



Alusa v Mobile Consultation Association Ltd t/a Tibu Health (Cause E394 of 2023) [2024] KEELRC 13438 (KLR) (16 December 2024) (Ruling)

Neutral citation: [2024] KEELRC 13438 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E394 OF 2023
BOM MANANI, J
DECEMBER 16, 2024**

BETWEEN

CLAUDETTE ALUSA CLAIMANT

AND

**MOBILE CONSULTATION ASSOCIATION LTD T/A TIBU
HEALTH RESPONDENT**

RULING

1. The Claimant has sued the Respondent for unfair termination of her contract of service. She contends that the Respondent terminated her contract of service abruptly in violation of the law and *the Constitution*.
2. She further alleges that the Respondent's action was discriminatory. As such, she alleges that the decision violated sections 41, 43, 44, 45 and 47 of the *Employment Act* and articles 27(5) and 41(1) of *the Constitution*.
3. On being served with the Summons to Enter Appearance, the Respondent filed the application dated 30th June 2023 seeking that the matter be referred to arbitration. The Respondent contends that the contract between them provides for arbitration of all disputes which may arise from the relationship. As such, this matter ought to be referred to arbitration.
4. The Respondent avers that by incorporating an arbitration clause into their contract, the parties voluntarily ousted the court's jurisdiction to entertain disputes arising from their contract. As such, this court lacks the requisite jurisdiction to entertain this action.
5. The Respondent further contends that parties are bound by the contracts they voluntarily enter into. And courts are not entitled to re-write the contracts by for instance overlooking an agreement to have disputes arising from them to be resolved through arbitration.



6. The Claimant has opposed the application. Through the affidavit dated 22nd September 2023, she contends that the Respondent is guilty of breach of the very agreement which it now seeks to invoke to justify the request for referral to arbitration. As such, the application should be declined.
7. The Claimant further contends that the parties have already attempted mediation of the matter to no avail. As such, the request to refer it back to arbitration should be declined.
8. The Claimant further avers that she is entitled to access the court and to have her case resolved in a cost efficient manner. She contends that these entitlements will be scuttled if the action is referred to arbitration.
9. The Claimant contends that the Respondent's decision to terminate her contract of service violated the law and the Constitution. As such, this court is seized of jurisdiction to look into her grievance.

Issues for Determination

10. Having looked at the application and the affidavit evidence on record, I am of the view that the following are the issues that arise for determination:-
 - a. Whether the presence of an arbitration clause in a contract has the effect of ousting the jurisdiction of the court to determine disputes arising from the contract.
 - b. Whether the instant dispute is suitable for arbitration.
 - c. Whether the orders sought in the application dated 30th June 2023 should issue.

Analysis

11. The Respondent contends that the presence of the arbitration clause in the agreement between them has the effect of ousting the court's jurisdiction to entertain the instant dispute. On the other hand, the Claimant contends that despite the clause, the court retains the jurisdiction to entertain the action.
12. Whether an arbitration clause in a contract has the consequence of ousting the court's jurisdiction over disputes that may arise from such contract is a matter which has been considered in a number of decisions. The general thinking is that it does not.
13. In Niazsons (K) Ltd v China Road & Bridge Corporation Kenya [2001] eKLR, the court expressed the view that an arbitration clause in a contract does not oust the court's jurisdiction over disputes that may arise from the contract. In the South African case of Cargill Zimbabwe v Culvenhum Trading (Pvt) Ltd (HC 5964 of 2005; HH 42 of 2006) [2006] ZWHHC 42 (28 March 2006), the court expressed a similar view. It observed that arbitration clauses only compliment the court's dispute resolution mechanisms but courts retain overall control over the process. A similar view was expressed in VJ v VJ and Another (258/2023) [2024] ZASCA 92 (11 June 2024) and Maina v Kenya Commercial Bank PLC & another (Constitutional Petition E003 of 2023) [2024] KEELRC 2287 (KLR) (26 September 2024) (Ruling).
14. As such, the Respondent's contention that the arbitration clause in the contract ousts the court's jurisdiction over the contract is erroneous. The court returns a finding that it retains jurisdiction in respect of disputes that may arise from the contract.
15. Whilst the court agrees that the principle of party autonomy requires that individuals be allowed the latitude to determine the terms upon which they should engage, it is noted that this presupposes that the parties were enjoying equality of power at the point of entering into the agreement. This reality does not find favour in employment relations where there is perceived imbalance of power between employers and employees. And hence the minimalistic application of the principle to



employment contracts as a matter of public policy (*Maina v Kenya Commercial Bank PLC & another* (Constitutional Petition E003 of 2023) [2024] KEELRC 2287 (KLR) (26 September 2024) (Ruling)).

16. The foregoing has tended to disfavor the inclusion of arbitration agreements, which are anchored on party autonomy, in employment contracts. As such, notwithstanding the general principle of the law of contract that parties are bound by the terms of their contracts, courts have often leaned in favour of not enforcing arbitration clauses in employment contracts (see *Okeyo v Board of Directors HHI Management Service Limited & another* (Cause E970 of 2023) [2024] KEELRC 1006 (KLR) (6 May 2024) (Ruling) and *Rono v Delish Nail & Beauty Ltd* (Cause E038 of 2023) [2023] KEELRC 2996 (KLR) (23 November 2023) (Ruling)).
17. Importantly, the Supreme Court has suggested that disputes which require interpretation and application of *the Constitution* may not be suitable for arbitration. The court observed that where a party has alleged infringement of his constitutional rights, he should be permitted access to court to have the dispute resolved irrespective of whether the matter arose from a contract with an arbitration clause (*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)).
18. In the instant suit, the Claimant seeks for orders that the Respondent's actions infringed on her rights under articles 27 (5) and 41 (1) of *the Constitution*. In effect, the dispute is, in part, anchored on alleged violation of constitutional rights. As such and to this extend, I find that the matter is not suitable for arbitration.

Determination

19. In the ultimate, I arrive at the conclusion that the application dated 30th June 2023 is not merited.
20. As such, it is dismissed.
21. Costs of the application shall abide the outcome of the suit.

DATED, SIGNED AND DELIVERED ON THE 16TH DAY OF DECEMBER, 2024

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

.....for the Respondent

ORDER

In light of the directions issued on 12th 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.

