



Machangi v County Government of Nyandarua & 2 others (Miscellaneous Case E131 of 2021) [2022] KEELRC 3817 (KLR) (18 August 2022) (Ruling)

Neutral citation: [2022] KEELRC 3817 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS CASE E131 OF 2021
AN MWAURE, J
AUGUST 18, 2022**

BETWEEN

DR JOSEPH MAINA MACHANGI APPLICANT

AND

COUNTY GOVERNMENT OF NYANDARUA & 2 OTHERS RESPONDENT

RULING

1. The Applicant (Dr Joseph Maina Machangi) vide a Notice of Motion application dated July 23, 2021 sought the following orders from the Court:
 - i. That this matter be certified urgent and be heard *ex-parte* in the first instance.
 - ii. That pending arbitration, the Respondents deposit Kshs 641,610 into his account number 0150147192400 Standard Chartered Bank, Treasury Square Mombasa being salary for the months of May 2021, June 2021 and July 2021.
 - iii. That pending arbitration the salary of the applicant be reinstated immediately for the month of August 2021 up until the expiry of the contract.
 - iv. That pending arbitration the Respondents do remit Kshs 2,566,440 being the total cumulative salary for the Applicant from the month of May 2021 up until the expiry of the contract on April 28,2022.
 - v. That the honourable court be pleased to issue an order restraining the Respondents and/or their appointed agents or servants from interfering with the Applicant's duties as Chief Officer of the Division of Agriculture.
 - vi. Any other order that this honourable court will deem fit to grant
 - vii. The costs of this application.



2. The Applicant averred that he was an employee of the Respondent on a contractual basis. The said contract was to remain in force for two years from May 5, 2020 to April 28, 2022. He added that the Respondents had failed to remit his salary for the months of May 2021, June 2021 and July 2021. Additionally, he stated that he had neither received any letter of termination nor had he been called to any disciplinary meeting. He urged the Court to issue the orders against the Respondent since he would suffer irreparable loss if the same were not issued. The actions of the Respondents were discriminatory and violated his constitutional rights. All reconciliatory means provided for under his contract were tried but his efforts bore no fruits, he said.
3. The Applicant's counsel prayed that the application dated July 23, 2021 be treated as an undefended suit since the same was served on the Respondents who made no appearance. On August 17, 2021, in its determination the Court ordered that the Respondent settle the applicant's salary as per prayer (ii) of the application and his salary for August 2021 and going forward till the expiry of the contract pending arbitration. Prayer (iv) and (v) were to be dealt with in arbitration or in full hearing as the case would be.
4. Vide a Notice of Motion application dated November 15, 2021, the Respondents prayed that the Court set aside or review its orders issued on August 17, 2021 pending hearing and determination of the application inter-partes and that they be granted leave to file their response to the application dated July 23, 2021. The Respondents averred that they did not see the application until their advocates were served with the court order. Their advocate stated that she did not see the email that served the application since she is a recipient of too many emails and she has very busy schedules. She prayed that her mistakes should not be used to penalize her clients.
5. The Respondents claimed that they had triable issues and prayed for an opportunity to plead their case. The Court relied on Section 33 of the Employment and Labour Relations Court Act and judicial precedents in determining whether or not to set aside or review the Ruling. It also invoked Article 159 of the *Constitution*. On February 10, 2022, it concluded that it is fair and reasonable to give all the parties an opportunity to be heard on merits. It exercised its discretion and set aside its order dated August 17, 2021 in its entirety pending hearing and determination of the Applicant's application. Furthermore, the Respondents were given leave to file and serve their respective responses to the application dated July 23, 2021.

