REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NO. 688'A' OF 2014

(Before Hon. Justice Maureen Onyango on 13.3.2015)

JANE MUTHONI MUKUNA .... CLAIMANT

-VERSUS-

FSI CAPITAL LIMITED .... RESPONDENT

R U L I N G

The claim herein was filed by the claimant Jane Muthoni Mukuna against the respondent FSI Capital Limited on 24th April 2014 by Memorandum of Claim of the same date alleging unfair termination of her employment. She is seeking the following reliefs:-

a. **Kshs 440,000/=, being two month's salary in lieu of notice;**

b. **Kshs 100,000/= being outstanding and/or withheld salary for November 2013;**

c. **Kshs 198,000/= being salary in lieu of leave says not taken in 2013;**

d. **Interest on (a)(b) and (c) above at commercial rates from 1st December 2013 until payment in full;**

e. **Kshs 2,640,000/= being twelve months' salary as compensation for wrongful termination;**

f. **An order compelling the respondent to deliver the original registration certificate for motor vehicle registration number KBK 707K to the claimant and execute all and any documents necessary to effect the transfer and/or registration of motor vehicle registration number KBT 707K in the claimant's sole name within fourteen (14) days;**

g. **In default of (f) above, the claimant be empowered to solely execute on her own behalf and on behalf of the respondent, all and any documents necessary to effect the transfer and/or registration of motor vehicle registration number KBT 707K in the claimant's sole name and the registrar of motor vehicles be at liberty to issue the claimant with a new registration certificate reflecting the claimant as the sole registered owner of motor vehicle registration number KBT 707K and dispense with the production of the original registration certificate currently in the possession of the respondent;**

h. **General damages;**

i. **Costs;**

j. **Interest;**

k. **Any further and other relief that this honourable court may deem fit to grant.**

The respondent filed a Memorandum of Appearance on 13th May 2014. On 12th June 2014 the respondent filed a Notice of Motion dated 5th June 2014. The motion is made under Section 6 of Arbitration Act Cap 49 of the Laws of Kenya,

Section 15 of the Industrial Court Act, Article 159 of the Constitution and all other enabling Laws. The respondent seeks the following orders:-

1. **That this honourable court do stay all further proceedings in and/or arising from the main claim herein.**

2. **That all the disputes and issues in the suit herein and the application be referred to Arbitration in terms of Clause 17 of the employment agreement between the parties herein entered on or about 8/12/2008.**

The application is premised on the following grounds:-

1. **The applicant, FSI Capital Limited and the respondent entered into an employment agreement on or about 8/12/2008 where the latter was employed by the applicant as an accountant.**

2. **The dispute as articulated by the claimant in the Memorandum of Claim herein stems from a purported breach of the terms and conditions of the Employment Agreement.**

3. **Among the various clauses contained in the Employment Agreement is an Arbitration Clause/Clause 17.**

The application is supported by the affidavit of EZRA KIBE sworn on 5th June 2014. In the affidavit he depones that he is the General Manager of the respondent which is a financial institution carrying out business of providing structured

financing to individuals and companies in Kenya. He further depones that:-

a. **The applicant and the claimant entered into an employment Contract whereby the applicant herein employed the claimant as an Accountant.**

b. **The claimant worked for the applicant up to on or about the 26th November 2013 when she went on leave. The claimant never returned to work after the lapse of her leave period.**

c. **The applicant also discovered that while still under its employment, the claimant had opened a parallel money lending company by the name Prominence Capital Limited. This was done in blatant violation of the Employment Contract.**

d. **The claimant was actually in blatant breach of the contract of employment.**

e. **Clause 11 and 12 of the Agreement provide *inter alia* that an employee should not divulge any information to any person or persons which he/she might receive or obtain in relation to the company's affairs. Further, that the employee shall not accept any other employment or engagement during the period of his/her service with the company.**

Mr. Kibe further depones that the claimant's employment contract provides that:-

"... Any dispute or differences arising between the parties hereto as to the construction or interpretation of this agreement or the rights, duties or obligations of any party hereunder or any other matter arising out of or concerning the same or the employee's employment hereunder which cannot be satisfactorily settled by reference to and discussion with the company's management shall be referred to a single arbitrator in accordance with the provisions of the Arbitration Act (Chapter 49) ..."

"That given my averments above I am advised by the applicant's advocates on record Messrs Gachugi Gichuki Advocates, advice which I verily believe to be true that pursuant to Article 159(2)(c) of the Constitution, Section 15 of the Industrial Court Rules and Section 6 of the Arbitration Act this Honourable Court is enjoined to stay the proceedings in and/or arising from the memorandum of claim and refer the parties to arbitration pursuant to Clause 17 of the agreement.

That in the circumstances I verily believe that it is only fair and just and in furtherance of the principle of freedom of contract that the effect of Clause 17 of the Agreement which is a Clause whose terms were agreed by the parties at the time the same was executed that the same be given full effect by this honourable court."

