



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF
KENYA AT NAIROBI
CAUSE NUMBER 626 OF 2013

JAMES HEATHER - HAYES.....CLAIMANT

VERSUS

AFRICAN MEDICAL RESEARCH FOUNDATION (AMREF)....RESPONDENT

RULING

1. By a Notice of preliminary objection filed on 1st December, 2017 the respondent objected to the hearing of this suit on the grounds that the order of Honourable Justice Marete made on 18th June, 2014 referring this dispute to arbitration was valid and in force. Further, that there was no pending appeal in respect of the said ruling and the same was binding on the court. In the circumstances, the court had no jurisdiction to hear and determine the issues in dispute.
2. When the matter came before me Mrs Wetende for the respondent in essence elaborated on these grounds stating that the withdrawal of the appeal did not set aside Justice Maretes' decision referring the suit to arbitration. According to Mrs Wetende, the contract provides that disputes be referred to arbitration.
3. Dr Kiplang'at on his part submitted that the matters contained in the preliminary objection were the same matters raised in reference to the court seeking the setting aside of the arbitral award. According to counsel Mrs Wetende was seeking to reargue the matter afresh. He further submitted that Judge Maretes' order was spent.
4. When Judge Marete delivered his ruling, upholding the arbitration clause and referring the dispute herein to arbitration the claimant had two options first to appeal against the judge's order or abide by it and submit to the arbitrator. The claimant filed a notice of intention to appeal but never proceeded to file the substantive appeal. In the meantime the parties herein submitted to the jurisdiction of the arbitrator unfortunately, the arbitrator for reasons contained in his short ruling declined jurisdiction for the main reason that he had jurisdiction only over arbitrations anchored in the Arbitration Act and not the Labour Relations Act as the parties purport to have agreed.
5. The decision of the arbitrator became subject of an application to set aside an interim award on jurisdiction. On 23rd June, 2017 after considering submissions by counsel for both parties, I upheld the arbitrator's award on jurisdiction and declared that the clause purporting to refer the dispute herein to arbitration in accordance with the provisions of the Labour Relations Act was a nullity since the parties and procedures contained in the Labour Relations Act did not contemplate arbitration by an arbitrator appointed by the Arbitration Act.

6. The issue before me then was a referral to set aside an interim arbitral award on jurisdiction. Whereas the ruling reached by myself might appear to conflict with the earlier ruling of Justice Marete, the learned Judge's ruling was not the subject matter before me. I do not have jurisdiction to sit on appeal on a decision of a Judge of concurrent jurisdiction but I do have jurisdiction to review and set aside an arbitral award as was presented to me by the respondent.

7. The Employment and Labour Relations Court is one with judges spread across the country. Therefore, in exercise of judicial authority the court is enjoined by article 159 of the constitution to among other things ensure that justice is administered without undue regard to procedural technicality and that justice is not delayed.

8. Under rule 33 of the rules of this court, the court has power to review its own decision for reasons among others; an error of law on the face of the record or for any other sufficient reason. Procedurally a review should be done by the judge who delivered the ruling or judgement or order. However, where such Judge has since left the station where such judgement, order or ruling was delivered or has been removed from service or unfortunately died, and apart from death or removal, procuring such Judge would occasion unnecessary costs and delay of the constitution it would be in keeping with the provisions of article 159 for any Judge available and of concurrent jurisdiction to review such judgement, ruling or order.

9. The ruling by my brother Judge has not been appealed against but has been rejected by the arbitrator on account of jurisdiction. I have upheld the arbitrator's interim award on jurisdiction. This procedurally creates an apparent conflict between myself and Judge Marete. Therefore in order to unlock this unnecessary conflict the only order that commends itself to me is to dismiss the preliminary objection herein and regard my ruling delivered on 23rd June, 2017 as the correct position regarding way forward in this matter.

10. I must however complain that this unfortunate situation could not have arisen had the parties informed the arbitrator that my brother Judge's ruling was subject of an intended appeal and pursued the appeal to conclusion.

11. It is so ordered.

Dated at Nairobi this 8th day of December, 2017

Abuodha J. N.

Judge

Delivered this 8th day of December, 2017

Abuodha J. N.

Judge

In the presence of:-

..... for the Claimant

..... for the Respondent