



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. E6462 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

DAVID KAMAU NGURE.....CLAIMANT

VERSUS

TOTAL KENYA LIMITED.....RESPONDENT/APPLICANT

RULING

1. Vide an application dated 29th January 2021, the Respondent seeks the following orders –

- (i) This Honourable Court be pleased to stay all proceedings in this matter pending the hearing and determination of this application;*
- (ii) This Honourable Court be pleased to refer the matter herein to Arbitration in accordance with Article VIII (iv) of the Young Dealer Marketing Licence Agreement (Likoni Road Total Service Station) dated 23rd February 2018, entered into between the Claimant and the Respondent; and*
- (iii) The costs of this application be borne by the Claimant.*

2. The grounds in support of the application are that –

- a. The Claimant's entire claim is premised on a Letter of Appointment dated 15th June 2017 as read together with the Young Dealer Marketing Licence Agreement (Likoni Road Total Service Station) dated 23rd February 2018, (hereinafter the "Agreement") entered into between the Claimant and the Respondent;*
- b. By dint of Article VIII (iv) of the Agreement the parties voluntarily elected to oust the jurisdiction of this Honourable Court and refer any and all disputes arising from the Agreement to arbitration;*
- c. The Claimant has instituted these proceedings in contravention of Article VIII (iv) of the Agreement without any legal basis;*
- d. The Arbitration Agreement is capable of being performed;*
- e. This Honourable Court has an obligation to promote alternative forms of dispute resolution pursuant to Article 159(2)(c) of the Constitution of Kenya;*
- f. In the premises, it is in the interest of justice, fairness and equity that the orders sought herein be granted as prayed.*

3. The application is supported by the affidavit of Rosemary Wakaba, the Respondent's Legal Officer in which she substantively reiterates the grounds on the face the application.

4. The Claimant opposed the application and filed a replying affidavit sworn on 4th May 2021.

5. The Claimant deposes that the Application herein is defective since the application and grounds in support thereof do not state the nature of the dispute to be referred to arbitration; that it is a condition precedent to the commencement of arbitration that parties to the dispute must

have attempted to settle the matter amicably; that the arbitration clause is only available during the continuance of the Market Licence Agreement (MLA).

6. The Claimant further avers that his claim is for inter alia this court to declare that there existed an employment contract under statute which prayer falls outside the jurisdiction of an arbitrator; that this Court is invited to make a determination on whether the Claimant was an employee or an independent contractor; and that arbitration is a consensual process to which he has not given his consent.

7. The application was disposed with by way of written submissions.

8. The issues of determination are whether the dispute between the Applicant/Respondent and the Claimant fall within the arbitration clause of the Young Dealer Marketing Licence Agreement between the Claimant and the Respondent.

9. In order to put the issue herein in perspective, it is important to set out the background of this suit.

10. The Claimant was previously employed as a fuel station manager by an independent contractor running a Total Service Station in Kapenguria in the Republic of Kenya. From this station and obviously from the good managerial skills of the Claimant, the Applicant approached the Claimant to enroll him into the Young Dealer Program run by the Applicant.

11. The object of the Young Dealer Program was to recruit young Kenyans, offer training and experience, accumulate enough capital (sourced from deducted commissions) to guarantee the Young Dealer the money equivalent of supply of enough petroleum product to run a service station as an independent contractor of the Applicant.

12. The Applicant recruited the Claimant as one such young Kenyan and deployed him initially to the Kamwangi Service Station in Gatundu and eventually to the Likoni Road Service Station in Nairobi. All the assets at the Applicant's premises remained the Property of the Applicant.

13. In his memorandum of claim the Claimant seeks the following prayers –

- a) A declaration that the Claimant was an employee of the Respondent and not an independent contractor for services;
- b) A declaration that the Respondent's action to indefinitely suspend the Claimant from employment was unlawful and unfair;
- c) A declaration that the Respondent's action to indefinitely suspend the Claimant from employment amounts to Constructive termination of employment;
- d) A declaration that the Respondent's action to withhold the Claimant's salary was unlawful and unfair;
- e) A declaration that the Respondent's action to withhold the Claimant's salary amounts to Constructive termination of employment;
- f) A declaration that the Respondent's action to terminate the Claimant from employment amounted to a violation of the Claimant's rights under the contract and that the Claimant is entitled to compensatory damages;
- g) An order for the Respondent to pay the Claimant one month's salary in lieu of Notice being Kshs.47,000/-;
- h) An order for the Respondent to pay the Claimant accrued leave for the years 2017, 2018 and 2019 being Kshs.141,000/-;
- i) An order for the Respondent to pay the Claimant accrued security deposit for the years 2017-2018 being Kshs.624,630/-;
- j) An order for the Respondent to pay the Claimant accrued security deposit for the years 2018-2019 being Kshs.1,800,000/-;
- k) An order for the Respondent to pay the Claimant Kshs.564,000/- being twelve months compensatory damages for unlawful and unfair termination as provided for in the Employment Act.
- l) Interest on (g) to (k) at court rates till payment in full;
- m) Costs of this cause; and
- n) Such other relief as the Court may deem fit to grant.

