



Omwenya v Sichangi Partners & Associates Network LLP (Cause E037 of 2021) [2023] KEELRC 1205 (KLR) (18 May 2023) (Ruling)

Neutral citation: [2023] KEELRC 1205 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E037 OF 2021**

**M MBARÚ, J
MAY 18, 2023**

BETWEEN

VINCENT M OMWENYA CLAIMANT

AND

SICHANGI PARTNERS & ASSOCIATES NETWORK LLP RESPONDENT

RULING

1. The ruling herein relates to Notice of Preliminary Objections filed by the respondent, Sichangi Partners & Associates Network LLP filed on June 3, 2021 on the grounds that;
 1. The court lacks jurisdiction to hear and determine the matter herein by virtue of the express provisions of Clause 9 of the subject Terms of engagement for the reasons that no reasonable effort has been taken to settle the dispute herein as provide in the said Terms of engagement.
 2. The proceedings before the court are defective having been commenced in violation of the *Arbitration Act* multifariously in violation of section 6 thereof.
 3. The present suit is consequently brought prematurely and is therefore an abuse of the process of this court for the foregoing reasons.
 4. The suit should therefore be dismissed with costs.
2. In reply, the claimant filed his Replying Affidavit and avers that the objections by the respondent is a tactic to delay justice and derail the hearing because clause 9 of the terms of engagement provided for attempts in good faith negotiations before filing suit. The claimant made attempt to reach out to the respondent in a bid to settle but was ignored. These efforts can be demonstrated by the fact that the claimant had a meeting with the respondent's Chief Operations Officer Ms Janet Okumu where he explained his frustrations but she suggested that he could leave if unhappy and in an email dated



July 15, 2019 the claimant wrote to the respondent about his owed dues. The email was sent to the operations officer and Mr Sichangi but both ignored it.

3. The claimant avers that a preliminary objection should be on a pure point of law and clause 9 of the terms of engagement is not on a point of law and would require call of evidence. Section 7 of the [Arbitration Act](#) does not oust the jurisdiction of the court but provides for parties to file an application for stay of proceedings. The respondent has submitted to the jurisdiction of the court by filing a Notice of Appointment and the objections herein should be dismissed with costs.

Parties attended and agreed to address the objections by way of written submissions.

4. The respondent submitted that clause 9 of the terms of engagement allowed parties to engage in arbitration and pursuant to Section 9 of the [Arbitration Act](#), any claim and disagreement between the parties is subject to arbitration. Proceedings before the court should not be continued where a dispute is subject to arbitration and remains undetermined. In the case of [Chania Gardens Limited v Gilbi Construction Company Limited & Another](#) [2015] eKLR the court held that Article 159 of the [Constitution](#) requires the court to promote arbitration and other alternative dispute resolutions. In [Mary Joy Wangui Gitau v Umberto Paoletti & others](#) [2021] eKLR a party approached court while arbitration clause existed and the court declined jurisdiction and similarly in this case, parties should revert back to arbitration.
5. The claimant submitted that a stay of legal proceedings to go for arbitration should be addressed before a party enters appearance as otherwise by submitting to the jurisdiction of the court, such step is overtaken. Section 6 of the [Arbitration Act](#) allow stay of proceedings and reference to arbitration or a stay of proceedings but such stay can be requested for by any party at the earliest point but no later than when the party files a Memorandum of Appearance which the respondent has already done. In the case of [Gourmet Meat Producers & Importers Ltd v Paul Lainan Nkina](#) [2021] eKLR the court declined stay of proceeding because the respondent had entered appearance and in this case the objections made should be dismissed with costs.

On April 7, 2021 the claimant filed his Memorandum of Claim on the basis that he was employed by the respondent and issued with terms of engagement with effect from February 5, 2018 but on May 9, 2019 he was forced to resign from his employment and claim in constructive dismissal.

6. The respondent entered appearance on 3rd june,2021 and also filed the Notice of Preliminary Objections. The gist of the objections is the application of Section 6 of the [Arbitration Act](#) where parties in an employment relationship are governed by terms of engagement which provide for arbitration before moving the court. The respondent's case is that clause 9 of the terms of engagement, parties agreed to arbitration of any dispute. The claimant on the other hand agree that such clause was part of his contract and he tried to engage the respondent for negotiations but was ignored.
7. In [Wangubu v Sustainet Group Limited](#) (Cause E085 of 2021) [2022] KEELRC 1226 (KLR) (21 July 2022) (Ruling) the court in addressing the provisions of Section 6 of the [Arbitration Act](#) held that in an employment contract, such as the one between the parties herein, is subject to the jurisdiction of this court pursuant to Article 162(2)(a) of the [Constitution](#) read with Section 12 of the [Employment and Labour Relations Court Act](#), 2011. The court retains its original jurisdiction to hear the matter, and this jurisdiction cannot be ousted by dint of clause 9 of an employment contract such as the one between the parties herein or Section 6 of the [Arbitration Act](#).

In the written submissions, the respondent does not contest that through an email dated July 15, 2019 he wrote to the respondent seeking to resolve the matter amicably and there was no response. Shop floor efforts to resolve an employment and labour relations dispute is lawful and not far removed from



the context of Article 159 of the Constitution, under Article 162(2)(a) of the Constitution, the court is given mandate to hear and determine employment and labour disputes.

8. Unlike commercial disputes where companies are regulated under Articles of Association and in the nature of relations a High Court has power to address by reference to arbitration as held in Mesback Kibunja Kaburi & 3 others v Kirubi Kamau & 5 others; Central Highlands Tea Company Limited (Interested Party) [2021] eKLR this is an employment and labour relations claim and the court has original jurisdiction to address on the merits.
9. Fundamentally, whether to stay proceedings and refer the matter to arbitration or not, the court is required to look at the provisions of Section 6 of the Arbitration act and the conditions under which a court can stay proceedings and refer a dispute to arbitration. The intention is to regulate and facilitate the realization of the constitutional objective of promoting alternative dispute resolution and to derogate or subvert the constitutional edicts as regards alternative dispute resolution. This is aptly addressed in the case of Raila Odinga v IEBC & 3 Others, the Supreme Court held that Article 159 (2), (d) of the Constitution simply means that a court of law should not apply undue attention to procedural requirements at the expense of substantive justice. Article 159 was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the courts.

The court has jurisdiction to hear the claim herein.

Objections By The Respondent Filed On June 3, 2021 Are Hereby Found Without Merit And Dismissed With Costs To The Claimant.

DELIVERED IN OPEN COURT AT MOMBASA THIS 18TH DAY OF MAY, 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

