**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 626 OF 2013**

**JAMES HEATHER HAYES……CLAIMANT**

**VERSUS**

**AFRICAN MEDICAL AND RESEARCH FOUNDATION……....RESPONDENT**

**AND**

**IN THE MATTER OF AN APPLICATION TO SET ASIDE THE INTERIM ARBITRAL AWARD ON JURISDICTION**

**BETWEEN**

**JAMES HEATHER HAYES……..……CLAIMANT**

**VERSUS**

**AFRICAN MEDICAL AND RESEARCH FOUNDATION……....RESPONDENT**

**RULING**

1. By a motion dated 19th October, 2015 the respondent sought the following orders from the court:

    1. **THAT** this Honourable Court be pleased to set aside the Interim Award herein delivered on 20th July, 2015.

    2. **THAT** the costs of this application be provided for.

2. The application was based on the grounds that:

    (i) Respondent instituted the suit herein on 9th May, 2013 in which he sought *inter alia* damages for unfair termination of his employment with the Applicant.

    (ii) Vide a ruling dated 18th June, 2014, this Honourable Court referred the employment dispute between the parties to Arbitration pursuant to the Arbitration Clause contained in the service agreement between the parties.

    (iii) Pursuant to the Court's ruling the parties appointed Mr. Allen Waiyaki Gichuhi to arbitrate the

dispute between them.

*(iv)* The Respondent herein however contested the Arbitral tribunal's (hereinafter *"tribunal")* jurisdiction to determine the dispute on the ground *inter alia* that the reliefs that he sought in the Arbitration which were under the Employment Act be reserved for hearing before the Employment and Labour Relation Court in **Cause No. 626 of 2013** and could not be a proper subject of the arbitral proceedings.

*(v)* Tribunal delivered its award on jurisdiction on 20th July, 2015, in which it allowed the Respondent's application.

*(vi)* The interim award went beyond the scope of the reference to arbitration as the Court had already made a decision on the Tribunal's jurisdiction to determine the dispute.

(vii) The interim award is contrary to justice as it has the effect of altering, varying and amending the order that had already been made by the court. The Law provides that a Court's decision can only be challenged upon review or appeal.

(viii) The contradiction in the award has created uncertainty by directing the Court to determine the dispute when the Court had already held that it did not have jurisdiction to do so.

(ix) The interim award is inconsistent to Article 159 of the Kenyan Constitution which recognizes and encourages the promotion of alternative dispute resolution mechanisms including Arbitration.

3. Mrs. Wetende for the applicant submitted in the main that the arbitration was commenced by the parties pursuant to paragraph 21 of the Service Agreement. This was therefore a contractual arbitration governed by the Arbitration Act, 1995. Concerning the issue of filing outside statutory thirty days period, Counsel submitted that under section 35 of the Arbitration Act, the timeline for filing the application is within three months of receiving the award and not 30 days as alleged by the respondent. Regarding the inapplicability of the Arbitration Act, Mrs Wetende submitted that although section 75 of the Labour Relations Act provides that Arbitration Act shall not apply to any proceedings before the Industrial Court, the present proceedings have not been brought under the Labour Relations Act but pursuant to the agreement between the parties, hence the Arbitration Act applies. Concerning the jurisdiction of the court to set aside an arbitral award, counsel relied on the case of **Cape Holdings Limited –vs- Synergy Industrial Limited [2016] eKLR** where the court held that section 35 of the Arbitration Act grants it jurisdiction to set aside an arbitral award.

4. According to Counsel, the Arbitrator exceeded his mandate yet his jurisdiction as was held in the case of **Kenya Tea Development Agency Ltd. & 7 Others –vs- Savings Tea Brokers Ltd. [2015] eKLR**, was tethered by the arbitration agreement, reference and the law.

5. Mrs Wetende further contended that the Court in its ruling delivered on 18th June, 2014 up held the validity of the arbitration clause and referred the matter to arbitration in terms of clause 21 of the Service Agreement.

In purporting to refer the matter back to the Court for adjudication, the Tribunal in effect altered, varied and or amended the order of the Court and it was trite law that arbitral tribunals do not have jurisdiction to vary or amend court orders. The interim award according to counsel, is manifestly in conflict with and contradicts the court orders yet such order had not been varied or set aside and there was indeed a pending appeal by the respondent. The interim award according to Mrs Watende, flies in the face of article 159 of the Constitution of Kenya which recognizes and places premium on alternative forms of dispute resolution including arbitration.

6. Dr. Kiplagat for the respondent on his part submitted that the application was brought out of time since section 58 (4) of the Labour Relations Act provided that an application to review an award was to be made to the Court within thirty days of the award. According to Counsel the arbitral award was made on

20th July, 2015 and the instant application filed on 19th October, 2015, a clear 90 days after the award was rendered. The applicant had not explained the delay hence the application should be struck out.

7. Concerning the application of Arbitration Act, Counsel submitted that section 75 of the Labour Relations Act expressly excluded the application of the Arbitration Act to any proceeding before the court. According to Dr. Kiplagat, this was a positive bar hence the present application having been brought under section 35 of the Arbitration Act is fatally defective and is for striking out.

