REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

ELRC NO. 924 OF 2018

(Before Hon. Lady Justice Hellen S. Wasilwa on 18th February, 2019)

LORCAN BYRNE...CLAIMANT

VERSUS

FRONTIER SERVICES GROUP EAST AFRICA LIMITED......RESPONDENT

RULING

1. The Application before the Court is one dated 24th July, 2018, brought under Article 159(2) of the Constitution, Section 15 of the Employment and Labour Relations Court Act, Order 2 Rule 15 of the Civil Procedure Rules wherein the Respondent seeks for Orders:-

1. That this suit be struck out for being an abuse of Court process.

2. That the subject matter of the dispute be referred for an arbitration by an arbitrator mutually appointed by the parties to the dispute failure of which by the Chairman Chartered Institute Arbitrators – Kenya Branch.

3. That the cost of this application be granted to the Respondent.

2. The Application is premised on the grounds that:-

a. By an employment agreement dated 15th September, 2017, the parties to the dispute agreed that "any claim, controversy or dispute that may arise directly or indirectly in connection with the Employee's employment or the termination of the employee's employment, and involving the Company… shall be arbitrated."

b. That in the same agreement the Claimant waived his rights to file any dispute arising out of his employment in a Court of law.

c. In the present suit the Claimant alleges unfair termination of his employment which is a dispute covered by Clause 11 of the Employment Agreement.

d. The Constitution and the Employment and Labour Relations Act No. 20 of 2011 enjoins the Honourable Court to encourage alternative dispute settlement mechanisms in the settlement of their disagreement and the parties having elected to follow strictly the alternative dispute settlement mechanism and no other this suit is misconceived and should be struck out.

3. The application is supported by the Affidavit of one Githinji Karanja, a legal officer of the Respondent wherein he reiterates the grounds on the face of the application and adds that the application is an abuse of Court process and should be struck out and the dispute be referred to arbitration.

4. The Claimant filed grounds of opposition wherein he states that Section 6 of the Arbitration Act does not provide for the striking out of the claim where a supposed arbitration agreement exits but only a stay of proceedings pending arbitration.

5. The Claimant also submits that the prayer for stay of proceedings pending arbitration is affected by laches since it was not filed contemporaneously with the filing of the Memorandum of Appearance as per section 6(1) of the Arbitration Act. Further that under the *contra proferentum* rule the arbitration clause is unenforceable for being in conflict with Clause 16 of the Agreement, which also provides for litigation of disputes under the Employment Act.

6. The Claimant avers that the application is unenforceable for lack of clarity by virtue of it alluding to a non-existent Section 13 and the waiver on supposed right to a jury trial which does not even exist in Kenyan Law.

7. That mandatory arbitration would be contrary to section 87 of the Employment Act on protection of enforcement of Employment disputes by the state through the Courts. That the same would also be a violation of the spirit of Chapter 4 of the Constitution on the protection and enforcement of fundamental rights.

Applicant's submissions

8. The Applicant submits that the Employment Agreement dated 17th September, 2017, contained a mandatory arbitration clause by which the parties agreed:-

> ***a. To refer any disputes directly or indirectly in connection with the Claimant's employment or his termination of employment by the applicant or involving discrimination of the claimant by the Applicant and/or arising under labour and/or employment laws of the Republic of Kenya to arbitration.***
>
> ***b. That the only claims between the parties that are not subject to arbitration are claims specifically exempted from that process by:-***
>
> > ***i. The Laws of Kenya.***
> >
> > ***ii. That agreement itself.***
> >
> > ***iii. Or by a subsequent agreement.***
>
> ***c. That by signing the Agreement the Claimant "knowingly and intelligently" waived any right he could have otherwise had to seek remedies in a Court of law or other forums including the right to jury trial.***
>
> ***d. The law of the Republic of Kenya was to govern the agreement.***

9. It is submitted that Courts are not supposed to re-write contracts between the parties as was stated in the case of **National Bank of Kenya Ltd vs Pipe Plastic Samkolit (K) Ltd & Another (2001) eKLR**. That the Claimant knowingly and intelligently agreed that the matter be referred to arbitration and that a Court of Law will have no jurisdiction whatsoever over such a dispute.

10. That the Claimant has not alleged that he signed the Employment Agreement under coercion or undue influence or that it was a fraud and as such is bound by it.

