Rambukwella v DL Koisagat Tea Estate Ltd (Cause E025 of 2024)
[2024] KEELRC 13203 (KLR) (21 November 2024) (Ruling)

Neutral citation: [2024] KEELRC 13203 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET

CAUSE E025 OF 2024

MA ONYANGO, J

NOVEMBER 21, 2024

BETWEEN

USSANGA WIJERATNE RAMBUKWELLA ..... CLAIMANT

AND

DL KOISAGAT TEA ESTATE LTD ..... RESPONDENT

RULING

1. Vide an application dated 5th June 2024 the Claimant seeks the following orders: -

    1. That this application be certified urgent and be heard ex-parte in the first instance.

    2. That an Order do issue to compel the Respondent by themselves, their servants and/or agents or any one authorized by them or claiming under them to pay the sum of USD 21,131.86 owed to the Applicant as part of the unpaid salary for services rendered during the months from February to June 2024 plus unpaid leave as the same is sought to facilitate the Applicant in effecting housing arrangements in Sri Lanka:

    3. That an Order do issue to compel the respondents by themselves, their servants and/or agents or any one authorized by them or claiming under them to permit the claimant to continue residing in the company-provided accommodation and be allowed to retain and use the company-provided vehicle until the full and final settlement of all dues, including but not limited to unpaid salary, severance pay, and any other contractual

    4. That the Respondent, its agents, or any other representatives be restrained from interfering with the Claimant's use of the company residence and vehicle during the period until the final settlement is completed.

    5. That an Order do issue compelling the Respondent meet the cost of shipping of personal effects and one-way air fare for self and family, subject to provision of a proforma invoice from

the shipping agent and airline be settled direct to the vendors within 10 working days of receipt of the proforma invoice and confirmed shipping and air flight dates.

6. That costs be in the cause.

2. The Application is premised on grounds that:

a. At the material time, the Claimant was employed as the General Manager- Technical Operations whose duty was to Carry out all assessment, evaluation, design, and development of all the factory operations to drive the overall business success of the factory and any other duties assigned by the Director.

b. The Claimant's assignment as General Manager- Technical Operations was being carried out at the DL Koisagat Tea Estate in Nandi, Kenya, as per the contract the assignment was to last for a cumulative period of 24 months starting from 13/06/2022 to 13/06/2024.

c. As the General Manager- Technical Operations, the Claimant's remuneration package included a gross salary of a set Monthly fee of USD 4,094 less tax payable to the Kenya Government, for every completed month of service.

d. The Claimant has on several occasions written to the Respondent to pay him his salary arrears

e. The Claimant is an expatriate employee who has been residing in the company-provided accommodation and using the company-provided vehicle as part of the employment contract.

f. The Claimant's continued use of the residence and vehicle is essential for maintaining a reasonable standard of living and ensuring the Claimant's mobility until all employment-related dues are settled,

g. The Claimant has no alternative accommodation or transportation in the host country, and the abrupt termination of these benefits would cause undue hardship.

h. The continuation of these benefits would not cause any significant inconvenience or financial burden to the Respondent, as they are already provisioned for as part of the Claimant's employment package.

i. Foremost, the Applicant is his family's only sole bread winner and a parent of a minor who faces the prospect of homelessness unless the respondent is mandated to fulfill the Applicants outstanding entitlements.

j. This Honourable Court has jurisdiction and unfettered discretion to issue the orders sought herein to prevent the applicant's suffering injustice. Equity will not suffer a wrong to be without remedy.

3. The application is further supported by the affidavit of Ussanga Wijeratne Rambukwella, the Claimant/Applicant in which he reiterates the grounds on the face of the application.

4. Upon service the Respondent filed a Notice of Preliminary Objection dated 25th June, 2024 on grounds that:

1. The jurisdiction of the Court has been wrongly invoked in breach of the express provision of under Clause 5 (L) of the Consulting Contract between the Respondent and the Claimant. The suit is therefore incompetent as it falls for determination by an Arbitral Tribunal under the *Arbitration Act* (Cap 49)

2. The Application is fatally defective for seeking Mandatory Interlocutory Injunctive Orders which are not available without a trial on merit before the appropriate forum.