8. Counsel further submitted that Labour Relations Act had its own elaborate procedure and that the Arbitration Act was a technical instrument specifically crafted for application to commercial contracts. It was a legislation that was not suitable for application to the unique circumstances of an employment dispute.

9. Regarding the contested clause 21 of the contract of employment, Counsel submitted that the literal and plain meaning or interpretation of the clause clearly meant that any dispute relating to matters referred to by the said clause could only be referred to arbitration under the provisions of Labour Relations Act, or any statutory modification for the time being in force. According to Counsel it was obvious that the arbitration clause could only be activated and operationalized under the provisions of the Labour Relation Act, 2007 or any statutory modification for the time being in force. The arbitrator therefore correctly found that he was bound by this interpretation.

10. The jurisdiction of the court to review an arbitral award on matters within the court's specialized mandate whether made under the Arbitration Act or Labour Relations Act has not been contested. The court is therefore properly seized of the application.

11. Justice Marete in his ruling made on 18th June, 2014 stated in the penultimate paragraph of the ruling as follows:

> "***It is not the duty of this court to redraw agreements by parties. The Court can only come in to facilitate an interpretation and implementation of these contracts and no more. I agree with the applicant/respondent that there is a subsisting contract that issues in dispute shall be referred to arbitration and I find as such."***

The ruling by my brother judge makes reference to ***"a subsisting contracts.".*** This is found under clause 21 of the Service Agreement, which provides as follows:

> "***Any dispute or difference arising between the parties as to construction or interpretation of this agreement of the rights, duties or obligations or any party on any matter arising out of or concerning the same or employee's employment which cannot be satisfactorily settled by reference to and discussion with Foundation's Board of Directors shall be referred to a singe arbitrator in accordance with the provisions of the Labour Relations Act, 2007 or any statutory modification for the time being in force."***

Whereas the ruling by my brother judge is still subject of a pending appeal to the Court of Appeal, it would seem the learned judge simply reasserted a provision in the Service Agreement which required the parties to submit any dispute they may have concerning the contract to a sole arbitrator in accordance with the provisions of the Labour Relations Act or any statutory modification for the time being in force.

12. The procedure for arbitration under Labour Relations Act is found under part VIII of the Act (*section 62-72)*.

13. Section 62(1) provides that a trade dispute may be reported to the Minister in the prescribed form and manner by or on behalf of a trade union, employer or employer's organization that is a party to the dispute and by the authorized representative of an employer, employer's organization or trade union on whose behalf the trade dispute is reported. This part of the Labour Relations Act concerns itself with trade disputes, persons who can report a trade dispute and mechanisms for handling them.

14. Section 2 of the Labour Relations Act define a trade dispute as:-

> "……..***A dispute or difference, or an apprehended dispute or difference between employers and employees, between employers and trade unions, or between an employer's organization and employees or trade unions, concerning any employment matter and includes disputes regarding the dismissal, suspension or redundancy of employees allocation of work or the recognition of a trade union."***

15. The above definition of a trade dispute read together with the provisions of section 62 of the Act yields an interpretation that the dispute resolutions mechanisms contemplated under the Labour Relations Act may only be invoked by trade unions or employer's organisations either acting alone or through their authorized representatives. The provisions of the Act do not seem to contemplate individuals invoking the dispute resolution mechanisms provided under it.

16. What this implies with regard to the matter before me is that whereas clause 21 purported to make reference to arbitration by a single arbitrator in accordance with the Labour Relations Act, 2007 or any other statutory modification for the time being in force, such reference is tantamount to a contractual red herring or a placebo of sorts.

17. Whilst the court is alive to the fact that the decision of Marete J. is still pending before the court of Appeal, it is of the view that clause 21 of the Service Agreement is flawed and did not effectively refer to arbitration, dispute between the parties to the agreement. It is in essence a null-clause.

18. Lady Justice Ndolo in the case of ***Stephen Nyamweya & Anorther –vs- Riley Services Ltd. – Cause No. 2469 of 2012*** observed as follows:

> "…***the law does however provide for elaborate conciliation process in employment matters. In this case, the respondent opted to include its own unique mechanism for dispute resolution. Unfortunately by some strange coincidence the dispute resolution clause as drawn is incapable of implementation owing to certain absurdities contained therein."***

19. I cannot agree more with regard to the matter before me that clause 21 of the Service Agreement contained absurdities.

20. In conclusion, the Court will uphold the interim award of the arbitrator sought to be reviewed in this application but directs that this suit shall remain stayed pending the outcome of the appeal against the Ruling by Justice Marete delivered on 18th June, 2014.

21. Costs shall be in the cause.

22. It is so ordered.

**Dated at Nairobi this 23rd day of June 2017**

**Abuodha J. N.**

**Judge**

**Delivered at Nairobi this 23rd day of June 2017**

**In the presence of:-**

……..…… for the Claimant

…….……..…….. for the Respondent

**Abuodha J. N.**

**Judge**