14. Both the initial YDMLA (Kamwangi Road Total Service Station) dated 27th June 2017 and the subsequent YDMLA (Likoni Road Total Service Station) dated 23rd February 2018, stipulate as follows under Article VIII (iv) that :-

"if at any time during the continuance of this agreement any dispute, difference or question relating to the construction meaning or effect of this Agreement or of any Clause herein shall arise between the parties, then the aggrieved or affected party shall give written notice of no less than 21 days to the other party herein. Each party shall within 14 days from the date of expiry of the written notice aforementioned, appoint an arbitrator. The matter shall thereafter be referred to the two Arbitrators. If any party shall fail to

appoint an Arbitrator within the given 14 days, then such Arbitrator as shall be appointed by the other party shall be the sole arbitrator for the purpose of hearing and determination of the matter in accordance with and subject to the Arbitration Act (1995) or any amendment or re-enactment for the time being in force.

Where the need so arises, the Arbitrators may appoint an umpire who shall determine such issues as such be referred to him/her by the Arbitrators.

The award of the Arbitrator(s) shall be conclusive as to the rights of the parties and no recourse shall be had to a court save on a matter of legal interpretation. The parties will apportion equally such costs of the arbitration including the fees to the arbitrator and umpire. Each party shall bear its own legal and other representation costs."

15. Section 6 of the Arbitration Act provides as follows –

6. Stay of legal proceedings

(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.

16. The Court therefore has to determine whether the issues in dispute in the claim herein are the subject of the arbitration clause.

17. The arbitration clause refers to “any dispute, difference or question in relation to the construction, meaning or effect” of the agreement or any clause therein.

18. As pleaded by the Claimant, there were two agreements between the parties. One was an employment contract and the other was the Young Dealer Marketing Licence Agreement (YDMLA).

19. In considering a similar application, the **High Court in Kerugoya in Civil Case No. 3 of 2018 County Government of Kirinyaga v African Banking Corporation Ltd [2020] eKLR**, at paragraph 25 had this to say;

“...The onus of proving that the matters in dispute fell within a valid and subsisting arbitration clause is on the party applying to the court for a stay of proceedings, once this burden has been discharged then the burden shifts to the opposing party to show cause why the effect should not be given to the arbitration clause.

26. In this case the applicant in the supporting affidavit has not stated the nature of the dispute which has arisen between the parties.

The grounds in support of the application do not disclose the dispute if any. It only refers to letters marked BM-2-. In one of the letters the applicant has stated that it was demanding an outstanding amount. The amount has not been stated. It is not sufficient for the applicant to state that under clause 26 of the agreement it is stipulated that any and all disputes arising out of or in connection with the agreement including and not limited to a dispute over its validity shall be referred to arbitration. The applicant must specify the dispute and the nature of the dispute...”

20. The Applicant has not stated what the dispute between the parties that is to be referred to arbitration is. The dispute between the parties is definitely not a question of construction, meaning or effect of the YDMLA, or any clause of the agreement.

21. Further, the arbitration clause provides for the procedure to be followed before arbitration. It provides that –

“An aggrieved party shall give written notice of not less than 21 days. It is after the expiry of the notice that the arbitrator is to be appointed.”

22. In the instant suit no notice has been given by either party. Indeed what triggered the suit herein is a “notice to show cause” issued by the Applicant/Respondent to the Claimant and it is this notice to show cause and what transpired subsequent thereto or as a consequence thereof that prompted the institution of the suit herein.

23. This therefore begs the question “Who is the aggrieved party?” And “What is the grievance?” These are questions that ought to be answered by the Applicant which it has not.

24. In **Esmaj v Mistry Shamji Lalji & Co (1984) KLR**, the principle governing the grant of stay of proceedings were laid down by the Court of Appeal as follows:-

- a) *The court is not bound to grant stay but has discretion to grant or not to grant.*
- b) *The discretion to grant should not be exercised when strong cause for doing so is shown.*
- c) *The burden of proving such strong cause is on the plaintiff.*
- d) *In exercising discretion, the court should take into account the circumstances of the particular case.*
- e) *A mere balance of convenience is not enough.*

25. The onus of proving that the matters in dispute fall within a valid and subsisting arbitration clause is on the party applying to the court for a stay of proceedings. Once this burden has been discharged then the burden shifts to the opposing party to show cause why effect should not be given to the arbitration clause.

26. It goes back to what I have already pointed out that the Applicant has not proved that there is a dispute or the nature of the dispute and whether the same is capable of being referred for arbitration.

27. It would therefore be premature for this Court to stay these proceedings at this stage and refer the matter to arbitration as the parties have not defined what question is to be referred to arbitration. Further, the parties have not complied with the conditions precedent to the reference to arbitration being the issuance of 21 days’ notice.

28. It is my finding that the Applicant has not proved that the dispute herein is subject to the arbitration clause in the YDMLA. The result is that the application has not been proved and is accordingly dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 19TH DAY OF NOVEMBER 2021

MAUREEN ONYANGO

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 has 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.

MAUREEN ONYANGO

JUDGE