



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Wanguhu v Sustainet Group Limited (Cause E085 of 2021)
[2022] KEELRC 1226 (KLR) (21 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1226 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E085 OF 2021
CN BAARI, J
JULY 21, 2022**

BETWEEN

JOHN WANGUHU CLAIMANT

AND

SUSTAINET GROUP LIMITED RESPONDENT

RULING

1. By a Chamber Summons application dated 17th December, 2021, brought pursuant to Section 6 of the Arbitration Act 1995, Rule 2 of the Arbitration Rules, 1997 and Sections 3A of the Civil procedure Act, the Respondent seeks the following orders:
 - i. That there be a stay of all proceedings herein pending arbitration.
 - ii. That the dispute between the parties be referred to arbitration.
 - iii. That the costs of this application be awarded to the Applicant against the Claimant.
2. The application is premised on the grounds on the face thereof and the supporting affidavit of one Thomas Owidi Apina. The crux of the application is that the parties herein on 1st April, 2019, entered into a contract of service, where the Claimant was employed as a Capacity Building Officer stationed in the Lower Nzoia Project in Siaya County with a starting salary of Kshs.350,000.00 per month and whose contract would run until 31st November, 2021.
3. The Respondent avers that in July, 2019, the Claimant's terms of service were slightly varied to raise the Claimant's gross salary to Kshs.440,000.00 and the term of service was also extended to 31st December, 2021.
4. It is the Respondent's assertion that Clause 11 of the Agreement stipulated that any dispute or difference arising therefrom shall be referred to arbitration. The Respondent further avers that by



virtue of the Agreement, parties are bound to proceed to arbitration on matters in dispute arising from the subject agreement.

5. The Respondent avers that the suit has been instituted by the Claimant prematurely in violation of the Agreement, as the dispute between the parties herein has not been referred to arbitration as stipulated under clause 11.
6. The Respondent states that Section 6 of the *Arbitration Act* 1995 empowers the Court before which proceedings are brought in a matter which is subject to an arbitration agreement, to stay the proceedings and refer the parties to arbitration. The Respondent further contends that Section 6(1) of the *Arbitration Act* empowers the Court to grant a stay of legal proceedings subject to the exceptions set out therein and that the stated exceptions do not apply to the situation in the instant suit.
7. The Claimant opposed the application through a replying affidavit sworn by Joseph Wanguhu, the Claimant herein, on 7th January, 2021.
8. The Claimant states that as averred by the Respondent, the contract of employment between him and the Respondent, at its Clause 11, refers to disputes such as the present one to being referred to Arbitration, and that is a fact known to parties herein. He further avers that immediately he was terminated, and pursuant to Clause 11 of the agreement, he sought the Intervention of the Labour Office in Kisumu in an attempt to have the dispute relating to the circumstances of his termination referred to arbitration.
9. The Claimant avers that the Labour Officer in Kisumu wrote to the Respondent/Applicant on 28th September, 2021, informing them of his complaint and invited them for an arbitration meeting on 14th October, 2021. The Claimant further avers that the Respondent ignored the letter, and did not even bother to dignify it with reply.
10. Parties canvassed the application by way of written submissions. Both parties filed submissions.

The Respondent/Applicant's Submissions

11. It is submitted for the Respondent/Applicant that where Parties freely and willingly oust the jurisdiction of the court, and agree to be bound to arbitration, they ought to be bound by the terms of the agreement. The Respondent had reliance in the case of *Union Technology Kenya Limited versus County Government of Nakuru* [2017] eKLR where the court in upholding an arbitration clause stated;

“Parties in an agreement/contract are bound by the mutually agreed and express terms of their agreement. It is not the duty of a court to re-write the agreement of the parties.”

12. It is submitted for the Respondent that there exists a valid and enforceable arbitration clause ousting this court's jurisdiction from hearing and determining the dispute between the parties herein, which obligates this court to stay the current proceedings in favour of Arbitration.
13. The Respondent submits that the Labour Office is a public office established under the Labour Institution Act, hence any meetings held thereon would not constitute arbitration proceeding. They sought to rely on the holding in *Morowa Fumo v Bamburi Cement Limited* [2015] eKLR, where the court seized with the issue of the function of the Labour Office where a dispute is referred to it under an arbitration clause stated thus:

“The Ministry of Labour is not a forum for private arbitration; it is a Public Office.”



