



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 2469 of 2012

STEPHEN NYAMWEYA.....1ST CLAIMANT

BERNARD BARASA NAMUKURU.....2ND CLAIMANT

VS

RILEY SERVICES LIMITED.....RESPONDENT

RULING

Background

1. The main claim in this case is for unfair termination of employment and failure to pay terminal dues. This ruling emanates from the Respondent's Preliminary Objection filed alongside the Memorandum of Response on 8th February 2013. The Preliminary Objection was argued on 11th April 2013 with Mr. Namada instructed by Namada & Co Advocates appearing for the Claimant and Mr. Burugu instructed by Obura Mbeche & Co Advocates appearing for the Respondent.

2. The gist of the Preliminary Objection is that this case is prematurely before the Court since Clause 11.2 of the Claimants' employment contracts provides as follows:

“Any dispute arising between the parties hereto with regard to the interpretation or implementation of this agreement during its continuance or upon or after its termination shall be referred to a single arbitrator appointed by the office of the Labour Commission in accordance with the Arbitration Act 2007. The making of any award thereby shall be a condition precedent to the right of either party instituting any proceedings in a court of law or tribunal.”

The Respondent's Submissions

3. Mr. Burugu for the Respondent submitted that by inserting Clause 11.2 in the employment contracts the parties temporarily suspended the jurisdiction of the Court. Counsel however noted that Clause 11.2 above cited carries certain absurdities in that there is no office known as the office of the Labour Commission or a statute known as the Arbitration Act 2007. Mr. Burugu nevertheless observed that the Labour Institutions Act, 2007 establishes the office of the Labour Commissioner who is empowered to appoint Labour Officers to carry out conciliation in employment matters.

4. Counsel urged the Court to ignore any absurdities in the employment contracts and interpret the contracts of employment to give effect to the intention of the parties. He further submitted that the Court is enjoined by Article 159(2)(c) of the Constitution of Kenya, 2010 and Section 15 of the Industrial Court Act to promote and support Alternative Dispute Resolution (ADR).

Claimant's Submissions

5. In reply, Mr. Namada for the Claimant submitted that the Respondent was engaging in an argument about its own document since employment contracts are normally drawn by the employer and the employee is invited to execute the contract if he accepts the terms of the contract. An employment contract is not a negotiated instrument. There is no exchange of drafts between the employer and the employee. The terms and words must theretofore be construed as drawn by the employer.

6. Counsel was of the view that the clause in issue was introduced by the Respondent to throw the Claimant off line and that the Respondent was inviting the Court to redraw the Respondent's documents. Mr. Namada added that since the office of the Labour Commissioner does not operate under the Arbitration Act, the Clause was not capable of any logical interpretation.

Finding and Determination

7. The parameters of what constitutes a preliminary objection were defined in the well known case of **Mukisa Biscuits Vs. West End Distributors Limited (1969 EALR)** in which the Court defined a preliminary objections as that which:

“raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

8. In the present case, the Respondent has cited a clause contained in the Claimants' contracts of employment, which according to the Respondent, operates as a temporary limitation to the jurisdiction of the Court to entertain the claim by the Claimants. In the same breath the Respondent pointed out that the said clause is not capable of implementation without intervention of the Court by way of interpretation.

9. Section 10 of the Employment Act, 2007 places the responsibility of drawing of employment contracts on the employer. The law also provides for the mandatory elements to be contained in employment contracts. Dispute resolution is not one of the mandatory elements to be included in a contract of employment.

10. The law does however provide for an 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.

11. Counsel for the Respondent cited a host of authorities on interpretation of commercial contracts to give effect to the intention of the parties and asked the Court to adopt the principles contained in these authorities. I however take the view that employment contracts are distinct as against commercial contracts.

12. First, employment contracts are drawn by the employer in a standard format to be applied to all employees, with minimal adjustments on job description and remuneration. Second, the employee has no opportunity to negotiate on standard clauses. That being the case, the employer owes the employee a duty of care to ensure that every clause is capable of implementation without too much trouble.

13. One of the unique features of the Industrial Court is that parties can access justice expeditiously, at a minimal cost and without too many legal hurdles. While employers are encouraged to adopt ADR at the work place, they are expected to do it in a way that facilitates the quick resolution of disputes rather than cause delay.

14. At any rate, 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. To my mind, the Respondent had the capacity to eliminate the absurdities contained in the ADR clause in the Claimants' contracts of employment which it now

seeks to rely on to bar the Claimants from accessing justice before this Court.

15. I therefore find the preliminary objection by the Respondent not well taken and hereby overrule it. I also strike out the said Clause 11.2 from the Claimants contracts of employment and direct that this case will proceed as if the said clause did not exist.

The costs of this application will be in the cause.

**DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 16TH DAY OF MAY
2013**

**LINNET NDOLO
JUDGE**

In the Presence of:

.....**Claimant**

.....**Respondent**