11. The Applicant submits that the rights alleged to have been violated by the Applicant can still be addressed in Arbitration by virtue of Section 15(1) of the Employment and Labour Relations Court Act, 2011. They also cite the case of **James Heather Hayes Vs African Medical and Research Foundation (AMREF) (2014) Eklr** it was held:-

> ***"It is not lost to all that Alternative Dispute Resolution is the preferred and fashionable kid on the block in dispute resolution. Article 159 and section 15 of the Constitution of Kenya, 2010 and the Employment Act are a clear indicator of this position. These provide for resolution of disputes through alternative dispute resolution.***
>
> ***Arbitration is a choice of the parties in so far as alternative dispute resolution is concerned."***

12. They submit that by allowing this suit to proceed, the Court would be setting a dangerous precedent that parties to a contract would enter into the same then thereafter refuse to adhere to its provisions by seeking the solace and assistance of the Court to perpetrate iniquity.

13. On whether the Arbitration Clause in the Employment Agreement is contrary to the constitution and the Employment Act the Claimant contends that the arbitration procedure would not guarantee him protection and enforcement of fundamental rights contained in the Constitution and the Employment Act.

14. The Applicant submits that this is misguided and cite the **South African Case of City of Cape Town Vs Khaya (Pty) Ltd** (158/15) (2016)ZASCA 107 where the Court was of the opinion that parties should first rely on the provisions proved in statute where it is found that a similar overall provision is in the Constitution. That the Supreme Court of South Africa observed as follows:-

> ***"The subsidiarity argument rests on the dictum in Mazibuko at para 72 referred above in which the residents of one of the poorer areas of Johannesburg challenged the constitutionality of the City of Johannesburg's decision to supply six kilolitres of free water per month to every account-holder in the city on the ground that the policy was in conflict with section 27(1)(b) of the Constitution, which provides that everyone has the right of access to sufficient water.***
>
> ***The Constitutional Court held that parties in seeking to enforce socio economic rights against the government should first rely on existing statutes or challenge those instruments as unreasonable.***
>
> ***The appeal was dismissed on that basis."***

15. That the Court further stated that:-

> ***"As indicated, in Mazibuko the Constitutional Court held that where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to a right, or alternatively challenge the legislation as being inconsistent with the Constitution. There are a number of statutes and regulations that regulate proper building practices."***

16. That the provision of Employment Act and Employment and Labour Relations Court Act were enacted to give effect to a provision of the Constitution and that those provisions read together with Article 159(2) and the circumstances of this case confirm that this dispute should be disposed of by way of arbitration.

17. It is also submitted that the Arbitration Clause in the Employment Agreement is not defeated by laches for the reason that section 6(1) does not state that the application in question, jurisdiction should be filed contemporaneously with Notice of Appearance. What the section requires is that the issue should be raised before a defence is filed. They cite the case of **ADRE Limited Vs Nation Media Group Limited (2017)Eklr** where the Court observed thus:-

> ***"It should be emphasized that the right to seek and obtain stay of proceedings under section 6(1) of the Arbitration Act is lost the moment a defence is filed in the proceedings. By dint of the defence, the party filing it subjects itself to jurisdiction of the Court and cannot thereafter resile that position."***

18. On the issue of the Arbitration clause being unenforceable under the contra proferentum rule in that it is in conflict with Clause 16 of the Employment Agreement it is submitted that Clause 16 in the Restrictive Covenant Agreement also made on 15th September, 2017 is a standalone agreement which is distinct from the Employment Agreement.

19. That the mere fact that the parties signed 2 agreements which regulate 2 different aspects of the Claimant's employment confirms that they were both alive to the fact that disputes over general terms of employment should be handled by way of arbitration process while involving restraint of trade in post-employment to be handled by the Courts. They urge the Court to allow the application as drawn.

Claimant/Respondent's submissions

20. The Claimant submits that Section 6(1) of the Arbitration Act does not provide for striking out of a suit on an application for reference to Arbitration and as such the Application should fail. On the issue of laches it is submitted that the Respondent/Applicant did not file the Application to refer to arbitration contemporaneously with the Memorandum of appearance. They cite the case of **Charles Njogu Lofty v Bedouin Enterprises Ltd [2005J eKLR** where their Lordships, upheld the dictum of Justice Githinji in the Court below, who had rendered himself thus:-

> ***"In my view, Section 6(1) of the Arbitration Act, 1995, which court is construing means that any application for stay of proceedings cannot be made after the applicant has entered appearance or after the applicant has filed pleadings or after the applicant has taken any other step in the proceedings, so the latest permissible time for making an application for stay of proceedings is the time that the applicant enters appearance. It seems that the object of section 6(1) of the Arbitration Act, 1995, was, inter alia, to ensure that applications for stay of proceedings are made at the earliest stage of the proceedings."***

21. The Claimant also submits that the contract is unenforceable for being ambiguous and self-contradicting. That paragraph 11 provides for arbitration and paragraph 13 provides for enforcement of rights in a court of law. That this parts should be severed off the contract for being contradictory.

