



**Zaidi v Lake Turkana Wind Power Limited (Cause E321 of 2022)
[2023] KEELRC 3414 (KLR) (20 December 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3414 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E321 OF 2022
K OCHARO, J
DECEMBER 20, 2023**

BETWEEN

JON ABBAS ZAIDI CLAIMANT

AND

LAKE TURKANA WIND POWER LIMITED RESPONDENT

RULING

Background

1. The Respondent/Applicant filed a Chamber Summons Application dated 17th June 2022 expressed to be brought under the provisions of Article 159 [2] [c] of *the Constitution* of Kenya, sections 6[1] and 7[1] of the *Arbitration Act*, 1995, section 5[1] of the Arbitration [Amendment] Act, Rule 3 of the Arbitration Rules, 2020, and section 12[3][viii] and [4] of the Employment and *Labour Relations Act*, 2011 seeking the following orders: -
 - (a) Spent
 - (b) That the dispute herein be referred to Arbitration in accordance with Clause 11 of the Mutual Separation Agreement dated 30th July 2021 between the Claimant and Respondent.
 - (c) That the Honourable Court be pleased to direct the Claimant to deposit Kshs.5,000,000/= security for costs with this Court or in a joint interest earning account in the names of Counsels on record.
 - (d) That the costs of this Application be borne by the Claimant.
2. The Claimant/Respondent opposed the Chamber Summons application through a Replying Affidavit sworn on 5th July 2022.



3. In Response to the said Replying Affidavit sworn on 5th July 2022, and pursuant to leave of this Court granted on 15th July 2022, the Respondent/Applicant filed a Supplementary Affidavit sworn on 26th July 2022, and Further Affidavit sworn on 28th July 2022.
4. The Claimant/Respondent purported to file two additional Affidavits; an Affidavit sworn on 12th August 2022 in Response to the Supplementary Affidavit dated 26th July 2022; and an Affidavit sworn on 12th August 2022 in Response to the Further Affidavit dated 28th July 2022. Both Affidavits were filed without leave of the Court. It is trite law that the Claimant/Respondent did not have a right of reply to the Supplementary Affidavit sworn on 26th July 2022 and Further Affidavit sworn on 28th July 2022. As such, the Claimant/Respondent's Affidavits sworn on 12th August 2022 are struck off the record.
5. Following this Court's directions for the application to be ventilated through written submissions, the Respondent/Applicant filed submissions dated 29th July 2022. The Claimant/Respondent filed submissions dated 15th August 2022 and a List and Bundle of Authorities dated 15th August 2022.

The Chamber Summons dated 17th June 2022

6. The Respondent/Applicant states that it entered into a Mutual Separation Agreement dated 30/7/2021, with the Claimant/Respondent in which they agreed to bring to termination the contract of service that was between them. Clause 11 of the agreement provided for a two-tier dispute resolution process in case a dispute arose between them, thus;
 - (i) Parties shall endeavour to resolve any dispute arising out of or in connection with this Deed amicably; and
 - (ii) If the dispute cannot be resolved within 30 days of notification of the dispute by one party to the other, the dispute shall be referred to a single arbitrator to be appointed by the parties and in the event of failure to agree upon the appointment, the arbitrator shall be appointed by the Chairman for the time being of the Chartered Institute of Arbitrators (Kenya Branch) which appointment shall be binding on the parties hereto.
7. Under the Agreement, the Claimant/Respondent received Kshs.31,212,817/- as full and final consideration for the mutual and amicable separation.
8. It is the Respondent/Applicant's position that the Mutual Separation Agreement is binding on both parties. The parties possessed the capacity to enter into the said Agreement at the time of execution. That although the Claimant/Respondent has filed the present suit seeking to declare the said Agreement null and void, he has not shown in his pleadings or otherwise that he intends to refund to the Respondent/Applicant the sum of Kshs.31,212,817/- that he received under the Agreement.
9. The Respondent/Applicant contends that the Claimant/Respondent is a foreigner currently residing in Epsom, Auckland, New Zealand and does not have any known address in Kenya, which fact is admitted by the Claimant/Respondent in his Verifying Affidavit dated 13th May 2022. As such, if the Claimant/Respondent is not successful in his claim, the Respondent/Applicant will experience extreme difficulties in recovering the costs of the proceedings herein.
10. It is further stated that the Claimant/Respondent has a track record of failing to honour his obligations. For instance, the Claimant/Respondent refused to settle outstanding legal fees amounting to Kshs.2,250,000/- to the Advocate who advised him on matters concerning the Mutual Separation Agreement, forcing the Respondent to settle the legal fees on his behalf.



