



**Muthiani v Women’s Link Worldwide (Petition E193 of 2021)
[2023] KEELRC 1771 (KLR) (14 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1771 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E193 OF 2021
AN MWAURE, J
JULY 14, 2023**

BETWEEN

LYDIA MUTHIANI CLAIMANT

AND

WOMEN’S LINK WORLDWIDE RESPONDENT

RULING

1. There is a preliminary objection application dated February 15, 2022 and the respondent challenge the jurisdiction of this court on the following grounds:-
 - a. A clause in the consultancy agreement provide that the High court of Kenya shall have exclusive jurisdiction over all disputes arising under this agreement and the parties the right to initiate proceedings in any other jurisdiction or forum.
 - b. Secondly the respondent raise the matter of the dispute resolution mechanism which provide in section 12.2 and 12.3 of the said consultancy agreement that any dispute will be settled amicably between the parties but if that fails it will be referred for mediation. If mediation will not succeed the matter will be referred to an arbitrator. The award of the arbitrator will be final and will be binding between the parties.
 - c. The respondent has also raised the issue that petitioner was a consultant and not an employee of the respondent according to the terms in the consultancy agreement.
2. The court has considered the respondent’s submissions dated July 5, 2022. The petitioners submissions dated 30th June 2022 were also considered by the court.



3. The court will refer to the tenets of a preliminary objection. In the case of Misc Application No 8 of 2021 *Peter Mungai vs Joseph Ngara Kuria, Stephen Thuo Gitao and Leah Njeri Ndicho* had this to say about a preliminary objection.

” The parameters of consideration of a preliminary objection are now well settled. A preliminary objection must only raise a point of law. The principles that the court is enjoined to apply in determining the merits or otherwise of the preliminary objection were set out in the Court of Appeal the case of Mukhisa Biscuit manufacturing Co Ltd vs West End distributors Ltd (1969) EA 696 where it states:

” A preliminary objection consist of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to jurisdiction of the court or plea of limitation or a submission that the parties are bound by a contract giving rise to a suit to refer the dispute to arbitration.”

4. A preliminary objection is not to be raised if any fact has to be ascertained or if what is sought is an exercise of judicial discretion.

5. The matters raised by the respondent in this preliminary objection seem to be trial and error. It is like the respondent is not sure what to bring out and so brings out so many issues some of which are clearly not points of law.

6. The fact that the consultancy agreement may have defined the petitioner as a consultant and not an employee is not a point of law. This I say because evidence will have to be adduced to establish if the petitioner was an employee under the *employment act* or not. That therefore does not qualify to be a pure point of law.

7. As to the issue raised that there is a provision that the High court of Kenya shall have exclusive jurisdiction over all disputes arising from this agreement is again in my view meant to show the jurisdiction is only in Kenya High Courts and not courts of other jurisdictions. That would not lock out the Employment and Labour Relations Court which is a court of equal status with the high Court. If it is proved that there is an employee and employer relationship then this court being one of the High Courts of Kenya would have jurisdiction to hear this case.

8. Now the matter of alternative dispute resolution mechanism is a matter of law. The parties acceded to insert a dispute resolution clause in their agreement and so they accepted the same then they must be bound by the same and should refer the dispute first to amicable negotiation and if that fails they can go for mediation. If mediation does not succeed then the parties will submit to arbitration.

9. Section 6(1) of the *arbitration act* Kenya provide follows:

” A court before which proceedings are brought in a matter which is the subject of 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 proceedings and refer the parties to arbitration.....”

10. When parties submit and commit themselves to settle disputes out of court it is a consensual decision and so they are bound by their consent and they entered into to be bound by that arbitration clause



unless they can show the agreement was null and void and incapable of being performed. In the case of Diocese of Marsabit Registered Trustees vs Technotade Pavillin Ltd eKLR the court held that”

“The requirement of section 6(1) of *Arbitration Act* is a substantial legal matter which aims at promoting and attaining efficacious resolutions of disputes through arbitration by providing for stay proceedings but only where a party desirous of taking advantage of an arbitration clause in a contract has applied promptly for stay of proceedings and made a request for referral to arbitration...”

11. Also in *Nyuto Agrovet Limited vs Airtel networks Kenya Limited and chartered Institute of Arbitrators (Interested Party)* SCK Petition No 12 of 2016 the court held:

“... the *arbitration act* was introduced into legal system to provide a quicker way of settling disputes which is distinct from the court process. Again the model law advocates the limiting and clearly defining court involvement in arbitration. This arbitration was intended as an alternative way of resolving disputes in a manner that is expeditious, efficient and devoid of procedural technicalities. Article 159(2) (c) of our constitution acknowledges the place of arbitration in a dispute settlement and urges courts to promote it.”

12. Flowing from the above it is clear the court is obliged to give alternative forms of dispute resolution a chance and more so in arbitration where the parties have provided for arbitration clause in their contract.

13. In that case the court will stay the proceedings and order the parties to attempt negotiations among themselves or if not possible go for mediation. If all that does not work then they must appoint an arbitrator as per their agreement.

14. To give clearer directions the parties are to attempt negotiations within 14 days and if that does not work the file will be placed before the Deputy Registrar Mediation to appoint a mediator to assist them. If mediation works that will be excellent and cost effective for they will not have to pay the mediator. However if it does not work then they will have to appoint an arbitrator within 45 days from the date the mediation session fails.

15. If they need to mention the case before the court for any orders to be adopted by the court the doors are open and are always free to move the court for mention.

16 Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 14TH DAY OF JULY, 2023.

ANNA NGIBUINI MWAURE

JUDGE

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 has 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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

