



Okanya v Woodrow Communications Limited (Employment and Labour Relations Cause E825 of 2022) [2023] KEELRC 2674 (KLR) (27 October 2023) (Ruling)

Neutral citation: [2023] KEELRC 2674 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E825 OF 2022
AN MWAURE, J
OCTOBER 27, 2023**

BETWEEN

WAMBITA OKANYA CLAIMANT

AND

WOODROW COMMUNICATIONS LIMITED RESPONDENT

RULING

1. The Respondent filed a Notice of Motion dated December 20, 2022 seeking the following orders that:
 1. Pending the hearing and determination of this application and of the main suit, the proceedings herein be stayed.
 2. The subject matter of the proceedings herein be referred to arbitration for hearing and determination.
 3. The costs of this application be provided for.
2. The application is grounded on the affidavit of Charles Tarr, the Chief Executive Officer of the Respondent and/ or the grounds on the face of the application.

Respondent/ Applicant's Case

3. The Respondent avers that it employed the Claimant in November 2021 vide a contract in writing.
4. The Respondent avers that the Claimant filed the suit herein vide a Memorandum of Claim dated November 10, 2022 arising out the terms of the contract.
5. The Respondent avers that the contracts contains an arbitration clause that states:

“All claims and disputes whatsoever arising under this Agreement shall be referred to arbitration in accordance with the provisions of the [Arbitration Act](#) 1995 or any



amendments or superseding acts replacing the same by a single arbitrator being an Advocate of not less than ten (10) years standing assisted by other professionals as he or she deems necessary such arbitrator to be appointed by agreement between the parties or, failing agreement within fourteen (14) days of the notification by either party to the other of the existence of a dispute or claim to be appointed by the chairman for the time being of the Institute of Arbitrators, Kenya Branch, Nairobi on the application of either party. The arbitration shall be conducted in Nairobi and all parties agree to be bound by the decision of the said Arbitrator.”

6. The Respondent avers the contract and the arbitration clause are valid and the terms of the arbitration clause should be upheld in accordance with the provisions of section 6 of the *Arbitration Act*.
7. The Respondent avers that no prejudice will be occasioned by any of the parties if the matter is referred to arbitration.

Claimant’s Case

8. The Claimant opposed the application by filing a replying affidavit dated January 24, 2023.
9. The Claimant avers that his claim not only arose from the terms of the contract but also from the Respondent’s breach of the Labour Laws of Kenya.
10. The Claimant avers that the issues in dispute are governed by the Employment and Labour Relations law and regulations and not the contract of employment and this court has jurisdiction to make a determination on the same.
11. The Claimant avers that the prayers sought cannot all be granted by an Arbitrator for instance a declaration that the termination be declared unlawful and unfair.

Analysis and Determination

12. Section 6(1) of the *Arbitration Act* No. 4 of 1995 provides:

- “(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 files any pleadings or takes any other step in the proceedings, 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.”



13. In the Court of Appeal, *Mt. Kenya University v Step Up Holding (K) Ltd* [2018] eKLR held as follows:

“The obligation of the court upon being moved in terms of the above provision has been crystalized by case law. We find it prudent to highlight a few as follows. In the case of *Niazsons(K) Ltd v China Road & Bridge* (supra) the court held *inter alia* that:

“All that an applicant for a stay of proceedings under section 6 (1) of the *Arbitration Act* of 1995 is obliged to do is to bring his application promptly. The court will then be obligated to consider the threshold being:

- (a) Whether the applicant has taken any step in the proceedings other than the steps allowed by the section;
- (b) Whether there are any legal impediments on the validity, operation or performance of the arbitration agreement; and
- (c) Whether the suit intended concerned a matter agreed to be referred to arbitration”

In *Corporate Insurance Company v Wachira* (supra) the court held *inter alia* that existence of an arbitration clause is a defence to a claim filed against a party, save that a party seeking to rely on the existence of such an arbitration clause as a defence cannot be allowed to use it to circumvent a statutory requirement with regard to the mode of applying for a stay of proceedings. In *UAP Provincial Insurance Company Ltd v Michael John Beckett* (supra), the court added that the current legal position with regard to applications for stay of proceedings pending arbitration was introduced by the 2009 amendment to section 6 of the *Arbitration Act*. In the said case, the court had this to say:

“In our view, the issue with which Mutungi, J was concerned when dealing with the application under section 6 of the *Arbitration Act* was whether or not the arbitration clause would be enforced and whether the matter was one for reference to arbitration. Section 6 of the Arbitration provides an enforcement mechanism to a party who wishes to compel an initiator of legal proceedings with respect to a matter that is the subject of an arbitration agreement to refer the dispute to arbitration. Section 6 of the *Arbitration Act* under which UAP’s application for stay of proceedings was presented provides in the relevant part:

.....

