



**Mwai v CMA CGM (K) Limited (Cause E378 of 2022)
[2024] KEELRC 2744 (KLR) (7 November 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2744 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E378 OF 2022
CN BAARI, J
NOVEMBER 7, 2024**

BETWEEN

JOSEPH RWAMBA MWAI CLAIMANT

AND

CMA CGM (K) LIMITED RESPONDENT

RULING

1. This ruling relates to the ex-parte Applicant’s Chamber Summons application dated 14th June, 2024, brought pursuant to Sections 10, 12, 17, 36, 37(1) & (2) of the *Arbitration Act*, Rules 2, 3, 9 and 11 of the Arbitration Rules, Sections 15 & 16 of the *Employment and Labour Relations Court Act*, Order 46 Rules 1, 2, 17, 18 and 20 of the Civil Procedure Rules, Sections 59 and 59C of the *Civil Procedure Act* and Article 159 of *the Constitution*. The Applicant seeks the following reliefs: -
 - i. Spent
 - ii. That parties are bound by their Consent dated 23rd January 2023, adopted as a Court Order on 31st January 2023 before the Honourable Justice James Rika, where they agreed to have the dispute referred to Arbitration.
 - iii. That parties are further bound by their contract titled Arbitration Agreement dated 24th March 2023 where they agreed to have the dispute referred to arbitration. Clause 1 of the Contract succinctly stated, “The Parties agree that the Dispute shall be referred to and finally resolved by arbitration under the Rules of the Chartered Institute of Arbitrators (Kenya Branch) Rules, 2020 and the *Arbitration Act*, No. 4 of 1995 (as amended from time to time).”
 - iv. That the matter be referred to the Chartered Institute of Arbitrators, as agreed, to appoint another Arbitrator to determine the issues on discrimination and harassment.



- v. That the Honourable Arbitrator determined the termination was unfair but erred in law and in fact by determining that the Arbitral Tribunal did not have jurisdiction to determine the issues of discrimination and harassment as they raised issues of Article 27(4) of *the Constitution*.
 - vi. That the Honourable Arbitrator erred in law and in fact by not determining if Judgment on Admission under Order 2 Rule 11 and Order 13 Rule 2 of the Civil Procedure Rules and should be entered against the Respondent on the issues of discrimination and harassment.
 - vii. That the Honourable Arbitrator erred in law and in fact by not determining if the Respondent justified the discrimination and harassment as provided by Section 47 (5) of the *Employment Act*.
 - viii. That the Honourable Arbitrator erred in law and in fact by not determining if the Respondent's had discharged the burden of proof for discrimination and harassment as provided by Section 5 (7) of the *Employment Act*.
 - ix. That the Honourable Arbitrator erred in law and in fact by not determining if the Respondent's breached, 1. the employment contract, 2. the CMA CGM Employee Regulations and the 3. CMA CGM Code of Ethics on the issues of discrimination and harassment.
 - x. That the Honourable Arbitrator erred in law and in fact by not determining if the Respondent's breached the contract guarantees provided in the CMA CGM Code of Ethics on the issues of discrimination and harassment.
 - xi. That the Honourable Arbitrator erred in law and in fact by not determining if the Respondent's breached the contract undertakings provided in the CMA CGM Code of Ethics on the issues of discrimination and harassment.
 - xii. That the matter be referred to the Chartered Institute of Arbitrators to appoint Arbitrator to determine the issues of issues of discrimination and harassment.
 - xiii. That the costs of this application be borne by the Respondent.
2. The Application is supported by the grounds on the face thereof, and the affidavit sworn by the Applicant on 14th June 2024. The crux of the application is that parties submitted their dispute to arbitration vide a consent recorded on 23rd January, 2023, and adopted by the Court on 31st January, 2023.
 3. The Claimant avers that Clause 3 of the Consent expressly stated that the matter be referred to Arbitration. The Claimant further states that parties subsequently entered into an Arbitration Agreement dated 24th March, 2023 wherein, Clause 1 thereof provided that the dispute shall be referred and finally resolved by Arbitration.
 4. The Applicant states that the Arbitrator while determining issues pertaining to unfair termination, held that he did not have jurisdiction to determine issues involving discrimination and harassment enshrined under Article 27(1-5) of *the Constitution*.
 5. The Applicant states that the Arbitral Tribunal under Clause 9.44 of the Arbitral Award held that:-

“I find and determine that I lack jurisdiction to deal with the Constitutional issues on discrimination of the Claimant while in the course of his employment under Article 27(1-5) of *the Constitution*.”



