



Oloo v Linksoft Intergrated Services E.A Limited & another (Cause 36 of 2017) [2022] KEELRC 12756 (KLR) (29 September 2022) (Ruling)

Neutral citation: [2022] KEELRC 12756 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 36 OF 2017
HS WASILWA, J
SEPTEMBER 29, 2022**

BETWEEN

TOM OLOO CLAIMANT

AND

LINKSOFT INTERGRATED SERVICES E.A LIMITED 1ST RESPONDENT

CAREER DIRECTIONS LIMITED 2ND RESPONDENT

RULING

1. Before this court for determination is the 1st respondent's application dated May 24, 2022, brought pursuant to order 2 rule 15(1) (b), (c) and (d) and order 51 rule 1 of the *Civil Procedure Rules*, section 3A of the *Civil Procedure Act*, rule 19(1) of the *Employment and Labour Relations Rules, 2016* and all other enabling provisions of the law seeking for orders;
 - a) That the claimant's statement of claim dated February 14, 2017 be struck out for being filed prematurely and an abuse of the court process contrary to clause 15 of the agreement of engagement between the 2nd respondent and the claimant which reserved all disputes between the parties to be resolved through negotiation and arbitration.
 - b) That in the alternative this honourable court be pleased to refer the dispute to arbitration and/or negotiation as provided for under clause 15 of the employment agreement between the 2nd respondent and the claimant.
 - c) That the costs of this application and the suit be awarded to the 1st respondent.
2. The application is supported by the ground on the face of the application and the supporting affidavit of Faith Mugambi, the 1st respondent's human resource officer, sworn on the May 24, 2022.



3. The basis upon which the application is made is that the suit herein arose out of contractual relationship between the claimant and the 2nd respondent in the employment letter dated February 3, 2015 and subsequent addendum dated January 15, 2016.
4. In the said agreement the claimant and the 2nd respondent agreed to resolve all disputes emanating out of the said contract by negotiation and arbitration, therefore the cause herein has been filed prematurely before exhausting the internal dispute resolution mechanism as provided for under the agreement.
5. The respondent want the issues in dispute refereed to arbitration and the suit herein struck off.
6. In response to the application, the 2nd respondent filed a replying affidavit deposed upon by Rodgers Wafula on the June 2, 2022, where the affiant stated that the application is dubious and an attempt by the applicant to delay and frustrate the expeditious disposal of this matter.
7. He stated that indeed there was an agreement between the claimant and the 2nd respondent dated February 3, 2015 and an addendum dated January 15, 2016. In the addendum the initially open contract was amended to be closed and only restricted to 3 months effective January 12, 2016 to April 12, 2016, with the option of renewal based on satisfactory performance.
8. It is stated that the 1st respondent was not a party to this agreement. He stated that the 1st respondent contracted the services of the 2nd respondent vide a separate contract dated October 30, 2014 to source for labour for it and that its upon that contract that the 2nd respondent employed the claimant and seconded him to the 1st respondent.
9. Between January, 2016 and March, 2016, there arose disputes between the 1st and 2nd respondent that led to the termination of the sub-contractor contract by the 1st respondent. This being the main contract, it had ripple effect to all employment contracts between the claimant(s) and the 2nd respondents.
10. Subsequently and as captured by the termination letter of March 24, 2016, the 1st respondent took over the responsibilities of the 2nd respondent and dealt with the claimant directly with effect from January 1, 2016, as such the 2nd respondent was no longer responsible for the management and recompense of the claimant's working for the 1st respondent from January 1, 2016.
11. The resolution, absolved the 2nd respondent from any further liability with regard to the claimant, was consented upon in Milimani Chief Magistrates civil suit No 4943 of 2016; *Career Directions Limited v Linksoft Communication Systems Limited*, where the parties by consent agreed that "the defendant to handle and settle all employment issues with the staff seconded to GDC from the period January 12, 2016 and June 19, 2016 and keep the plaintiff indemnified for all claims arising during that period".
12. It is stated further that the contract was not renewed between the claimant and the 2nd respondent after the lapse of the contract on April 12, 2016, demonstrating further the end of employment relationship between the claimant and the 2nd respondent before the cause of action arose.
13. He avers that the cause of action occurred on the June 15, 2016, about two months after the expiry of the contract subject of this suit, explaining the fact that termination notice was issued by the 1st respondent and not the 2nd respondent.
14. The 2nd respondent's deponent states that the contract of February 3, 2015, that the 1st respondent want to subject it to the arbitration and negotiation, expired by effluxion of time before the rise of the cause of action. Furthermore, that the 1st respondent was not a party to the said contract.