11. The Applicant argues that this Court does not have jurisdiction to entertain, hear, and determine the suit herein in light of the Mutual Separation Agreement as the parties had agreed to refer any dispute emanating from the agreement to arbitration. Further, the suit herein is an abuse of the Court process.
12. The Respondent/Applicant further states that under Section 7 of the Arbitration Act, this Court has the authority to issue an interim protective measure before or during the arbitration process. On the strength of this provision of the law, this Court should direct the Claimant to deposit Kshs. 5,000,0000/- with this Court or in a joint interest-earning account in the names of the Counsel for the parties, before commencing the arbitration proceedings. This will mitigate the risk of the Claimant/ Respondent disappearing without settling the costs upon determination of the arbitration.

The Claimant/Respondent's Response

13. The Claimant/Respondent opposes the Respondent's application and states that he was employed on 15th September 2019 by the Respondent on a thirty-six (36) month renewable contract to the position of Chief Executive Officer. That his employment contract was set to expire on 15th September 2022 at which time it would be considered for renewal.
14. The Claimant/Respondent states further that he discharged his duties faithfully and diligently at all times until 3rd August 2021, when his employment was unfairly, unconscionably and unlawfully terminated. This, was after he had been subjected to human rights abuses, harassment, humiliation, economic duress, undue influence, and coercion to execute a conjured up "Revised Mutual Separation and Confidentiality Deed" backdated to 30th July 2021.
15. The Claimant/Respondent asserts that his claim herein is not pegged on the conjured up "Revised Mutual Separation Deed" but fully arises from the Respondent/Applicant's breach of his fundamental rights, fair labour practices and Employment Contract dated 15th September 2019. His claim herein cannot be a subject of the arbitration process contemplated under the agreement as it does not seek any benefit under the agreement.
16. He takes great exception with the fact that Philippus Leferink depones in his supporting affidavit states that he is conversant with the facts of this case. At the material time, being 3rd March 2020 to August 2021, he was not an employee of the Respondent/Applicant, having been dismissed from his position as General Manager in 2018, and only re-joined the Respondent organization as CEO way after the Claimant/Respondent left the employment of the Applicant.
17. The Claimant/Respondent contends that at all material times, the Applicant/Respondent was aware, that he was indeed domiciled in New Zealand and, of the physical address of his residence. This fact was within its knowledge even before it engaged him in employment. It is malicious of the Applicant/ Respondent to now start using the fact against him by alleging that there is a possibility that in the event he fails in his pursuit herein, the costs of this suit cannot be recovered from him as it will be difficult to trace him.
18. He states that he is a person of good moral standing and an executive of international repute. He has successfully been an expatriate in various countries including Pakistan, Kazakhstan and Nigeria which have issued him with outstanding moral, and professional clearances and Police Character Certificates.
19. The Claimant/Respondent contends that he was dismissed from employment. He never left by mutual consent. His exit from employment was unilaterally and maliciously instigated by the Respondent. It was attracted by unlawful threats, economic duress, intimidation, harassment and coercion.



20. That the Claimant/Respondent's contract was terminated on 3rd August 2021 at 10.11 pm via an email from one Bob Chestnutt (a Director of the Respondent). It is under cover of the same that the "Revised Mutual Separation and Confidentiality Deed" dated 30th July 2021, was sent to him.
21. That the "Revised Mutual Separation and Confidentiality Deed" was unconscionably backdated to 30th July 2021 and unlawfully meted on the Claimant/Respondent to retroactively dismiss him from Employment. That the Agreement was unconscionable, flawed, unfair and unlawful since it was backed and characterized with coercion, duress, undue influence, intimidation, threats, dire limitation of his employment rights, threat of cancellation of his employment permit without notice, and eviction from the house provided to him. It lacked mutuality, consent, voluntariness and good faith.
22. The Claimant/Respondent admits to receiving the sum of Kshs.31,212,817/- from the Respondent/Applicant but insists that this amount was in partial payment of his terminal dues accrued from the services which he had provided under his Employment Contract. The payment wasn't a result of the conjured-up Revised Mutual Separation and Confidentiality Deed.
23. It is asserted that this Court has full jurisdiction to fully hear and determine this claim based on, the employment relationship between the parties arising from the Employment Contract dated 15th August 2019; Articles 41 and 162 (2) (a) of *the Constitution* of Kenya; the *Employment Act* 2007; the lack of an Arbitration Clause in the Employment Contract; and the invalidity of the Revised Mutual Separation and Confidentiality Deed.
24. The Claimant/Respondent states that Clause 23 of the Employment Contract stipulated that it was governed by Kenyan law and both parties would submit to the exclusive jurisdiction of Kenyan Courts in connection with any claim or matter arising therefrom.
25. That the present application is a ploy to delay the course of justice, and the matter should not be referred to arbitration since it is already before this Court.
26. That the present application is also an attempt by the Respondent/Applicant to mislead this Court into validating the unlawful, unfair, illegal and unconstitutional Revised Mutual Separation and Confidentiality Agreement.
27. No prejudice will be suffered by the Respondent/Applicant if the Claimant/Respondent's Claim is heard and determined by this Court. On the flip side, the Claimant/Respondent will indeed suffer prejudice, loss and damage if the Arbitration Clause in the conjured-up "Revised Mutual Separation and Confidentiality Agreement" is validated.