6. The Claimant contends that the Arbitrator erred in law and in fact by not determining if Judgment on Admission under Orders 2 Rule 11 and 13 Rule 2 of the Civil Procedure Rules should be entered against the Defendant on the issues of discrimination and harassment.
7. The Claimant contends that the Arbitrator further erred in law and in fact by not determining matters and issues relating to discrimination and harassment that had been pleaded and traversed by the parties. In particular, it did not consider whether the Respondent had satisfied the burden of proof for discrimination and harassment as provided under Section 5 (7) of the *Employment Act*, and whether the Respondent had breached the employment Contract, the Respondent's Employee Regulations and Code of Ethics with regards to issues pertaining discrimination and harassment.
8. The Claimant finally asserts that the Arbitrator is functus officio and prays that the matter be referred back to the Chartered Institute of Arbitrators for appointment of an alternative Arbitrator to determine the issues pertaining to discrimination and harassment that had been raised in the suit.
9. The Respondent opposed the application vide a Replying Affidavit sworn by one Jane Christine Gundo on 9th July, 2024. The Respondent avers that the application lacks legal basis as the legal provisions invoked do not apply to the orders sought.
10. It is the Respondent's assertion that the Claimant filed proceedings against it in this court alleging unfair termination, discrimination and harassment and that after much deliberations on how to resolve the matter, parties agreed to refer the dispute to arbitration vide a Consent dated 23rd January, 2023.
11. The Respondent further avers that parties subsequently entered into an arbitration agreement dated 30th March, 2023, which provided under its Clause 1, that the dispute would be referred to and finally resolved through arbitration by a sole arbitrator appointed by the Chartered Institute of Arbitrators. The Respondent further states that Clause 7 of the Agreement provided that the Arbitrator's decision would be final and binding.
12. The Respondent avers that the Institute appointed a Mr. Philemon Morara who arbitrated the matter, and made a final Arbitral Award dated 19th March, 2024, wherein, he held that he lacked jurisdiction over the issues relating to discrimination and harassment espoused under Article 27 of *the Constitution* of Kenya.
13. The Respondent states that after the issuance of the final arbitral award, the arbitral proceedings came to an end and the arbitration agreement was accordingly discharged. The Respondent contends that the arbitral award remains final notwithstanding that the Claimant is dissatisfied with the outcome.
14. The Respondent avers further that this Court lacks jurisdiction to review or provide any recourse to address the purported errors of law and fact alleged by the Claimant, save for setting aside which has not been sought for by the Claimant.
15. The Respondent avers that the application is fatally defective on the basis that seeking the Court's intervention in the appointment of an Arbitrator is against the principle of party autonomy and the orders sought are equivalent to having the Court direct another arbitrator to sit on appeal over another arbitrator's final award.
16. It is the Respondent's position that the application is intended to relitigate issues that have already been determined and prays that the application be dismissed with costs.
17. Parties further filed submission on the application, and which have been duly considered.



Analysis and Determination

18. I have carefully considered the application, the Replying Affidavit in opposition and the rival submissions. The singular issue for determination is whether the Court has jurisdiction to grant the orders sought.
19. Jurisdiction they say is everything, and without which, the court must not make one more step. (See Owners of Motor Vessel 'Lillian S' Vs Caltex Oil (Kenya) Limited [1989].
20. Under the instant application, the Claimant inter alia, seeks that the Court refers the matter back to the Chartered Institute of Arbitrators for appointment of another Arbitrator to determine the issues of discrimination and harassment which were allegedly not determined by the Arbitrator in his Final Award dated 19th March, 2024.
21. Under clause 9.44 of the arbitral award, the arbitrator held thus:

“I find and determine that I lack jurisdiction to deal with the Constitutional issues on discrimination of the Claimant while in the course of his employment under Article 27(1-5) of *the Constitution*.”
22. Pursuant to a consent dated 23rd January, 2023 entered between the parties, and adopted by the Court on 31st January, 2023, the parties herein, agreed to refer the dispute to Arbitration.
23. Subsequently, the parties entered into an Arbitration Agreement dated 24th March, 2023 wherein, they submitted to Arbitration. Clause 1 of the Arbitration Agreement states:

“B. Reference

The Parties agree that the Dispute shall be referred to and finally resolved by arbitration under the Rules of the Chartered Institute of Arbitrators (Kenya Branch) Rules, 2020 and the *Arbitration Act*, No. 4 of 1995 (as amended from time to time).”
24. Consequently, the Chartered Institute of Arbitrators appointed a Mr. Philemon Morara Apiemi to arbitrate the matter, and which arbitration culminated in the determination of the matter vide a final award issued on 19th March, 2024. The Claimant, being dissatisfied with the Arbitrator's findings, filed the instant application seeking the aforesaid reliefs.
25. Section 10 of the *Arbitration Act* provides:

“

“10. Extent of court intervention

Except as provided in this Act, no court shall intervene in matters governed by this Act.”
26. By the foregoing provision, it is clear that the jurisdiction of the Court on arbitral awards is limited, and may thus only be invoked in very clear circumstances as specified under the same Act.
27. Further, Section 32A of the Act provides: -

“Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this Act”.