3. The Application is a manifest abuse of the court process

5. The Respondent further filed an application by way of Chamber Summons dated 25th June 2024 seeking the following orders:

1. That this Court be pleased to certify the Application as urgent and be placed before the Honourable Judge for directions.

2. That this Honourable Court be pleased to stay all and any proceedings herein pending the hearing and determination of this Application pursuant to Section 6 (2) of the *Arbitration Act* No. 4 of 1995.

3. That this Honourable Court be pleased to stay the proceedings herein and the issues raised in the Memorandum of Claim be referred to arbitration.

4. That parties appoint an Arbitrator to determine the dispute herein within Sixty (60) days from the date of granting the Order herein in accordance with Clause 5 (L) of the Consulting Agreement.

5. That The costs of this Application be provided for.

6. The grounds in support of the chamber summons as stated at the foot thereof are that:

a. The dispute before the court ought to be referred to an arbitrator in accordance with the Arbitration Agreement between the parties.

b. The consulting contract has an arbitration clause which requires that any dispute, claim, controversy or disagreement between the parties as to matters arising under or pursuant to the contract be referred to an arbitrator.

c. The Claimant/ Respondent has wrongly invoked the jurisdiction of the Honourable Court in clear breach of express terms of the subject contract which prescribes the dispute resolution fora.

d. This Honourable Court has the power to grant the orders sought herein.

7. The application is supported by the affidavit of Daniel Kariuki, the Respondent's Human Resource Director in which he states that the subject matter of the suit is a consultancy agreement in which there is provision for arbitration at Clause 5(L) and that the instant suit has therefore been instituted in contravention of the said clause. That this court has inherent powers to stay the proceedings herein and refer the matter to arbitration. That Article 159(2)(c) mandates courts to promote alternative dispute resolution mechanisms including arbitration where parties have so provided in their contracts.

8. That both the suit and the application by the Claimant are an abuse of court process and ought to be dismissed with costs to the Respondent.

9. The court directed that the Respondent's application dated 25th June 2024 be disposed of first by way of written submissions.

10. The Respondent filed submissions dated 4th October, 2024 in which it is submitted that this court has no jurisdiction to hear and determine the suit herein as this case emanated from a consultancy agreement which at clause 5 thereof provides for arbitration, that this court cannot grant mandatory

injunctive orders at interlocutory stage before hearing evidence from the parties, that the application was brought under the wrong provisions of law and that the application does not meet the threshold for grant of interim orders pending arbitration. It is submitted that the Applicant has not demonstrated the existence of status quo.

11. The Respondent relied on the following decisions:

> Brand Strategy and Design (EA) Limited v Ethics and Anti-Corruption Commission [20171 eKLR where Nzioka J stated:
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> > " The Applicant acknowledges that there is a dispute to be referred to Arbitration but proceeds to file a substantive suit herein seeking for substantive prayers, which in my opinion will form the subject of arbitration. In this regard, the Applicant is being less than candid in its conduct. They cannot expect to invoke the jurisdiction of the Court and Arbitration at the same time. The Law is clear; Parties are the terms of their own contract. If the parties agreed on Arbitration as the mode of dispute settlement. then this Court has no jurisdiction entertain this matter jurisdiction is everything."

The County Government of Kirinyaga v African Banking Corporation Ltd [2020] eKLR, the court observed that: -

> The tenor and import of Article 159(2) (c) of *the Constitution* as read together with Section 6(1) of the *Arbitration Act* is that where parties to a contract consensually agree on arbitration as their dispute resolution forum of choice, the courts are obliged to give effect to that agreement. Secondly, where a party elects to come to court and the other party seeks to invoke the arbitration agreement the party seeking to invoke the agreement is obligated to do so not later than the time of entering appearance.

