



**Lipa Later Limited v Wanini (Cause E750 of 2023)
[2023] KEELRC 3193 (KLR) (4 December 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3193 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E750 OF 2023
JK GAKERI, J
DECEMBER 4, 2023**

BETWEEN

LIPA LATER LIMITED CLAIMANT

AND

CAROLINE WANINI RESPONDENT

RULING

1. Before the court for determination is the respondent's preliminary objection dated September 18, 2023 that this Honourable Court lacks jurisdiction to entertain this suit and the application dated September 11, 2023 be struck out with costs.
2. The grounds of objection to the applicant's notice of motion dated September 11, 2023 are that:-
 1. The honourable court lacks jurisdiction to hear and determine the matter herein by virtue of the express provisions of section 6(1) of the Arbitration Act, 1995 for reason that no reasonable effect has been taken to settle the dispute herein as provided in the said Act.
 2. The Arbitration Act conditions were incorporated under clause 15 of the subject contract of employment entered into by the claimant and the respondent dated July 29, 2022 which forms the basis of the suit.
 3. The present suit is therefore brought pre-maturely and is therefore an abuse of the process of the court.
3. The Respondent prays for the striking out of the application and the suit with costs to the Respondent.
4. It is common ground that the claimant/applicant filed a notice of motion dated September 11, 2022 and suit of even date on September 14, 2023 and directions on service and inter partes hearing were given on September 15, 2023.



5. On October 5, 2023, counsel for the applicant reported that he had received a preliminary objection and grounds of opposition but none was on record and directions were issued.
6. On October 24, 2023, the court directed that the preliminary objection (PO) be canvassed by way of written submissions, 7 days a piece and both parties confirmed having filed on November 9, 2023 and a ruling date was given.

Respondent's submissions

7. Counsel urged that the court lacks jurisdiction to hear and determine the application dated September 11, 2023 and the same should be dismissed with costs.
8. Counsel relied on section 6(1) of the *Arbitration Act*, 1995.
9. As regards exhaustion, counsel relied on *Black's Law Dictionary* 10th Edition and the sentiments of the court in *William Odhiambo Ramogi & 3 others v Attorney General & others* (2020) eKLR for an explanation of the doctrine of exhaustion, to urge that the Applicant had neither pursued nor exhausted administrative remedies under the law before filing the instant suit and the court has no jurisdiction to hear and determine the application dated September 11, 2023 for want of exhaustion of remedies.
10. Finally, counsel cited the sentiments of the Court of Appeal in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* (1989) KLR on jurisdiction.

Applicant's submissions

11. Counsel addressed two issues on jurisdiction and reference to arbitration.
12. On jurisdiction, counsel relied on article 162(2)(a) of the *Constitution of Kenya*, 2010 and section 12 of the *Employment and Labour Relations Court Act*, 2011 to urge that the court had jurisdiction to hear and determine the application.
13. The decision in *H.F. International Incorporated & another v Sayed Hossam Mohamed Elsbrawi Mobamed Khalifa & another* (2017) eKLR was relied upon to buttress the submission.
14. On reference to arbitration, it was submitted that the Respondent was supposed to file an application for reference of the matter to arbitration when she entered appearance.
15. That the respondent filed the notice of preliminary objection, grounds of opposition, memorandum of appearance and notice of appointment, all dated September 18, 2023 as opposed to filing an application to have the matter referred to arbitration and thus submitted to the court's jurisdiction.
16. Counsel relied on the sentiments of the court in *Agip (K) Ltd v Kibutu* (1981) eKLR.

Determination

17. It is common knowledge that the claimant/applicant filed the application dated September 11, 2023 seeking various orders in the nature of injunctions to restrain the respondent from doing or being engaged in various categories pending the hearing and determination of the application and the suit.
18. The notice of motion application provoked the instant objection.
19. The issues for determination are;
 - i. Whether the respondent's preliminary objection is competent.



- ii. Whether the preliminary objection is sustainable.
20. As to whether there is a competent Preliminary Objection before the court, the sentiments of the justices of appeal in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 provide the answer;
21. According to Law JA,
- “ . . . a Preliminary Objection consists 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, will dispose of the suit. Examples are an objection to jurisdiction of the court a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer dispute to arbitration.”
22. In the words, Sir Charles Newbold;
- “ A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion . . . ”
23. The foregoing sentiments capture the basis of the respondent’s preliminary objection in that jurisdiction of the court and reference of the dispute to arbitration in accordance with the contract, as both are identified as examples.
24. In the circumstances, the court is satisfied that the respondent’s objection meets the threshold of a preliminary objection.
25. On jurisdiction, it is trite that jurisdiction is everything and without it a court has no power to make one more step as held in the *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* (*supra*).
26. The essence of the doctrine of exhaustion was captured by the Court of Appeal in *Republic v National Environment Management Authority ex parte Sound Equipment Ltd* (2011) eKLR as well as *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslim for Human Rights & 2 others (Interested Parties)* (2020) eKLR.
27. It is the Respondent’s position that the Applicant has not exhausted the procedures provided by the contract between them and the suit was filed prematurely.
28. Since arbitration is consensual, it is in the court’s view cannot be cited as an internal dispute resolution mechanism which a party must exhaust.
29. Clause 15 of the Claimant’s contract of employment by the Respondent dated July 29, 2022 provided as follows;
- “Should any dispute arise between Employer and Employee or between Employee and other Employees at any time out of any aspect of the employment relationship, including but not limited to hiring, performance or termination of employment and/or cessation of employment with the Employer and/or against any employee, officer, alleged agent, director, affiliate, subsidiary or sister company relationship, or relating to an application or candidacy for employment, Employer and Employee will confer in good faith to resolve promptly such dispute.



