IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 53 OF 2014

DR. KENNEDY AMUHAYA MANYONYI……CLAIMANT

VERSUS

AFRICAN MEDICAL AND RESEARCH FOUNDATION ……RESPONDENT

RULING

The Claim herein was filed by the Claimant on 22nd January 2014 through a Memorandum of Claim dated 21st January 2014. He alleges that his contract of employment was unfairly terminated by the Respondent.

He prays for a declaration that the termination of his employment was unfair. He further seeks terminal benefits, costs and interest. The Claimant did not attach any documents to his claim.

On 19th March 2014 when the cause came up for mention, Mrs. Wetende appearing for the Respondent sough orders compelling the Claimant to supply the documents he intended to rely upon to the Respondent before the Respondent could file its defence. The court directed the Claimant to file the documents.

Thereafter on 2nd April 2014 the Respondent filed a notice of motion seeking orders that the case be referred to arbitration in accordance with the terms of the agreement signed between the Claimant and the Respondent on 26th March 2012. The Respondent further prayed for costs of the application.

The Claimant filed grounds of opposition to the application. Among the grounds raised by the Claimant in the objection are that the applicant lost its right to have the case referred to arbitration by virtue of Section 6 (1) of Arbitration Act, that the applicant was in default of a court order directing it to file its defence within 14 days from 19th March 2014, that the application was an afterthought, that the application by the Respondent is prejudicial to the Claimant and intended to delay or frustrate the expedient trial of the claim and lastly, that this court has exclusive original and appellate jurisdiction to hear and determine disputes relating to employment and labour relations under both article 162 (2) of the Constitution and Section 12 of Industrial Court Act.

When the application came up for hearing on 12th May 2014 it was agreed that the Claimant argues his ground of preliminary objection as part of his grounds of opposition. Mr. Chiuri Ngugi appeared the Claimant while Mrs. Wetende appeared for the Respondent Applicant.

Mrs. Wetende submitted that the Claimants notice of motion was grounded on Section 15(1) of Industrial Court Act and Article 159 of the Constitution, that there was no dispute, that under paragraph 20 of the claimants contract of employment which has not been disputed by the Claimant by affidavit or otherwise,

there is a provision requiring all disputes to be referred to arbitration under the Arbitration Act (Chapter 49). She stated that the Arbitration Act (1995) at Section 6 (1) provided for the manner in which disputes were to be referred to arbitration. She relied on the case of **AREVA & T & T INDIA LIMITED V PRIORITY ELECTRICAL ENGINEERS & ANOTHER [2012] eKLR**. On the objections raised by the Claimant Mrs. Wetende submitted that the Respondent was within the provisions of Section 6(1) of Arbitration Act as the only action taken before the Respondent's application was filed was the application for an order that the Claimant files the documents he wished to rely upon in his claim, that the Claimant is seeking to vary the terms of his contract and that when the Respondent was directed to file its defence it filed the present application. That no substantive step was taken by the Respondent before filing the application. She urged the court to refer the case to arbitration.

Mr. Ciuri for Claimant submitted that the Respondent had lost the opportunity to refer the dispute to arbitration as the Respondent should have filed the application on 17th February 2014 when it filed its Memorandum of Appearance. He relied on the case of **CHARLES NJOGU LOFTY V BEDOVIN ENTERPRISES LTD [2005] eKLR.** That the Respondent did not raise the issue of arbitration again when the parties appeared in court on 19th March 2014. He urged the court to dismiss the claim.

I have considered the pleadings and arguments by the parties. I have also considered the authorities cited.

Section 6(1) of the Arbitration Act provides as follows:-

6 (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.*

In the present case the Respondent filed its memorandum of appearance on 17th February 2014. Thereafter it wrote to the court on 4th March 2014 seeking a mention date for the purpose of obtaining directions. The parties appeared before me on 19th March when the Respondent only raised the issue of supply of documents to be relied upon by the Claimant.