Applicant's Submissions

28. The Applicant identifies three issues that in its view present themselves for determination in this matter:
 - (i) Whether the proceedings should be stayed and the matter referred to arbitration;
 - (ii) Whether the Respondent's application for security of costs should be granted; and
 - (iii) Who should bear the costs of this matter?
29. The Applicant submits that this Court lacks the jurisdiction to hear and determine the suit herein. The mutual separation agreement and confidentiality deed dated 30th July 2021 was executed by the Claimant freely, willingly, and voluntarily. The agreement in clause 11, incorporates an elaborate



and tiered dispute resolution mechanism comprising settlement, mediation and arbitration which mechanism has not been explored by the parties herein.

30. The Respondent/Applicant draws the attention of this Court to the provisions of Section 6[1] and [2], and 17 of the *Arbitration Act*, 1995, to support its position that owing to the existence of the arbitration clause in the deed, this Court does not have jurisdiction to proceed further in this matter.
31. Citing the decision in the case of Meshack Kibunja Kaburi & 5 others; Central Highlands Tea Company Limited [Interested Party] [2021] eKLR, the Applicant submits that the tenor and import of Article 159[2] of *the Constitution* as read together with Section 6[1] of the *Arbitration Act* is that where parties to a contract consensually agree on arbitration as their dispute resolution forum of choice, the courts are obliged to give effect to the agreement.
32. It is further submitted that in determining the instant application this Court is enjoined to consider; whether the applicant has taken any step in the proceedings other than the steps allowed by the section; whether there are any legal impediments on the validity, operation or performance of the arbitration agreement; and whether the suit indeed concerns a matter agreed to be referred. See, *Iris Properties Limited & Another vs Nairobi City Council* [2002] eKLR.
33. On the issue of security of costs, the Applicant submits that the Claimant herein is resident in Auckland, New Zealand, and does not have any known assets within Kenya which could satisfy an order for costs if such an order was ultimately made in favour of the Respondent, considering the vast claim made in this suit. To support these submissions, reliance is placed on the cases of *Scotch Whisky Association & 2 Others V Africa Spirits Limited* [2020] eKLR, and *Kibiwott & 4 Others v Registered Trustees of Monastery Our Lady of Victory* [2004] eKLR.
34. The Applicant sums up its submissions by urging the Court to allow its application herein in its entirety.

The Claimant's/Respondent's Submissions

35. The Claimant has framed four issues for determination and made submissions on each of them. The issues are;
 - (i) Whether the Mutual Separation and Confidentiality Deed lacks mutuality, was involuntary, and was not amicable.
 - (ii) Whether this Court has jurisdiction to determine the validity of the Mutual Separation and Confidentiality Deed.
 - (iii) Whether the Respondent in its Application dated 17th June 2022 identifies a Dispute and the Nature of the Dispute that this Hon. Court should refer to Arbitration.
 - (iv) Whether this Honourable Court should condemn the Claimant to deposit Kshs.5,000,000.
36. It is submitted that an Arbitration Agreement is a creation of the Law of Contract and must possess the elements of a valid contract, in the default of which it should be declared null and void. This Court has the jurisdiction to determine the validity of the Mutual Separation Agreement as sought in the Statement of Claim herein. To buttress these submissions, reliance has been placed on the decision in the case of *Pauline Wangeci Warui v Safaricom Limited* [2020] eKLR.
37. It cannot be said that the alleged arbitration agreement was negotiated freely. Having been suspended on the 30th of June 2021 and exposed to an indefinite suspension with no hope apart from an awaited termination, and the Applicant's approach on the claimant through the HR Committee that parties



