



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

PETITION NO.17 OF 2018

HALIMA GABABA ABDULAHI.....PETITIONER

VERSUS

HE. LEE KINYANJUI.....1ST RESPONDENT

COUNTY GOVERNMENT OF NAKURU.....2ND RESPONDENT

RULING

The petitioner filed the Petition and a Notice of Motion on 20th November, 2018 and seeking conservatory orders to suspend the respondents' decision removing her from the position held with the 2nd respondent vide letter dated 1st November, 2018.

On 22nd November, 2018 the respondents filed application and Chamber Summons under the provisions of section 6 of the Arbitration Act and Rule 2 of the Arbitration Rules, 1997 and seeking stay of proceedings herein for reference of this matter to arbitration.

The petitioner filed Grounds of Opposition to the Chamber Summons filed by the respondents.

At the scheduled hearing, parties agreed to address the respondents' application first.

Counsel for the respondents submitted that the petitioner was issued with letter of appointment to govern employment with the respondents and clause 10 has provision for settlement of disputes by arbitration. The parties agreed upon employment of the petitioner to refer any disagreement or dispute with regard to the employment to arbitration as a binding provision. The contract of employment has effectively been terminated, the petitioner is dissatisfied and this relates to the employment which should be referred to arbitration instead of filing suit with the court.

In the petition, paragraph 6 relates to a claim that the petitioner was not given a fair hearing before employment was terminated by the respondents. These are questions which can be addressed by arbitration and any owing dues paid.

In the case of **Mt. Kenya University versus Step Up Holdings (K) Ltd [2013] eKLR** the court held that in order to succeed, a party should file application seeking reference to arbitration simultaneously with entry of appearance and thereafter take no procedural steps in the matter. In the case of **Adrec limited versus National Media Group Limited [2017] eKLR** the court held that where a suit is founded on contract containing an arbitration clause enters appearance or causes a notice of appointment of advocates and seeks for stay of proceedings the court is obligated to stay such proceedings and refer parties to arbitration as the constitution recognises alternative dispute resolution mechanisms including arbitration. In **Union Technology Kenya Ltd versus County Government of Nakuru [2017] eKLR** the court held that parties should be encouraged to explore alternative disputes resolution mechanisms including arbitration.

The respondents also made reference to the case of **William Oluande versus American Life Insurance Company (K) Limited [2006] eKLR** requiring the court to give effect as far as possible to the purpose and intent of the parties especially the essence of the agreement between the parties which included the employment contract. In **Mjomba Agencies Limited versus Mvule Investment Company Ltd [2017] eKLR** the court is required to undertake an enquiry under section 6(1) of the Arbitration Act to ascertain whether there is a dispute between the parties and if so, whether such dispute is with regard to the matters agreed to be referred to arbitration.

The petitioner submitted that in this case there was no express provision for reference to arbitration. It is not mandatory. In the employment contract at clause 10 the parties agreed to the use of legal means to settle disputes and laws of Kenya should apply but there was no express requirement for arbitration. Prayers (4) and (5) in the petition can be arbitrated upon but prayers (6) on the violation of the constitution and fundamental freedoms and rights can only be addressed by the court.

Under the Arbitration Act, the court is required to enquire whether there is a dispute between the parties which can be referred to arbitration. Such reference can only be made if the petitioner was challenging a valid process of termination but in this case the entire process leading to

termination of employment and the outcome of it is challenged. Constitutional rights have been violated and which cannot be addressed by arbitration.

The petition is premised on the violation of the Bill of Rights and under Article 23 of the Constitution, only the court can address such matters and not by arbitration. The petition and Notice of Motion seek interim measures of a conservatory nature and under section 7 of the Arbitration Act the court is mandated to intervene before or during arbitration proceedings and in the event of a valid arbitration, to grant such measures of protection.

In **petition No.160 of 2013 Rose Wangui Mabo & others versus Limuru Country Club & others [2013] eKLR** the court held that commissions are not court of law and therefore restricted in the remedies to grant as only the court can issue orders under article 23 of the constitution. **in Petition No.51 of 2011 Muslims for Human Rights versus Municipal Council of Mombasa & another [2018] eKLR** the court held a dispute must relate to matters agreed upon by the parties to go on arbitration and stay of proceeding for the parties to go for arbitration is a delay tactic and a delay to justice.

The parties herein had not contemplated a violation of rights under the constitution so as to make reference to arbitration where a violation arose. The parties agreed to be bound by the law and the application seeking stay and reference to arbitration does not take away the power of the court to issue interim orders at any stage.

It is common cause that the petitioner was an employee of the 2nd respondent until letter and communication dated 1st November, 2018 terminating employment on the grounds of gross misconduct as per the notice to show cause notice dated 7th June, 2018 and suspension letter dated 23rd August, 2018. Such communication was premised on the provisions of section 40(1) (c) of the County Government Act.

The petition is premised on alleged violation of articles 2, 10, 19, 20, 27, 28, 41, 43, 47, 50, 165, 179, 183, 236 and 258.

The prayers sought in the interim relate to preservation of the position held by the petitioner on the basis that the decision to terminate employment was arrived at in breach of constitutional rights and should therefore be quashed and the respondents stopped from appointing another person/officer in the same position and the petitioner be retained in the same position and in the alternative terminal dues for the period served be paid and also payment for the remainder of term of the contract of employment.