The Claimant's Submissions

14. It is submitted for the Claimant that a decision on whether or not to grant a stay of proceedings is a judicial discretionary tool at the disposal of the Court to serve the interests of justice. The Claimant further submits that the discretion should only be exercised in the interest of justice. He sought to rely on the holding in *Re Global Tours & Travel Ltd* HCWC No.43 of 2000 to support this position.
15. The Claimant submits that the Application before court has not been brought in good faith and it is merely a means to delay justice and/or circumvent legal obligations rightfully accrued. It is the Claimant's further submission that if indeed the Respondent was interested in an expedient determination of this matter, it would have participated in the process set in motion by the Labour Officer.
16. The Claimant submits that he sought to engage the Respondent/Applicant's through their Advocates even after the present Application dated 17th December, 2021, had been filed, with a view of exploring an out of court settlement but that the Respondent/Applicant frustrated the negotiations by insisting that the negotiations be limited to compensation of a maximum of two months' salary and that the cost of the Arbitration be borne equally by the parties despite the Respondent/Applicant being the author of the said procedure of Arbitration.
17. The Claimant submits that the prayers sought in the instant application have been overtaken by events as the parties have attempted an out of court resolution of the dispute, which efforts have failed meticulously on account of the Respondent/Applicant. He further submits that it is unlikely that another attempt at the same would succeed, instead, the parties should submit to the jurisdiction of this court and allow it to determine the dispute once and for all.
18. It is submitted for the Claimant that the Respondent/Applicant suffers no prejudice whatsoever by submitting to the Jurisdiction of this Honourable Court. The Claimant further contend that he stands to suffer irreparably and especially, in the hands of the Respondent/Applicant, if this court does not immediately grant him audience.

Analysis and Determination

19. I have considered the application, grounds, affidavits and the rival submissions. The issue for determination is whether the court should refer this matter to arbitration pursuant to the Arbitration agreement under the contract of employment.

Whether the court should refer the matter to arbitration pursuant to the Arbitration agreement under the contract of employment

20. The Respondent vide the instant application, contends that the arbitration clause at Clause 11 of the employment agreement between her and the Claimant, ousts this court's jurisdiction to entertain this matter, and should therefore refer the suit herein to arbitration and stay proceedings to facilitate the arbitration of the claim.



21. This court derives jurisdiction from Article 162(2) of *the Constitution* and Section 12 of the *Employment and Labour Relations Court Act*, 2011. The Supreme Court in the case of *Samuel Kamau Macharia & another versus Kenya Commercial Bank & 2 others* [2012] eKLR stated thus: -
- “ A court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.....”
22. Section 6(1) of the *Arbitration Act* of 1995, provides that a court may stay 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.
23. In the case of *Niazsons (K) Ltd v China Road & Bridge Corporation Kenya* [2000] eKLR, it was held by majority that an applicant for a stay of proceedings under section 6(1) of the *Arbitration Act* was obliged to bring his application promptly. The court would then consider three things, these are:
- a. whether the applicant had taken any steps in the proceeding other than the steps allowed by the section;
 - b. whether there were any legal impediments on the validity, operation or performance of the arbitration agreement; and
 - c. whether the suit indeed concerned a matter agreed to be referred to arbitration.
24. It is not disputed that the Respondent’s application herein was lodged promptly, having been filed together with the Conditional entry of appearance that is evenly dated. It is also not disputed, and the Claimant has admitted as much, that the dispute subject of the suit sought to be stayed, is a matter agreed to be referred to arbitration.
25. In determining whether to grant a stay of proceedings, the Court is called upon to consider validity of the arbitration agreement. This goes to say that a court cannot enforce unconscionable and invalid arbitration agreements which are marred with inequality of bargaining power and resulting in improvident bargain.
26. The Claimant is opposed to the claim being referred to arbitration premised on the Respondent’s refusal to adhere to calls to settle the matter out of court. In the case of *James Heather – Hayes v African medical and Research Foundation (AMREF)* [2014] eKLR, the court held that contracts were normally commenced by sober and willing parties. The contract of employment is standard form contract and a product of the employer which did not give the employee a chance to participate in its making.
27. The Claimant took steps to try and have the Respondent agree to an out of court settlement by seeking to have the matter conciliated by the Labour Officer, and later after the filing of the instant application through his counsel. The Respondent remained adamant in both instances. Section 6 (1) (a) of the *Arbitration Act* further provides that a court may refuse to stay legal proceedings and fail to refer the dispute to arbitration where the arbitration agreement is incapable of being performed.
28. In my view, the Respondent having refused to participate in other forms of alternative dispute resolution available to the parties herein, goes to confirm that referring the suit to arbitration is



an exercise in futility. The Respondent's request that the Claimant's suit be stayed and referred to arbitration, is a mere delaying tactic.

29. I reach the conclusion that the manner in which the Respondent has handled previous calls to settle the claim herein out of court, confirms that the arbitration agreement embodied in the employment contract between the parties herein, is incapable of being performed.
30. Further, an employment contract, such as the one between the parties herein, is subject to the jurisdiction of this court pursuant to Article 162(2) read with Section 12 of the *Employment and Labour Relations Court Act*. The court retains its original jurisdiction to hear the matter, and this jurisdiction cannot be ousted by dint of clause 11 of the contract of employment.
31. In the upshot, the Respondent/Applicant's application dated 17th December, 2021, is found to lack merit and is hereby dismissed in its entirety.
32. The costs of the application shall abide the cause.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 21ST DAY OF JULY, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Ms. Waihito h/b for Mr. Nderitu for the Respondent/Applicant

N/A for the Claimant/Respondent

Ms. Christine Omollo-C/A

