



**Chadda v Lake Turkana Wind Power Limited (Cause E702 of 2022)
[2023] KEELRC 338 (KLR) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 338 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E702 OF 2022
L NDOLO, J
FEBRUARY 9, 2023**

BETWEEN

ASHISH CHADDA CLAIMANT

AND

LAKE TURKANA WIND POWER LIMITED RESPONDENT

RULING

1. On October 5, 2022, the Claimant filed a claim against the Respondent seeking the following remedies:
 - a) A declaration that the ‘Revised Mutual Separation and Confidentiality Deed’ dated July 23, 2021 is unconscionable, unlawful and unfair and therefore null and void;
 - b) A declaration that the termination of the Claimant’s employment by the Respondent was unlawful and unfair;
 - c) A declaration that the Respondent violated the Claimant’s fundamental right to:
 - i) Fair labour practice under Article 41 of the Constitution;
 - ii) Fair administrative action guaranteed under Article 47 of the Constitution.
 - d) Damages for breach of the Claimant’s right to fair labour practice under Article 41(1) of the Constitution;
 - e) Damages for harassment, humiliation, embarrassment and defamation;
 - f) Reinstatement to employment.
2. Subsequent to this, the Respondent filed a Chamber Summons application dated November 1, 2022, seeking the following orders:



- a) An order staying the suit and referring the dispute to arbitration in accordance with Clause 11 of the Mutual Separation and Confidentiality Deed dated July 23, 2021;
 - b) An order directing the Claimant to deposit Kshs. 5,000,000 in a joint interest earning account in the names of Counsel on record, as security for costs.
3. The application is supported by an affidavit sworn by the Respondent's Chief Executive Officer, Philippus Leferink and is based on the following grounds:
- a) It is the Respondent's understanding that the Claimant does not have any known assets in Kenya, whether real or moveable;
 - b) The Claimant and the Respondent entered into a mutual separation agreement by way of the Mutual Separation and Confidentiality Deed dated July 23, 2021, in which the parties agreed to mutually and amicably terminate the Claimant's employment as the Chief Finance Officer of the Company. Clause 11 of the Deed provides for a two-tier dispute resolution process as follows:
 - i) The parties shall endeavour to resolve any dispute arising out of or in connection with this Deed amicably; and
 - ii) In the event that the dispute cannot be resolved within 30 days of notification of the dispute by one party to the other, the dispute shall be referred to a single arbitrator to be appointed by the parties and in the event of failure to agree upon the appointment, the arbitrator shall be appointed by the Chairman for the time being of the Chartered Institute of Arbitrators (Kenya Branch) which appointment shall be binding on the parties hereto.
 - c) The Claimant signed the Deed freely, voluntarily and without any coercion and/or undue influence;
 - d) The Claimant also took independent legal advice from his Counsel of choice which ensured that he was advised on the terms of the Deed;
 - e) By dint of Clause 4.1 of the Deed, the Claimant waived any and all claims against the Respondent. The aforementioned Clause states as follows:

The Employee covenants that the terms of this Deed are offered by the Company without any admission of liability on the part of the Company and in full and final settlement of all and any claims, disputes or rights of action that the Employee may have against the Company and/or its officers or employees whether arising out of his employment with the Company (whatsoever and howsoever arising) or its termination or from events occurring after this Deed has been entered into, whether under common law, contract, statute or otherwise, whether such claims are, or could be, known to the parties or in their contemplation at the date of this Deed.
 - f) Pursuant to the Deed, the Claimant received a colossal sum of Kshs. 20,000,000 as full and final settlement of the mutual and amicable separation;
 - g) The Claimant has not shown any indication in his pleadings or otherwise that he intends to refund the settlement amount to the Respondent since he has preferred instituting legal proceedings;



