



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 132 OF 2019

IN THE MATTER OF ARTICLES 22, 23, 162 AND 165 OF THE CONSTITUTION

AND

IN THE MATTER OF THE CONTRAVENTION AND VIOLATION

OF ARTICLES 27 AND 28 OF THE CONSTITUTION

BETWEEN

MIRIAM NZILANI MWEU.....PETITIONER

VERSUS

KIPTINNESS & ODHIAMBO ASSOCIATES.....RESPONDENT

RULING

1. Miriam Nzilani Mweu (applicant) is an advocate of the High Court of Kenya. She was admitted as a Partner with Kiptinness & Odhiambo Associates (Respondent) on 1 January 2018 after serving as an Associate for about 3 years.
2. Around 28 September 2018, the applicant gave notice of resignation from the partnership and also served the Respondent with computation of commissions/income distribution due to her in terms of the partnership agreement.
3. The Respondent did not make any formal response and on 24 June 2019, the applicant issued a demand for Kshs 1,872,995/- being accrued commissions.
4. The applicant followed up on the demand by filing a Petition alleging violation of her constitutional rights (including discrimination).
5. Together with the Petition, the applicant filed a motion seeking orders

1. ...

2. **THAT** pending the hearing and determination of this Petition, this Honourable Court be pleased to issue a mandatory order in the nature of an injunction directing the Respondent to pay the Petitioner within seven (7) days of issuance of the order the sum of:

a) KES 1,126,461 being the amount accrued between January 2018 and December 2018 from 1st January 2019 with interest at court rates until payment in full.

b) KES 710,534.48 being the amount accrued from January 2018 and March 2019 from 1st April 2019 with interest at court rates until payment in full.

3. **THAT** the Petitioner be granted leave to file further affidavits from witnesses in support of the Petition and further that the Petitioner be granted leave to call witnesses to give viva voce evidence at the hearing hereof.

4. **THAT** this Petition be heard on priority basis.

5. **THAT** costs of this application be provided for.
6. On 18 July 2019, the Court directed the applicant to serve the application for *inter partes* hearing.
7. Upon service, the Respondent, instead of filing grounds of opposition and/or replying affidavit, filed a *Summons* seeking orders
 - a) THAT the Honourable Court be pleased to grant a stay of execution of all proceedings herein pending arbitration.
 - b) THAT the Honourable Court be pleased to refer the dispute between the parties to arbitration.
 - c) THAT the applicant be at liberty to apply for further or other orders and/or directions as this Honourable Court may deem fit and just to grant in the circumstances.
 - d) THAT the costs of this application be in the cause.
8. When the Respondent's application came up for hearing on 30 July 2019, the Court directed the applicant to file and serve her responses to the application for stay before 19 September 2019.
9. Confronted with 2 applications, the Court directed that the Respondent's application be deemed as part of its opposition to the applicant's motion and that parties exchange written submissions.
10. The applicant filed her submissions on 26 September 2019 while the Respondent filed its submissions on 2 October 2019.
11. The Court has considered all the material (evidential and submissions) placed before it.
12. It is not in dispute that the parties herein were in a contractual relationship. It is further not denied that clause 9 of the agreement provided for arbitration.
13. The applicant, in her resignation notice, alerted the Respondent as to what she felt were her outstanding commissions/dues.
14. The Respondent in response did indicate that (an audit would be concluded by end of June 2019) and still indicates in the submissions that its auditors were looking at its financial records to determine how much was owing to the applicant.
15. For unexplained reasons, there was no disclosure from the Respondent what became of the audit and/or whether the computations by the applicant were erroneous.
16. However, for present purposes, the Respondent has not placed anything before the Court to demonstrate that it did not or does not agree with the computations by the applicant.
17. The Respondent has not in any formal way disputed the computations by the applicant.
18. In the circumstances, it is the view of the Court that a formal dispute worth referring to arbitration has not crystallised.
19. Such a dispute would only arise upon the Respondent indicating to the applicant that her computations were wrong and/or disclosing its own computations.
20. The Court, therefore, agrees with the applicant that based on case law (see *Addock Ingram East Africa v Surgilinks Ltd* (2012) eKLR; *UAP Provincial Insurance Company Ltd v Michael John Beckett* (2013) eKLR and *Nanchang Foreign Engineering Company (K) Ltd v Easy Properties Kenya Ltd* (2014) eKLR, it would serve no purpose to stay these proceedings and refer a dispute to arbitration. Such a course would only serve to delay these proceedings and arm-twist the applicant.
21. In effect, the Court is of the view that the Respondent's application/grounds of opposition lack merit.
22. Apart from raising contractual entitlements, the applicant has raised grave allegations on violations of (her) constitutionally protected human rights.
23. It is legally doubtful if an arbitrator would have jurisdiction over such allegations (including sexual harassment and discrimination), even if the same arose within a contractual relationship.
24. The Court finds that the contractual breaches alleged by the applicant, and the purported violations of the Bill of Rights are so intertwined that it would save judicial time if the Petition were determined once and for all.
25. In lieu of allowing the applicant's motion, the Court directs
 - (i) The Respondent to file and serve its answer to the Petition on or before 8 November 2019.

(ii) The Applicant to file and serve any further affidavits in response to the Respondent's answer to Petition together with submissions on the Petition setting out clearly her *Proposed Issues* for determination on or before 22 November 2019.

(iii) The Respondent to file and serve its submissions setting out clearly its *Proposed Issues* for determination on or before 6 December 2019.

(iv) Submissions to be highlighted on a date to be agreed to hereinafter.

26. Costs in the cause.

Delivered, dated and signed in Nairobi on this 23rd day of October 2019.

Radido Stephen

Judge

Appearances

For applicant Mr Muchemi instructed by Muchemi & Co. Advocates

For Respondent Mr Oduol instructed by Kiptinness & Odhiambo Associates

Court Assistant Lindsey