



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT BUNGOMA**

**ELR CAUSE NO. 34 OF 2021**

**MATHEW EKISA EKIRAPA.....CLAIMANT**

**VERSUS**

**HON. OKU KAUNYA.....1<sup>ST</sup> RESPONDENT**

**PARLIAMENTARY SERVICE COMMISSION TESO NORTH CONSITTUENCY.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Ruling is on the Notice of Motion Application dated 8<sup>th</sup> November 2021 by the 1<sup>st</sup> Respondent seeking the following orders:-

(i) Pending the hearing and determination of this application an order of stay of proceedings and/or further proceedings be and is hereby granted.

(ii) The suit be and is hereby referred to arbitration

(iii) Pending the hearing of the matter before an Arbitration Tribunal and filing of an arbitral award, all proceedings in this suit be and are hereby stayed.

(iv) Cost of this application be in the cause.

2. The grounds of the Application are stayed therein and the Applications is further supported by the Affidavit of Gerald Omori Kimanga Advocate for the Applicant.

3. The Claimant is opposed to the Application and filed grounds of opposition dated 2<sup>nd</sup> February 2022.

4. The Application was canvassed by way of written submissions. The Applicant's written submissions are dated 11<sup>th</sup> February 2022. The 1<sup>st</sup> Claimant's written submissions are dated 2<sup>nd</sup> February 2022.

5. The Application is brought under Article 159 of the Constitution, Section 6 (1) of the Arbitration Act ( Cap 49 Laws of Kenya), Section 59 of the Civil Procedure Act (Cap 21 Laws of Kenya) and Order 46 Rule 1 of the Civil Procedure Rules 2010. The Application seeks to stay the proceedings before court and for the suit to be referred to arbitration. The Applicant avers that under Clause 9 of the employment contract between the parties, any claim arising out of the Contract is to be referred to arbitration in accordance with the Arbitration Act ('GOK1'). That the 1<sup>st</sup> Respondent is willing and ready to have the matter heard before the Arbitral Tribunal. That it is desirable that alternative dispute resolution is given a chance before the parties can resort to formal process . That arbitration is recognized by the Constitution and the Civil Procedure Rules. That the Claimant still retains its constitutional right to be heard and any other right to access court and have their case heard and determined.

6. That Applicant states it will suffer substantial loss and severe infringement of fundamental rights if the Application herein is not granted. The Applicant states it has brought the Application timeously and with due promptitude.

**7. The Claimant/Respondent Position.**

The Claimant vide grounds of opposition dated 2<sup>nd</sup> February 2002 states that the Application is misconceived, frivolous, and bad in law, that the Application is in complete breach of the provisions of Section 6 of the Arbitration Act, No. 4 of 1995, that the Application is an

abuse of court process since the Applicant waived his right to refer the matter to arbitration and that the Application is an abuse of court process.

## **DETERMINATION**

### **Issues**

- (a) Whether there is an arbitration clause.
- (b) Whether the Application is meritorious.

### **Whether there is an arbitration Clause.**

8. The answer is in the affirmative. The Applicant has annexed the Claimant's employment contract 'GOK-1'. Clause 9 of the contract states as follows:-

*"Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be referred to arbitration in accordance with the Arbitration Act, No. 4 of 1998".*

The court finds there was an arbitration clause in the contract of employment between the parties.

### **Whether the Application is meritorious.**

9. The Applicant submits that the forum for settling the dispute is arbitration as per the contract of employment which is binding between the parties. The Applicant relies on Section 6 (1) of the Arbitration Act which provides this:-

*(i) "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 moperative or incapable of being performed:*

*(b) That there is not infact any dispute between the parties with regard to the matters agreed to be referred to arbitration. The Applicant submits that Clause 9 of the Employment Contract between the parties covers issues under the dispute before court".*

10. The Applicant submits that the provisions of Section 26 (1) (sic) the court opines this is an error and should read 6 (1) of the Arbitration Act are coached in mandatory terms with the only provision being if the subject arbitration agreement is null and void. That the Agreement is valid and effective and it is only fair that the court allows the same to take effect as was the intention of the parties as per the agreement. The Applicant to buttress this position relies on the decision in *Wringles Company ( East Africa -vs- Attorney General & 3 others ( 2013) eKLR* where the court held, *that, 'courts cannot re write what has already been agreed upon by the parties as set out in the agreement. The parties had agreed that in the case of a dispute arising as to the validity of the agreement, then the same would be subject to arbitration and the court cannot re- write the same".*

The court finds that authority not relevant in the instant application as there is no dispute as to the validity of the Agreement. The Claimant's case is that the Applicant waved his right to rely on the arbitration clause by filing defence and proceeding with the hearing before the court before filing the instant application.

