Chamsou and jorin v Boeing International Corporation PLC (Cause E994 of 2021) [2022] KEELRC 1738 (KLR) (21 June 2022) (Ruling)

Neutral citation: [2022] KEELRC 1738 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E994 OF 2021

JK GAKERI, J

JUNE 21, 2022

BETWEEN

CHAMSOU AND JORIN ..... CLAIMANT

AND

BOEING INTERNATIONAL CORPORATION PLC ..... RESPONDENT

RULING

1. Before me for determination is a chamber summons application dated 21st January 2022 seeking orders that:

    i. There be a stay of these proceedings pending arbitration of the dispute herein.

    ii. Costs of this application be provided for.

2. The application is expressed under Section 6 of the *Arbitration Act*, 1995 and Rule 2 and 8 of the Arbitration Rules, 1997 and is premised on the grounds that:

    a. By an Employment Agreement dated 28 February 2017, the Claimant was employed by the Respondent in the position of Government Affairs & Market Development Director Sub Sahara Africa Bl Director International Sales, Africa.

    b. On or about 5 November 2020, the parties herein entered into a Mutual Termination and Settlement Agreement ("the Agreement") agreeing to terminate the Claimant's employment by mutual consent on the terms and conditions outlined therein.

    c. A dispute has arisen between the parties in respect of the Agreement.

    d. The parties, at Clause 15.2 of the Agreement, had provided for arbitration as the forum for the resolution of all disputes, controversy or claims arising out of or relating to the Agreement.

e. It is fair and just that these proceedings be stayed and the matter be referred to arbitration, in accordance with the agreement of the parties.

3. The application is supported by the affidavit of Terry Mwango, Advocate who depones that under the provisions of Section 6(2) of the *Arbitration Act*, the application has the effect of staying the proceedings before this Court. That it is fair, equitable and just that the suit be referred to arbitration and contemplated by the parties.

4. The Claimant/Respondent responded with a replying affidavit sworn by the Claimant who deposes that the dispute between him and the Respondent arise from his employment in Kenya by an employment agreement dated 28th February 2017, but effective 1st March 2017 when the Respondent appointed him as the Director of Government Affairs and Market Development for Sub Saharan Africa. That clause 21 of the agreement provided that any discrepancies arising in connection with interpretation and performance of the contact would be submitted to the exclusive jurisdiction of Kenyan Courts and the said fact was in the knowledge of the Respondent and had not changed.

5. That all disputes arising from employment are referred to the Employment and Labour Relations Court which has exclusive jurisdiction to hear and determine such cases.

6. The Claimant disputes the legality of the Mutual Termination and Settlement Agreement (MT&SA) on record. That the said MT&SA was agreed upon in the middle of the COVID 19 pandemic. That he was faced with a "take it or leave it scenario" from one of the biggest aircraft manufacturers globally.

7. The Claimant further depones that the Respondent floated the offer of a voluntary separation on 20th August 2020, on terms similar to the Voluntary Layoff Program (VLP) being implemented by the Respondent for executives in levels E2 to E5.

8. That the terms of the VLO were touted as better than those imposed by local laws and those who declined would still have exited the company. That the Claimant was approached separately for a mutual separation agreement. That if he did not take up the offer, he would still be forced out anyway.

9. The Claimant depones that on 12th October 2020 he received the draft MT&SA but did not agree with the terms including computation of gross salary and termination notice among others and communicated the same via email. That the Respondent presented him with a take it or leave it matter. That on 23rd November 2020 the Respondent was emphatic that no payment would be made unless the Claimant signed the MT&SA and since he required funds, he signed the MT&SA under coercion, bullying and harassment.

10. That his separation with the Respondent was involuntary, unlawful and in disregard of Section 45 of the *Employment Act*, 2007.

11. That the MT&SA was forced onto the Claimant by the Respondent and there was no mutuality in the separation of the two.

12. That the application to refer the matter to arbitration is an attempt to beguile the Court to refer the dispute to arbitration thereby affirming the legality of the agreement.

