



Ngwatu v Tavevo Water & Sewerage Company Ltd & another (Cause 97 of 2022) [2023] KEELRC 1302 (KLR) (25 May 2023) (Ruling)

Neutral citation: [2023] KEELRC 1302 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 97 OF 2022**

**AK NZEI, J
MAY 25, 2023**

BETWEEN

RICHARD MWAREMA NGWATU CLAIMANT

AND

TAVEVO WATER & SEWAGE COMPANY LTD 1ST RESPONDENT

HOUGHTON M MOMBO 2ND RESPONDENT

RULING

1. The claimant herein sued the respondent *vide* a memorandum of claim dated December 23, 2022 and filed in court on even date, and sought the following reliefs:-
 - a. an order restraining the 1st and 2nd respondents from sending the claimant on compulsory leave pending hearing and determination of this claim.
 - b. an order restraining the 1st and 2nd respondents from dealing and determining any issue arising from the employment contract pending hearing and determination of the claim.
 - c. a declaration that the compulsory leave issued to the claimant is null and void.
 - d. an order to reinstate the claimant should the 1st and 2nd respondents on the basis of the letter of compulsory leave remove the claimant from office illegally.
 - e. any other relief the court deems fit to grant in the circumstances.
 - f. that costs of the suit be borne by the respondents.
2. The claimant pleaded that he is the managing director of the 1st respondent on a fixed term contract of three years with effect from January 4, 2021 to January 3, 2024, earning a salary of Ksh 200,000 per month, which is equivalent to Ksh 2,400,000 per year.



3. The claimant further pleaded that on December 5, 2022, he received a letter from the 2nd respondent requiring him to proceed on leave for a period of 45 days with immediate effect, and that on December 14, 2022, he received yet another letter from the 2nd respondent sending him on compulsory leave, making reference to board meetings held on December 1, 2020 and December 8, 2022, purported to have been a disciplinary hearing, yet the claimant had never been issued with a notice to show cause. That the claimant is likely to suffer, and to be exposed to unfair labour practice and be terminated from his employment whose contract is clear.
4. The suit was filed contemporaneously with a notice of motion dated December 23, 2023 whereby the following orders are sought:-
 - a. a temporary injunction restraining the respondents by themselves, their agents, employees or any other person acting on their authority from sending the claimant on compulsory leave and or terminating his contract and or replacing him until the application is heard and determined.
 - b. a permanent injunction restraining the respondents by themselves, their agents, employees or any other person acting on their authority from sending the claimant on compulsory leave or terminating his contract or replacing him until the claim herein is heard and determined.
 - c. that costs of the application be provided for.
5. The application is supported by the claimant's supporting affidavit sworn on December 23, 2022. Documents annexed to the supporting affidavit include the claimant's employment contract dated December 31, 2020 and signed by the claimant on January 4, 2021, the respondents' letter dated December 5, 2022 sending the claimant on 45 days leave; the respondents letter dated December 14, 2022 levelling accusations of wrong doing against the claimant and requiring him to hand over to a Mr Richard Kabengo by close of business on December 15, 2022 and to proceed on compulsory leave, among other documents.
6. The foregoing application, which was filed under a certificate of urgency, was on December 23, 2022 placed before the vacation duty court, which certified the application as urgent and granted interim orders in term of prayer (a) set out in paragraph 4 herein.
7. The employment contract between the claimant and the 1st respondent contains a dispute resolution clause which states:-

“All disputes arising out of or relating to this contract (including and not limited to its interpretation, application or implementation), shall be resolved by way of consultation held in good faith between the parties. Such consultation shall begin immediately after one party has delivered to the other a written request for such consultation.

If within seven (7) business days following the date on which such notice is given the dispute cannot be resolved, the dispute shall be submitted to mediation. The mediation shall be conducted by a mediator appointed by the parties.”
8. On January 18, 2023, the respondents entered appearance and filed a replying affidavit, sworn by the 2nd respondent on January 17, 2023 in response to the claimant's application set out in paragraph 4 of this ruling. The respondents also filed a notice of preliminary objection dated January 17, 2023 stating:-
 - a. the employment contract has a dispute resolution clause for resolution of disputes through mediation.