In the event that Employer and Employee are unable to resolve their dispute and should either desire to pursue a claim against the other party, both Employer and Employee agree to have the dispute resolved by one Arbitrator who shall be appointed by the Chairperson of Chartered Institute of Arbitrators, Kenya Branch whose decision shall be final and binding. The employer and employee agree that the Arbitration shall be held in the country where Employee currently works for Employer or most recently for Employer.”

30. It is common ground that the Applicant’s Notice of Preliminary Objection was necessitated by the alleged violation of Clause 14 of the Contract of Employment dated July 29, 2022.
31. Having grounded its application on Clause 14 of the contract of employment, the Applicant was contractually obligated to invoke clause 15 of the agreement and engage the Respondent in an endeavour to resolve the dispute amicably failing which invoke the arbitration process.
32. As alleged by the Respondent, there is no evidence on record to demonstrate that any action has been taken to invoke Clause 15 before the application was filed on 14th September, 2023.
33. However, the more salient issue is how the Respondent herein reacted and acted to the suit by the Applicant.
34. The applicant filed a notice of preliminary objection and grounds of objection dated September 18, 2023 on October 4, 2023 and notice of appointment on September 25, 2023.
35. The grounds of objection as adverted to elsewhere in this ruling are based on section 6(1) of the *Arbitration Act*, 1995 which provides that;

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.
36. A plain reading of section 6(1) of the *Arbitration Act* reveals that an arbitration agreement does not deny a court jurisdiction to hear and determine a suit based on the agreement and as courts have maintained, it merely gives the Respondent a defense to the claim which must be exploited by way of an application for stay for the dispute to be referred to arbitration.
37. The Respondent has not filed any application for reference of the dispute to arbitration despite relying on section 6(1) of the *Arbitration Act*, 1995.
38. Under Section 6(1) of the Act, the court can only stay proceedings “if a party so applies.”
39. Clause 15 of the contract of employment dated 29th July, 2022 is clear that the arbitration clause encompasses any dispute arising between the parties at any time out of any aspect of the relationship.
40. It requires no belabouring that the arbitration clause covers the current dispute between the parties.
41. In *Eunice Soko Mlagui v Suresh Parmar & 4 others* (2017) eKLR, the Court of Appeal stated as follows;

“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 mind, 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 even if the conditions set out in paragraphs (a) and (b) 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 filing of the defense.”

42. In *Mt. Kenya University v Step Up Holdings (K) Ltd* (2018) eKLR, the court stated as follows;
- “In *Corporate Insurance Company v Wachira (supra)*, the court held inter alia that existence of an arbitration clause is a defense 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.”
43. The Claimant’s counsel submitted that the preliminary objection herein is self destructive as held in *Agip (K) Ltd v Kibutu* (supra) because the Respondent entered appearance and subsequently filed a Preliminary Objection and was thus precluded from seeking referral of the matter to arbitration.
44. In the *Agip (K) Ltd v Kibutu case*, the Court of Appeal found that there was no application by the defendant for the suit to be stayed.
45. The court stated as follows;
- “A strange feature of this appeal is that there has never been an application by the defendant for the suit to be stayed . . .
- But such an application must be made “before delivering any pleadings or taking any other steps in the proceedings . . .
- The only way in which an application for stay can be made is by notice of motion supported by affidavit, it cannot be disguised as a point of law contained in a pleading . . .”
46. The court is guided accordingly.
47. Similarly, in *Mesback Kibunja & 3 others v Kirubi Kamau & 5 others, Central Highlands Tea Co. Ltd (Interested Party)* (2021) eKLR, Muigai J. expressed herself as follows;
- “A Preliminary Objection is not the legal procedure to seek stay of proceedings under Section 6 of the *Arbitration Act* for parties to pursue arbitration.
- The tenor and import of article 159(2)(c) of the *Constitution* 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 obligated to give effect to that agreement. Secondly, where a party elects to come to court and the other party to the arbitration agreement seeks to invoke the arbitration agreement, the party seeking to invoke the agreement is obligated to do so not later than the time of entering appearance . . .”



48. Based on the foregoing authorities, the court is satisfied that it has the requisite jurisdiction to hear and determine the claimant's notice of motion dated September 11, 2023.
49. In the end, it is the finding of the court that the respondent's notice of preliminary objection dated September 18, 2023 is unsustainable and it is accordingly dismissed with no orders as to costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 4TH DAY OF DECEMBER 2023

DR. JACOB GAKERI

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 [Civil 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.

DR. JACOB GAKERI

JUDGE

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