The Applicant's Case

6. The Applicant filed a Notice of Motion application dated July 23, 2021 and prayed as in Paragraph 1(i) to 1(vii). He told the Court that he was employed by the Respondent as a County Chief Officer on a two-year contract running from May 5, 2020 to April 28, 2022. He stated in his supporting affidavit that his salary was Kshs. 213,870 and that as per Clause 9.0-9.0.2 of his employment contract all disputes were to be resolved through reconciliation and if unresolved they were to be referred to Arbitration before the issues are commenced in court. He prayed that the orders be granted in the interest of justice pending Arbitration to safeguard his interest.
7. He averred that he had been working with the Ministry of Agriculture and due to good performance and expertise he was seconded to Nyandarua County Government where he served diligently.
8. He stated that the Respondents stopped processing his salary in May 2021 and he had not received even the salary for June 2021. He further added that he had not received any communication explaining why his salary had been withheld when his colleagues were receiving theirs.



9. He added that despite his diligence the Respondents discriminated him for no good cause. He confirmed no receipt of any termination letter from the Respondents or any letter inviting him for a disciplinary hearing. He contends that the actions of the Respondents to withhold his salary is illegal and would make him suffer harm since he has a mortgage to pay and that he has monthly checkups for diabetes at the Nairobi Hospital. He avers that he has not been able to attend the medical checkups.
10. In his written statement to the Respondent's replying affidavit (at Para 13 onwards), the Applicant reiterated that his contract was still in force up to and including April 28, 2022. He added that the then acting County Secretary (Mr Stephen Njoroge) had no authority under any law to recall his contract as purported by the Respondent. Even the Governor by himself cannot terminate the contract of a Chief Officer. This he says was an abuse of office. The case of David Ogega Kebero & Another versus Kisii County Public Service Board & Another [2017] eKLR is quoted. The Court said:

‘The power to dismiss a County Chief Officer is not donated by any of the provisions set out in the County Government Act 2012. Section 45 of the County Government Act only gives the governor the authority to appoint and to reassign a county chief officer and not any other power over the county chief officer.’
11. His Contract with the County Government of Nyandarua had nothing to do with his secondment from the Ministry of Agriculture. The secondment, he says, was his personal request to the Ministry so that he could retain his employment with the Ministry upon expiry of the contract with the County Government of Nyandarua. Additionally, the Applicant states that he has not hidden anything from the Court as to termination.
12. As to reconciliation he faults the Respondents for frustrating the entire process. He says he tried pursuing all resolution measures but his efforts bore no fruits. The Respondents only left the task of seeking reconciliation to him. He insists that this was a case where only one party was interested in conciliation whereas the other party showed total disinterest. He says that this will make it impossible for Arbitration to take place.

The Respondents' Case

13. In his replying affidavit (Muigai Wainaina) the County Secretary and Head of Public service in the County of Nyandarua avers that the Applicant's employment with the County was recalled vide a letter dated April 15, 2021 addressed to him by the then acting County Secretary & Head of Public Service (Stephen Njoroge).
14. It is the Respondents' case that the 1st Respondent communicated to the Principal Secretary Ministry of Agriculture, Livestock & Fisheries that the Applicant's contract had been terminated and that he had been instructed to report back to the Ministry as of April 15, 2021. They state that the applicant has approached this Court with unclean hands since he elected to hide that he had been terminated.
15. The Respondents state that the Applicant did not exhaust all the dispute resolution mechanisms before approaching the Court. Clause 9 of the contract of employment provides as hereunder:

9.0 SETTLEMENT OF DISPUTES

9. 0.1 In the event of any dispute, controversy or claim arising out of or relating to the interpretation, breach, termination or invalidity of his contract, the parties shall first employ conciliation to amicably resolve the matter.