The claimant filed a replying affidavit on 9th July 2014 in which she states *inter alia* that:-

"... Section 12 of the Industrial Court Act confers on this Honourable Court exclusive jurisdiction to determine disputes and its decision to refer a dispute alternative dispute resolution is discretionary in nature taking into account all relevant circumstances of each case. Further, the Employment Act vests only the Industrial Court with the jurisdiction to hear matters relating to unfair termination and to order payment of damages thereof."

" **and that the respondent is not deserving of the exercise of this honourable court's discretion and the application ought to be dismissed for following reasons:-**

i. **Section 15 of the Industrial Court Act contemplates alternative dispute resolution mechanisms for ongoing disputes in an ongoing employment relationship. The employment relationship herein having terminated, there is no dispute to be referred to arbitration, the only outstanding issue being the my terminal dues;**

ii. **The application to refer the matter to arbitration has been filed way after the respondent had entered appearance contrary to Section 6(1) of the Arbitration Act;**

iii. **The respondent prepared the application on 5th June 2014, filed it on 12th June 2014 and served it on 26th June 2014. I verily believe that these are pointers to calculated steps to delay the final disposal of this matter;**

iv. **The respondent's conduct, particularly of retaining my dues and motor vehicle Logbook since December 2013 are inequitable and not deserving of the exercise of this honourable court's discretion."**

When the application came up for hearing on 14th July 2014 parties were allowed to dispose of the application by way of written submissions. The respondent filed its submissions on 23rd September 2014 while the claimant filed on 2nd October 2014.

In the submissions the respondent submitted that pursuant to Section 6 of the Arbitration Act and Article 159(2) of the Constitution, where the court finds that parties have entered into a valid and enforceable arbitration agreement and the issues in dispute were of the kind contemplated under the arbitration agreement/clause, the court is obliged as a matter of law to refer the parties to arbitration.

The respondent relied on the case of **Nectel (K) Limited V Eastern & Southern African Trade and Development Bank [2008]** eKLR in which **Kimaru J** stated as follows:-

"The court is mandated to grant an order staying proceedings if it is established that there is an agreement that provides for the settlement of the dispute by arbitration. This court is required to consider whether or not to stay proceedings and not make any other order concerning the arbitral process."

The respondent submitted that the application has been timeously filed, that there exists a valid arbitration agreement entered into between the respondent and the claimant and that there exists as between the parties the kind of dispute contemplated under the Arbitration Act.

The respondent relied on the case of **TM AM Construction Group V Attorney General** in which **Mbaluto J** as he then was stated as follows:-

"...what is the effect of the late filing of application for stay? The language of the relevant provision is very clear and allows no room for doubt. The application is to be made not later than the time when appearance is made or before taking any steps in the proceedings or before an applicant acknowledges the claim against him..."

The respondent further relied on the case of **Maru Piling & Geotechnical Contractors Ltd V Zakhem Construction** in which **Lesit J** decided that since the defendant had not filed any defence or taken any steps in the proceedings it had not waived its rights to arbitration.

The respondent further relied on the case of **Eunice Soko Mlagui V Suresh Parmar [2013]** eKLR in which **Kimaru J** stated as follows:-

"The essence of Section 6(1) of the Act is that the 1st and 2nd defendants ought to have filed an application for stay of proceedings at the time they were to file their memorandum of appearance and before taking any other step in the proceedings herein."

The respondent further relied on **Halsbury's laws of England, Volume 2, 4th Edition at page 345** which states that the applicant for either a discretionary or mandatory stay must prove existence of a written arbitration agreement. The respondent submitted that Clause 17 of the claimant's contract provides that:-

"any dispute, controversy or claim arising out of or in connection with this agreement, including any question regarding its existence, validity or termination shall be referred to and finally resolved by an arbitrator under the rules of the Arbitrator Act."

The respondent submitted that the claimant conceded the existence of the agreement and that the dispute between the claimant and respondent is the kind contemplated under the arbitration agreement. The respondent relied on **Justice Kimaru's** decision in the case of **Nectel (K) Limited V Eastern & Southern African Trade and Development Bank** (supra) where he stated:-

"Since the plaintiff conceded that there exists an arbitral clause in the loan agreement, and further, since the plaintiff is not opposed to the dispute being referred to arbitration, this court will grant the defendant's application for stay of proceedings pending resolution of the dispute by arbitration."

The respondent urged that this court reaches the same conclusion and refers this case to arbitration.

The claimant opposed the application. In her submissions filed through the firm of Kamotho Njomo & Company Advocates on 1st October 2014 the claimant states that:-

i. The application was filed late contrary to the mandatory provisions of Section 6(1) of the

Arbitration Act;

ii. There is no dispute to refer to arbitration as the employment relationship had been terminated and the only out outstanding issue is the claimant's terminal dues.

iii. The Industrial Court has exclusive jurisdiction in employment matters.

iv. The claimant is not interested in amicable settlement of the dispute as is clear from his conduct.

v. The cost of arbitration, particularly the arbitrator's fees is beyond the claimant's means.