- b. the claimant's suit is in contravention of the dispute resolution clause, thus incompetent and fatally defective and an abuse of the court's process.
 - c. the court lacks jurisdiction to take cognizance, hear and determine the suit as the parties are bound by the dispute resolution clause in the contract to resolve disputes that arise from the contract of employment.
 - d. the suit offends the doctrine of ripeness as no real dispute capable of adjudication by the court has arisen to warrant the court's intervention.
9. Further on January 18, 2023, the respondent filed an urgent notice of motion dated January 17, 2023 seeking orders:-
- a. that pending the hearing and determination of the application, the court be pleased to review, stay and set aside and/or discharge its *ex-parte* orders issued on December 23, 2022 restraining the respondent/applicants and/or their agents from sending the claimant on compulsory leave and/or terminating his employment.
 - b. that the court be pleased to review and set aside and/or discharge its *ex-parte* orders issued on December 23, 2022 restraining the respondent/applicants and/or their agents from sending the claimant on compulsory leave and/or terminating his employment.
10. The application is supported by a supporting affidavit sworn by the 2nd respondent on January 17, 2023, and documents annexed to the affidavit include unsigned minutes of the 1st respondent's full board dated December 1, 2022, the letter dated December 5, 2022 sending the claimant on 45 days leave, unsigned minutes of the 1st respondent's board's conference call meeting held on December 9, 2022, a letter dated December 14, 2022 raising accusations/charges against the claimant, sending him on compulsory leave and instructing him to handover to one Richard Kabengo, the claimant's contract of employment and a show cause letter dated June 29, 2022.
11. On January 26, 2023, I certified the respondent's notice of motion dated January 17, 2023 as urgent and ordered that the respondent's notice of preliminary objection dated January 17, 2023 be treated as part of that application. I further directed that the claimant's notice of motion dated December 23, 2022 and the respondent's notice of motion dated January 17, 2023 be heard concurrently. The two applications are, therefore, before me for determination.
12. The respondent's notice of motion dated January 17, 2023, having been merged with the preliminary objection challenging this court's jurisdiction, shall be determined first.

The Notice of Motion dated 17/01/2023

13. As already stated in this ruling, the notice of motion dated January 17, 2023 incorporates the respondent's preliminary objection also dated January 17, 2023. The application is expressed to be brought under the *Judicature Act*, sections 1A, 1B, 3B and 59(c) of the *Civil Procedure Act*, section 15(1) (4) of the *Employment and Labour Relations Court Act*, order 45 rules 1,2 & 3 and order 40 rule 7 of the *Civil Procedure Rules* and article 159(2) of the *Constitution* of Kenya 2010. The application is supported by the affidavit and documents referred to in paragraph 10 of this ruling. The respondent/applicants are basically seeking review and setting aside and/or discharge of the interim injunctive orders given by the duty court on December 23, 2022; and stay of the proceedings herein pending referral, hearing and determination of the dispute herein through the structured dispute resolution mechanism (mediation) envisaged in the employment contract dated December 31, 2020.



