



Chunwei v China Railway No. 5 Engineering Group Co. Ltd (Cause E314 of 2023) [2023] KEELRC 3433 (KLR) (21 November 2023) (Ruling)

Neutral citation: [2023] KEELRC 3433 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E314 OF 2023
NZIOKI WA MAKAU, J
NOVEMBER 21, 2023**

BETWEEN

WUN CHUNWEI CLAIMANT

AND

CHINA RAILWAY NO. 5 ENGINEERING GROUP CO. LTD RESPONDENT

RULING

1. The Respondent has filed a preliminary objection to the effect that:-
2. Mr. Opondo learned Counsel for the Respondent submits that the court lacks jurisdiction as the contract of employment between the Claimant and the Respondent at Article 8 of the contract of employment dated 9th January 2014 provides that in case of any dispute between parties, the law of the Peoples Republic of China shall apply. It further states either party may refer the same to Guiyang Labour Dispute Arbitration Committee. The Respondent argues that the present proceedings have been filed under Kenya Law contrary to the provisions of the contract. Mr. Opondo asserts that in line with the provisions of the contract, this Court lacks jurisdiction and should down its tools per decisions on *Phoenix of East Africa Assurance Company Limited v SM Thiga t/a Newspaper Service* [2019] eKLR and *Owners of Motor Vessel Lilian 'S' v Caltex Oil (K) Limited* [1989] KLR 1.
3. Mr. Oduor learned Counsel for the Claimant submitted that the Respondent had filed a notice of appointment and the response to claim without indicating that these were filed under protest. He argued that section 6 of *Arbitration Act* applies and is mandatory. He submits that before filing anything there should have been an application asserting that there is an arbitration clause. He argues that the Respondent did not file such notification and neither did it comply with Rule 2 of the *Arbitration Act Rules* which provide procedure and is in mandatory terms. Counsel submitted that by filing even the Preliminary Objection the Respondent had acceded to jurisdiction of the court and abandoned the arbitration clause. He cited the case of *Ila P. Haria & another v Bishop Ikatwa Inanga & another* [2020] eKLR and urged that the preliminary objection be dismissed with costs.



4. In his reply, Mr. Opondo stated the Respondent maintains the court lacks jurisdiction. The Respondent asserts through counsel that it protests the filing of the suit and this was raised on notice of Preliminary Objection and that there is no other place the issue would be determined other than this court. He submitted that the Court should hold it lacks jurisdiction and down its tools.
5. The issue that falls for determination is whether this court has the jurisdiction to hear and determine the suit or whether it should down its tools as it is devoid of the same. Section 6 of the Arbitration Act provides as follows:-
 6. Stay of legal proceedings
 - (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.
 6. The choice of law is a provision embedded in many a contract. In this case, the parties in their contract at article 8.2 provided as follows: This contract shall be governed by the laws of the People’s Republic of China only. In case any dispute arises during the performance of the Contract, and if negotiation fails, either party may refer the dispute to Guiyang Labour Dispute Arbitration Committee. Before the arbitration award is made, the parties shall continue to perform the contract. In this particular instance, it is asserted that there is a dispute and the same arose during the performance of the contract. The parties have 2 available avenues before them – negotiate or refer the dispute to the Guiyang Labour Dispute Arbitration Committee. In the premises the suit is found to be premature and is accordingly stayed pending the determination of the dispute by the Guiyang Labour Dispute Arbitration Committee which it is hoped will be within the timelines that will accord with the 365 days rule on claims before the court meaning a decision ought to be made before 17th April 2024.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF NOVEMBER 2023

NZIOKI WA MAKAU

JUDGE