- h) The Deed is binding on both parties who had the capacity to enter into the said agreement at the time of execution;
 - i) The Court does not have jurisdiction to entertain, hear and determine the suit filed by the Claimant by virtue of the Deed as parties had agreed to refer any dispute to arbitration. The suit herein is an abuse of the court process and an attempt by the Claimant to by-pass his contractual obligations;
 - j) Section 6(1) of the Arbitration Act provides that a party to an arbitration agreement can apply to the High Court for an interim measure of protection and the High Court can grant the interim measure of protection before or during arbitration proceedings;
 - k) Prior to commencing the arbitration proceedings, the Respondent requests the Court, pursuant to the provisions of Section 7(1) of the Arbitration Act, to direct the Claimant to deposit security for costs amounting to Kshs. 5,000,000 with the Court or in a joint interest earning account in the names of the Counsel on record;
 - l) If the Claimant fails to deposit the security for costs with the Court or in a joint interest earning account, there is a risk that the Respondent will not recover its costs of the suit;
 - m) It is in the interest of justice that the Claimant is directed to deposit the security for costs pending the institution and determination of arbitration proceedings;
 - n) In so far as this application is made under the provisions of Section 12(3) (viii) and (4) of the Employment and Labour Relations Court Act, the Court has jurisdiction to make such an order as to costs as the Court considers just and fit to grant;
 - o) It is just and equitable in the circumstances that the orders sought in the application are granted as prayed.
4. The Claimant's response to the application is contained in his replying affidavit sworn on November 14, 2022. The Claimant begins by denying the averment by the Respondent that he had taken independent legal advice before signing the Mutual Separation and Confidentiality Deed dated July 23, 2021.
 5. He states that on June 15, 2021, without notice or an opportunity to be heard, he was furnished with a draft Termination and Settlement Agreement by Rizwan Fazal.
 6. The Claimant further states that by an email dated June 16, 2021, the then Chief Executive Officer, John Zaidi wrote to the Board members raising concern over information that the Board intended to terminate the Claimant's employment.
 7. The Claimant depones that his signature on the Mutual Separation and Confidentiality Deed was not voluntary and was procured through coercion. He terms the Deed as unconscionable, unfair and oppressive.
 8. The Claimant states that the Respondent's push for security for costs is an affront to the Claimant's constitutional right to fair hearing under Article 50 of the Constitution.
 9. Philippus Leferink swore a further affidavit on December 13, 2022, stating that the Claimant, while seeking orders for the Mutual Separation and Confidentiality Deed dated July 23, 2021 to be invalidated, has failed to refund the settlement sum of Kshs. 20,000,000.



10. Leferink takes the view that the Claimant is estopped, by his conduct, from alleging that the Deed is invalid, while continuing to enjoy its fruits. Leferink asserts that the Deed was executed freely and voluntarily, without coercion, duress or undue influence.
11. Leferink further takes issue with the time lapse between execution of the Deed and filing of the Claimant's claim. He points out that Deed was signed on July 23, 2021 while the claim was filed more than a year later, on September 30, 2022. He terms this delay as inordinate and unreasonable.
12. Leferink depones that the Claimant is estopped, by his conduct, from alleging that his employment was unfairly terminated when he knows fully well that he negotiated and executed the Deed as a mutual separation and confidentiality bargain with the Respondent.
13. He concludes that as provided under Section 17 of the *Arbitration Act*, an Arbitral Tribunal, through the doctrine of kompetenz-kompetenz is the proper forum to settle matters relating to jurisdiction and validity of the arbitration agreement.
14. The parties urged their respective positions by way of written submissions. In pursuing its application, the Respondent relies on Section 6(1) of the *Arbitration Act*, which provides as follows:

6. Stay of legal proceedings

- (1) 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 unless it finds-
 - (a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or
 - (b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

15. Clause 11 of the Mutual Separation and Confidentiality Deed dated July 23, 2021, which is the subject of this dispute, makes provision for governing law and dispute resolution as follows:

This Deed and any dispute or claim arising out of or in connection with it or its subject matter or formation shall be governed by and construed in accordance with the Laws of Kenya. The Parties shall endeavour to resolve any dispute arising out of or in connection with this Deed amicably and in the event that the dispute cannot be resolved within thirty (30) days of notification of the dispute by one party to the other, the dispute shall be referred to a single arbitrator to be appointed by the Chairman for the time being of the Chartered Institute of Arbitrators (Kenya Branch) which appointment shall be binding on the parties hereto.

