



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KISUMU
APPEAL NO. 7 OF 2019
BENJAMIN OLUOCH ONOKA.....APPELLANT
VERSUS
SOLARNOW SERVICES KENYA LTD.....RESPONDENT

(Being an Appeal from the Ruling of the Magistrate Hon Telewa delivered on 8.05.19 in Kisumu C.M. ELRC No. 38 of 2019)

JUDGMENT

1. Benjamin Oluoch Onoka (the Appellant) sued Solarnow Services Kenya Ltd (the Respondent) before the Chief Magistrates Court on 8 April 2019, alleging breach of contract and unfair termination of employment.
2. On 24 April 2019, the Respondent filed a Motion seeking orders:
 1. ...
 2. ...
3. THAT this Honourable Court be pleased to refer this matter to arbitration as provided for in the employment contract executed between the 3 Claimant and the Respondent herein and further order of stay of proceedings do issue to last until the determination of the arbitral proceedings.
4. THAT the cost of this application be granted to the applicant.
3. The Motion was canvased, and in a Ruling delivered on 8 May 2019, the Magistrates Court referred the dispute to arbitration. The Court further stayed the Court proceedings pending the outcome of arbitration proceedings.
4. The Appellant was dissatisfied, and he filed a Memorandum of Appeal contending:
 1. THAT the Learned trial Magistrate erred in fact and in law in finding that the arbitration clause in employment contract overrides section 75 of the Labour Relations Act, 2007.
 2. THAT the Learned trial Magistrate erred in fact and in law to make a finding that favours an Act of general application over the Act of specific application.
5. The Record of Appeal was filed on 17 November 2020.
6. The Court gave directions on 4 November 2020 and 25 November 2020, leading the Appellant to file his submissions on 13 January 2021 (should have been filed/served before 18 December 2020).
7. The Respondent's submissions were not on file by the agreed timeline of 30 January 2021. It is not clear whether the Appellant informed the Respondent of the orders on filing and exchange of submissions.
8. The Court has considered the record and the submissions and concluded that the Appeal has no merit for the following reasons.
9. First, clause 18 of the contract(s) between the Appellant and Respondent provided for dispute resolution mechanisms.

10. The first avenue agreed by the parties was mutual negotiations and, if that failed, referral to arbitration, after that, to report a dispute to the Labour Office or the Court.

11. Considering that the contract was mutual, the Appellant was bound by its terms on dispute resolution mechanism before moving the Court.

12. Second, despite invoking section 75 of the Labour Relations Act, 2007 both before the Magistrates Court and this Court to argue that the Arbitration Act does not apply to proceedings before this Court, it is the view of this Court that the section does not invalidate parties agreeing to arbitration in case of disputes as between themselves as that agreement is within their party autonomy.

13. And if the Court were wrong in the above conclusion, then it was still incumbent upon the Appellant as the aggrieved party to cascade the dispute to the Labour Office for conciliation. He did not attempt to use that avenue before commencing Court action.

14. Further, in the view of this Court, the import of section 75 of the Labour Relations Act (which Act largely applies to trade disputes and not employment disputes) is that a party who has opted to resolve a dispute under the Arbitration Act may not have recourse to this Court after a determination by an Arbitrator.

15. In this respect, this Court will depart with the conclusions in the cases cited by the Appellant (see *Naqeeb Imtiaz Kara v Medanta Africare Ltd* (2019) eKLR, *Charles Nganga Kariuki v Sanlam Insurance Co Ltd* (2019) eKLR, *Thomas Midiwo Warega Ongoro v Hillcrest Investments Ltd* (2014) eKLR and *Stephen Nyamweya & Ar v Riley Services Ltd* (2013) eKLR).

16. Third, it is now settled that where alternative dispute resolution mechanisms have been provided for or agreed, the same should be exhausted before moving to the Court.

17. In fact, section 15 of the Employment and Labour Relations Court Act and, indeed, Article 159 of the Constitution encourage alternative dispute resolution.

18. Last, the Court notes that although the Appellant has made extensive reference to the Employment Act, 2007 before this Court, no such submissions or reference was made before the Magistrates Court.

Conclusion and Orders

19. For the above reasons, the Court finds no merit in the Appeal, and it is dismissed with costs to the Respondent.

Delivered through Microsoft teams, dated and signed in Kisumu on this 3rd day of March 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Appellant Omondi, Abande & Co. Advocates

For Respondent Olel, Onyango, Ingutiah & Co. Advocates

Court Assistant Chrispo Aura