22. That the spirit of the Employment Act is that all parties should be able to access justice even where alternative dispute resolution mechanisms exist. That to allow the orders sought would be to deny the Claimant access to the Court on the basis of alternative dispute resolution. The Respondent/Claimant prays for the Application to be dismissed with costs.

23. I have examined the submissions of the parties and the averments made herein. It is true that by an agreement between the parties dated 15/9/2017 and signed by the Claimant/Respondent on 17/09/2017, Clause 11 stated as follows:-

> "***The parties agree that any claim, controversy or dispute that may arise directly or indirectly in connection with the Employee's employment or the termination of the Employee's employment, and involving the Company and/or any employee(s), director(s), officer(s), or agent(s) of it, whether arising in contract, statute, tort, fraud, misrepresentation, discrimination, common law or any other legal theory, including but not limited to disputes relating to the making, performance or interpretation of this Agreement, as well as and claims or other disputes arising under the labor and/or employment laws of the Republic of Kenya, shall be arbitrated. If, however, any party woidd otherwise be legally required to exhaust administrative remedies to obtain legal relief that party can and must exhaust such administrative remedies prior to pursuing arbitration. The only claim between the parties that are not subject to arbitration are claims specifically exempted from arbitration by the laws of the Republic of Kenya or this or any subsequent agreement between the Employee and the Company, including but not limited to those claims referenced in Section 13 above. By signing this Agreement, the Employee voluntarily, knowingly and intelligently waves any right the Employee may otherwise have to seek remedies with a court or other forums including the right to a jury trial. The laws of the Republic of Kenya shall govern the arbitrability of all claims."***

24. By virtue of the above claim the parties indeed agreed to refer any claim they may have to Arbitration.

25. The Claimant/Respondent filed this claim on 11/6/2018 and the Respondents entered appearance on 12/7/2018 and thereafter filed the current application seeing to have the claim struck out.

26. Section 6(1) of the Arbitration Act reads 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 that party enters appearance or otherwise acknowledges the claim (emphasis is mine) 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 L agreed to be referred to arbitration. "***

27. In interpreting this section, the Court of Appeal in Civil Appeal No. 253/2003 Charles Njogu Lofty v Bedouin Enterprises Ltd [2005] eKLR upheld the dictum of Justice Githinji (as he then was) and rendered themselves thus:-

> ***"In my view, section 6(1) of the Arbitration Act, 1995, which court is construing means that any application for stay of proceedings*** **cannot be made after the applicant has entered appearance** ***or after the applicant has filed pleadings or after the Applicant has taken any other step in the proceedings,*** **so the latest permissible time for making an application for stay of proceedings is the time that the Applicant enters appearance. It** ***seems that the object of section 6(1) of the Arbitration Act, 1995, was, inter alia, to ensure that applications for stay of proceedings are made at the earliest stage of the proceedings. "***

28. To make assurance to this position, the Court of Appeal further stated as follows:-

> **"Section** ***6(1) of the Arbitration Act, Cap 49 (now repealed) allowed applications for stay of proceedings to be made at any time after the applicant has entered appearance.***
>
> **Section 6(1) of the Arbitration Act, 1995, has changed the law as it does not permit an application for stay of proceedings to be made after entering an appearance.** ***That is the only aspect of the law that has been changed"***

29. From the above position, my understanding is that the Application can only preserve that right to subject the Respondent to an arbitral process by not entering appearance in any claim filed by such Respondent and by filling an application to strike out any claim so filed. Where an Applicant proceeded to enter appearance, they agree to be subject to the Court's jurisdiction and the only remedy they have is a stay of proceedings pending the hearing and determination of the arbitral process.

30. In the circumstances, it is my position that the application to strike out this claim is not merited. I dismiss this application accordingly and in line with Section 6 of the Arbitration Act, I refer the parties to Arbitration. In the meantime, proceedings in this claim will stay pending the outcome of the arbitral process.

Dated and delivered in open Court this 18th day of February, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Okeyo holding brief Obura for Respondent – Present

Claimant/Applicant – Absent