



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO.E053 OF 2021

KINGDOM BANK LIMITED.....CLAIMANT

VERSUS

TIMOTHY MWANIKI KABIRU.....RESPONDENT

RULING

The claimant filed application dated 21st January, 2021 under the provisions of Order 51 Rule 1 of the Civil Procedure Rules, section 1A, 1B and 3A of the Civil Procedure Act and seeking for orders that;

The arbitration proceedings commenced pursuant to arbitration clause contained in the Mutual Release and Separation Agreement dated 10th June, 2020 be stayed pending the hearing and determination of this suit.

The application is supported by the affidavit of Jackson Kimathi the head of legal department in the claimant and on the grounds that the respondent resigned from his employment from Jamii Bora Bank Limited (now the claimant Kingdom Bank Limited) on 16th August, 2020 and pursuant to the Mutual Release and Separation Agreement (agreement) dated 10th June, 2020 agreed upon by the parties. The Agreement was procured unprocedurally since it was not approved by the board.

The agreement provided for payment of Ksh.78, 036,398.45 tabulated as 36 months of gross payment of Ksh.74, 289,348.45 and unused leave days amounting to ksh.3, 747,050.45 which was done contrary to procedure by giving undeserving benefits to the respondent and was not brought to the attention of the employer.

In his affidavit, Mr Kimathi avers that through a service agreement dated 15th December, 2011 the respondent was employed under a 5 years contract and which was subsequently renewed for another 5 years term ending 22nd November, 2021.

By letter dated 31st December, 2018 the claimant's board appointed the respondent as Ag. Chief Executive officer from 1st January, 2018 and with a duty to act in the best interests of the claimant particular prior to acquisition of the bank by the Co-operative Bank of Kenya Limited in the year 2020 when the bank was on a downward trend resulting in huge losses and total wipe out of the shareholders equity and leading to 100% acquisition by Co-operative Bank of Kenya Limited and whereupon the board made an offer to subscribe to Class A shares in Jamii Bora Bank which resulting in ownership of 90% of the issued share capital.

The shareholders of Jamii Bora Bank trusted the respondent would act in its best interests with regard to the acquisition transaction which was completed on 24th August, 2020 with a public announcement that Jamii Bora Bank would be operating as Kingdom Bank Limited upon the necessary approvals.

Mr Kimathi also avers that the respondent resigned from the claimant's employment on 16th August, 2020 ostensibly under the agreement dated 10th June, 2020 with unjustified and unreasonable payment of Ksh.78,036,398.45 which would have inhibited the acquisition transaction as Kingdom Bank Limited would not have accepted to take over such liability. The respondent in breach of the fiduciary duty acted in conflict of interest and contrary to the employer's interests by putting self-interest before that of the bank and with knowledge the financial operations were in the negative.

The respondent acted contrary to the Articles of Association for Jamii Bora Bank which required that the decisions of the board would be passed by way of board meeting or written resolution through a meeting in person or video conference and the resolutions be proposed by the company secretary with each director having been given notice. Such resolution to pay the respondent was not passed or approved by the board and there is no resolution to this effect.

It would amount to bad faith and breach of fiduciary duty for the board to have reviewed the agreement under the prevailing business financial performance of the company.

The board had at this time signed other resolution with regard to acquisition but not the agreement which was entered in bad faith and in disregard of procedures.

Mr Kimathi also avers that on 3rd November, 2020 the respondent made demand for payment under the agreement failure to which it would trigger the arbitration clause under the same.

On 19th November, 2020 the claimant denied the existence of the agreement as the same was null and void *ab initio* and on a without prejudice basis appreciated the respondent's years of service and that pension had been paid in full and the certificate of service was ready for collection.

the claimant in good faith offered to pay the respondent 6 months' salary in gratuity for the total number of years worked and that it would transfer motor vehicle KCV 779M to him and maintain the existing loans at staff rate until full payment save the offer was declined and the respondent triggered the arbitration clause under the agreement.

The Arbitration Institute appointed an arbitrator to the dispute vide letter dated 7th December, 2020 and before such proceedings commence, it shall serve justice that the same be stayed pending determination of the instant suit challenging the validity of the Agreement and the orders sought be allowed as prayed.

The respondent filed **application dated 8th February, 2021** and seeking for orders that;

This court be pleased to issue orders staying the proceedings herein before in in the instant suit and refer the dispute for resolution by the sole Arbitrator, the Honourable Justice (Retired) Edward Torgbor C. Arb FCI Arb.

