



REPUBLIC OF KENYA



**Atandi v African Medical and Research Foundation (AMREF) Flying Doctors
(Cause E900 of 2021) [2023] KEELRC 991 (KLR) (28 April 2023) (Ruling)**

Neutral citation: [2023] KEELRC 991 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E900 OF 2021
SC RUTTO, J
APRIL 28, 2023**

BETWEEN

FRIDAY GWARO ATANDI CLAIMANT

AND

**AFRICAN MEDICAL AND RESEARCH FOUNDATION (AMREF) FLYING
DOCTORS RESPONDENT**

RULING

1. The Respondent/Applicant has moved this Court *vide* a Notice of Motion Application dated 14th December, 2022 seeking the following orders: -
 1. That the cause filed herein be stayed and the dispute be referred to arbitration in accordance with the agreement of the parties as set out in the Service Agreements dated 2nd May 2008 and 26th September 2017.
 2. That costs of this action and of the Application be borne by the Claimant.
2. The Application which is supported by the Affidavit of Ms. Esther Wakahia is premised on the grounds that: -
 - a. The Claimant's cause of action arises from the alleged breach of the terms of Service Agreements entered into by the parties herein.
 - b. Under the terms of the said Service Agreement, it was mutually agreed by the parties that all disputes relating to, in connection with or arising out of the interpretation and/or application of the agreement or any other disputes between the parties that could not be settled by reference to discussions with the Respondent's Board of Directors, would be referred to arbitration.
 - c. In filing this cause against the Respondent, the Claimant has failed to follow the procedure for settlement of disputes as was agreed between the parties.



- d. It is only just and fair that the dispute be resolved in accordance with the terms agreed upon by the parties.
3. In response to the Application, the Claimant filed a Replying affidavit sworn on 20th December 2022 in which he avers that: -
 - a. The Application is a non-starter and has been made in bad faith aimed at delaying the course of justice in this matter.
 - b. While there are prayers that can be arbitrated upon, there are also some that are touching on the violation of the Constitution and fundamental freedoms and rights that can only be addressed by this Court as opposed to arbitration.
 - c. Being a person who professes the Christian faith and being a Seventh Day Adventist, his faith cannot allow him to work on Saturday and that this was the main reason his services were terminated by the Respondent/Applicant. That his discrimination is therefore based on religion and is the main cause of the complaint which can only be addressed by the Honourable Court.
 - d. The parties herein had not contemplated a violation of rights under the Constitution so as to make reference to arbitration where such violation arises.
 - e. This Court is the appropriate forum as it possesses original jurisdiction to hear the matter given that it raises fundamental constitutional issues touching on religion and the same cannot be removed by dint of clause 20 of the Service Agreement.
 - f. The Applicant's request to refer the matter back to the shop floor or to arbitration will only cause a delay of justice.
 4. Upon being served by the Claimant's Replying Affidavit, the Respondent/Applicant filed a Further Affidavit sworn by Ms. Esther Wakahia sworn on 16th February, 2023 in which she avers that: -
 - a. The Application is justified in light of Clauses 20 and 21 of the Service Agreement between the parties.
 - b. Given that the underlying complaint in the Claimant's claim is the alleged unlawful termination of his employment, the Employment Act provides adequate remedies and orderly enforcement mechanisms.
 - c. The Claimant's case does not disclose a cause of action anchored on the Constitution neither does it raise any question regarding the interpretation or application of the Constitution that is the exclusive jurisdiction of this court. That further, the claim as filed is referenced as a cause and not a petition for redress of alleged violations of constitutional rights.
 - d. The allegations of discrimination alleged did not form the basis of termination of the Claimant's employment contract or at all as he has only made reference to Articles 22 and 41 of the Constitution; a clear indication that the matters complained of are within the area of unfair termination of employment.
 - e. The allegations of discrimination on the basis of religion are misleading and made in bad faith as there were steps put in place to accommodate the respondent from working on Saturdays and the work rota was accordingly revised to reflect these changes.



- f. The *Employment Act* as read with the *Employment and Labour Relations Court Act* stipulates the procedure for enforcement of employment rights which will guide the arbitrator to apply the relevant law and award such reliefs as may be proved by the parties.
 - g. The respondent has not demonstrated any position to the contrary.
5. On 1st February 2023, the Court directed that the Application be canvassed by way of written submissions. Both parties complied and the Court has considered their respective submissions.