Okanya v Woodrow Communications Limited (Employment and Labour Relations Cause E825 of 2022) [20231 eKLR which found:

> The Respondent/Applicant filed the application at the time of entering appearance and the Claimant has not objected on the validity of the arbitration clause in the employment contract and only opposes it on the fact that he will be denied declaratory orders but not that the process will be frustrated or he will be denied justice.
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> In view of the foregoing, the Respondent's application is merited. The claim herein is stayed and subject matter of the claim is referred to arbitration for hearing and determination. The parties are given 90 days to agree on an arbitrator and proceed with the matter of arbitration and make a report to this court on February 7. 2024.

A to Z Textile Mills Limited v East Africa Portland Cement Company PLC (Civil Case E002 of 2023) [20241 KEI-IC 4697 (KLR) wherein the court deliberated as follows:

> " In this case, the Applicant filed the present application after filing a memorandum of Appearance, and have taken no further procedural steps. It is therefore my finding that a dispute exists between the parties herein. The Applicant has complied with section 6 of the *Arbitration Act*. Cap 49 of the Laws of Kenya by not filing their statement of defense and/ or taken any other steps to counter the claim of the Plaintiff Respondent. Article 159(2), (c) of *the constitution* of Kenya 2010 provides and promotes alternative resolution mechanism which includes reconciliation, mediation Arbitration and traditional dispute resolution

mechanism and this court will only enforce the parties' agreement to use this alternative justice system to resolve their dispute."

Burn Manufacturing USA LLC v Sage South Africa (PTY) Limited [20201 eKLR wherein the Court held as follows:

> " I find that the instant application was filed in time and within the period envisaged under Section 6(1) of the Act as the applicant had not taken any further steps in the proceedings prior to instituting the application apart from filing a Memorandum of Appearance.

Abwoga v Checkups Medical Centre Ltd & another (Cause E802 of 2023) [20241 KEELRC 123 (KLR) wherein the Court stated as follows:

> The parties in their agreement which is the substratum of the claim herein. agreed at clause 34 in particular 34.2 to refer the matter to mediation failing which the Chairman/President at the Chartered Institute of Arbitrators Kenya Chapter would appoint mediator upon application any party, The Court being mindful that it has a mediation procedure housed within the Judiciary refers the matter to mediation.

Highland Carriers Limited V National Oil Corporation of Kenya Limited [2021] eKLR where the Judge held:

> The contract has been terminated. The orders sought by Highlands is for all intents and purposes a reinstatement of the contract and therefore in the nature of a mandatory injunction. The principles upon which a Court may grant a mandatory injunction are clear and restated in Kenya Breweries Limited & another v Washington O. Okeyo [2002] eKLR as follows:-
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> > "The test whether to grant a mandatory injunction or not is correctly stated in Vol. 24 Halsbury's Laws of England 4th Edn. Para 948 which reads:
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> A mandatory injunction can be granted on an interlocutory application as at the hearing, but in the absence of special circumstances. it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a match on the plaintiffs .... a mandatory injunction will be grated on all interlocutory application.'
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> If, however the Court were to grant an order reinstating the dealership on the ground that Highland's case is clear enough in which this Court is sufficiently. assured that it can be summarily remedied by reinstatement, then the Court may well be determining the dispute. The result will be that the Court will have decided the merit of the dispute and would be making an order that is inimical and not in support of the intended arbitration.

Mukuha v Mukuha & 3 others (Civil Suit E267 of 2023) [20241 KEHC 2693 (KLR) (Commercial and Tax) (15 March 2024) (Ruling) where he stated that:

> Addressing the matter of interim measures, I find myself in agreement with the defendants' position that this Court's authority is confined to the issuance of interim measures, rather than the dispensation official injunctive relief, in circumstances such as those before us. The Court of Appeal in the case of Safaricom Ltd v Ocean View Beach Hotel Ltd & 2

Others, [2010] eKLR set out the factors to be considered before issuing an interim measure of protection under section 7 of the Act.

