



REPUBLIC OF KENYA



**Mburu v Sagitarix Ltd & another (Cause E542 of 2022)
[2023] KEELRC 766 (KLR) (28 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 766 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E542 OF 2022
DKN MARETE, J
MARCH 28, 2023**

BETWEEN

DR. DIANA NGENDO MBURU CLAIMANT

AND

CHECKUPS MEDICAL CENTRE LTD 1ST RESPONDENT

SAGITARIX LTD 2ND RESPONDENT

RULING

1. This is an application by way of notice of motion dated December 10, 2022. It comes out thus:
 1. That there be a stay of all proceedings in this suit pending the inter partes hearing and determination of this application.
 2. That this honourable court be pleased to review, set aside and/or vary the orders issued on September 12, 2022 by Hon. Lady Justice Maureen Onyango.
 3. That the respondent's/applicant's chamber summons application dated September 9, 2022 be reinstated and be heard inter partes.
 4. That the costs of this application be provided for.
2. It is grounded as follows;
 - a. The agreements providing for arbitration were wilfully entered into by both parties and should therefore be upheld. The arbitration clauses are operational and capable of being performed.
 - b. There is a dispute between the parties as to the termination of the parties agreements and the alleged remedies, if any, due to the claimant arising from the termination of the agreements.



- c. The claimant herein has not followed the stipulated legal requirements relating to the parties' agreed dispute resolution mechanism, thereby making the suit filed by the claimant an abuse of the court process particularly in light of the arbitration clauses.
3. The claimant/respondent in her grounds of opposition dated January 30, 2023 answers the application on the following terms. It is her case that the application does not meet the threshold for review as envisaged in rule 33, of the *Employment and Labour Relations Court (Procedure) Rules, 2016*. Again, the claimant raises constitutional issues which can only be determined by this court under article 165(3)(6) of the *Constitution of Kenya, 2010*.
4. It is her further case that the application is frivolous, vexatious and an abuse of the process of court.
5. The parties further buttress the various positions and cases through their respective written submissions in support of their cases.
6. It is the respondent/applicant's case that this court has wide powers and discretion to review and set aside the ex parte orders dated September 12, 2022. She urges the court to exercise its discretion and review and set aside the orders as they were entered irregularly without affording the parties an *inter partes* hearing on the merits of the chamber summons application dated September 9, 2022. It is clear from the record that the court in making its orders on September 12, 2022, striking out the Chamber Summons application dated September 9, 2022, acted in the mistaken belief that the parties' agreement did not provide for arbitration as a dispute resolution mechanism, yet the said agreements explicitly provided for arbitration if any dispute cannot be settled amicably, by mediation or otherwise.
7. The respondent/applicant's case overwhelms that of the claimant. This is because it is visibly that from the onset, the application dated September 9, 2022 was determined summarily and without hearing the parties to the application. The right to a hearing is fundamental, basic and cardinal and non-negotiable. It should never have been ousted in the first place.
8. This is a case for allowing the application. This is because the parties should, in the interest of justice be facilitated and accommodated in a hearing of the issues raised in the now impugned application. There is no choice on this.
9. I am therefore inclined to allow the application with orders that each party bears their costs of the same..

DELIVERED, DATED AND SIGNED THIS 28TH DAY OF MARCH 2023.

D.K. NJAGI MARETE

JUDGE

Appearances

Komu instructed by Nduta, Munene & Kimo Advocates for the Respondent/Applicant instructed by Onesmus Githinji & Company Advocates for the Claimant/Respondent

Miss Njeri Kariuki holding brief for Kalaine instructed by Onesmus Githinji & Company Advocates for the Claimant/Respondent

