REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT MOMBASA

CAUSE NUMBER 259 OF 2014

BETWEEN

PAUL CHEMUNDA NALYANYA ……..
CLAIMANT

VERSUS

I. MESSINA KENYA LIMITED…….
RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Mr. Alando Advocate instructed by Alando & Company Advocates for the Claimant

Mr. Makokha & Ms. Opolo Advocates instructed by the Federation of Kenya Employers, for the Respondent

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ISSUES IN DISPUTE:

1. UNFAIR AND UNLAWFUL TERMINATION

2. THE EFFECT OF ARBITRATION CLAUSE IN A CONTRACT OF EMPLOYMENT

AWARD

[Rule 27 [1] [a] of the Industrial Court [Procedure] Rules 2010]

1. The Claimant filed a Statement of Claim against the Respondent, his former Employer, on the 11th June 2014. He claims he was employed as the Finance Manager, on the 18th November 2009. He states he was forced to go on compulsory leave by the Respondent on the 30th April 2014 on the grounds of poor performance and misconduct. He last earned a gross monthly salary of Kshs. 625,000. His salary was stopped in the following month of May 2014. He considered his contract terminated unfairly and

unlawfully. He therefore presented this Claim, seeking a staggering total sum of Kshs. 145,000,000 [one hundred and forty five million] in damages for wrongful termination, anticipatory salaries up to the retirement age of 60 years, accrued annual leave and notice pay.

2. The Respondent filed its Statement of Response on the 4th July 2014. It is conceded the Claimant was employed by the Respondent on the stated date, earning the indicated gross monthly salary at the time of his exit. He was heard in the presence of his Advocate prior to his exit. He was availed the grounds upon which the Respondent intended to terminate his contract. He rushed into filing the Claim when Parties were still negotiating, and even before the termination decision had been made and communicated to him. The retirement age adopted by the Claimant was not part of his contact. He is not entitled to any of the items giving rise to the amount of Kshs. 145,000,000. The Respondent prays the Court for dismissal of the Claim.

3. The Parties agreed on the 29th June 2015, to dispose of the dispute through their Pleadings, Bundles of Documents and Submissions as provided for under Rule 21 of the Industrial Court [Procedure] Rules 2010.

The Court Finds:-

4. The Claimant's letter of appointment is dated 18th November 2009. It was signed by both Parties on the same date. By signing the letter, the Claimant accepted the terms and conditions of employment, and agreed to abide by them, whilst in the service of the Respondent.

5. Clause 17 of the letter of appointment states:

''Save as may be hereinbefore otherwise specifically provided, any disputes arising between the Parties hereto not mutually settled and agreed between them shall be referred to arbitration by a Single Arbitrator to be appointed by the agreement of the Parties. In default of agreement by the Parties hereto, appointment shall be by the Chief Executive for the time being of the Federation of Kenya Employers and every award made under this clause and expressed to be made under the Arbitration Act 1995 or other Acts or enactments for the time being in force in Kenya in relation to arbitration''

6. The Employment and Labour Relations Court is not an Arbitral Institution of any shade. It is a Court established under Section 4 of the Employment and Labour Relations Act, pursuant to Article 162 [2] [a] of the Constitution, to adjudicate, not arbitrate employment and labour disputes. It is a Public Institution, a public mechanism, for dispute settlement. The mechanism contemplated by the Parties in their arbitration agreement above, is a private mechanism, with an Arbitrator appointed by the Parties themselves, or in the absence of their consensus, appointed through the CEO of the Federation of Kenya Employers. Such an Arbitrator is to be paid for his or her services by the Parties.

7. The Claimant's letter of appointment positively rejects the jurisdiction of this Court in favour of a private dispute resolution mechanism. The Parties' mutual acceptance of the jurisdiction of the Court in their respective pleadings does not invalidate the arbitration clause. This acceptance does not confer the Court with the jurisdiction. No waiver can be assumed in the absence of clear and unambiguous variation or revocation of the arbitration agreement. Neither of the Parties has shown any evidence or other material repudiating the arbitration agreement. The clause is a renunciation of the Parties' constitutional right to have the dispute decided by the Courts. The Court has an obligation to respect the Parties' agreement. Section 15 [1] of the Employment and Labour Relations Act states:

'' Nothing in this Act may be construed as precluding the Court from adopting and implementing on its own motion, or at the request of the Parties, any other appropriate means of dispute resolution, including internal methods, conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159 [2] [c] of the Constitution.''

8. Section 15 [2] further supports the Parties' right to renunciation of the Court's jurisdiction, and the Court's right to decline jurisdiction whenever Parties have opted for other mechanisms, stating: ''*The*

Court may refuse to determine any dispute other than an appeal or review before the Court, if the Court is satisfied there has been no attempt to effect settlement pursuant to subsection [1].'' This provision allows the Court to decline jurisdiction, even where such jurisdiction may be shown to exist. Section 15 [4] on the other hand allows the Court the option to stay proceedings, where it becomes apparent the dispute ought to have been subjected to other dispute resolution mechanisms. The Court has the discretion to stay proceedings, or reject proceedings commenced in disregard of other legitimate dispute resolution mechanisms.

9. Clause 17 of the Claimant's letter of appointment must be interpreted in favour of arbitration. The clause covers any dispute arising under the contract, not mutually settled by the Parties. The clause suffers no defects, and is not pathological. It is unambiguous, and does not contain any conflicting dispute resolution provision, leaving no room for doubt on the proper forum for dispute resolution. It is a valid arbitration agreement under Section 4 of the Arbitration Act Number 11 of 2009. The clause *divests this Court the jurisdiction to hear and determine the dispute; confers jurisdiction on an Arbitrator to hear and determine the dispute; and by corollary creates a contractual obligation on the Parties to have their disputes submitted to Arbitration. It is a clause that has adequate anchorage in our law.*

8. The Claim is therefore improperly before the Court. The Judge of the Employment & Labour Relations Court is a public official, appointed by the sovereign, remunerated from the public till, and discharging a public role. He is not an Arbitrator. The Court can only be asked to intervene by the Parties in aiding the process of arbitration; in enforcement of the arbitral award; or in the rarest of cases, in setting aside such an award. Parties cannot ignore a valid arbitration clause in their contract, and rush to Court seeking adjudication, in a dispute which is clearly subject to arbitration. The Court must uphold the Parties' positive rejection of its jurisdiction. As the Court finds it has no jurisdiction, it cannot order stay of the proceedings, as would be justified under Section 15 of the Employment and Labour Relations Act, as read together with Section 6 of the Arbitration Act Number 11 of 2009. It must instead order the Claim is struck out, to enable the Parties resolve the dispute under the appropriate forum. They may revert to the Court in event any judicial intervention is necessary and legally permissible, in the process and outcome of the arbitration. There is no reason to stay proceedings which have been commenced in disregard of the jurisdiction of the Court. The arbitration clause, as seen above, covers any dispute between the Parties, not settled and mutually agreed between the Parties. It leaves no substantive aspects of the dispute for the consideration of the Court, so as to justify the stay of the proceedings in Court, rather than their termination. The Parties should proceed with arbitration, and only seek the assistance of the Court if need be, through miscellaneous applications.

IT IS ORDERED:-

a. ***The Court has no jurisdiction to hear and determine the substantive dispute in light of the arbitration clause contained in the Claimant's letter of appointment.***

b. ***The Claim is therefore struck out with no orders on the costs.***

c. ***The dispute shall be resolved under Clause 17 of the letter of appointment.***

Dated and delivered at Mombasa this 28th day of September, 2015

James Rika

Judge