



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2420 OF 2016

(BEFORE HON. JUSTICE HELLEN S. WASILWA ON 29TH JUNE, 2017)

DR. JOHN MOTURI OMITI..... CLAIMANT

-VERSUS-

KENYA INSTITUTE FOR PUBLIC POLICY RESEARCH AND ANALYSIS.....RESPONDENT

RULING

1. The Respondents herein have raised a Preliminary Objection dated 29.12.2016 in the following terms:

1. "That the proceedings instituted herein is fatally and incurably defective and the same is for striking out in limine for having been instituted in violation of the Arbitration Act variously at Section 33(2) & (3) as read with Section 6 thereof.

2. That the proceedings are in violation of Article 14 of the CIArb Arbitration Rules 2015".

2. It is the Respondents contention that in the contract of service between the Claimant and Respondent had an Arbitration agreement and when the dispute arose, the issue was referred to arbitration. The parties proceeded for arbitration which process is still ongoing.

3. The Respondents therefore want these proceedings be struck out in reliance to Section 33 of Arbitration Act. They also relied on the Chartered Institute of Arbitration Rules 2015 which detail how arbitration proceedings can be terminated.

4. They contend that Article 14 and Rule 6 of the said Act only apply where a party moves the Court for Interim Protective Orders and this is not what the Claimant has done.

5. The Claimants opposed the Preliminary Objection indicating that the arbitration process was withdrawn by them as indicated at paragraph 5 of their claim. They indicate that they withdrew the process and instructed the Arbitrator of the withdrawal after considerable delay in proceeding with the same.

6. It is their contention that this Court is established under Article 162(2)(b) of the Constitution to hear and determine labour disputes and the same jurisdiction is given at Section 12 of Employment and Labour Relations Act. It is therefore their submission that what is given by the Constitution and Legislation cannot.

7. They also cited various authorities Joseph Aoko vs. Civicon Limited Court of Appeal CA No.48/2012, page 18, Rob D Jong vs. Charles Wachira page 10 Walid Khalid vs. County Assembly of Mombasa (page 8 to 10), Francis Mutunga (page 2 to 4) etc.

8. They contend that they have opted to come to Court to avoid tactics being practiced by the Respondent by trying to delay the arbitration process.

9. It is their further submission that in the case of Jane Muthoni Mukuna case 668A of 2014 Nairobi Employment & Labour Relations Court the Court held that despite the existence of the Arbitration Act, the jurisdiction of this Court cannot be ousted.

10. In Manyonyi vs. African Medical & Research Foundation also referred to ADR, the Court found that there was a deliberate intention by Legislature not to refer labour cases for arbitration as this Court has original and appellate jurisdiction. That in Employment & Labour Relations Court in Mombasa Okwara vs. County Government of Mombasa; the same finding was also made.

11. The Claimants have also submitted that the Arbitration Act having been promulgated before the Constitution has no reference to this case and the Claimant cannot be denied a right to access justice in this Court. They sought to rely on CA 253/2003 Charles Njogu Lofty vs Bedouin Enterprises Limited and Kanti & Company Limited vs South British Insurance Company Limited (CA 39/1980).

12. In reply to the submissions of the Claimant, the Respondent sought to distinguish the authorities in question stating that in the Kanti & Company case and in case of Charles Njogu, the Court of Appeal was considering a Preliminary Objection brought under Section 6 of the Arbitration Act. They submit that the jurisdiction of Employment & Labour Relations Court can only be invited where there is no arbitration agreement and where arbitration is not ongoing.

13. I have considered submissions of the parties in relation to this Preliminary Objection. The Claimant herein was issued with a contract of appointment dated 25th February 2013. Clause 26 of this contract stated as follows:

“the parties shall attempt in good faith to negotiate a settlement to any claim or dispute between them arising out of or in connection with this contract.

Any dispute, difference of opinion in question which may arise at any time between the parties touching upon the construction of this agreement on the rights and liabilities of the parties with respect thereto shall be referred to the decision of a single Arbitrator to be agreed upon between the parties.