13. That the Respondent's application seeks to have the Court pronounce itself on the substantive suit and effectively determine the dispute at the interlocutory stage without hearing the cause in full as predicated on the memorandum of claim.

14. That the legality of the MT&SA is being called into question at the interlocutory stage and the memorandum of claim does not have an arbitration clause.

15. That the Employment and Labour Relations Court was established to deal with inequalities in negating abilities and disparities of economic strength of employer and employee.

16. That the Respondent's application is unmeritorious and unjust.

17. The Court is urged to disallow the same with costs to the Claimant.

Applicant's Submissions

18. The Applicant identifies one issue for determination namely, whether the suit should be stayed and the dispute referred to arbitration and relies on Section 6 of the *Arbitration Act* to urge that the Court has jurisdiction to stay legal proceedings. It is submitted that the requirements of Section 6 have been met, that the application is filed at the time of entering appearance, the arbitration agreement is operative and capable of being performed or that there is a dispute between the parties with regard to the matters agreed to be referred to arbitration.

19. With regard to the making of the application, the Applicant relies on the decision in Charles Njogu Lofty v Bedouin Enterprises Ltd [2005] e 2KLR 227 for the proposition that the object of Section 6(2) of the *Arbitration Act* is to ensure that application for stay of proceedings and references of a dispute to arbitration are made at the earliest stage in the proceedings.

20. As to whether the arbitration agreement is operative, it is submitted that courts cannot re-write contracts freely entered into by the parties. The decision in *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] KLR 112 is used to reinforce the submission as is the decision in *Clarion Ltd & Others v National Provident Institution* [2000] 2 All E.R. 265 at 281 – 282.

21. The Applicant denies that the Claimant/Respondent was coerced to enter into the agreement. It is the Applicant's submission that it gave the Claimant the option to enter into a mutual separation agreement and the Claimant freely and willingly accepted. That he had sufficient opportunity to decline the offer.

22. That the Claimant shared the signed agreement and implored upon the Applicant/Respondent to meet its part of the bargain.

23. It is submitted that the Applicant fulfilled its obligations under the agreement and thus the Claimant cannot approbate and reprobate.

24. Reliance is made on the decision of the Supreme Court of India in State of *Punjab & Others v Dhanjit Singh Sandhu* – Civil Appeal No. 5698-5699 of 2009 to urge that the Claimant seeks to approbate and reprobate at the same time.

25. The decision in National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another (supra) is relied upon for the proposition that the Court should give effect to the intentions of the parties and enforce the agreement as contemplated by the parties.

26. It is submitted that courts have variously held that where parties have bound themselves by a dispute resolution clause, the same should be given effect. See *James Heather – Hayes v African Medical and Research Foundation (AMREF)* [2014] eKLR.

27. In response to the Claimant's claim that this Court retains the sole jurisdiction to entertain employment disputes, the Applicant submits that in the present case, the parties have an enforceable arbitration agreement. The decision in *Carol Adhiambo Olela v Asterisk Limited* [2014] eKLR is relied upon to buttress the submission.

28. It is the Applicant's submission that the Court has no jurisdiction to entertain the claim and the parties are bound by the terms of the agreement and the arbitration clause.

29. As to whether there is a dispute between the parties on matters agreed to be referred to arbitration, the Applicant relies on the Court of Appeal decision in *UAP Provincial Insurance Company Ltd v Michael John Beckett* [2013] eKLR to urge that there is a dispute between the parties on the separation agreement between the parties.

Claimant/Respondent's Submissions

30. The Claimant identifies three issues for determination:

    i. Whether the Court has jurisdiction to determine the matter;

    ii. Whether the settlement agreement and arbitration clause are valid and enforceable;

    iii. Whether the claim should be stayed and the matter referred to arbitration.

31. On the first issue, reliance is made on *Republic v Karisa Chengo & 2 others* [2017] eKLR as well other articulations of the term jurisdiction.