Such arbitration shall be carried out in accordance with and subject to the provisions of the *Arbitration Act*, 1995 of the Laws of Kenya (*Arbitration Act*) or any re-enactment or statutory modification thereof for the time being in force. The decision of the arbitrator shall be binding upon the parties. The proceedings shall be held in Nairobi and the language shall be English.



16. In the submissions filed on behalf of the Respondent, reference was made to the decision in *Kenya Pipeline Company Limited v Datalogix Limited & another* [2007] eKLR where Warsame J (as he then was) stated thus:

“...the court must give effect to the terms of the contract which provide for arbitration and as a matter of course the court has a duty to honour the plea of the parties so as to give effect to the wishes of the parties and their contractual relationship. Arbitration is a modern way of resolving disputes quicker, amicably and in a friendly environment and manner. It is for that reason that the court would always endeavour to encourage parties to resolve their disputes through arbitration. It is against public policy to deprive parties of their choice and hinder their attempt to resolve their disputes through arbitration.”

17. Similar sentiments were expressed by Odunga J (as he then was) in *Yes Housing Co-operative Society Limited v Kenneth Onsare Maina* [2020] eKLR as follows:

“...this court is not just under a duty to enforce a contractual clause binding the parties to refer their disputes to arbitration but is under a constitutional obligation to promote that mode of dispute resolution...it would amount to an abdication of its judicial duty if the court were to shirk that duty and decline to refer a matter to arbitration simply because a party believes that the applicant’s case is unmerited and is bound to fail.”

18. The Claimant’s case is that the Mutual Separation and Confidentiality Deed is unconscionable and unlawful. He states that he did not execute the Deed voluntarily.

19. On its part, the Respondent asserts that the Claimant executed the subject Mutual Separation and Confidentiality Deed voluntarily and even reaped the fruits of the Deed by receiving the sum of Kshs. 20,000,000. The Respondent therefore takes the view that the Claimant is, by his own conduct, estopped from questioning the legality of the Deed.

20. In his written submissions, the Claimant presents himself as a weak party who had no idea what he was doing when he executed the Deed. The Court however notes that the Claimant was a senior employee of the Respondent, holding the position of Chief Finance Officer, at the time of leaving employment. Such a senior employee cannot, in my view, claim to have signed an important document such as a Mutual Separation Deed blindly. The Claimant’s claim that he signed the Deed involuntarily is therefore rejected.

21. Instructively, the Claimant did not respond to the Respondent’s challenge to return the Kshs. 20,000,000 paid to him pursuant to the Deed, he now seeks to challenge. What is more, it took more than a year for the Claimant to take issue with the Deed. This period is rather long given the severity of the complaints raised by the Claimant. The only conclusion to make therefore is that the Claimant’s complaints are an unjustified afterthought.

22. Ultimately, I find nothing unconscionable in the Mutual Separation and Confidentiality Deed executed by the parties on July 23, 2021. The corollary finding is that by virtue of Clause 11 of the Deed, this Court is obligated to refer the dispute to arbitration as agreed by the parties.

23. In light of this, I find no reason to burden the Claimant with an order to deposit security for costs at this stage.

24. The final order in this application is that the proceedings herein are stayed pending the outcome of the arbitration proceedings.



25. I make no order for costs.

26. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 9TH DAY OF FEBRUARY 2023

LINNET NDOLO

JUDGE

Appearance:

Mr. Ali for the Claimant

Mr. Waioto for the Respondent