15. The 2nd respondent prayed for the application by the 1st respondent to be dismissed with costs to the 2nd respondent.
16. The claimant did not file any response to the application but relied on the affidavit of the 2nd respondent. The application was then canvassed by way of written submissions with the applicant filing on the July 26, 2022, the 2nd respondent filed on July 28, 2022 and the claimant on July 14, 2022.

Applicants' Submissions

17. The applicant submitted on two issues: whether the 1st applicant can enforce the arbitration clause and whether the claimant claim should be struck out.
18. On the first issue, it was submitted that the claimant has filed this suit against the respondents on the strength of the employment contract between him and the 2nd respondent. It was argued that as much as it is a general rule that a contract affects only the parties to it and cannot be enforced by or against a person who is not a party, there are exceptions to the general which include where a contract between two parties is accompanied by a collateral contract between one of them and a third party relating to the same subject matter. To support their argument, the 1st respondent relied on the case of *Chidhya (Kenya) Limited v Africa Equipment & Engineering Power SA (AEE Power SA)* [2020] eKLR, relied on the case in Civil Appeal 206 of 2008 *City Council of Nairobi & Wilfred Kamau Gitbua T/A Gitbua Associates v Nairobi City Water & Sewerage Co Ltd* on privity of contract and contractual assignment.

“The doctrine of privity of contract is that, as a general rule, at common law, a contract cannot confer rights or impose obligations on strangers to it, that is persons who are not parties to it. The parties to a contract are those persons who reach an agreement and, whilst it may be clear in a simple case who these parties are, it may not be so obvious where there are several contracts, or several parties or both. For example in the case of multilateral contracts; collateral contracts, irrevocable credits, contracts made on the basis of memorandum & articles of a company; collective agreements, contracts with unincorporated association and mortgages, surveys and valuations.....”

19. This was also stated in the case of *Kenya Women Finance Trust v Bernard Oyugi Jaoko & 2 others* [2018] eKLR where the court held that;

“The case for recognizing a contract for the benefit of a third party is simple and straightforward. The autonomy of the will of the parties should be respected. The law of contract should give effect to the reasonable expectations of contracting parties. Principle certainly requires that a burden should not be imposed on a third party without his consent. But there is no doctrinal, logical or policy reason why the law should deny effectiveness to a contract for the benefit of a third party where that is the expressed intention of the parties. Moreover, often the parties, and particularly third parties, organize their affairs on the faith of the contract. They rely on the contract. It is therefore unjust to deny effectiveness to such a contract.”

20. Accordingly, that having contracted services of the 2nd respondent, who seconded the claimant to their employ, they are exempted from privity of contract rule. It was further argued that the contractual relationship between the 1st respondent and the 2nd respondent ended with effect from March 24, 2016, and the 1st respondent took over the duties of the 2nd respondent which included payment of the staff, as such the 1st respondent ought to enjoy the rights and obligation of the assigned duties as aptly capture



in book titled '[Principles of the Law of contract](#)' by Kibaya Imaana Laibuta at page 86 to 90 which stated that-

“an assignee may enforce rights originally acquired by the assignor in contract to which the assignee was not privy. But save for assignment of contractual rights, which the assignee may enforce by action, no one should be burdened with obligations under a contract to which he was not a party”.

21. On the second issue, it was submitted that, since the letter of employment provided for an arbitration clause, the claimant was mandated under the law to ensure compliance with the same before invoking the jurisdiction of this court. To support its case the applicant relied on the case of [Naomi Nimazuri Zani and 2 others v Lettas Development Limited and another](#)[2021] eKLR where the court cite the case of [Wrangles Company \(East Africa\) v 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.”

22. It was further submitted that article 159(2)(c) of the [Constitution](#) emphasize on the use of alternative dispute resolution mechanism. In the end, the applicant prayed for the suit herein to be struck out or in the alternative be referred to arbitration as agreed in the employment contract.

2nd Respondent's Submissions.