Safaricom Limited v Ocean View Beach Hotel Limited & 2 others 120101 e KLR as follows:

Under our system of the law on arbitration the essentials which the court must take into account before issuing the interim measures of protection are:-

1. The existence of an arbitration agreement.
2. Whether the subject matter of arbitration is under threat.
3. In the special circumstances which is the appropriate measure of protection after an assessment of the merits of the application?
4. For what period must the measure be given especially if requested for before the commencement of the arbitration so as to avoid encroaching on the tribunal's decision making power as intended by the parties?

12. For the Claimant it was submitted that section 7 of the *Arbitration Act* allows an aggrieved party to apply to court for interim measures of protection. That the Claimant invoked this provision to seek protection and preserve the status quo and to ensure that the Respondent does not delay his payments.

13. Relying on the decision in the Safaricom case (supra) the Claimant submitted that arbitration does not oust the jurisdiction of the court.

14. It was further the submission of the Claimant that the Respondent's application is intended to delay payment. That the Claimant has attached emails in which the Respondent acknowledged owing the Claimant the amount claimed. That the Respondent became interested in arbitration only after the Claimant filed this suit. That the application is therefore in bad faith. It relied on the decision in Nairobi Bottlers Limited v Andrew Onyango Odongo where the court stated that parties should not be allowed to abuse arbitration.

15. The Claimant submitted that he met the conditions for granting interim orders in that:

    a. Prima facie case: He has established a strong case by showing that the Respondent has not fulfilled its financial obligations under the Consulting Contract. The Respondent has admitted to owing the Plaintiff and yet seeks to avoid payment by invoking the arbitration clause.

    b. Irreparable harm: The Claimant, an expatriate, is facing financial hardship due to the non-payment. Delaying the matter further through arbitration would cause significant harm that cannot be adequately compensated by damages. This position is supported by the decision in American Cyanamid Co v Ethicon Ltd [1975], where the court emphasized that irreparable harm must be avoided where possible.

    c. Balance of convenience: The balance of convenience clearly favors the Claimant who has been waiting for payment, while the Respondent, by its own admission, has failed to meet their obligations. As stated in Giella v Cassman Brown [1973] EA 358, the balance of convenience favors the party that is more likely to suffer harm if the interim measures are not granted.

16. The Claimant further submitted that the Respondent would suffer no prejudice while the Claimant who is an expatriate will have to incur additional costs on accommodation, transport and other living expenses when the Respondent has already acknowledged the debt. Relying on the decision in Samura

Engineering Ltd & Others v Don-Wood Co. Ltd the Claimant submitted that alternative dispute resolution should not be used to frustrate parties seeking justice.

17. In concluding, the Claimant prayed that the Respondent's application for stay of the proceedings in this suit be dismissed and that the court awards the Claimant interim measures of protection sought.

18. I have considered the applications and notice of preliminary objection, the replies and submissions by the parties for and against the same. The issues arising for determination are:

    a. Whether the claim herein ought to be stayed and the dispute referred to arbitration