However, in event of disagreement on who should be the Arbitrator, the Chairman for the time being of the Kenya Branch of the Chartered Institute of Arbitrators should determine the Arbitrator within thirty (30) days.

Such arbitration shall be conducted in Nairobi, Kenya in accordance with and subject to the provisions of the Arbitration Act of 1995 on any statutory modification or re-enactment thereof for the time being in force. The decision of the Arbitrator shall be final and binding on both parties.

The fees and expenses of the Arbitrator shall be borne by the parties in equal shares”.

14. The Claimant was terminated by the Respondent on 13.11.2015. On 12.1.2016, the Claimant wrote to Respondent requesting that Mr. John Ohaga be appointed an Arbitrator as per the contract.

15. The Respondent failed to communicate with him. The Claimant wrote another letter dated 9.2.2016 through his advocate addressed to the Chairman CI Arbitrators asking him to appoint an Arbitrator to the

dispute within 30 days vide a letter of 10th March 2016 one Mr. Protas Saende Gathege as the sole Arbitrator in relation to this dispute.

16. It is not clear whether the appointed Arbitrator proceeded with his arbitration but or on 7th November 2016, the Claimant's Counsel wrote to the Arbitrator withdrawing from the process citing delay and the inability of the Arbitrator to restart the process. The Claimant thereafter filed this case on 24.11.2016.

17. Section 6 of Arbitration Act states as follows:

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 on 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".

18. The above procedure deals with stay of arbitration proceedings.

19. However, from the submissions made by the Claimant, the Claimant made a presentation to a particular Arbitrator appointed and the Respondent failed to respond. The Chairman of CI Arbitrators appointed another Arbitrator who also failed to move the process forward hence this case.

20. The question then is whether the arbitration process collapsed or is in force. Of course this process didn't take off and Section 15 of the Act provides the manner of terminating an arbitration process and provide as follows:

"Failure or impossibility to act:

1. The mandate of an arbitrator shall terminate if:

a. He is unable to perform the function of his office or for any other reason fails to conduct the proceedings properly and with reasonable dispatch or

b. He withdraws from his office or

c. The parties agree in writing to the termination of the mandate.

2. If there is any dispute concerning any of the grounds referred in subsection (1) (a), party may apply to the High Court to decide on the termination of the mandate.

3. A decision of the High Court under subsection (2) shall be final and shall not be subject to appeal".

21. Indeed the mandate of the arbitrator in this case determined when he failed to act with reasonable dispatch.

22. Section 16 of the Act however provides what should proceed if the mandate of the Arbitrator terminates and the position is that a substitute Arbitrator shall be appointed in accordance with the procedure that was applicable to the appointment of the Arbitrator being replaced.

23. It is however unfortunate that the Claimant did not pursue the issue of replacement of an Arbitrator but instead chose to file this case.

24. Case Law however submitted before me point to the fact that the Arbitration Act does not halt the other ADR processes provided for under the Employment & Labour Relation Court Act as this Court has both original and appellate jurisdiction as provided for under Article 162(2) of the Constitution.

25. The Employment & Labour Relations Court (ELRC) draws its mandate from Article 162(2) of the Constitution and Section 12 of Employment & Labour Reactions Act which gives the Court exclusive original and appellate jurisdiction to hear and determined disputes relating to labour and employment.

26. This provision cannot be overridden by statute. The Court has a duty to ensure expedite disposal of labour disputes and is evident that the arbitration process has already been delayed thus defeating the very essence of arbitration which is mitigation of costs, time and speed.

27. In order to avoid any more delay, I will refer this case back to arbitration but will now give strict time lines which must be followed in order to allow Court to proceed with this case if no solution is forthcoming.

Read in open Court this **29th day of June, 2017.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Bonyo holding brief for Obura for Claimant – Present

Mis Nyanchoka holding brief for Akhuha for Respondent