14. The respondent/applicants seek the orders on grounds that the claimant filed the present suit and the application giving rise to the injunctive orders dated December 23, 2022 prematurely as the contract of service signed by both parties incorporates a dispute resolution clause which the respondent/applicants are desirous of invoking as a dispute has arisen as to the parties' rights and obligations under the employment contract. It is the respondent/applicants' assertion that in view of the said dispute resolution clause in the employment contract, the suit herein is an abuse of the court's process and that this court lacks jurisdiction to take cognizance, to hear and to determine the same.
15. The respondent/applicants' further assertion is that the impugned orders dated December 23, 2022 were given on the basis of material non-disclosure by the claimant in that:-
 - a. on December 1, 2022, a special board meeting of the 1st respondent, which the claimant attended, had discussed the claimant's response to a show cause letter issued against him, and an attempted attack on the Managing Director's office and that the claimant agreed to take/proceed on leave pending investigations; and that the 2nd respondent's letter dated December 5, 2022 was a reminder to the claimant that he was supposed to proceed on leave.
 - b. that after the claimant failed to take leave, another meeting held on December 9, 2022 authorized the 2nd respondent (the chairman of the 1st respondent's board of directors) to issue a compulsory leave letter.
 - c. that the claimant failed to disclose that he was still an employee of the 1st respondent.
16. The application is opposed by the claimant *vide* a replying affidavit sworn by him on January 24, 2023. The claimant admits having been issued with a notice to show cause in June 2022, to which he responded, and that he did not hear from the respondents again, save for the 2nd respondent verbally telling him that he had issued the notice to show cause under pressure from other quarters.
17. The claimant further acknowledged being aware of the special (board) meeting of December 1, 2022, but stated that the same was convened contrary to Taveta Board Charter and that any deliberations thereat were illegal. The claimant further deponed that an acting managing director had been installed by the 2nd respondent, and that the claimant has been removed from being a signatory to the company's (1st respondent's) two bank accounts despite this court's order.
18. Both parties filed written submissions for and against the application pursuant to this court's directions in that regard, which I have considered. In my view, two issues fall for determination in this application, and these are:-
 - a. whether the *ex-parte* interim orders dated December 23, 2022 should be discharged by reason of material non-disclosure on the part of the claimant.
 - b. whether this court is seized of jurisdiction to hear and to determine the suit and if so, whether the proceedings herein should be stayed.
19. Before delving into the two aforesaid issues, I should state that I have noted that the respondents have, in their written submissions, used the words arbitration and mediation interchangeably; hence the need to address the meaning of each of the said two words.
20. The *Black's Law Dictionary* (10th Edition) defines the word arbitration as follows:-

“A dispute resolution mechanism in which the disputing parties choose one or more neutral third parties to make a final binding decision resolving the dispute. The parties to the dispute



may choose the third party directly, or indirectly, such as by agreeing to have an arbitration organization select the third party.”

21. In other words, arbitration may be defined as a method for settlement of disputes and differences between two or more parties, whereby such disputes are submitted to the decision of one or more persons specifically nominated for that purpose, either instead of having recourse to an action at law or by order of the court after such action has been commenced.
22. On the other hand, mediation is defined in the [*Black's Law Dictionary*](#) (10th Edition) as follows:-

“A method of non-binding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution.”
23. Mediation does not resolve disputes, it merely helps the parties to do so. Mediation does not declare the parties rights, and therefore does not have the force of judgment.
24. In my view, the presence of a mediation clause in a contract does not preclude the parties to the contract from taking a dispute arising from the contract in issue to court, and neither does it divest the court in which the dispute is filed of jurisdiction to entertain, to hear and to determine the dispute. All that the clause means is that mediation in the manner stated in the contract must be given priority.
25. In the present case, it is to be noted that disputes arising out of the employment contract in issue started arising and/or manifesting in June 2022 when the respondents issued a show cause letter to the claimant, to which the claimant responded. Whatever the subject of the show cause letter was, it arose from the employment contract and ought to have been subjected to mediation. This was not done, and according to the documents filed herein, the respondents made the claimant's response to the show cause letter the subject of discussion by the 1st respondent's board of directors on December 1, 2022 and December 9, 2022 respectively, leading to resolutions that the claimant proceeds on leave/ compulsory leave.
26. The present suit was filed after the claimant was required to proceed on compulsory leave as a disciplinary measure and an acting managing director was picked to replace the claimant as he proceeded on forced leave.
27. The respondents, who now plead that they are desirous of invoking the alternative dispute resolution clause, appear to have ignored the said clause and to have acted contrary to it until the present suit was filed against them. Can their plea be considered by this court, under the circumstances”.
28. As long as the contracting parties' intention to subject disputes arising from their contract to alternative dispute resolution is discernable from the wording of the contract, courts will be quick to giving effect to that intention by staying any proceedings already filed in court and give the parties an opportunity to pursue alternative dispute resolution. Article 159(1) (c) of the [*Constitution*](#) of Kenya 2010 obligates courts to do exactly that. It provides as follows:-

“(c) Alternative forms of dispute resolution, including conciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted subject to clause (3).”
29. Indeed, contracts belong to parties and it is them who negotiate and agree on the terms of their contracts before they finally put ink to paper. Court's cannot re-write those terms, but will give effect to them if and when the contracts become the subject of litigation. In [*748 Air Services Limited v Theuri*](#)



Munyi [2017] eKLR, the Court of Appeal cited with approval the decision of Mwera J (as he then was) in *Housing Finance Company of Kenya Limited v Njuguna* LLR 1176 (CCK) where it was stated:-

“contracts belong to parties and they are at liberty to negotiate and even vary the terms as and when they choose.”