    b. Whether the Claimant's application dated 5th June 2024 has merit

19. Clause l of the contract between the Claimant and Respondent provides as follows:

    l) Governing law and jurisdiction
    This contract shall be governed by and construed in accordance with the laws of the Republic OF KenyaEach party shall use its best efforts to settle amicably any dispute claim controversy or disagreement arising out of or in connection with this contract or in its validity, interpretation or termination.Save as herein otherwise specifically provided, any dispute, claim, controversy or disagreement between the parties as to matters arising under or pursuant to this contract as aforesaid which cannot be settled amicably within fifteen (15) days after receipt by one party of the other party's request for such amicable settlement may be submitted by either party to arbitration in accordance with the provisions or Clauses in this agreement.If the parties so agree, the dispute shall be referred to a single arbitrator or if they are unable to agree upon the person to be appointed as arbitrator within seven (7) days from the date of the notice requesting arbitration, the dispute shall be referred to a board of three (3) independent arbitrators. The Consultant shall nominate one (l) arbitrator and the Company shall nominate one (l) arbitrator within a further period of seven (7) days. These two (2) arbitrators shall then jointly nominate a third (3rd), who shall act as umpire. The venue and seat the arbitration shall be Nairobi.If the arbitrators named by the Consultant and the Company do not succeed in appointing a third (3rd) arbitrator (who shall act as umpire) within three (3) days after the later of the two (2) arbitrators named by the parties have been appointed, the third (3rd) arbitrator shall, at the request of either the Company or the Consultant, be appointed by the Chairman of the Chartered Institute of Arbitrators of the United Kingdom, Kenya Branch or failing him by the Chairman of the Law Society of Kenya.Except as stated herein, arbitration proceedings shall be conducted in accordance with the rules or procedures for arbitration of the Chartered Institute of Arbitrators of the United Kingdom, Kenya Branch.If for any reason an arbitrator is unable to perform his function, a substitute shall be appointed in the same manner as the original arbitrator.The decision of the single arbitrator or the majority of the board of arbitrators, as the case may be, shall be final and binding on the parties.Notwithstanding the above provisions of this Clause 14, a party is entitled to seek preliminary injunctive relief or interim or conservatory measures from any court of competent jurisdiction pending the final decision or award of the arbitrators.

20. It is clear that the contract between the parties allows court intervention by way of preliminary injunctive relief pending final decision or award of an arbitrator. The Claimant therefore was justified in moving this court for interim injunctive orders by his application dated 5th June 2024.

21. On whether the suit should be stayed and the dispute herein referred to arbitration, the contract provides that the same should be done within 15 days of failure to amicably settle the dispute. It is not clear whether there is any dispute in this case as the Respondent has not given any indication that what is demanded by the Claimant is not due. Non-payment of an uncontested sum is in my view not a dispute warranting reference to arbitration in terms of the contract between the parties. It is thus my

view that there is no dispute to be referred to arbitration as none has been formulated by the parties as yet.

22. On whether the Claimant's application is merited, it has not been disputed that the Claimant is owed money arising from services rendered by him to the Respondent.

23. It is further not in dispute that the Claimant is an expatriate and was engaged by the Respondent on that understanding and that upon expiry of his contract he would have to go back to his country of origin.

24. The arbitration clause in the contract between the parties does not provide for costs of the arbitrator or the time frame for arbitration. The Claimant would therefore suffer irreparable harm as he will require funds to sustain himself during the pendency of the arbitration process which is likely to take a while based on the process of appointment and at an unascertained cost.

25. The balance of convenience is in my view in favour of granting the prayers sought by the Claimant.

Conclusion

26. Having reached the findings above, I find no merit in the preliminary objection and application filed by the Respondent both dated 25th June 2024 and accordingly dismiss the same.

27. I find merit in the Claimant's application dated 5th June 2024 and make orders as follows:

    a. That an order do issue and is hereby issued compelling the Respondent by itself, its servants and/or agents or any one authorized by it or claiming under it to permit the Claimant to continue residing in the company-provided accommodation and be allowed to retain and use the company-provided vehicle until the full and final settlement of all dues, including but not limited to unpaid salary, severance pay, and any other contractual or further orders of the court.

    b. That the Respondent, its agents, or any other representatives be and are hereby restrained from interfering with the Claimant's use of the company residence and vehicle during the period until the final settlement is completed or further orders of this court.

    c. That directions be given at the time of delivery of this ruling for fast tracking the hearing of this suit in view of the nature of orders sought in the claim and the orders that have been granted by the court herein.

    d. Costs of the applications shall be in the cause.

DATED, DELIVERED VIRTUALLY AT ELDORET THIS 21ST DAY OF NOVEMBER, 2024.

M. ONYANGO

JUDGE