11. The Claimant/Respondent submits that the Application falls for determination under Section 6 (1) of the Arbitration Act. That the Section has been interpreted in a number of cases in our jurisdiction one of them being in case of *Charles Njogu lofty -vs- Bedowin Enterprises Ltd Civil Appeal NO. 253 of 2003* where the court states as follows:-

*" we respectively agree with these views so that even if the conditions set out in paragraphs (a) and (b) of Section 6 (1) 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 if no appearance is entered at the time of filing any pleadings or at the time of taking any step in the proceedings".*

12. The court is persuaded by the above holding. The Claimant/Respondent to buttress his opposition to the Application further relies on decision in the case of *Diocese of Marsabit Registered Trustee -vs- Techno trade Pavilion Ltd ( 2014) eKLR* where court stated *" I should add that the requirement of Section 6 (1) of the Arbitration Act is not a mere technicality which can be diminished by Article 159 (2) (d) of the Constitution as claimed by the Applicant. It is a substantial legal matter which aims at promoting and attaining officious resolution of disputes through arbitration by providing for stay of proceedings but only where a party desirous of taking advantage of an arbitration clause in a contract has applied promptly for stay of proceedings and made a request to have the matter referred to arbitration".(emphasis given)*

The court further stated :-

*" needless to state that arbitration falls in the alternative forms of dispute resolutions which under Article 159 (2) (c) of the*

*Constitution should be promoted by courts except in so far as they are not inconsistent with any written law. By these provisions of the Constitution and the fact that the process of arbitration is largely consensual, a party who fails to adhere to the law such as section 6 (1) of the Arbitration Act forfeits his right to apply for and have the proceedings stayed or matter referred to arbitration. And for all purposes, such is an indolent party who should not be allowed to circumvent the desire and right of the other party from availing itself or the judicial process of the court. With that understanding, a delay of fourteen ( 14) days becomes unreasonable in the eyes of the law and the circumstance of the case. On that ground alone the application herein having been made fourteen days after the filing of appearance, should fail.”*

13. The Applicant in the instant case simply avers it makes this application timeously without further details. The Applicant attempts to explain the noncompliance with Section 6 (1) of the Arbitration Act in the submissions a position which is not tenable under the law as submissions are not pleadings. The 1<sup>st</sup> Respondent’s response dated 18<sup>th</sup> December 2020 to the memorandum of claim does not raise the issue of existence of Arbitration Clause. The instant Application filed on 11<sup>th</sup> February 2022 is first time the issue of arbitration is raised in pleading before the court. The Application was filed after the closure of the Claimant’s case. The court finds the instant application to be in breach of Section 6 (1) of the Arbitration Act. The Court upholds the decision of the court in *Diocese of Marsabit Registered Trustees -vs- Technotrade pavilion Ltd ( 2014) eKLR*(supra) to effect that by failing to adhere to the law under Section 6 (1) of the Arbitration Act, the Applicant forfeited his right to apply for and have the proceedings stayed and matter referred to arbitration. That for all purposes, such an indolent party like the Applicant should not be allowed to circumvent the desire and right of the other party from availing itself of the judicial process of the court.

14. The instant Application filed after closure of the hearing of the Claimant’s case is brought after unreasonable delay in the eyes of the law and in breach of Section 6 (1) of the Arbitration Act. The Application fails.

## **CONCLUSION**

The Application dated 8<sup>th</sup> November 2021 is dismissed with costs to the Claimant /Respondent .

It is so ordered.

**DATED, SIGNED AND DELIVERED THIS 24<sup>TH</sup> MARCH, 2022.**

**J. W. KELI**

**JUDGE.**

### **IN THE PRESENCE OF:-**

COURT ASSISTANT: BRENDA WESONGA

CLAIMANT: IN PERSON

1<sup>ST</sup> RESPONDENT: MS KIAGE

2<sup>ND</sup> RESPONDENT : ANGAYA