get into a mutual separation instead of the latter being taken through a disciplinary process, left him with no option other than to sign the agreement. To support the point that such an agreement can therefore not be held to have been, freely entered, the Claimant cites the decisions in the Pualine Wangechi Warui case [supra] and Sandhu v Jan De Rojik Transport Ltd [2007] EWCA Civ 430 [10th May 2007].

38. Submitting on Section 6[1] of the *Arbitration Act*, and how it relates to the instant matter, the Claimant states that where the arbitration agreement is null and void, inoperative or incapable of being performed; or where there is not any dispute between the parties concerning the matters agreed to be referred to arbitration, the Court cannot refer the matter to arbitration. To buttress these submissions, reliance has been placed on the decisions in Niazsons [K] Ltd v China Road & Bridge Corporation Kenya Ltd [2020] and County Government of Kirinyaga v African Banking Corporation Ltd [2020] eKLR.
39. It is further submitted that the application herein must fail for the reason that the Applicant has failed to demonstrate the existence of a dispute which it wants the Honorable Court to refer to Arbitration as required under Section 6[1][b] of the *Arbitration Act*. Further, it is not enough to just assert that the agreement has an arbitration clause which requires a dispute between the parties to be referred to arbitration. To bolster this argument, the Claimant cites the cases of Mt. Kenya University v Step Up Holdings Ltd [2018] eKLR and County Government of Kirinyaga v African Banking Corporation [2020] eKLR.
40. On the prayer for deposit of security, the Claimant argues that the same is devoid of merit. The same is anchored on the fact that previously the Claimant has demonstrated that he cannot be able to pay costs due and payable from him to other parties. Though the Applicant cites Legal fees that was allegedly payable to Counsel for the Claimant but which he did not pay as an example, the Court should lose sight that the various affidavits filed herein by the Applicant are inconsistent on the exact amount of the alleged unpaid legal fees. This should aid the Court in concluding that there is no solid ground to justify the grant of the order for the deposit of security.
41. This Court has jurisdiction to hear and determine this matter. The Applicant's application dated 17th June 2022 which is based on non-factual allegations should be dismissed.

Analysis and Determination

42. I have carefully considered the Chamber Summons dated 17th June 2022, the Grounds thereof, the Supporting Affidavit sworn by Philipus Lefferink on 17th June 2022, the Respondent's Replying Affidavit sworn by Jon Abbas Zaidi on 5th July 2022, the Supplementary Affidavit of Philipus Lefferink sworn on 26th July 2022, the Further Affidavit of Daniel Robert Chestnut sworn on 28th July 2022, submissions filed by both parties and authorities relied on. The following issues emerge for determination: -
 - (a) Whether the dispute between the parties should be referred to Arbitration;
 - (b) Whether this Court should order the Claimant to deposit Kshs.5,000,000/- in court or a joint account in the names of Counsel for the parties, as security for costs.

(a) Whether the dispute between the parties should be referred to Arbitration

43. What the Applicant's application herein raises is a jurisdictional issue which therefore this Court is enjoined to decide forthwith. Further, I get the application as suggesting that by operation of the Law, and to be specific Section 6 of the *Arbitration Act*, this Court's jurisdiction to entertain the instant



matter is restricted. The Court of Appeal in the case of Owners of the Motor Vessel “Lilian S” v Caltex Oil [Kenya]Ltd [1989] eKLR, aptly stated on the matter, jurisdiction;

“With that, I return to the issue of jurisdiction and to the words of Section 20 [2][m] of the 1981 Act. I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority:

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind or nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal [including arbitrator] depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given the power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

Words and Phrases Legally Defined-Volume 3: I-N page 113.

