



**Gearbox Panafrican Network v Atsiaya (Miscellaneous Application
E262 of 2024) [2024] KEELRC 13183 (KLR) (21 November 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13183 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E262 OF 2024**

**L NDOLO, J
NOVEMBER 21, 2024**

BETWEEN

GEARBOX PANAFRICAN NETWORK APPLICANT

AND

FREDRICK YIDA ATSIAYA RESPONDENT

RULING

1. This ruling determines the Notice of Motion dated 20th September 2024, by which the Applicant asks the Court to stay arbitral proceedings between the parties.
2. The application is supported by an affidavit sworn by Kamau Gachihi and is based on the following grounds:
 - a. The Applicant and the Respondent executed a consultancy agreement dated 1st December 2022, by which the latter was engaged as a financial accounting and operations management consultant, holding the position of Chief Finance & Operations Officer;
 - b. The said consultancy agreement was terminated by the Applicant on 15th February 2024, upon which the Respondent was duly compensated for all services offered;
 - c. The Respondent, vide a Statement of Claim dated 20th June 2024, invoked clause 15 of the agreement and referred the dispute between the parties to arbitration upon which Doreen Kibia, MCIArb was appointed as the sole arbitrator;
 - d. Pursuant to Section 17(2) of the *Arbitration Act*, the Applicant filed a Response to Claim concurrently with a notice of Preliminary Objection dated 12th July 2024, in which the Applicant challenged the jurisdiction of the Arbitral Tribunal to hear and determine the dispute, and render any reliefs under the *Employment Act*, in light of the express provisions of Section 15(1) of the *Employment and Labour Relations Court Act*;



- e. The Applicant submitted on the Preliminary Objection, that the Arbitral Tribunal lacked jurisdiction to make any orders in an employment related dispute as held in *Dr. Kennedy Amuhaya Manyonyi v African Medical and Research Foundation* [2014] eKLR as read together with *Steve Okeyo v Board of Directors HHI Management Service Limited* [2024] KEELRC 1006 (KLR);
 - f. However, the sole Arbitrator proceeded to render 'Award No. 1' dated 9th August 2024 and published on 3rd August 2024, touching on the Applicant's Preliminary Objection, in violation of various rules of natural justice and procedures to wit;
 - i. The sole Arbitrator did not accord the Applicant any opportunity to submit on the Preliminary Objection dated 12th July 2024;
 - ii. The sole Arbitrator proceeded to rule on the Applicant's Preliminary Objection suo moto, without issuance of any directions on its disposal contrary to the tenets of a fair hearing;
 - iii. Despite the Applicant's Advocate on record informing the Arbitral Tribunal of this flaw, the sole Arbitrator proceeded to maintain the decision of the Tribunal, without recourse and/or attempt to remedy the various flaws;
 - iv. In light of the aforesaid, the Arbitral Tribunal is openly biased against the Applicant and does not adhere to the rules of natural justice.
 - g. Further to the foregoing, the sole Arbitrator erred in law and in fact by dismissing the Applicant's Preliminary Objection dated 12th July 2024, well knowing that the Employment and Labour Relations Court has recently ruled that the employer-employee relationship cannot be subject to arbitration and the Arbitral Tribunal lacks jurisdiction to grant reliefs under the [Employment Act](#);
 - h. The sole Arbitrator dismissed the Applicant's challenge on jurisdiction without any proper basis in law and tainted the Arbitral Tribunal with bias, by assuming jurisdiction over a matter that she totally lacks jurisdiction to adjudicate over;
 - i. The Applicant, being wholly dissatisfied with the award by the Arbitral Tribunal, has lodged an Originating Summons dated 6th September 2024, pursuant to the provisions of Section 17(1-8) of the [Arbitration Act](#) and Rule 2 & 3 of the Arbitration Rules;
 - j. The Originating Summons has been fixed for hearing before this Court;
 - k. However, the Arbitral Tribunal has issued directions on the hearing and disposition of the substantive claim;
 - l. Accordingly, the Applicant invites the Court to grant a temporary stay of the arbitral proceedings so as not to render the Originating Summons nugatory and moot;
 - m. The intervention of the Court pursuant to Section 10 of the [Arbitration Act](#), is inevitable to avert an injustice.
3. The Respondent opposes the application by his replying affidavit sworn on 27th September 2024.
 4. The Respondent depones that he received a cease and desist letter dated 28th February 2024, informing him that he was terminated on account redundancy, pursuant to Section 40 of the [Employment Act](#), while levelling accusations of libel and breach of confidentiality clauses against him.



5. The Respondent states that he responded to the cease and desist letter on 29th February 2024, by which he invited the Applicant to negotiate on his outstanding arrears. Having received no response to his letter, the Respondent invoked clause 15 of the Agreement, which requires that disputes arising therefrom be referred to arbitration.
6. On 25th April 2024, the Chairman of the Chartered Institute of Arbitrators appointed Ms. Doreen Kibia, MCI Arb as sole Arbitrator. Thereafter, the Applicant filed Milimani CMCC No E1068 of 2024: Gearbox Panafrican Network v Fredrick Yida Atsiaya in which the Respondent entered appearance and filed an application for stay of proceedings and reference to arbitration. In a ruling delivered on 23rd August 2023, Hon. L.B Koech referred the dispute to arbitration.
7. The gist of the Applicant's plea before this Court is that the Arbitrator appointed to adjudicate the dispute between the parties has no jurisdiction because the dispute arises out of an employment relationship.
8. The Applicant bases its argument on Section 15(1) of the *Employment and Labour Relations Court Act*, which does not mention arbitration as a dispute resolution mechanism in employment related disputes. The Applicant further relies on two decisions of this Court (differently constituted) being; Dr. Kennedy Amuhaya Manyoni v African Medical and Research Foundation [2014] eKLR as read together with Steve Okeyo v Board of Directors HHI Management Service Limited [2024] KEELRC 1006 (KLR).
9. I have had occasion to read the two decisions and the running thread in their ratio decidendi is that because of inequality of arms in employment relationships, employees pursuing their rights against an employer, ought to be insulated from the high costs associated with arbitration. There is nothing in the two decisions however, to suggest that in appropriate cases, arbitration as a mode of dispute resolution, would be outlawed.
10. My conclusion in this regard is not in any way affected by the lack of inclusion of arbitration in Section 15(1) of the Employment and *Labour Relations Act*.
11. The present case is unique as it is the employer rather than the employee, who wants to run away from arbitration. The Respondent, who is the weaker party, states that he is comfortable with arbitration as the chosen mode of dispute resolution.
12. The hallmark of arbitration is party autonomy and where parties consciously and without coercion, opt for this mode of dispute resolution, the courts have no business interfering. Regarding the procedure adopted by the Arbitrator in assuming jurisdiction, I agree with the Respondent that under the doctrine of kompetenz kompetenz, the Arbitrator was well within her powers to determine the question of her jurisdiction in the manner she did.
13. On the whole, I find no reason to interfere with the ongoing arbitral proceedings. The Applicant's Notice of Motion dated 20th September 2024, is therefore dismissed with no order for costs.
14. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 21ST DAY OF NOVEMBER 2024

LINNET NDOLO

JUDGE

Appearance:

Mr. Farrah for the Applicant



Fredrick Yida Atsiaya (the Respondent in person)