23. The Respondent submitted from the onset that the object of construction of terms of written contracts is to establish the intention of the parties to the contract. Similarly, that the employment contract of 3rd February, 2015 between the claimant and the 2nd respondent lapsed upon expiry on the April 12, 2016, therefore cannot be transferred to be enforced by the 1st respondent as submitted. Furthermore, that the cause of action arose on June 15, 2016 way after the lapse of the contract between the claimant and the 2nd respondent as such incapable of being transferred or acted upon. To support his arguments, the respondent relied on the case of [Registered trustees of the Presbyterian Church of East Africa and another v Ruth Gathoni Ngotho Kariuki](#) [2017] eKLR where the court held that;

“We note that fixed term contracts carry no rights, obligations, or expectations beyond the date of expiry. Accordingly, any claim based after the expiry of the respondent's contract ought not to have been maintained.”

24. Essentially, that the applicant cannot seek to enforce the contract that he was not a party to. In any case that the applicant ought to have filed the said application as soon the suit was filed in 2017, therefore that the move to have the matter struck out and deferred for arbitration is a decoy employed by the applicant to delay the hearing and determination of this case.
25. It was the respondent's argument that since the contract has lapse, nothing was left, to be assigned to the applicant as submitted.

Claimant's Submissions.

26. The claimant on the other hand submitted that the applicant has not met the threshold provided for under order 2 rule 15 of the [Civil Procedure Rules](#) on striking out of pleading. He argued that there is



no demonstration by the applicant of his action that precipitates towards abuse of the court process to warrant the striking out of his case.

27. The claimant submitted that the case herein emanates out of unfair termination of contract on June 15, 2016, by the 1st respondent, and the contract which the 1st respondent is relying on in making this application is the one between him and the 2nd respondent with lapsed by effluxion of time April 1, 2016, therefore any terms indicated therein no longer hold.
28. He argued that even if the said contract was still alive, the arbitration clause at paragraph 15, does not oust the jurisdiction of this court from hearing the dispute between the parties and to support his argument the claimant cited the case of *Indigo EPZ Limited v Eastern and Southern African Trade & Development Bank* [2002] eKLR, where the court held that;
- “In any case, “(there) is a well settled general rule recognized (even) in the English courts which prohibits all agreements purporting to oust the jurisdiction of the court. (see judgment of Lakha JA in the case of *Tononoka Steels Limited v the Eastern and Southern African Trade and Development Bank* (Court of Appeal Civil Appeal No 255 of 1998).”
29. On whether this case should be referred to arbitration, the claimant submitted that section 6(1) of the *Arbitration Act*, envisages a situation where the matter is referred to arbitration as soon as the party raising it does not enter appearance. It was argued that having entered appearance and participate in the proceedings before this court up to hearing, the applicant has acceded to jurisdiction of this court and I estopped from seeking to have the matter refer to arbitration. To support this the claimant relied on the case of *Fairlane Supermarkets Limited v Barclays Bank Limited* NBI HCCC No 102 of 2011 where (Odunga J), the court held that:
- “... the option to refer to the matter to arbitration was sealed when the defendant herein entered appearance and followed it with a defence. In the case of *Corporate Insurance Company v Wachira* (1995-1998) 1 EA 20, it was held that if the appellant had wished to invoke the clause, it ought to have applied for a stay of proceedings after entering appearance and before delivering any pleading and that the appellant had lost its right to rely on the arbitration clause by filing a defence ... any party who wishes to take advantage of the arbitration clause in a contract should either at the time of entering appearance or before the entry of appearance make the application for reference to arbitration.”
30. Consequently, having filed a response to the claim, this matter fell within the ambit of this court as the court is full seized of this matter, therefore that the application to have this case referred to arbitration at this stage lack merit and should be dismissed with costs to the claimant.
31. I have examined the averments of the parties herein. The claimant herein filed this claim in February 2017.
32. The respondent was served with summons to enter appearance and he entered appearance on March 22, 2017 through Githinji & Koki Advocates. The respondent further filed a defence on April 11, 2017.
33. The respondent having entered appearance and further having filed a defence in this claim, acceded to this court’s jurisdiction and wasted his right to proceed for arbitration as provided in the contract with the claimant.
34. This is as was held in *Fairlane Supermarkets Limited v Barclays Bank Limited* (Supra) above by Odunga J as he then was.



35. I find that the respondent indeed wasted his right to proceed on arbitration when he entered a defence and he is therefore estopped from raising that issue at this time.
36. I therefore find the application before me unmerited and I dismiss it accordingly and order the claim to proceed.
37. Costs in the cause.

RULING DELIVERED VIRTUALLY THIS 29TH DAY OF SEPTEMBER, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Koome for Claimants – present

Rweya for 1st Respondent Applicant – present

Bosire for the 2nd Respondent – present

Court Assistant - Fred