It is my opinion that if the Respondent wished to raise the issue of reference of this case to arbitration it should have done so at the time it filed the Memorandum of Appearance. That was the earliest opportunity.

Section 6 (1) is explicit. The court can only stay the proceedings and refer the parties to arbitration "***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.***"

For this ground alone, the Respondents application must fail.

I however find it necessary to address the issue of reference to alternative dispute resolution mechanisms as provided in both Article 159 (2) (c) of the Constitution and Section 15 (1) of the Industrial Court Act. Article 159(2) (c) requires that the judiciary in exercising judicial authority should promote the principles of alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution.

Section 15 (1) of the Industrial Court Act requires this court to promote appropriate means of dispute

resolution including internal methods, conciliation, mediation and traditional dispute resolution mechanisms.

This section specifically omits to mention arbitration as an alternative method of dispute resolution in the Industrial Court.

In my mind, this was a deliberate omission as both the Employment Act and the Labour Relations Act provide for both internal dispute resolution mechanisms and conciliation. Internal dispute mechanisms are provided for under Section 12 of the Employment Act which requires employers to have internal disciplinary rules, Section 26 which recognizes terms in a Collective Agreement and Section 87 which provides for an aggrieved employee to lodge a complaint with the Labour Officer or the Industrial Court.

The Labour Relations Act provides for conciliation of disputes involving trade unions under Part VIII (Section 62 to 72) by reporting the dispute to the Minister for Labour. The Act expressly provides at Section 75 that the Arbitration Act shall not apply to any proceedings before the Industrial Court.

In my opinion the reason for reference of disputes to alternative dispute resolution is to save time and expenses, or to utilise expert opinion. If these ends are not likely to be achieved and where courts provide the most direct and expedient avenue to resolve an employment dispute, then no alternative mechanism may be resorted to.

Section 15 (1) of the Industrial Court Act recognizes this position when it requires that disputes be referred to other appropriate means of dispute resolution by the court on its own motion, or by the parties. The Act does not refer to one party. This means that where the reference is by the parties, it should be by consent of both parties.

Clause 20 of the employment contract that the Respondent wishes to rely upon in this case reads as follows :-

> "20 DISPUTES
>
> *Any dispute or difference arising between the parties as to the construction or interpretation of this Agreement or the rights, duties or obligations of any party or any matter arising out of or concerning the same or the Employee's employment which cannot be satisfactorily settled by reference to and discussion with the Foundation's Board of Directors shall be referred to a single arbitrator in accordance with the provisions of the Arbitration Act (Chapter 49) or any statutory modification for the* time being in force."

The clause does not state how this process is initiated or by whom, does not have time limits and does not state who appoints the single arbitrator.

In Cause No. 2469 of 2012, Justice Ndolo stated as follows:-

> "**If an employer attempts to halt or delay the jurisdiction of the court, they must do so in a way that manifestly aids the cause of justice."**

She further stated that:-

> **"One unique feature of the Industrial Court is that parties can access justice expeditiously, at a minimal cost and without too many legal hurdles."**

In this case I find that the arbitration clause in the Claimant's employment contract is vague and is not consensual as it is a term imposed on the employment contract by the employer, in this case the Respondent. It was not negotiated with the Claimant, unlike in commercial contracts where parties negotiate and agree on every clause of the contract.

As held by Justice Ndolo in above case, employment contracts are distinct as against Commercial contracts. In other words an employment contract is not a commercial contract.

For the foregoing reasons I find that both the Industrial Court Act and the Employment Act do not recognize arbitration as an appropriate means of dispute resolution in employment disputes.

From the foregoing I find that the notice of motion filed by the Respondent lacks merit and dismiss the same.

Costs of the application shall be in the cause.

Orders accordingly.

Dated and delivered at Nairobi this 30th day of May 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

No appearance for Claimant

Ms. Aluvale holding brief for Mrs. Wetende for Respondent