It is clear from this provision that the enquiry that the court undertakes and is required to undertake under section 6(1) (b) of the *Arbitration Act* is to ascertain whether there is a dispute between the parties and if so, whether such dispute is with regard to matters agreed to be referred to arbitration. In other words, if as a result of that enquiry, the court comes to the conclusion that there is indeed a dispute and that such dispute is one that is within the scope of the arbitration agreement, and then the court refers the dispute to arbitration as the agreed forum for resolution of that dispute. If on the other hand the court comes to the conclusion that the dispute is not within the scope of the arbitration agreement, then the correct forum for resolution of the dispute is the court.

The inquiry by the court with regard to the question whether there is a dispute for reference to arbitration, extends, by reason of Section 6 (1) (b), to the question whether there is in fact, a dispute. In our view, it is within the province of the court, when dealing with an application for stay of proceedings under section 6 of the *Arbitration Act*, to make an evaluation of the merits or demerits of the dispute. In dealing with the application for stay of



proceedings, and question whether there was a dispute for reference to arbitration, Mutungi J, was therefore within the ambit of section 6 (1) (b) to express himself on the merit or demerit of the dispute. Indeed, in dealing with a section 6 application, the court is enjoined to form an opinion on the merits or otherwise of the dispute.

The provisions in section 6 (1) (b) of the *Arbitration Act* are similar to the provisions of section 1(1) of the *Arbitration Act*, 1975 of England before its amendment by the *Arbitration Act*, 1996.”

14. In *Adrec Limited v Nation Media Group Limited* [2017] eKLR, the court added that:

“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”

15. Also *Eunice Soko Mlagui v Suresh Parmar & 4 others* [2017] eKLR, for similar reflections on this provision the court held as follows;

“Section 6 of the *Arbitration Act* is a specific provision of a statute that provides for stay of proceedings and referral of a dispute to arbitrating where parties to the dispute have entered into an arbitration agreement. The conditions under which the court can stay proceedings and refer a dispute to arbitration are prescribed by section 6 and in our view, the purpose of that provision is to regulate and facilitate the realization of the constitutional objective of promoting alternative dispute resolution. We do not therefore find anything in the provision that can be described as derogating or subverting the constitutional edict as regards alternative dispute resolution. The provision, for example, of section 6 which require parties to make an application for referral of a dispute to arbitration at the earliest opportunity and before taking any other action, or those that require the court not to refer a dispute to arbitration if the arbitration agreement is null and void, or is incapable of being performed, or if there is no dispute capable of being referred to arbitration, cannot be described as inconsistent with the constitutional principle of promoting alternative dispute resolution because the court is also obliged to take into account the equally important constitutional principle that justice shall not be delayed, by for example sending to arbitration a non- existent dispute, or allowing a party who has otherwise elected to pursue proceedings in the court, to belatedly purport to opt for arbitration.”

16. Also in the ruling of the High Court, (Gikonyo, and J) in *Dioceses of Marsabit Registered Trustee v Techno Trade Pavilion Ltd*, HCCC No. 204 of 2013 the court observed:

“The main difference between the position before and after 2009 is that before 2009, a party was required to apply for referral of the dispute to arbitration at the time of entering appearance or before filing any pleadings or taking any other step in the proceeding. After 2009, the provision still requires a party to apply for referral of the dispute to arbitration at the time of entering appearance or before acknowledging the claim in question. In our minds, filing a defence constitutes acknowledgement of a claim within the meaning of the provision.

Be that as it may, to the extent that after amendment section 6 (1) still requires a party to apply for referral of the dispute to arbitration at the time of entering appearance, the pre-2009 decisions of our courts on the application of section 6(1) are still good law to that extent.



In *Charles Njogu Lofty v Bedouin Enterprises Ltd*, CA No. 253 of 2003, this court considered section 6(1) and held that that even if the conditions set out in paragraphs (a) and (b) above are satisfied, the court would still be entitled to reject an application for stay of proceedings and referral thereof to arbitration if the application to do so is not made at the time of entering appearance or is made after the filing of the defence.

(See also *Niazsons (K) Ltd v China Road & Bridge Corporation Kenya* [2001] KLR 12, *Corporate Insurance Co. v Loise Wanjiru Wachira*, CA 151 of 1995 and *Kenindia Assurance Co. Ltd v Patrick Muturi*, CA No. 87 of 1993).”

17. Further, Article 159 (2)(c) of [Constitution of Kenya](#) provides: -

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3)”

18. The Respondent/Applicant filed the application at the time of entering appearance and the Claimant has not objected on the validity of the arbitration clause in the employment contract and only opposes it on the fact that he will be denied declaratory orders but not that the process will be frustrated or he will be denied justice.

19. In view of the foregoing, the Respondent’s application is merited. The claim herein is stayed and subject matter of the claim is referred to arbitration for hearing and determination. The parties are given 90 days to agree on an arbitrator and proceed with the matter of arbitration and make a report to this court on February 7, 2024. Having said so, there is nothing that would stop the parties from using any other process of alternative dispute resolution by consent like internal negotiation or even mediation which will not cost them any money. On the other hand, arbitration will cost them not only legal fees but also fees for the arbitrator. The choice is theirs.

20. Costs of this application will be in the cause

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 27TH DAY OF OCTOBER, 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