28. The limitation on this Court's jurisdiction in arbitration matters stems from the fact that arbitration is a consensual process between the parties. When parties choose arbitration over Courts as a means to resolve their dispute, they also consent to the Arbitrator's interpretation of the facts and the contract involved. Consequently, courts do not address claims of facts or errors made by an Arbitrator, similar to an appellate courts' reviewing a lower court's decision. This principle upholds the parties' autonomy central to the *Arbitration Act*.
29. This position was reiterated in the case of Synergy Industrial Credit Ltd v Cape Holdings Ltd [2020] eKLR, where the Court of Appeal held thus:-
- “One of the significant features of the *Arbitration Act* (the Act) is the principle of party autonomy, which entitles parties to have their disputes resolved by the forum and in the manner of their choice. For that very reason, the instances when the court may intervene in arbitral proceedings or interfere with an arbitral award are not at large; they are few and only those specified by the Act.”
30. Similarly in Geo Chem Middle East v. Kenya Bureau of Standards [2020] eKLR, the Supreme Court of Kenya quoted with approval Ochieng J's holding that:-
- “It is not the function nor mandate of the High Court to re-evaluate such decisions of an arbitral tribunal, when the court was called upon to determine whether or not to set aside an award ... if the court were to delve into the task of ascertaining the correctness of the decision of an arbitrator, the court would be sitting on an appeal over the decision in issue. In light of the public policy of Kenya, which loudly pronounces the intention of giving finality to arbitral awards, it would actually be against the said public policy to have the Court sit on appeal over the decision of the arbitral tribunal.”
31. Upon a careful analysis of the contents of this application, vis-a-vis the finding by the Arbitrator, the inevitable conclusion is that the Applicant is in essence challenging the decision by the Arbitrator for not determining issues involving discrimination and harassment between the parties. These issues no doubt go into the merits and demerits of the Arbitrator's decision based on points of law and facts.
32. This Court returns that these issues would normally be raised in a substantive appeal under Section 39 of the *Arbitration Act*, 1995 upon prior written agreement by the Parties and not in an application such as this.
33. The Supreme Court of Kenya in Application No.2 of 2012; Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, had this to say on jurisdiction:-
- ‘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 other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law... Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.’
34. According to the *Arbitration Act*, an aggrieved party is not without remedy, the party's recourse against an arbitral award may be through an application to the High Court or courts of equal status expressly seeking orders for setting aside the arbitral award on one or more of the following grounds namely:-



- i. incapacity of a party;
 - ii. invalidity of an agreement;
 - iii. insufficient notice of appointment of an arbitrator or the arbitral proceedings;
 - (iv) where an arbitrator exceeds the scope of his or her reference;
 - iv. where an award is induced or influenced by fraud or corruption;
 - (vi) where the dispute is not capable of being resolved by arbitration; or
 - (vii) where the arbitral award is against public policy.
35. For starters, the Applicant has not sought the setting aside of the arbitral award. What he seeks is further referral of the matter to arbitration. This court wonders how it would refer the matter back for arbitration when the Arbitrator already declined jurisdiction.
36. The court is further wary of a party who challenges an arbitral award on appealable issues of law disguised in an application. The application before court is clothed as an appeal challenging the findings of the arbitral award which is a wrongful invocation of the Court's jurisdiction.
37. Regrettably, this Court does not have the authority to make an assessment on the merits of the arbitral award. The jurisdiction of the Court is limited to what is permissible under Section 35 of the Arbitration Act. Any other intervention by the Court is expressly prohibited under Section 10 of the Act.
38. The parties in submitting their dispute to arbitration, made their bed and have now to lie on it.
39. In the final analysis, I find the Claimant's application and the reliefs sought therein, are outside the purview and jurisdiction of this Court, and the court will not reopen the issues already heard and determined by the Arbitrator.
40. In light of the foregoing, I find the application lacking in merit and is accordingly dismissed with no orders on costs.
41. It is hereby so ordered.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 7TH DAY OF NOVEMBER, 2024.

C. N. BAARI

JUDGE

Appearance:

N/A appearance for the Claimant/Applicant

Ms. Mulindi present for the Respondent

Mr. Kirui - C/A

