IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 804 OF 2013

THOMAS MIDIWO WAREGA ONGORO ……..……CLAIMANT

-VERSUS-

HILLCREST INVESTMENTS LIMITED ……RESPONDENT

Martin Munyu for Applicant/Respondent.

Desma Nungo for Respondent/Claimant.

RULING

The Applicant who is the Respondent in the main suit filed a Chamber Summons Application dated 4th July, 2013 on 9th July, 2013 seeking for an order in the following terms *inter alia*;

> *"3. That all the proceedings in this suit and the suit filed herein be stayed pending arbitration as stipulated by clause 16.2 of the Contract of Employment dated 1st September, 2012 made between the parties hereto and in accordance with the provisions of Section 6 of the Arbitration Act, 1995, Act No. 4 of 1995, Laws of Kenya."*

The application is supported by grounds outlined in paragraphs a – f thereof which in the main point out that the contract of employment between the parties dated 1st September, 2012 at clause 16.2 provides that;

> *"For the purpose of this Agreement, the parties shall submit any difference arising out of or in connection with this Agreement to arbitration by a single arbitrator to be appointed by agreement between the parties or in default of such agreement within 14 days of the notification of any dispute, upon the application of any party, by the Chairman for the time being of the Kenya Branch of the Chartered Institute of Arbitrators. Such arbitration to be conducted in accordance with the provisions of the Arbitration Act."*

Furthermore Clause 17 titled "Law" provides

> *"This agreement shall be subject to and construed in accordance with the laws of Kenya."*

It is common cause that this Agreement is a contract of employment between the applicant and the Respondent in terms of which the Respondent was employed as a teacher at the Hillcrest School, Langata Road, Nairobi.

It is also not in dispute that the Respondent stopped working for the Applicant on 30th January, 2013 in

terms of a letter of resignation annexed to the application as annex 2.

The issue in dispute between the parties is unlawful and unfair termination of employment and infringement of the right to human dignity, reputation and right to fair labour practice as enshrined in the Constitution.

The Respondent opposes this application on grounds that it is contrary to ***Sections 4***, ***12*** and ***15*** of the Industrial Court Act, No. 20 of 2011.

That in terms of these provisions the Industrial Court has exclusive jurisdiction to hear and determine employment and labour disputes and alternative dispute resolution is only to be conducted in terms of Labour Relations Act, 2007 and not Arbitration Act No. 4 of 1995.

Section 75 of the Labour Relations Act No. 14 of 2007 provides;

"The Arbitration Act shall not apply to any proceedings before the Industrial Court."

It was submitted for the Respondent/Claimant that it is inappropriate to refer disputes before the court to Arbitration in terms of the Arbitration Act.

This agreement was concluded on 1st September, 2012 well after the enactment and coming into operation of the Labour Relations Act, 2007 and the Industrial Court Act 2011.

To that extent the clause is in appropriate for the purpose and the same is incapable of putting into effect and therefore the court has no obligation to refer this dispute to an arbitrator in terms of the Arbitration Act.

The court has considered the competing arguments and has come to the conclusion that it is already seized of this matter and that it is in the interest of justice and fair play to have this dispute adjudicated before the court.

The claim will take its normal course and the Applicant/Respondent is granted leave to respond to it within 14 days from the date of this Ruling.

Dated and delivered at Nairobi this 18th day of October, 2013.

MATHEWS N. NDUMA

PRINCIPAL JUDGE