32. Article 162 of *the Constitution* is relied upon to underscore the origins of the Employment and Labour Relations Court, Section 12(1) of the Employment and Labour Relations Court Act, 2011 is cited to underscore the jurisdiction of the Court. It is submitted that the present case falls under the jurisdiction of this Court under Section 87 of the *Employment Act*, 2007.

33. The decision in *Patrick Kariithi Wahome & 114 others v County Government of Laikipia & another; Transitional Authority & another (Interested Parties)* [2020] eKLR is relied upon to urge that the Employment and Labour Relations Court has original jurisdiction to hear and determine employment and labour relations disputes in Kenya. That the Court is the original jurisdictional forum.

34. It is submitted that clause 3 of the settlement agreement sets out the waiver of claims in elaborate terms but the dispute herein is about allegedly unlawful and illegal termination of employment.

35. That the settlement agreement demanded that the Claimant relinquishes his statutory rights to compensation for wrongful termination.

36. The Claimant submits that referring the dispute to arbitration would be a determination that the termination was legal.

37. The Claimant however admits that parties could make reference to alternative disputes resolution mechanisms.

38. That the issue of jurisdiction is contained in the employment agreement dated 28th February 2017 which provided that Kenyan courts had exclusive jurisdiction.

39. The Claimant submits that he was coerced to enter into the settlement agreement that contains an arbitration clause set forth in clause 15.2 but further submits that he executed the agreement under duress.

40. On the second issue, the Claimant posits that he did not enter into the settlement agreement voluntarily because the Respondent took advantage of its financial situation to coerce the Claimant to sign the agreement and as such the settlement agreement is not a bar for the Claimant to seek reliefs under the employment agreement.

41. Reliance is made on Blacks Law Dictionary and the decision in Fatuma Mohamed Haji & another v African Banking Corporation Limited & 4 others [2020] eKLR to urge that coercion takes various forms and certain factors must be considered in determining whether there was coercion.

42. It is further submitted that the Claimant expressed reservation about certain issues and signed the agreement because "... it is important that I access the finances so that I can move on, I will sing the agreement on the terms proposed by the company."

43. That he had no other option but to comply with the demands of the Respondent. That he protested. That he would have lost his job anyway.

44. That he had no other course open to him such as adequate legal remedy.

45. That the Claimant signed the settlement agreement on account of coercion.

46. That the Claimant's fate was sealed whether or not he sought legal advice. He did not.

47. That the timelines were strict. The offer was made on 12th October 2020 and by 3rd November 2020, the Respondent had indicated it was summarising the offer. That the time was too short for the Claimant to seek independent advice.

48. That the Claimant could not avoid the contract since he needed the finances to manage his life and avoiding the contract would have left him without finances and thus subjected himself to far less amounts.

49. That the emails on record show that the Claimant took steps to avoid the contract.

50. On the last issue, it is submitted that since the Claimant signed the settlement agreement against his free will and was coerced to do so, the agreement was voidable and according to the Claimant, the arbitration clause cannot be invoked in the case since the validity of the arbitration agreement is challenged and disputed.

51. That the High Court has jurisdiction in this matter and the same should not be referred to arbitration.

52. The Court is urged to decline the application to stay the proceedings.

Analysis and Determination

53. From the pleadings, replying affidavit and submissions by the parties, the issues for determination are: -

    a. Whether there is a competent preliminary objection before the Court;

    b. Whether this Court has jurisdiction to determine the application;

    c. Whether the proceedings should be stayed and the matter referred to arbitration.

Whether there is a competent preliminary objection before the Court

54. On this issue, the Court is guided by the sentiments of the Court of Appeal for East African, in the *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* [1969] E.A. 696 where Law JA and Newbold P expressed themselves as follows:

> " So far as I am aware, 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 may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation

or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

55. According to Sir Charles Newbold P:

> " A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of jurisdiction discretion …."

