



**Omari v Sendwave Limited (Cause E495 of 2022)
[2023] KEELRC 1402 (KLR) (8 June 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1402 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E495 OF 2022
MN NDUMA, J
JUNE 8, 2023**

BETWEEN

LYDIA OMARI CLAIMANT

AND

SENDWAVE LIMITED RESPONDENT

RULING

1. The Respondent/Applicant filed a Chamber Summons application dated 14th September, 2022 seeking to have the proceedings stayed and the suit referred to arbitration in terms of Clause 22 of the Contract of Service dated 14th May, 2021 between the parties.
2. That the claimant will not suffer any prejudice if the suit is referred to arbitration. The application is supported by affidavit of Premier Shihemi who depones that the claimant was employed by the respondent vide a letter of offer dated 13th May, 2021. That on 17th May, 2021 the claimant was summarily dismissed from employment for gross misconduct following disciplinary hearing.
3. That Clause 22 of the Contract of Service provides that disputes arising between the parties in connection with the contract of service shall be resolved by way of arbitration.
4. That the claimant filed this suit in disregard of the contract.
5. That the proceedings be stayed and matter be referred to arbitration.
6. The respondent/claimant filed a replying affidavit dated 14th September, 2022 vide which she opposes this application stating that she was issued two employment contracts and there was no agreement to refer disputes to arbitration in terms of the second contract of employment. The claimant states that this Court has exclusive jurisdiction to determine all employment and labour relations disputes. That the parties cannot oust the jurisdiction of this Court as amended under Section 12 of [Employment](#)



and Labour Relations Court Act, 2014. That the contract in any event ceased to be of any effect upon termination of employment. That the application be dismissed.

7. The respondent filed a further affidavit dated 15th December, 2022 joining issue with the Claimant and reiterating the contents of the application and prays that the application be allowed.

Determination

8. The Court has carefully considered the matter and is satisfied that the claim before Court is solely founded on the termination of contract of employment between the parties dated 13th May, 2021. That the claimant seeks an award of compensation and terminal benefits arising from alleged unlawful termination of the said contract of employment by the respondent.

9. The Court has considered the provisions of Clause 22 of the contract of employment which provides as follows:-

“Should any dispute arise between the parties hereto with regard to the interpretation, rights, obligations, and/or implementation of anyone or more of the provisions of this agreement, then, the parties to such dispute shall in the first instance attempt to resolve such dispute by amicable negotiations and should such negotiations fail to achieve a resolution then either party may declare a dispute by written notification to the other whereupon such dispute shall be referred to arbitration under the following terms:-”

10. The applicant refers the Court to the provisions of Section 6(1) of the Arbitration Act which provides as follows:-

“.....(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— ”

11. The applicant refers the Court further to the case of Adrec Limited v Nation Media Group Limited [2017] eKLR, in which the Court of Appeal upheld Section 6(1) of the Arbitration Act and stated:-

“any party who wishes to take advantage of the arbitration clause in a contract should either at the time of entering appearance or before the entry of appearance make the application for reference to arbitration.”

12. The applicant submits that the application has been brought at the appropriate time and that this suit be stayed and referred to Arbitration in terms of Clause 22 of the Contract of Employment.

13. The applicant urges the Court to be guided by Article 159(2) of the Constitution and apply alternative dispute resolution methods in appropriate cases. The Court is also referred to Section 15 of the Employment and Labour Relations Court Act, 2014 which provides:-

“ 15. Alternative dispute resolution

- (1) Nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion or at the request of the parties, any other appropriate means of dispute resolution, including internal methods, conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2)(c) of the Constitution. (2) (Deleted by Act No.



18 of 2014, Sch.). (3) (Deleted by Act No. 18 of 2014, Sch.). (4) If at any stage of the proceedings it becomes apparent that the dispute ought to have been referred for conciliation or mediation, the Court may stay the proceedings and refer the dispute for conciliation, mediation or arbitration.”

14. A careful consideration of Section 12(1) of the *Employment and Labour Relations Court Act* shows that the Court assumes exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of *the Constitution*.....”
15. The jurisdiction of the Court includes the opportunity to determine if it has mandate to determine the matter referred to it in the first instance in terms of the guidance by the Court of Appeal Mukisa Biscuits case.
16. In the present case, Section 22 of the Contract of employment obliged the parties to refer a dispute arising between them with regard to stated matters to negotiations and where negotiations fail to arbitration.
17. In the present matter, the Contract of employment was terminated by the respondent without referring the dispute arising between the parties to negotiations. It appears that the respondent by-passed the provisions of Clause 22 of the Contract of employment in the first place before proceeding to terminate the contract of employment.
18. Clause 22 does not specifically refer to resolution of disputes after the termination of the contract. A plain interpretation of Clause 22 suggests that disputes arising between the parties during the tenure of the contract of service were to be resolved in the first instance by negotiations and if negotiations fail were to be referred to arbitration.
19. If the parties had any intention to refer disputes arising post tenure of the contract to negotiations or arbitration they ought to have stated so in clear and unequivocal terms. They did not do so.
20. Accordingly, once the termination of the contract happened, the claimant had a right to refer the post contract dispute to the Court. This Court now has exclusive jurisdiction over determination of this dispute and does not deem it appropriate to refer the same to negotiations or arbitration as sought by the applicant.
21. The application lacks merit and is dismissed with costs in the cause.
22. The suit to proceed on the merits in terms of the Rules of this Court.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 8TH DAY OF JUNE, 2023.

MATHEWS N. NDUMA

JUDGE

Appearances

M/s Ochola for the applicant/respondent

M/s Kwamboka for claimant

Mr. Ekale – Court Assistant*

