



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 203 OF 2020

BETWEEN

BERNARD OUMA BABU.....CLAIMANT

VERSUS

WHITE SPACE TECHNOLOGIES LIMITED.....RESPONDENT

RULING

1. On 30th July 2020, the Court made orders arising from 3 applications dated 20th May 2020, 11th June 2020 and 25th June 2020, brought by the respective Parties.
2. The orders on record are: -
 - a. Pending hearing and determination of the suit and by reason of the allegations in the show cause letter herein, the initiated disciplinary proceedings amount to a dispute subject to clause 22 of the shareholders' agreement to be continued and determined in accordance with the procedures set out in the said clause 22 of the shareholders' agreement.
 - b. Pending hearing and determination of this suit or pending conclusion of the dispute resolution process under clause 22 of the shareholders' agreement and whichever is earlier, the Respondent to continue paying the Claimant's monthly salary for the period of suspension in issue.
 - c. Costs of the 3 applications in the cause.
3. The Parties have subsequently filed other applications pursuant to the orders issued above. The Claimant seeks enforcement through an application for contempt of court dated 9th April 2021, while the Respondent seeks review and setting aside of the orders issued above, through its application dated 5th August 2021.
4. The Court directed on 16th September 2021, that the application dated 9th September 2021, is dealt with first, with directions to issue on the second application, after ruling is made on the first.
5. It was agreed on 27th May 2021, that the application of 9th April 2021, is considered and determined based on respective affidavits and submissions filed by the Parties. Ruling was reserved for 22nd October 2021 but is ready for delivery, with notice to the Parties, on the date indicated below.
6. The Claimant states in his founding affidavit that the Respondent has knowledge of the orders above. The orders were served electronically. Parties have engaged at their own level, on settlement of the accrued salaries. The Respondent has acted deliberately in breach of the orders. Consequently, the Claimant has endured hardship and cannot meet family/financial obligations.
7. The Respondent answers that the Claimant acted in breach of his fiduciary duties, which prompted the Respondent to suspend the Claimant's salary pending disciplinary hearing. The Claimant obtained the orders on the eve of the disciplinary hearing. The Parties engaged in out-of-court negotiations on compliance, but while negotiations were ongoing, the Claimant filed this application for enforcement. The Respondent states it is in financial doldrums, and on the verge of liquidation, compounding its ability to meet its financial obligations. As the Chief Executive Officer, the Claimant is aware of Respondent's financial position. Lastly, the Respondent submits that the Respondent has other Directors, and by picking on one, Amin Manji to face contempt proceedings, the Claimant is being malicious.

The Court Finds: -

8. The Court in order number one, on 30th July 2020, principally directed the Parties to their dispute resolution process, under clause 22 of the shareholders' agreement. That clause is a positive rejection of the jurisdiction of the Court, in favour of arbitration and mediation.
9. By continuing to file a potpourri of applications in Court, after the orders of 30th July 2020, the Parties are ignoring the orders on jurisdiction, made on 30th July 2020. They are retaining the dispute in the Court. They are compelling the Court to exercise a jurisdiction they have taken away from the Court.
10. Instead of proceeding with the substantive dispute as directed, they are compelling the Court to continue hearing them. The dispute and matters ancillary to it, ought to be heard under clause 22 of the shareholders' agreement.
11. The Court remitted disciplinary proceedings for determination in accordance with clause 22, observing that *“the regime places the procedure in the Respondent's shareholders, and within prescribed timelines, which should enable the Respondent to have the dispute determined expeditiously [page 15 of 16, Ruling dated 30th July 2021].”*
12. Why have not the Parties complied with the first order? Why keep knocking at the doors of the Court, while it is clear they have consensually repudiated the jurisdiction of the Court? The dispute would have been settled by now, had the Parties proceeded under clause 22 as advised by the Court. Instead there are applications pending in Court while the Claimant's 5- year term contract advances. The Claimant is not working, the disciplinary process against him is not going on, and he continues to demand payment of arrears of salary accrued during the period of the contested suspension. In the meantime, the Respondent argues it is teetering on the precipice of financial ruin. It is at war with its CEO, and apparently rudderless.
13. The Court held further on 30th July 2020, that clause 22.1 does not preclude any Party from obtaining interim relief on urgent basis from a Court of competent jurisdiction, pending the decision of the arbitrator/mediator. Parties have come under this clause and presented several applications.
14. This clause does not allow the Court to assume jurisdiction on the main dispute. It should not allow Parties to freely approach the Court, on ancillary disputes. It does not allow Parties to ignore the dispute resolution mechanism, and focus on applications and counter-applications before the Court. Clause 22.1 is an assistive tool, with respect to the dispute resolution mechanism embraced by the Parties. It should only be invoked in assisting the main dispute move forward. In the understanding of the Court, this would include application such as relates to appointment of arbitrator/ mediator. Applications that touch on the substance of the dispute, should not come before this Court; they are to be dealt with by the arbitrator/mediator. The Court only renders assistance to the elected mode of dispute resolution. Once it is determined that there is a valid alternative dispute resolution clause governing the Parties' relationship, then the Court should be avoided by all means. The Court should not be turned into a mechanism, for avoiding or delaying the available alternative dispute resolution mechanism.
15. It is correct that the Court ordered the Respondent to continue paying the Claimant's salary during the period of suspension. It is correct that the Respondent had at the outset, undertaken to pay the Claimant's salary for the period of suspension. The Respondent has not paid, explaining that it is on the verge of collapse.
16. There is obviously no compliance with the orders for payment of salary, but is imprisonment of one of the Respondent's Directors the prudent mode of enforcement? Should Parties be seeking imprisonment of their counterparts, even before the arbitration process has been initiated?
17. The Court does not think so. The most prudent mode is for the Parties to continue with their negotiations on settlement of the orders on payment, while arbitration/mediation process has been set in motion. If the Respondent has the ability to pay, and this should be known to the Claimant who is still the CEO, payment can be enforced through other modes which de-escalate, the main dispute. The Claimant could for instance, seek to execute the orders of payment through attachment and sale of the Respondent's movables. This is a monetary order. It is capable of enforcement against the property of the Respondent. Amin Manji need not be deprived of his liberty for the shortcomings of a Company, in which he serves as one of the Directors. Ultimately Parties must avoid the Court, as intended in their shareholders' agreement, and proceed with the main dispute under clause 22.
18. The Claimant has not shown why he has directed his application for contempt against one of the Directors, while the Respondent is a corporate entity, with other Directors, and of which the Claimant is the suspended CEO.
19. The Parties should comply with the first order issued on 30th July 2020. It would help them in resolving other extraneous disputes.

IT IS ORDERED: -

- a. The Application filed by the Claimant, dated 9th April 2021 is declined.***
- b. The dispute to proceed substantively under clause 22 of the shareholders' agreement, as ordered by the Court on 30th July 2020.***
- c. If necessary, the Claimant may explore other modes of execution of the orders made in his favour, other than contempt proceedings.***
- d. No order on the costs.***

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 15TH DAY OF OCTOBER 2021.

JAMES RIKA

JUDGE