The claimant referred on the case of **TM AM Construction Group (African) V Attorney General** in which the court stated that the application is to be made not later than the time of filing appearance and dismissed the application filed by the Attorney General 41 days after entering appearance. The same position was held in the case of **Petro Oil Kenya Limited V Kenya Pipeline Company Limited** in Mombasa HCC No. 16 of 2009 where the respondent filed the application under Section 6(1) of the Arbitration Act 11 days after filing appearance. In declining the application the court held that 11 days was too late.

The claimant submitted that in this case the respondent filed appearance on 13th May 2014 and waited a month before filing this application on 12th June 2014.

The claimant also referred to the case of **Charles Njogu Lofty V Bedouin Enterprises Limited** (Nairobi Civil Appeal No. 253 of 2003) where the court held that:-

"... the court would still be entitled to reject an application for stay of proceedings and referral thereof to arbitration if the application to do so is not made at the time of entering appearance ..."

The claimant further relied on the case of **TM AM Construction Group (African)** where the court stated as follows:-

"...the failure by the applicant to tender evidence showing that there is in fact any dispute between the parties means that no basis has been established to show that a dispute in fact exists to justify staying the proceedings and referring the parties to arbitration. Given that position, I agree with the submission by the learned counsel for the respondent that the Attorney General is using Section 6(1) of the Arbitration Act for purposes of delaying the respondent from recovering the money owed to it under the contract..."

The claimant further submitted that the Industrial Court has exclusive jurisdiction over employment matters under the Industrial Court Act and the Employment Act, that Section 15 of the Industrial Court Act contemplates referring ongoing disputes to alternative methods of resolution, that the employment relationship herein has been terminated so that there is no dispute to be referred to arbitration. That the only outstanding issue is payment of claimant's dues and release of her motor vehicle Logbook.

The claimant further submitted that the power to refer disputes to alternative dispute resolution is discretionary and is exercised by the court after considering all relevant factors. She invited the court to take judicial notice that arbitration is an expensive process fraught with delays and frustrations and is a process that is prejudicial to the claimant. She urged the court to reject the application in the interests of justice. The claimant urged the court to dismiss the application on grounds that it is devoid of merit.

In considering the application I will start by setting out the legal provisions under which the application has been brought.

Section 6 of Arbitration Act states:-

"(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.

Article 159**. "(1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.**

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(a) justice shall be done to all, irrespective of status;

(b) justice shall not be delayed;

(c) alternative forms of dispute resolution including

reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

(d) justice shall be administered without undue regard to procedural technicalities; and

(e) the purpose and principles of this Constitution shall be protected and promoted.

(3) Traditional dispute resolution mechanisms shall not be used in a way that—

(a) contravenes the Bill of Rights;

(b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or

(c) is inconsistent with this Constitution or any written law."

From the submissions of the parties, several issues arise; whether the application was timeously filed, whether there is a dispute to be referred to arbitration, jurisdiction of this court and whether it is in the interest of justice to grant the application.

Section 6(1) of Arbitration Act is clear on the time of filing. It states an application under the section must be filed **"not later than the time when that party enters appearance or files any pleadings, or takes any other step in the proceedings...**"

In this case appearance was filed on 13th May 2014. The application was filed on 12th June 2014, exactly one month after filing appearance. As held by the courts in the precedents cited by the parties which I have referred to herein above, this is sufficient reason to dismiss the respondent's application.

In the case of **Dr. Kennedy Amuhaya Wanyonyi V African Medical and Research Foundation [2014]** eKLR I had occasion to determine a similar application. I observed that Section 15 of the Industrial Court Act does not refer to arbitration as one of the forms of alternative dispute resolution

unlike Article 159 (2)(c) which expressly refers to arbitration. My conclusion in the case was that the Industrial Court Act excludes arbitration in employment cases.

The claimant also has another very valid arguments that the employment relationship having been terminated there was nothing to refer to arbitration. That the respondent, having had a dispute with the claimant, should have referred the dispute to arbitration before termination of contract. After its termination, and taking into account the fact that the claimant is not suing for reinstatement but for terminal dues, there is no contract to be referred to arbitration. The applicant did not make any submissions in respect of this argument by the claimant.

In the present case, I find that this application has no merit on grounds that the application does not comply with Section 6(1) of the Arbitration Act. It is also my opinion that reference of employment cases to arbitration is expensive and in many cases takes more time than reference of disputes to this court and that reference to arbitration therefore is against the very objectives of arbitration which is to save cost and time.

The application is consequently dismissed with no orders for costs.

Orders accordingly.

Dated and delivered in Nairobi this 13th day of March, 2015

MAUREEN ONYANGO

JUDGE

In the presence of:

….. for claimant(s)

…... for respondent(s)