44. There is no doubt that the parties herein entered into the Revised Mutual Separation and Confidentiality Deed dated 30th July 2021. At its preamble the purpose for the same was set out, thus;
- “B. The Company and the Employee have by mutual consent agreed that the Employee’s employment with the Company shall terminate with effect from the date of this Deed and on the terms and conditions set out in this Deed.
 - C. The parties have entered into this Deed to record and implement the terms on which they have agreed to terminate the Employment Contract and to settle any claims between the Employee and the company.”
45. It is not uncommon that a contract of service can be ended through a mutual separation agreement between the parties. The agreement could set out the terms and conditions of the separation. The same being a contract between the parties must possess the ingredients of a valid contract, absence of the ingredients shall render its validity assailable in a court of law or any other appropriate forum. Consequently, this Court cannot be off the mark to state that the Claimant had the right to assail the agreement. However, the question that springs up is whether this Court is the correct forum to hear and determine the challenge. It is this question that the instant application seeks addressed.



46. Undeniably, Clause 11 of the Mutual Separation Agreement provided for a dispute resolution mechanism, thus;

“Governing Law and Dispute Resolution

This Deed and any dispute or claim arising out of or in connection with it or its subject matter or formation shall be governed by and construed in accordance with the Laws of Kenya. The parties shall endeavour to resolve any dispute arising out of or in connection with the Deed amicably and in the event that the dispute cannot be resolved within 30 days of the notification of the dispute by one party to the other, the dispute shall be referred to a single arbitrator to be appointed by the parties and in the event of failure to agree upon the appointment, the arbitrator shall be appointed by the Chairman for the time being of the connected Institute of Arbitrators [Kenya Branch] which appointment shall be binding on the parties hereto.

Such arbitration shall be carried out in accordance with and subject to the provisions of the *Arbitration Act* 1995 of the Laws of Kenya [*Arbitration Act*] or any re-enactment or statutory modification thereof for the time being in force. The decision of the arbitrator shall be binding upon the parties. The proceedings shall be held in Nairobi and the language shall be English.”

47. It is not in dispute that this layered dispute mechanism was not resorted to by the Claimant before resorting to commence the suit herein. The Respondent/Applicant argues that pursuant to section 6[1] of the *Arbitration Act*, and in light of the above-stated clause, this Court has no jurisdiction and cannot move a step more in the proceedings herein. For various reasons as shall come out shortly hereinafter, the Claimant holds that the argument by the Respondent/Applicant is misplaced.

48. Section 6[1] of the *Arbitration Act*, 1995 provides;

“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 agreed matters to be referred to the arbitration.”

49. It is my view that Section 6 of the Act is aligned to the well-worn principle that Courts do not rewrite contracts for parties. They give effect to the intention of the parties as expressed in a contract freely and willfully entered into when both of them have the legal capacity and the same is free from any vitiating factors. In *Attorney General of Belize et al Vs Belize Telecom Ltd & Another* (2009), 1WLR 1980 at page 1993, citing *Lord Person in Trollope Colls Ltd Vs Northwest Metropolitan Regional Hospital Board* (1973) 1 WLR 601 at 609, held as follows:

“The court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves. If the express terms are perfectly clear from ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the court thinks some other terms could have been more suitable.”



And I agree.

50. In *International Consultancy Company Ltd vs Telkom Kenya & Another* [2019] eKLR, the Court held;

“I further find that the defendants herein took the earliest opportunity, upon becoming aware of the filing the case, to seek the reference of the dispute to arbitration. My take therefore is that the issue of the reference being overtaken by events does not arise. Needless to say, the parties herein, under Clause 24 of the said Agreement chose to bind themselves to the arbitration clause and this Court cannot therefore be seen to remove them from the terms of their agreement by determining this case as to do so would be tantamount to rewriting the agreement between the parties.”

51. The stipulations of Article 159 and more specifically on alternative dispute resolution can be best given effect by enforcement of statutory provisions like section 6[1] of the *Arbitration Act*. To demonstrate that this view is with authority I refer to the holding in the case cited by the Respondent/applicant, *Meshack Kibunja Kaburi & 3 others v Kirubi Kamau & 5 others; Central Highlands Tea Company Limited [Interested Party]* [2021], thus;

“The tenor and import of Article 159[2] [c] of *the Constitution* as read together with Section 6[1] of the *Arbitration Act* is that where parties to a contract consensually agree on arbitration as their dispute resolution forum of choice, the courts are obliged to give effect to the agreement.”

52. However, the foregoing is not to say that Section [6][1] has no limitations. The Court takes cognizance of the fact that there are, as the Claimant/ Respondent rightly argues. The limitations are set out in subsection [1][a] and [b]. It is the Claimant who is asserting that the limitations are applicable in the instant matter, and therefor under an obligation to demonstrate that indeed they are.