56. The Supreme Court of Kenya has confirmed and extended the scope and nature of preliminary objections in decisions such as *David Nyekorach Matsanga & another v Philip Waki & 3 others* [2017] eKLR as well as *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others* [2014] eKLR and *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* [2015] eKLR.

57. The Respondent states that it employed the Claimant by a written agreement dated 28th February 2017 but effective 1st March 2017. That on 5th November 2020, the parties entered into a Mutual Termination and Settlement Agreement to terminate the Claimant's employment mutually on the terms and conditions therein outlined. That a dispute has arisen between the parties in respect of the agreement.

58. It is the Respondent's case that clause 15.2 of the Agreement provided for arbitration as the forum for the resolution of all disputes, controversy or claims arising out of or relating to the agreement.

59. Clause 15.2 of the agreement provides inter alia:

> " The parties shall endeavour to resolve any dispute arising therefrom amicably and in the event that the dispute cannot be resolved within 30 day 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 … such arbitration shall be carried out in accordance with and subject to the provisions of the *Arbitration Act* 1995 ("The *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."

60. Applying the test formulated in Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd (supra) the Court is satisfied that the preliminary objection herein is competent.

61. As to whether the Court has jurisdiction to determine this matter, the Court is in agreement with the Respondent's submissions above and associates itself with the constitutional, statutory and judicial authorities relied upon including the decision in Patrick Kariithi Wahome & 114 others v County Government of Laikipia & another; Transitional Authority & another (supra), that Article 162(1)(a) and (3) as read with Article 165(5) and (6) of *the Constitution* of Kenya, 2010 and Section 12 of the Employment and Labour Relations Court Act, 2011 and Section 87 of the *Employment Act*, 2007 confer upon this Court original jurisdiction to hear and determine employment and labour relations disputes in Kenya.

62. In Patrick Kariithi Wahome & 114 others v County Government of Laikipia & another; Transitional Authority & another (supra) the Court expressed itself as follows:

> " The constitutional and statutory jurisdiction of the court cannot be removed and conferred to a tribunal or other quasi-judicial body. Where a claim/dispute/suit/matter relates to

employment and labour relations and for connected purposes the original forum to adjudication is with the court unless the parties opt to apply the provisions of section 15 of the Employment and Labour Relations Court Act, 2011 and make reference to alternative disputes resolution mechanisms."

63. This proposition of law is unequivocal that parties to an employment agreement are at liberty to provide for reference of disputes between them to other sanctioned dispute resolution mechanisms.

64. The Court is in agreement with the sentiments of D. K. Njagi Marete J. in James Heather – Hayes v African Medical and Research Foundation (AMREF) [2014] eKLR as follows:

> "... In any event, the definition of an arbitration agreement under S. 3(1) of the *Arbitration Act* does not oust arbitration in contracts or other legal relationships
>
> "..... in respect of a defined legal relationship, whether contractual or not."
>
> It is not lost to all that Alternative Dispute Resolution is the preferred and fashionable kid on the block in dispute resolution. Article 159 and S.15 of *the Constitution* of Kenya, 2010 and the *Employment Act* are a clear indicator of this position. They provide for resolution of disputes through alternative dispute resolution.
>
> Arbitration is a choice of the parties insofar as alternative dispute resolution is concerned. One of its undisputed advantages is its granting of party autonomy whereby parties to an arbitration agreement are awarded the autonomy of choosing their own judge(s) and other facilities in dispute resolution. This was so in the instant case and the parties' contract and must be honoured."

65. The Court is persuaded that alternative dispute resolution mechanisms are a constitutional imperative.

66. Contrary to the Claimant's Counsel submission that the validity and enforceability of the settlement cannot be determined at this stage, Section 6(1) of the *Arbitration Act* requires the Court to satisfy itself that the arbitration agreement in question is enforceable. Relatedly, it is the Claimant's Counsel who introduced the issue and submitted broadly on it citing several authorities to buttress the submissions.

