



REPUBLIC OF KENYA



**Patel v Maxcure Hospital Limited (Cause E047 of 2022)
[2023] KEELRC 1058 (KLR) (4 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1058 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E047 OF 2022**

CN BAARI, J

MAY 4, 2023

BETWEEN

DR. JIGAR PATEL CLAIMANT

AND

MAXCURE HOSPITAL LIMITED RESPONDENT

RULING

1. This ruling relates to the Respondent's Notice of Preliminary Objection dated March 6, 2023, brought pursuant to Sections 6 and 10 of the [Arbitration Act](#). The Respondent seeks the striking out of the Claimant's suit on the basis that the Court is divested of jurisdiction on account of an arbitration agreement at clause 18(A)(i) of the contract of employment between the parties.
2. The Preliminary Objection was urged orally on March 13, 2023.
3. The Respondent contends that the employment agreement between the parties herein, carries an arbitration clause which in effect ousts this Court's jurisdiction to hear and determine this claim.
4. The Respondent states that it has complied with the requirements of Section 6 of the [Arbitration Act](#), having indicated in its statement of response to the claim, that the Court does not have jurisdiction to entertain the suit.
5. The Respondent further avers that the contract between the parties expressly requires that any dispute between the parties be resolved through arbitration. It is its further assertion that the Preliminary Objectively was brought timeously.
6. The Respondent further states that it was the intention of the parties to subject themselves to arbitration, and invites the Court to make paramount the sanctity of contract and the rights of parties therein. The Respondent had reliance in the case of *Liaison & Sons (K) Ltd v China Road & bridge Corporation* to support this position.



7. The Respondent finally states that although they lodged their Objection only three days to this hearing, technicalities should not carry the day.
8. The Claimant opposed the objection, and while admitting that the employment contract between the parties herein bears an arbitration clause, Section 6 of the Arbitration Act, demands that the Respondent/Defendant refers the matter to arbitration before parties enter appearance, and that the provision is couched in mandatory terms
9. The Claimant further states that the Respondent filed their response to claim on December 8, 2022, after entering an appearance, while the application to refer the matter ought to have been filed on November 29, 2022.
10. It is the Claimant's position that the suit was mentioned for pre-trial directions twice, and a date for hearing of the main suit fixed, before the preliminary objection was filed. The Claimant avers that the Objection is not meritorious and is intended to delay justice.
11. The Claimant submits that Section 6 of the Arbitration Act does not allow stay of proceedings after entering of appearance. The Claimant further states that what the Respondent seeks under the Preliminary Objection is the striking out of his suit, while the law only envisages staying proceedings pending arbitration.
12. The Claimant concludes by submitting that an arbitration clause does not oust the Court's jurisdiction.

Determination

13. I have considered the Preliminary Objection and the rival submissions. The issue for determination is whether the suit herein should be struck out on account of an arbitration clause in the employment agreement between the parties herein.
14. Section 6 of the Arbitration Act, provides for arbitration clauses in the following words: -
 - “ 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.
 - 2 Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.
 - 3 If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.”



15. The Respondent entered appearance in the matter on November 29, 2022. The Memorandum of Response to claim was filed on December 8, 2022, and the Notice of Preliminary Objection was subsequently filed on March 7, 2023.
16. The Court also notes that the matter herein, was listed for pre-trial directions on two occasions, and it was only after a hearing date for the main suit was reserved that the Preliminary Objection was filed.
17. The provisions of Section 6(1) of the *Arbitration Act*, as correctly submitted by the Claimant, require that a party to a suit that is subject to arbitration, applies to have the matter referred, not later than at the time of entering appearance.
18. In *Wrigleys Company vs Attorney General and 3 Others* Petition No 22 of 2012, 2013 eKLR, the Court held that courts cannot rewrite what has already been agreed upon by the parties as set out in their agreement. The Court proceeded to add that it is alive to the provisions of Section 15 of the Employment and Article 159 of the *Constitution* of Kenya, 2010, which adopts alternative dispute resolution.
19. Further, in *Union Technology Kenya Limited versus County Government of Nakuru* [2017] eKLR, the court in upholding an arbitration clause stated;

“Parties in an agreement/contract are bound by the mutually agreed and express terms of their agreement. It is not the duty of a court to re-write the agreement of the parties.”
20. This said, it is clear that the Section of the law that allows stay of proceedings premised on an arbitration clause, is couched in mandatory terms. The law plainly and unambiguously requires that an application to refer be made before appearance is entered. In *Adrec Limited v. Nation Media* (2017) eKLR, the Court held thus: -

“Any party who wishes to take advantage of the arbitration clause in a contract should either at the time of entering appearance or before entry of appearance make the application for reference.”
21. Courts have also widely held that agreements purporting to oust the jurisdiction of the court are void.
22. Further, although the law allows for stay of proceedings on account of arbitration clauses and subject to the conditions prescribed under Section 6 of the *Arbitration Act*, the Respondent’s Preliminary Objection, seeks the striking out of the Claimant’s suit premised on the arbitration clause.
23. The law does not envisage striking out of suits based only on there being an agreement requiring parties to arbitrate the issue(s) subject of the suit. That parties are bound by their pleadings, cannot be gainsaid.
24. In sum, I find the Respondent Objection lacking in merit and is hereby dismissed with costs.
25. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 4TH DAY OF MAY, 2023.

N BAARI

JUDGE

Appearance:

Mr M M Omondi present for the Claimant



N/A for the Respondent
Ms Christine Omollo-C/A