The functions of courts is to enforce and give effect to the intention of the parties as expressed in their agreement. In the English Court of Appeal case above – *Globe Motors Inc & others v TRW Lucas Electric Steering Ltd & others* (supra), Lord Justice Beatson stated as follows:-

“absent statutory or common law restrictions, the general principle of the English Law of Contract is [that parties to a contract are free to determine for themselves what obligations they will accept]. The parties have the freedom to agree whatever terms they choose to undertake, and they can do so in a document, by word of mouth or by conduct.”

30. In *Kenya Alliance Insurance Co Ltd v Annbel Muthoki Muteti*, the Court (Odunga J, as he then was) citing the decision in *Blue Limited v Jaribu Credit Traders Limited* Nairobi (Milimani) HCCC No 157 of 2008 (Kimaru J) stated:-

“ 30it is now settled law that where parties have agreed to resolve any issue arising out of a commercial agreement, the courts are obliged to give effect to the said agreement of the parties by staying proceedings and referring the dispute for resolution by arbitration. Before staying the proceedings, the court has to be satisfied that there is a valid arbitration clause in the agreement capable of performance. At the stage of the application for stay of proceedings, the court is not called upon to determine the merits or otherwise of the plaintiff’s suit or the counter-claim filed by the defendant. The court is further not required at this stage of proceedings to consider the validity, legality or otherwise of the agreement that was entered between the plaintiff and the defendant. The court is only required to consider whether there was a valid arbitration clause in the agreement capable of being enforced....

Such clause is considered as a separate and severable agreement between the parties who have agreed to resolve any dispute arising from the agreement by arbitration...”

31. Although the dispute herein involves a mediation clause as opposed to an arbitration clause; the applicable principles regarding stay of suits are, in my view, the same. It is my finding that although this court has jurisdiction over the suit herein, the proceedings must be stayed to allow the parties herein an opportunity to submit the dispute herein to mediation by a mediator appointed by the parties in accordance with the dispute resolution clause in the employment contract in issue, which is valid and legal. This answers to the first issue herein.
32. On the second issue, it is a common ground that disciplinary proceedings against the claimant had been commenced as at the time the suit herein and the notice of motion dated December 23, 2022 were filed and interim orders subsequently issued. This court has jurisdiction to grant interim measures protecting the subject of the dispute herein, the claimant’s contract of employment, and the rights of the parties. The court did exactly that on December 23, 2022 when it granted interim orders. Those orders will not be discharged as sought by the respondent/applicant. The notice of motion dated January 17, 2023 thus partly succeeds and is allowed in the following terms:-



- a. the proceedings herein are hereby stayed for a period of forty five (45) days to enable the parties herein to submit the dispute the subject of the suit herein to mediation in accordance with the mediation clause contained in the contract of employment dated December 31, 2020 and signed by the claimant on January 4, 2021.
- b. for avoidance of doubt, the interim orders dated December 23, 2022 shall remain in force pending further orders of the court.

The Notice of Motion dated 23/12/2022

33. Determination of the claimant's notice of motion dated December 23, 2022 is hereby stayed pending referral of the dispute herein for mediation in accordance with the mediation clause in the claimant's contract of employment; and the directions taken on January 26, 2023 regarding concurrent hearing of the applications dated December 23, 2022 and January 17, 2023 are hereby varied to that extend. The merits or otherwise of the notice of motion dated December 23, 2022, cannot be considered by the court without addressing, to some extent, merits or otherwise of the claimant's suit. This should not happen before referral to mediation. This is what the court addressed in the *Kenya Alliance Insurance case* (supra)
34. Orders accordingly

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 25TH MAY 2023

AGNES KITIKU NZEI

JUDGE

ORDER

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Mr. Mwanzia for Claimant

Mr. Mokaya for Respondent