Analysis and Determination

6. Flowing from the pleadings and submissions on record, it is evident that the main issue for determination is whether the Application is merited. In other words, should the main suit be stayed and the dispute referred to arbitration?
7. The Application is anchored on clause 20 and 21 of the Service Agreements entered into by the parties. Clause 20 of the Service Agreement dated 29th April, 2008 and clause 21 of the Service Agreement dated 12th October, 2017 provides for reference of disputes between the parties to a single arbitrator in accordance with the *Arbitration Act*. As per the said Service Agreements, such disputes relate to the right, duties or obligations of any party or any matter arising out of or concerning the employee's employment.
8. Submitting in support of the Application, the Applicant has argued that it has satisfied the twin requirements under Section 6 of the *Arbitration Act* and that the parties freely chose to refer the dispute for arbitration hence the Court should give effect to the parties' wishes.
9. On the other hand, the Claimant submitted that the position taken by the Applicant will delay the course of justice. It was the Claimant's further submission that besides the obvious claim of unfair and unlawful termination, the Claim is premised on violation of *the Constitution* and his rights under Article 32. This position was opposed by the Applicant who argued that the claim does not disclose a cause of action anchored on *the Constitution*. That further, the alleged violations are statutory and do not amount to infringement of the Claimant's fundamental freedoms under the Bill of Rights.
10. I have carefully considered the Application, the Response and more importantly, the nature of the Claim before Court. It is evident from the Claim that the Claimant has cited the Applicant for discrimination on account of his religious beliefs. This discounts the Applicant's argument that the claim does not raise any question with regards to violation of the Claimant's constitutional rights. Indeed, the Claimant has made a separate claim for compensatory damages equivalent to USD 100,000.00 on account of the alleged discrimination. This is besides the Claim for compensatory damages for unfair termination under Section 49(1) (c) of the *Employment Act*.
11. Therefore, the issues to be resolved by the Court transcend the Claimant's termination from employment as the Court will have to address itself to the issues of the alleged discrimination of the Claimant at the work place and determine whether he is entitled to damages as a result.
12. What this boils down to is that the arbitrator will not be in a position to determine all the issues in dispute particularly the issues regarding the Claimant's alleged discrimination.



13. On this score, I am guided by the binding authority of the Supreme Court in *Bia Tosha Distributors Limited vs Kenya Breweries Limited & 6 others (Petition 15 of 2020) [2023]* KESC 14 (KLR) (Constitutional and Judicial Review) (17 February 2023) where it was held that: -

“...Breaches, violations and infringements of the Constitution do not fall within the jurisdiction of arbitrators and such breaches cannot be the basis of setting aside arbitral awards. We asserted this position in the case of Nyutu Agrovets Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) SC Pet No 12 of 2016 [2019] eKLR:

“[76] Reading each of the above provisions, alleged breaches of the Constitution cannot be properly introduced by way of an application to set aside an arbitral award. Breaches of the Constitution are properly governed by articles 165(3) and 258 of the said Constitution and cannot by litigational ingenuity be introduced for adjudication by the High Court by way of invocation of section 35 of the Arbitration Act.” Underlined for emphasis

14. The Apex Court proceeded to determine as follows: -

“This court has insisted on the exhaustion of the local remedies....This, however, refers to remedies set out in statutory provisions. The mandate of an arbitrator largely proceeds on the basis of the agreement by parties, and is mainly tasked with the resolution of a dispute as set out in the governing agreement. Where the dispute, however, transcends the commercial dispute, well into the constitutional sphere, as is the case before us, every person is free to access courts and have their day in court. As we see it, there is no tension between arbitration and enforcement of constitutional rights as distinct dispute resolution mechanisms. A court of law cannot turn a blind eye to alleged constitutional breaches in order to invoke the principle of party autonomy that binds parties to their agreements. This in itself does not mean that any person who sets out to petition the court alleging violation of fundamental rights and freedoms under the Bill of Rights must succeed, as cases are determined on their merits.” Underlined for emphasis

15. In light of the above determination by the Supreme Court which I wholly adopt and apply to the instant case, I am inclined to disallow the Application dated 14th December, 2022 on grounds that the Claim as framed, falls outside the jurisdiction of the arbitrator as envisaged under clause 20 and 21 of the Service Agreements executed by the parties.

16. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL, 2023.

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STELLA RUTTO

JUDGE

Appearance:

Ms. Onyango for the Applicant /Respondent

Mr. Onsembe for the Claimant

Abdimalik Hussein Court Assistant

ORDER



In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