The court is conferred with jurisdiction under the provisions of article 162(2) read together with section 12 of the Employment and Labour Relations Court Act, 2011 to address employment and labour relations disputes and for connected purposes. The court is given original jurisdiction under the constitution and by statute over matters of employment and labour relations and connected purposes as held in by the Supreme Court in the case of **Samuel Kamau Macharia & another versus Kenya Commercial Bank & 2 others [2012] eKLR**:

A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings. ... Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

In this case, the respondent's case is that under clause 10 of the contract of employment the parties agreed to be bound by the arbitration process to resolve any dispute(s) arising out of the employment relationship. Under clause 10.0.1 of the contract the parties agreed that;

The parties shall use all legal mechanisms available at their discretion to amicably settle disputes arising out of or in connection with this contract or interpretation herein.

Under clause 10.02 the parties agreed that;

Any dispute, difference, or question, which may arise at any time between the parties, which shall not have been resolved in 9.0.1 above, shall be referred for arbitration and the provisions of the arbitration Act 1995 of the Laws of Kenya shall be applicable and binding to the parties.

The referenced clause 9.0.1 does not exist. Clause 9 comprises a provision that;

This contract shall be interpreted and construed in accordance with the laws of Kenya.

As noted above, the petitioner's employment terminated vide letter dated 1st November, 2018. Referenced in this letter is a notice to show cause issued to the petitioner and a suspension notice. Such motions and procedures were applied before employment terminated. The petitioner is now not an employee of the respondents.

Turning to the question whether the court can refer the dispute to Arbitration, it is apparent that the parties have not agreed to refer the matter to arbitration. Section 6(1) of the Arbitration Act provides as follows:

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 the 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.

The dispute must therefore be the subject of an arbitration agreement or the parties consent to arbitration. In the case of **Kenya Pipeline Company Limited versus Kenolkobil Limited [2013] eKLR** the court held;

.....a plain reading of Article 159 of the Constitution of Kenya, 2010 requires the court to promote settlement of disputes by way of alternative dispute resolution. That may be so but such referral must be by the consent of the parties because of the very nature of the resolution methods. It is for that reason that the Constitution uses the words “promote” and not “shall refer to” alternative dispute resolution. ... It is clear that it is only where other methods of alternative dispute resolution are concerned that the court can on its own motion; refer a matter under such methods. On the other hand, referral of a matter to arbitration that is in court must be by the consent of the parties. If the court had the power to refer matters pending in court for arbitration suo moto, nothing would have been easier than for the drafters of the legislation to have explicitly stated so. ...

In the case of **Martin Otieno Okwach & Charles Ongondo Were T/a Victoria Clearing Services versus Kenya Post Office Savings Bank [2014] eKLR** the court held as follows;

Unless, parties consent to have the matter referred to arbitration under Order 46 Rule (1) of the Civil Procedure Rules, 2010, they are firmly stuck in the court system. Indeed, while Article 165 of the Constitution of Kenya, 2010 gives the High Court supervisory jurisdiction over any person, body or authority exercising a judicial and quasi-judicial function to ensure the administration of justice, such authority can only be exercised within the parameters of Section 10 of the Arbitration Act which provides as follows:-

“Except as provided in this Act, no court shall intervene in matters governed by this Act.”

The above position is buttressed by the Court of Appeal in the case of **Adrec Limited versus Nation Media Group Limited [2017] eKLR** and as submitted by the respondents with regard to the application of section 6(1) of the Arbitration Act and the requirement by the court to ascertain whether;

(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.

In this regard with employment terminated and arising therefrom the petitioner having taken the option to urge the cause by petition and raising constitutional questions and the parties thus regulated by an employment contract which is subject to the jurisdiction of the court, and clause 10.0.2 of the contract making reference to a non-existent clause, 9.0.1 as to which matters are to be addressed by way of arbitration, the court retains its original jurisdiction to hear the matter. The matter cannot be removed from the jurisdiction of the court by dint of clause 10.0.1 alone or the application of the entire clause 10 noting the ambiguity.

Taking the above into account, under section 15 of the Employment and Labour Relations Court Act, 2011 it is recognised that the court has power to refer parties to alternative disputes resolution mechanisms at any stage of the matter.

1. Nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion or at the request of the parties, any other appropriate means of dispute resolution, including internal methods, conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2)(c) of the Constitution.

2. ...

3...

4.If at any stage of the proceedings it becomes apparent that the dispute ought to have been referred for conciliation or mediation, the Court may stay the proceedings and refer the dispute for conciliation, mediation or arbitration.

This is in recognition that employment and labour relations matters are best resolved at the shop floor however, when employment has terminated following notice to show cause, suspension and a sanctioned taken that of termination of employment on the grounds of gross misconduct, to refer the matter back to the shop floor would only cause a delay of justice for the employee who alleges violation of fundamental rights or to an employer who has addressed itself to a case of gross misconduct as held in the case referenced by the petitioner in **Muslims for Human Rights versus Municipal Council of Mombasa & another [2018] eKLR**.

The respondent made reference to the case of **Union Technology Kenya Ltd versus County Government of Nakuru**, cited above, in my humble view, the matter related to objections raised with regard to the application to an arbitral clause under the service agreement and where a defence had been filed with a counter-claim. In my reading of the referenced clause subject of the court ruling and clause 10 of the employment contract between the parties herein, the details, provisions and settlement of the dispute by reference to an independent arbitrator is foundationally different.

In this regard and by dint of section 7 of the Arbitration Act empowering the Court to issue orders regardless of the presence of an arbitration clause in an agreement, application by the respondents dated 22nd November, 2018 is hereby declined. Noting the legal issues thus addressed each party shall bear own costs? The respondents shall address the petition and the court shall hear parties on their merits.

Delivered at Nakuru this 31st day of January, 2019.

M. MBARU

JUDGE

In the presence of: