appeal.
37. Fifth, owing to the imbalance of power between the employer and the employee, employment law provides certain protections to employees. Yet, there is no guarantee that these protections will be extended to the employee during arbitral proceedings since the arbitrator is under no obligation to apply this regime of law when undertaking arbitration.
38. Owing to the foregoing, a number of judicial decisions in Kenya have declined to embrace arbitration as a mode of resolving employment disputes. In *Okeyo v Board of Directors HHI Management Service Limited & another (Cause E970 of 2023)* [2024] KEELRC 1006 (KLR) (6 May 2024) (Ruling), whilst rejecting a request to refer the dispute to arbitration, the learned Judge observed as follows:-

.....it is clear that the arbitral law in Kenya was principally intended to resolve commercial disputes as opposed to employment disputes as is the case in the instant case.

Incorporation of arbitral clauses in employment contract is atypical and underlines the reality of the unequal bargaining power between the employer and the employee.”

39. In *Rono v Delish Nail & Beauty Ltd (Cause E038 of 2023)* [2023] KEELRC 2996 (KLR) (23 November 2023) (Ruling), the trial Judge expressed her reservations about the applicability of arbitration to employment disputes. She went further to observe as follows:-

“...in Dr *Kennedy Amuhaya Wanyonyi v African Medical and Research Foundation* [2014] eKLR the Court held that section 15 of the Industrial Court Act does not refer to arbitration as one of the forms of alternative dispute resolution. The Court went on to conclude that the Industrial Court Act, now ELRC Act, excludes arbitration in employment cases.”

40. Section 3 of the *Arbitration Act* defines the term “party” in the Act to mean a party to an arbitration agreement and includes a person claiming through or under such party. Under section 6 of the Act, the court may stay proceedings pending before it and refer the matter to arbitration where parties to the dispute have an arbitration agreement. The provision reads as follows:-

“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....”

41. As mentioned earlier, the term “party” in the Act means parties to the arbitration agreement. Therefore, when the legislation provides that the court may refer the “parties” to arbitration, it means that the court may refer the parties to the arbitration agreement to arbitration. Thus, the court cannot invoke the provisions of the Act to refer a nonparty to an arbitration agreement to arbitration.
42. As has been deponed by the Petitioner, the Central Bank of Kenya, sued as the 2<sup>nd</sup> Respondent in this action, is not a party to the arbitration agreement between the Petitioner and the 1<sup>st</sup> Respondent. As such, the dispute between the 2<sup>nd</sup> Respondent and the Petitioner on the latter’s contract of service cannot be adjudicated upon by an arbitrator pursuant to the provisions of the *Arbitration Act*. The court cannot close its eyes to this reality and refer the matter to arbitration.



43. The impugned arbitration agreement does not contemplate the 2<sup>nd</sup> Respondent. Therefore, it is void and inoperative against this Respondent. It cannot be enforced and is incapable of performance against it (the 2<sup>nd</sup> Respondent). As such and in terms of section 6 of the *Arbitration Act*, this court is not entitled to enforce the said agreement against the 2<sup>nd</sup> Respondent. In the case of *Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 others (Petition 15 of 2020)* [2023] KESC 14 (KLR) (Constitutional and Judicial Review) (17 February 2023) (Judgment), the Supreme Court appears to support this view by suggesting that an arbitration agreement can only be enforced against parties to it (see paragraph 105 of the decision).
44. Importantly, the instant dispute alleges violation of the Petitioner’s constitutional rights. Although the Court of Appeal was of the view that such grievances ought to be referred to arbitration if they are tied to breach of contract, the Supreme Court appears to have expressed a contrasting view on the matter.
45. In *Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 others (Petition 15 of 2020)* [2023] KESC 14 (KLR) (Constitutional and Judicial Review) (17 February 2023) (Judgment), the apex court expressed itself on the matter as follows:-

“The jurisdiction of the arbitrator is limited by the appointing document and largely operates with the consent, cooperation and participation of the parties before it. This is commonly referred to as “party autonomy”. Breaches, violations and infringements of *the Constitution* do not fall within the jurisdiction of arbitrators.....” (See par 104).

“The mandate of an arbitrator largely proceeds on the basis of the agreement by parties, and is mainly tasked with the resolution of a dispute as set out in the governing agreement. Where the dispute, however, transcends the commercial dispute, well into the constitutional sphere, as is the case before us, every person is free to access courts and have their day in court. As we see it, there is no tension between arbitration and enforcement of constitutional rights as distinct dispute resolution mechanisms. A court of law cannot turn a blind eye to alleged constitutional breaches in order to invoke the principle of party autonomy that binds parties to their agreements. This in itself does not mean that any person who sets out to petition the court alleging violation of fundamental rights and freedoms under the Bill of Rights must succeed, as cases are determined on their merits.” (See par 106).

46. The Supreme Court observed that the mere fact that one has filed proceedings under *the Constitution* does not constitute a bar to the matter being arbitrable. However, allegations relating to breach of constitutional rights ought to be considered by a court of law. As such, a party alleging violation of his constitutional rights should be allowed his day in court.
47. In the instant action, the Petitioner has made several claims of alleged violation of his constitutional rights by the 1<sup>st</sup> Respondent. Whether these assertions are merited cannot be determined at this stage. However, having regard to the position expressed by the Supreme Court in the Bia Tosha case, I arrive at the conclusion that he (the Petitioner) is entitled to his day in court.

### **Determination**

48. Having regard to the foregoing, I am of the view that although the contract between the Petitioner and 1<sup>st</sup> Respondent provides for arbitration in respect of disputes arising therefrom, this matter is not suitable for referral to arbitration. As a consequence, I decline to issue the orders sought in the application dated 24<sup>th</sup> March 2023.
49. As such, the application is dismissed with no order as to costs.



DATED, SIGNED AND DELIVERED ON THE 26<sup>TH</sup> DAY OF SEPTEMBER, 2024

**B. O. M. MANANI**

**JUDGE**

**In the presence of:**

..... for the Petitioner/Respondent

.....for the Respondent/Applicant

Order

In light of the directions issued on 12<sup>th</sup> July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**B. O. M. MANANI**