67. The Claimant's Counsel went to great lengths to demonstrate that this Court has exclusive original jurisdiction in employment and labour relations disputes.

68. The Claimant's Counsel tactfully relies on the contract of employment between the Claimant and the Respondent which had no arbitration clause and which was explicit that the applicable law was the Kenyan law.

69. As regards the Mutual Termination and Settlement Agreement (MT&SA) dated 12th October 2020 and signed by the Claimant on 5th November 2020, the Claimant's Counsel widely submitted to demonstrate that the Claimant was coerced to enter into the contact and relied on a host of emails between the Claimant and the Respondent between 12th October and 8th November 2020.

70. The last two paragraphs of an email dated 5th November 2020 at 1.33 am reads as follows:

> "I was hoping that part settlement of the undisputed portions of the settlement could be achieved so that we resolve the entire terms of the separation amicably. Since it seems that is not possible and it is important that I access the finances so that I can move on I will sign the agreement on the terms proposed by the company.

I have herewith attached the separation duly signed to enable you process the payment. I look forward to your settlement of the sums due under this Agreement."

71. The Claimant had read and understood the import of the MT&SA and had a few concerns which he had raised before 5th November 2020. It is also evident that the Claimant was aware of the actual payments involved as the email above intimates.

72. The Claimant assails the MT&SA on the premise that it contained a clause on waiver of claims which is standard practice whenever final and full payments or settlement agreements are entered into.

73. The second ground of contention is that although the Claimant signed the MT&SA on 5th November 2020, he was coerced to do so by the Respondent.

74. Reliance is made on the decision in Fatuma Mohamed Haji & another v African Banking Corporation Limited & 4 others (supra) which cited the words of Lord Scarman in PAO ON vs LIAU YIU LONG [1980] AC 614 as follows:

> " In determining whether there was coercion of will such that there was no true consent; it is material to inquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract he did or did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it. All these matters are as was recognised in Maskell v Hrner [1915] 3k. B. 106 relevant in determining whether he acted voluntarily or not."

75. It is submitted that the Claimant had met the threshold set out in the sentiments above. That he protested through the emails to the Respondent, had no alternative course open to him, had no time to seek independent advice and took steps to avoid the agreement.

76. In the instant case, the emails adverted to elsewhere in this judgment raised certain concerns. But more importantly, the contents of the email dated 5th November 2020 are unequivocal. In a similar vein, the Claimant had 23 days from the date he received the draft agreement to the date he signed it. He had sufficient time to seek and obtain legal advice on an eight (8) page document.

77. Contrary to the Claimant's submission that the took steps to avoid the settlement, he did not and there is no email or other communication purporting to avoid the agreement after the signature was appended on 5th November 2020.

78. It is trite law that coercion or duress renders a contract voidable at the option of the party alleging to have been coerced.

79. Finally, at common law, signature prima facie means acceptance. Its binding nature can only be escaped from if it is shown that the contract was vitiated by misrepresentation, duress, undue influence or was illegal.

80. The Claimant tendered no evidence that he took any step to avoid the contract before he filed the suit herein on 6th December 2021, more than one (1) year after the settlement was signed.

81. The upshot of the foregoing is that there was financial pressure but no coercion.

82. For the foregoing reasons, it is the finding of the Court that the Claimant has not placed sufficient material before the Court to establish that the Mutual Termination and Settlement Agreement dated 12th October 2020 was unenforceable. Even assuming that the agreement was voidable for duress, the

Claimant took no steps to avoid until he filed the instant case more than twelve months later after deriving benefits from it.

83. The last issue on the settlement agreement is that of payments received by the Claimant under the agreement.

84. From the emails on record, it is evident that the Claimant was aware of the amount due to him under the agreement and wanted payment hastened.

85. The memorandum of claim dated 18th October 2021 makes no reference to any payment having been made before 6th December 2021 more than one (1) year after the allegedly unenforceable settlement agreement.

