



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 451 OF 2019

LUCY WAMBUI YINDA.....CLAIMANT

VERSUS

MUMIFLORA LIMITED T/A BARAKA ROSES.....RESPONDENT

(Before Hon. Justice Hellen S. Wasilwa 24th February, 2020)

RULING

1. Before this Court is the Respondent's Application dated 31/7/2019 wherein the following orders have been sought:-

- a. This suit be struck out for being an abuse of the process of the Court.**
- b. The subject matter of the dispute is referred for an arbitration by an arbitrator mutually appointed by the parties of the dispute failure of which (sic) by the Chartered Institute of Arbitrator Kenya Branch.**
- c. The costs of this application be granted to the Respondent.**

2. The Application is supported by the grounds set out therein and the supporting affidavit of Njeri Waruguru Mahihu sworn on 31/7/2019.

The Applicant's Case

3. The Applicant avers that in their agreement of 20/1/2015, parties agreed to refer any dispute relating to constitution of the agreement or their rights and liabilities, to arbitration. Further, clause 4.5 of the Family Business Charter requires family grievances to be resolved by the family council to ensure that family disputes are kept and resolved within the family.

4. It is the Applicant's position that the Constitution and the Employment and Labour Relations Act (sic) No. 20 of 2011 requires this court to encourage alternative dispute resolution (ADR). Since the parties have opted to adopt this mechanism to resolve their dispute, then the suit herein is misconceived and should be struck out with costs.

5. In her Affidavit, the Affiant avers that the Claimant raised some grievances in June of last year as such, a family council was constituted to hear the grievances as per the Charter and the Agreement. This was communicated to the Claimant on 14/6/2019 but she opted to institute this claim rather than abide by the decision.

The Claimant's Case

6. The Claimant opposed the Application vide the Grounds of Opposition filed on 13/8/2019 and her Replying Affidavit sworn on 7/8/2019.

7. She avers that her employment relationship with the Respondent was governed by the Employment Act. Further, that by failing to file this application at the same time as the Memorandum of Appearance, the Respondent submitted to the jurisdiction of this Court.

8. The Claimant avers that the claims against the Respondent are admitted in its letter of 22/2/2019 therefore there is no dispute to be referred to arbitration. Further, the request that the suit be struck out is inconsistent with section 6 (1) of the Arbitration Act. Lastly, that the application lacks merit and should be dismissed with costs.

9. In her Affidavit, the Claimant deposes that she was employed as the Respondent's managing director responsible for daily management of

the company and was remunerated for the same. The Respondent did not issue her with a written contract and discussions relating to the terms of her employment were never finalized.

10. She contends that the Family Business Charter is a draft document that has not been finalized, signed or dated by the parties and does not bind the Respondent who is a separate legal entity. In any event, the Charter cannot hinder her from exercising her fundamental rights and freedoms.

11. It is contended that the Shareholders and Cooperation Agreement of 20/1/2015 is not relevant to her employment relationship with the Respondent as it was to govern the relationship between members of the Respondent amongst themselves and between the members and the Respondent in their capacity as shareholders.

12. She avers that the claims as admitted by the Respondent in its letter of 22/2/2019 remain unsettled hence the institution of this suit. She further avers that she did not respond to the letter of 14/6/2019 as her claim lies with the Respondent and not the family. She then prayed for the application to be dismissed with costs.

The Applicant's Rejoinder

13. The Applicant filed a rejoinder vide the Supplementary Affidavit of Njeri Waruguru Mahihu sworn on 11/11/2019 where she contended that having acknowledged the existence of the draft family charter, the Claimant was therefore bound by it since every family member was bound by the same. She further contends that the Claimant has perjured herself in paragraph 4 of her Affidavit.

14. The Affiant denies there being a resolution by the Respondent admitting any indebtedness to the Claimant and that the letter being referred to by the Claimant does not bind the Respondent. She is of the view that the Application is unopposed as the Claimant failed to respond to the prayer to have this matter referred to arbitration.

15. The Application was disposed of by way of written submissions where the Applicant filed its submissions on 27/11/2019 with the Claimant filing hers on 5/12/2019.