53. The Claimant contends that the Respondent/Applicant has not demonstrated with specificity the matters that it wants referred to arbitration. To support this point, he cites the decision in the *County Government of Kirinyaga* [Supra]. In my understanding of the Respondents application, it asserts that all those matters raised by the Claimant/Respondent are matters that in the contemplation of the arbitration clause are resolvable through arbitration proceedings. I find a challenge in understanding how clearer the Respondent was supposed to be.

54. The matters raised in the instant claim are matters that flow from or are connected to the Separation Agreement and that should therefore by dint of the arbitration clause be subjected for resolution through the mechanism identified in clause 11.

55. In a bid to place the dispute herein under the exceptions to section 6[1], the Claimant/Respondent has argued that the Deed is null and void, on the basis that it lacked mutuality, consent, voluntariness and good faith as he signed it under coercion, duress, undue influence, intimidation, threats, dire limitation of his employment rights, threat of cancellation of his employment permit without notice, and eviction from the house provided to him.

56. To determine whether the limitation under Section 6[1][b] applies to the instant matter, the Court is certainly enjoined to interrogate, and form an opinion on, merits and demerits of the dispute herein. See *Mt Kenya University v Step up Holdings [K] Ltd* [2018] eKLR. However, caution should be exercised to avoid the Court appearing to prejudge the matter before its hearing in whatever appropriate forum on merit. I have carefully considered the facts as they have emerged from the



material placed before me by the parties, inter alia the fact that it is not disputed that the Claimant/ Respondent was represented by his Counsel through the process culminating to the Agreement, and say no more than that the limitation of Section 6[b] of the Act cannot come to the aid of the Claimant's/Respondent's opposition against the instant application.

57. Lastly, I should state that public policy requires of Courts to allow parties resolve their disputes in other forums outside the court system where they [the parties] have expressly set out the intention in an agreement. In this view I draw support from the South African case of *Gbenga-Oluwatove v Reckitt Bensikiser South Africa (Pty) Limited and Another*, Case CC 41/16 where it was held:

“ ... we must consider the importance of giving effect to agreements, solemnly concluded, by parties operating from the necessary position of approximate equality of bargaining power. Here, the power of the Labour Appeal Court's approach is obvious. What is at issue here is a powerful consideration of public policy - the need for parties to settle their disputes on terms agreeable to them.”

58. For the above reasons, this Court is inclined to give effect to the Revised Mutual Separation and Confidentiality Deed dated 30th July 2021. I hereby refer the matter to arbitration pursuant to Clause 11 of the Mutual Separation Agreement.

(b) Whether this Court should order the Claimant to deposit Kshs. 5,000,000/ in court or in a joint account in the names of Counsel for the parties, as security for costs

59. The Respondent/Applicant asserts that the Claimant/Respondent is a foreigner and a resident of Auckland, New Zealand, with no known assets or address in Kenya. Consequently, if he was to lose this pursuit that he has initiated, and payment of attendant costs is required of him, it shall be impossible for the Applicant to recover the costs.

60. In reaction, the Claimant asserts that at all material times the Respondent knew that he was a resident of Auckland New Zealand, and his physical residence.

61. In my view, the fact that someone is a foreigner resident out of the jurisdiction of this court is not an enough ground to conclude that realization of any sums that might be required of him to pay will be impossible. The law allows for execution of decrees or orders outside Kenyan jurisdiction using the laid down procedures.

62. It worth stating that Courts should be cautious enough not to allow the crave for security of costs to be an impediment to the constitutionally guaranteed right to access to justice or stifle prosecution of genuine claims. A balance must be struck between those pursuing justice through litigations and the adversaries' pursuit for security of costs.

63. It is this Court's considered view that an order for Kshs.5,000,000/-[certainly a huge amount] as security for costs against the Claimant/Respondent herein would serve to impede his Constitutional right to access to justice. For this reason, this Court declines to grant the order for security of costs.

64. In the upshot, I hereby allow prayer (2) of the Respondent/Applicant's Chamber Summons dated 17th June 2022. Costs shall be in the cause.

65. It is so ordered.

READ, DELIVERED AND SIGNED THIS 20TH DAY OF DECEMBER, 2023.

OCHARO KEBIRA



JUDGE

In the presence of: -

Ms. Sadia for the Claimant

Mr. Wairoto for the Respondent

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.

OCHARO KEBIRA

JUDGE