9. 0.2 Any dispute, difference or question, which shall remain unresolved within 60 days after employing clause 9.0.1 above, shall be referred to arbitration and the provisions of the *Arbitration Act* 1995 shall be applicable and binding to the parties.
 9. 0.3 No legal proceedings shall be commenced in any court of law or tribunal unless and until the procedure provided in 9.0.1 and 9.0.2 above have been followed by the two parties.
16. The Respondent avers that the Applicant has further not demonstrated that he attempted or even considered the laid down mandatory procedures before bringing this matter to court. Additionally, he chose not to disclose his misconduct during employment. It is evident that numerous letters from the County Executive Committee Member for Agriculture were addressed to the applicant requesting explanations for his misconduct during the course of the employment.
17. It is the Respondents' case that the Applicant was seconded for employment by the National Government and as such they believe that where an employee has been seconded, the seconding employer remains the primary employer at all times and not the employer to whom the employee is seconded to. The recall letter of the Applicant was followed closely by a termination letter dated April 21, 2021. It is further confirmed that a Notice to Show Cause had been issued to the Applicant as a result of gross misconduct and absenteeism on March 11, 2021.
18. The Respondent state that no salary should be paid to the Applicant a he would be earning double salary from both levels of government. They also aver that the Applicant was paid his dues up to April 30, 2021 as is seen in their exhibit.
19. Additionally, James Karitu (County Executive Committee Member for Agriculture, Livestock and Fisheries states that the Applicant was and still is the Deputy Director of Agriculture in the Ministry of Agriculture at the National Government. He states that as the Applicant's supervisor he was obligated to task the Applicant with assignments which were communicated by letters. It is his averment that the Applicant failed or neglected to respond to some of the duties he was assigned. He added that the applicant was out of station without due clearance from January 11, 2021 to February 8, 2021. The applicant also used a county vehicle to carry out his personal assignments.
20. The Applicant's actions are deemed to be in total disregard of the values and principles set out in Article 10 and 232 of the *Constitution* of Kenya 2010. They further submit that this matter be dispensed with through arbitration as the alternative means of dispute resolution.

Decision

Issues for Determination

21. The court would like to look at the two issues for determination.
 - a. Whether the applicant was lawfully terminated by the Respondent and does he deserve to be paid his salary upto the expiration of his contract
 - b. Whether the case should be referred for arbitration.
22. The applicant had signed a contract of employment for a term of 2 years with the respondent from April 28, 2020 to April 28, 2022. The respondents avers the applicant was seconded to the respondent by the Ministry of Agriculture. The said letter however does not allude anywhere to secondement by the said Ministry. The Court has not even been shown any documents referring to the secondment



of the applicant and the terms of such secondment. Indeed the said letter of appointment is a comprehensive contract between the applicant and the respondent.

23. Furthermore paragraph 11.0 of the agreement provides that the contract constitutes the entire agreement of the parties with regard to its subject matter and supercede and cancel all previous negotiations, contracts and agreement.
24. The respondent avails in their replying affidavit that the applicant had discipline issues and had given him a letter dated March 11, 2021 on the same. The court would find the applicant was really an employee of the respondent and therefore was to be subjected to the relevant law of dealing with discipline issues and especially section 41 and 45 of the Employment Act. Section 41 provides:-

“An employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”

And section 45 of the Employment Act provides:-

- (1) No employer shall terminate the employment of an employee unfairly.
 - (2) A termination of employment by an employer is unfair if the employer fails to prove—
 - (a) that the reason for the termination is valid;
 - (b) that the reason for the termination is a fair reason—
 - (i) related to the employees conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure.
25. Without going into the issues of lawful or unlawful termination I would find this is a matter that would need to go for full hearing either in the court of law or in arbitration.
26. The other issues is whether the matter should be referred for arbitration. Article 159(2)(c) ofn the Constitution of Kenya 2010 provides that judicial authority exercised by courts and tribunals shall promote the use alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. Clause 9 of the contract between the Applicant and the Respondent county provides for the use of reconciliation to resolve disputes amicably and arbitration where the dispute resolution cannot be attained through reconciliation. Clause 9 provides as below:

9.0 SETTLEMENT OF DISPUTES

9. 0.1 In the event of any dispute, controversy or claim arising out of or relating the interpretation, breach, termination or invalidity of his contract, the parties shall first employ conciliation to amicably resolve the matter.



