



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO.E.436 OF 2021

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

JAMES MAGIRI.....CLAIMANT

VERSUS

AUBERY GROUP LIMITED.....RESPONDENT

RULING

1. The applicant has brought an application by way of Chamber summons with a supporting affidavit dated 9th September, 2021. He prays that this Honourable stays all proceedings in this suit pending the hearing and determination of this application.
2. That proceedings be referred for arbitration.
3. Costs of this application be borne by the claimant.

THE FACTS OF THE CASE

4. The Respondent filed a statement of claim dated 28th May, 2021 claiming unfair termination of contract.
5. The agreement of employment between the applicant and the Respondent April 2017 provide that in the event of a dispute or controversy the parties will aim to resolve the dispute amicably. In the event the mutual settlement fails the parties will refer the same for Arbitration under Arbitration Act of Kenya (1995).
6. The Respondent claims he attempted to resolve the dispute mutually but failed.

He therefore filed this suit. The applicant on that premise filed this application to pray for referral of the dispute to the proper dispute resolution mechanism under the contract agreement.

7. The applicant swore a supporting affidavit dated 9th September, 2021 sworn by the applicants chief executive officer **JOAN WANGARI MWAURA AND** the Respondent opposed the application vide replying affidavit dated 18th October, 2021 sworn by the Respondent **JAMES MAGIRI**.

8. The Respondent avers that on 16th December, 2020 his advocate wrote to the applicant Chief Executive Officer requesting for a meeting to try to resolve the dispute.

He says the response he got dated 5th January, 2020 shut down any chances of settling the dispute.

9. He says thereafter they wrote to the Respondent requesting to refer matter for mediation vide letter dated 19th January, 2021. The letter was sent vide a process server to the applicant's office. The applicant did not receive the letter but called police from Kileleshwa to evict the process server. The policeman found process server had done no wrong and thereafter his advocate forwarded letter to Respondent's Chief Executive Officer via email but was never responded to.

10. The Respondent states he has tried to have the matter resolved amicably but with no success.

He says he is apprehensive the applicant is bringing this application to only delay his efforts to get justice.

DETERMINATION

11. Section 10 of the Arbitration Act provides for the extent of court intervention in arbitration proceedings. It provides that except as provided in this Act, no court shall intervene in matters governed by this Act. This restricts the jurisdiction of the court to only such matters as are provided for by the Act. The Section epitomizes the recognition of the policy of the parties autonomy which generally underline arbitration process.

12. The Arbitration Act therefore greatly restricts the courts intervention where there is an arbitration agreement as in this case where there is an arbitration provision in the agreement of employment.

13. Having said so Article 48 of the Kenya constitution 2010 provide that state shall ensure access to justice for all persons and if any fees is required it shall be reasonable and shall not impede access to justice.

Also Article 50 (e) provide for a fair trial without unreasonable delay.

14. Having considered the evidence in this case, I find that the Respondent was informed of his employment termination by redundancy on 30th July, 2020 and from that time till he filed his claim in 28th May, 2021 he had been trying all means to get the applicant to meet to resolve the dispute by mutual settlement and also mediation. The applicant did not co-operate in order to seek amicable settlement.

15. There was a call by the Respondent to invite the applicant to appoint a mediator and even proposed a mediator. The applicant did not respond.

That was wrong of the applicant because in alternative dispute resolution mechanism if parties do not co-operate it can really impede the delivery of justice.

16. The court having noted this can still not proceed with the claim before the arbitration process is carried out as earlier observed that Section 10 of Arbitration Act 1995 limits the jurisdiction of the court greatly in the contracts where there is an arbitration agreement between the parties.

17. The court therefore makes the following orders;-

(a) The court stays all proceedings in this suit pending the hearing and the determination of this application.

(b) The proceedings herein be referred for arbitration and the parties are ordered to appoint an arbitrator within 30 days who will be acceptable to both the parties and finalise the arbitration process within 90 days from the date of this Ruling.

Failure or frustration of any party the court proceedings will proceed without delay.

Costs be in the cause.

Order accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 11TH DAY OF FEBRUARY 2022.

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.

1.

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

ANNA NGIBUINI MWAURE

JUDGE