The Applicant's Submissions

16. The Applicant submits that the Claimant being a shareholder of the Respondent is bound by clause 16.1 of the Shareholders and Cooperation Agreement as she has not adduced any evidence to prove that she was unduly influenced or that the agreement is fraudulent.

17. The Applicant further submits that this Court cannot interfere with an agreement made between the parties and relies on the case of **National Bank of Kenya vs. Pipeplastic Samkolit (K) Limited [2002] 2 EA 503** where the Court of Appeal held that Courts cannot re-write a contract for the parties unless coercion, fraud and undue influence are pleaded and proved, thus, parties are bound by the terms of their contract.

18. The Applicant submits that article 159 (2) (c) requires courts to encourage ADR, as such, this suit is mischievous and misconceived; the parties having agreed to solely resolve their disputes through ADR. The Applicant contends that clause 4.5 of the Family Charter binds the parties and concludes its submissions by urging this Court to grant the orders sought.

The Claimant's Submissions

19. On the other hand, the Claimant submits that under Section 6 (1) of the Arbitration Act, the Court cannot stay proceedings and refer them to arbitration except where there is no arbitration agreement or no dispute. However, the Court must satisfy itself of these requirements before making an order for referral.

20. The Claimant submits that the dispute before this Court relates to termination of her employment and payment of her terminal dues hence is an employment dispute and as conceded by the Respondent in paragraph 2 of its submissions.

21. She further submits that the Shareholders and Cooperation Agreement does not contain any provisions governing the employment relationship between her and the Respondent and relates to the commercial relationship of the Respondent and its shareholders.

22. It is submitted that the Respondent is not subject to the Family Charter neither does the Charter contain a reference to any terms of the employment relationship between the parties. She contends that previous communication regarding her employment was communicated by the Respondent, as such, the Respondent cannot purport to communicate through the Mahihu Family Council.

23. She also contends that there is no written employment contract hence no arbitration agreement, as such, the dispute herein cannot be referred to arbitration. She relies on the cases of **Eunice Soko Mlagui vs. Suresh Parmar & 4 Others; Civil Appeal 276 of 2014 [2017] eKLR**, **UAP Provincial Insurance Company Limited vs. Michael John Beckett; (U/R) Civil Appeal 26 of 2007, Mt. Kenya University vs. Step Up Holding (K) Limited; Civil Appeal 186 of 2013 [2018] eKLR** and **Nanchang Foreign Engineering Company (K) Limited vs. Easy Properties (K) Limited [2014] eKLR** where the Courts have held that before a matter can be referred to arbitration, the merits of the case should be considered. Further, if there is no dispute that can be referred then the Court automatically assumes jurisdiction and which action is not inconsistent with article 159 (2) (c).

24. She submits that the application must be dismissed for failing to meet the requirements of Section 6 (1) of the Arbitration Act, which requires the application for referral to be made at the time of entering appearance.

25. In this case, the application was made 5 days after the Respondent had entered appearance. She relies on the case of **Eunice Soko Mlagui vs. Suresh Parmar & 4 Others [SUPRA]** where the Court was of the view that an application for referral should be rejected where it was not made at the time of entering appearance.

26. It is submitted that the Applicant's prayer to have the suit struck out contradicts section 6 (1) of the Arbitration Act which requires a matter to be stayed.

27. In light of the foregoing, the Claimant urges this Court to dismiss the suit with costs.

28. I have examined all the averments of both Parties. This case was filed before this Court on 9/7/2019.

29. On 25/7/2019, the Respondents filed an unconditional Memorandum of Appearance therefore submitting to the jurisdiction of this Court and therefore the Respondent/applicant cannot at this point in time deny this Court's jurisdiction to hear this claim.

30. I find the application has no merit in the circumstances but in view of this Court's desire to encourage ADR, the Court will stay its proceedings and grant the Parties some time to try and resolve the dispute out of Court and report back within time lines given by the Court.

31. Costs in the cause.

Dated and delivered in open Court this 24th day of February, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Wataka for Claimant/Respondent – present

No appearance for Respondent/Applicants