9. 0.2 Any dispute, difference or question, which shall remain unresolved within 60 days after employing clause 9.0.1 above, shall be referred to arbitration and the provisions of the Arbitration Act 1995 shall be applicable and binding to the parties.
 9. 0.3 No legal proceedings shall be commenced in any court of law or tribunal unless and until the procedure provided in 9.0.1 and 9.0.2 above have been followed by the two parties.
27. The Court refers to Section 6 of the Arbitration Act 1995 which provides for stay of legal proceedings. Section 6 of the Arbitration Act states that:
- (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.
28. *In Lofty v Bedouin Enterprises Ltd [2005] EALR* the Court of Appeal pronounced itself on the issue of arbitration thus as:
- “ We respectfully 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 an 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.
29. In the present application, the Respondents on November 15, 2021 asked the Court to set aside its orders which were in favour of the Applicant and filed their replying affidavits on March 21, 2022. The Respondents have seemingly not complied with the provisions of Section 6 of the Arbitration Act 1995. Their prayer that this matter be referred to arbitration was made after they had entered appearance and had already filed pleadings.
30. Be that as it may, the phrase “pending arbitration” can be seen in the pleadings of the Applicants. The Court interprets this to mean that the Applicant is in no way opposed to referral of this matter to arbitration. He is in fact aware of Clause 9 in his contract which provides for dispute resolution mechanisms to be followed.



31. In *Chania Gardens Limited v Gilbi Construction Company & Another* [2015] eKLR the Court took the position that where there was a valid arbitration clause, all issues falling within the jurisdiction of the arbitrator should be decided by an arbitrator and the court need not intervene. The arbitration agreement between the parties at Clause 9 is capable of being performed within the meaning of Section 6 of the *Arbitration Act* 1995.
32. Additionally, it is also not inoperative. In *Euromec International Limited v Shandong Taikai Power Engineering Company Limited* (Civil Case E527 of 2020) [2021] KEHC 93 (KLR) (Commercial and Tax) the Court held that the word inoperative could be deemed to cover those cases where the arbitration agreement had ceased to have effect. The ceasing of effect to the arbitration agreement could occur for a variety of reasons. One reason could be that the parties had implicitly or explicitly revoked the agreement to arbitrate. Or in the alternative if the same dispute between the same parties had already been decided in arbitration or court proceedings.
33. This Court is of the view that the dispute in this case may be resolved amicably by an arbitrator. It is obvious that both the Applicant and the Respondents are not opposed to arbitration. The Applicant has not contended either that the Respondents have waived their right to have the matter be referred to arbitration. In that regard, this Court will not interpret Section 6 of the *Arbitration Act* in its strictest sense. The parties have raised very important issues in their pleadings. These are triable issues relating to employment, secondment and termination. Clause 9 of the employment contract between the Applicant and the 1st Respondent is to govern the dispute resolution between the parties to this suit.
34. In the meantime the of salary of an employee is fundamental to employment as observed earlier in my Ruling of 17th August 2021. In the case of *Alinur Mubamed Abdi vs County Government of Garissa* (2021)eKLR the court observed that payment of salary is fundamental to an employment relationship and failure to pay the same constitutes a fundamental breach justifying termination thereof by an employee.
35. I order the respondent to settle the applicants salary in accordance to prayer 2 of this application.
36. The other prayers will be canvassed substantially at the arbitration proceedings and to the effect that parties are ordered to appoint an arbitrator within 60 days from the date of this ruling and commence and finalize arbitration proceedings within 60 days hereof. Case to be mentioned for further report on progress after 120 days (December 7, 2022) made hereof to ensure the parties do not drag proceedings at the detriment of the parties.
37. Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 18TH AUGUST, 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 had 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.

ANNA NGIBUINI MWAURE

JUDGE