86. The Court is in agreement with the Respondent's/Applicant's submission that the Claimant is blowing hot and cold at the sometime. He voluntarily accepted the settlement agreement as he had a choice to decline it.

87. The Respondent satisfied its obligations under the agreement and the Claimant cannot be permitted to approbate and reprobate.

88. In *Evans v Bartlam* [1937] 2 All ER 649 at page 652 Lord Russel of Killowen stated:

> " The doctrine of approbation and reprobation requires for its foundation inconsistency of conduct, as where a man, having accepted a benefit given to him by a judgment cannot allege the invalidity of the judgment which conferred the benefit."

89. Similarly, in *Republic v Kenya Revenue Authority Ex- Parte Aberdare Freight Services Ltd & 2 others* [2004] eKLR Nyamu J. held that the Applicant could not be allowed to approbate and reprobate at the same time.

90. A similar holding was made by the Court of Appeal in *Behan & Okero Advocates v National Bank of Kenya* [2007] eKLR.

91. Finally, Wendoh J. applied the same principle in *Republic v Institute of Certified Public Secretaries of Kenya Ex-parte Mundia Njeru Geteria* [2010] eKLR, the Judge stated:

> "... It is obvious that Mundia is approbating and reprobating which is an unacceptable conduct... In the instant case, Mundia has only challenged these by-laws which he has been benefiting from because he lost the elections. That is evidence of bad faith and he cannot be entitled to the discretionary orders of Judicial Review because his conduct amounts to an abuse of the court process."

92. The principle is generally accepted in common law jurisdictions.

93. The Claimant knowingly accepted the benefits of a contract dated 12th October 2017 and is thus estopped from denying its validity or binding effect. He cannot be heard to say that the circumstances were different. He is bound hook, line and sinker. He accepted the agreement as it was and cannot complain.

94. As to whether the proceedings should be stayed and the matter referred to arbitration, the starting point is Section 6 of the *Arbitration Act*, 1995 which provides:

    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.

95. Section 6(1) of the *Arbitration Act* is couched in mandatory terms. That the Court is obligated to grant the stay sought unless either of the conditions in paragraphs 6(1)(a) and (b) applies.

96. I will now determine whether the Respondent/Applicant has fulfilled the requirements of Section 6 of the *Arbitration Act* for a stay of the proceedings herein to issue.

97. As regards the timing of filing of the application for stay, the provisions of Section 6 of the *Arbitration Act* are explicit that it must be done not later than the time when the party enters appearance.

98. It is not in dispute that the Respondent filed the application at the time it entered appearance and thus on time for purposes of this provision and no other steps have been taken in the proceedings.

99. Secondly, the Claimant's submission that he was coerced to enter into the agreement is patently unstainable in light of the circumstances of this case. The Claimant received the agreement on 12th October 2020 and signed it on 5th November 2020. He had sufficient time to consult an advocate of his choice. He did not. In addition, he signed the agreement and forwarded the signed copy to the Respondent. He did not sign it under protest. There is none on record.

100. More significantly, the Claimant is challenging the enforceability of the agreement after deriving advantages therefrom. A perfect case of approbation and reprobation, which the law does not allow.

101. Finally, paragraph 6(1)(b) of the Act requires Court to satisfy itself that there is a dispute between the parties with regard to the matters agreed to be referred to arbitration. This requirement was underscored by the Court of Appeal in UAP Provincial Insurance Company Ltd v Michael John Beckett [2013] eKLR.

102. The Claimant has not contested the fact that there is a dispute between him and the Respondent. The fact that the Claimant instituted proceedings against the Respondent is sufficient demonstration of a dispute.

103. In the final analysis, the Court is satisfied that the Respondent has met the threshold prescribed by Section 6 of the *Arbitration Act*.

104. Consequently, the chamber summons dated 21st January 2022 is merited and the proceedings herein are stayed and the matter is hereby referred to arbitration as dictated by clause 15.2 of the Mutual Termination and Settlement Agreement.

105. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 21ST DAY OF JUNE 2022

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