The application is alleged to be supported by the affidavit of the respondent save the Supporting Affidavit is not placed on the record. The application has no supporting affidavit. It fails to conform to the rules of procedure and has no probative value. See Rule 17 of the Employment and Labour Relations Court (Procedure) Rules, 2016.

there is the respondent's Supplementary Affidavit in support of his application debated 8th February, 2021 and in response to the claimant's application dated 20th January, 2021 and on the grounds that the claimant's board held a meeting on 29th May, 2020 wherein several issues regarding operations were discussed and under the agenda of *any other business* his exit package was addressed and at that stage he was asked to exit the meeting, sae the minutes are by error dated 29th May, 2019 instead of 2020.

That the minutes referenced by the claimant under paragraph 26 to 28 of the Replying affidavit relates to a different meeting of 29th May, 2019.

The respondent also avers in his Supplementary Affidavit that the claimant's board had another meeting on 3rd June, 2020 where the issue of his exit from employment was discussed under Minute 05/06/2020 save the minutes submitted by the claimant are incomplete and unsigned.

Determination

On the written submissions and on the application and affidavits, the single issue for determination is whether the arbitration proceedings commenced pursuant to the arbitration clause contained in the mutual realises and separation agreement dated 10th June, 2020 should be stayed pending the hearing of the claim herein.

The jurisdiction of the court to hear and determine employment, labour relations matters and for connected purposes is sacrosanct, original and protected under Article 162(2) of the Constitution, 2010 read together with section 12 of the Employment and Labour Relations Court Act, 2011.

Employment between the parties and the cause of action herein is employment and labour relations and is not contested.

A term of the employment relationship is contested by the claimant on the grounds that the respondent has relied on a Mutual Release and Separation Agreement dated 10th June, 2020 to claim payment of Ksh.78, 036,398.45 contrary to the employer's interests and which agreement gave the respondent undeserved substantial benefits that had not been discussed by the employer. That the respondent has now applied the agreement to initiate arbitration proceedings which the claimant seeks to be stayed pending the hearing of the suit herein.

In effect the application of the Agreement, Mutual Release and Separation Agreement dated 10th June, 2020 is challenged.

Section 10 of the Arbitration Act states that no court shall intervene in a matter governed by the Act except as provided under the Act. The Court of Appeal in **Niazsons (K) Ltd v China Road & Bridge Corporation Kenya (2001) eKLR** held that;

Whether or not an arbitration clause or agreement is valid is a matter the court seized of a suit in which a stay is sought is duty bound to decide. The aforequoted section does not expressly state at what stage it should do so. However, a careful reading of the section leaves no doubt that the court must hear that application to come to a decision one way or the other. It appears to me that all

an applicant is obliged to do is to bring his application promptly. The Court will then be obliged to consider three basic aspects. First, whether the applicant has taken any step in the proceeding other than the steps allowed by the said section. Second, whether there are any legal impediments on the validity, operation or performance of the arbitration agreement. Third, whether the suit indeed concerns a matter agreed to be referred.

Parties to an employment contract are governed under the terms and conditions thereof and where there is conflict on any given term(s) or condition(s) such dispute shall be heard by the court.

The employment terms and conditions of separation for the respondent are challenged by the claimant as the employer. The respondent seeks to reply on an agreement dated 10th June, 2020 which he asserts was discussed by the claimant's board in its various meetings.

The board minutes of 29th May, 2019 are stated to have been by error as the meeting was held in the year 2020. These are board minutes and the attending board in the subsequent meeting ought to have corrected any error on the record, if any, as otherwise, under the applicable law and Companies Act, such minutes cannot be altered or left to the respondent to correct. Any matter thereof, if at all there is such error ought to be addressed by the employer, which is not the case here.

Without going into merits and or demerits of the claim, under the provisions of section 10(6) and (7) of the Employment Act, 2007 the employer such as the claimant herein is the legal custodian of all employment records and the record produced by the employer upon proceedings before this court are the true and correct records unless the contrary is proved. The board minutes and record of the claimant in this case is the true record with regard to the employment relationship between the parties.

A term of employment thus challenged, and including the very agreement relating to reference to arbitration, the court is the primary forum for determining such a dispute.

Accordingly, application dated 20th January, 2021 is found with merit and is hereby allowed and the arbitration proceedings commenced by the respondent are hereby stayed pending the hearing and determination of the suit herein. Costs shall be in the cause.

Delivered in court at Nairobi this 4th day of October, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

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