REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. E374 OF 2020

SAMMY ONYANGO OCHIENG.....CLAIMANT

VERSUS

ABNO SOFTWARES INTERNATIONAL LIMITED.....RESPONDENT

RULING

The respondent, ABNO Softwares International Limited filed application dated 29th September, 2020 and seeking for orders that;

1. The application be heard on priority basis in the nature of a Preliminary objection.

2. The court do refer the dispute to Arbitration in compliance with the Arbitration Agreement between the parties.

3. The claimant do pay costs of this application.

The application is supported by the annexed Supporting Affidavit and Affidavit in Response of Alex Barasa and on the grounds that the dispute before the court ought to be referred to an arbitrator in accordance with the Arbitration Agreement between the parties. The contract of employment for the claimant had an arbitration clause which required that any dispute arising from the contract be referred to an arbitrator and there is nothing unique with the present dispute that exempts it from being handled in accordance with the arbitration clause.

Mr Barasa also avers that he is the chief executive officer of the respondent and the claimant has filed suit seeking several reliefs alleged to be in his contract of employment. The suit is premature for lack of exhaustion of alternative dispute resolution mechanisms contemplated in the contract of employment.

It was a term of the employment contract under clause 8 that all disputes between the parties would be referred to an arbitrator and both parties are aware of such requirement.

Parties have already exchanged communication with regard to the appointment of an arbitrator but in a sudden change of tact and without consultation the claimant wrote and indicated that he had decided to file suit. That the reasons given were that there are public interests questions that required to be addressed by the court but there exists no such questions.

Mr Barasa also avers that the decision to vary and vitiate the terms of the contract of employment is an affront to the intention of the parties to the agreement and the same should not be entertained by this court and the matter should be referred to arbitration.

In reply, the claimant filed his Replying affidavit and avers that the objections made are meant to delay the course of justice and there is no good cause to seek and refer the matter to arbitration and the matter is properly before this court.

The alleged dispute resolution mechanism clause under the contract of employment refers to where a dispute arises within the course of employment the same can be referred to arbitration but employment has since terminated and the claimant is not subject to the respondent's human resource policy. Upon termination of employment the claimant had a right to file suit with the court.

Clause 10 of the employment contract stipulates that the governing law of the contract is the Employment Act and a host of other labour laws and regulations. Upon the breach of the employment contract, the claimant was at liberty to file suit with the court.

The arbitration clause of the employment contract was meant as an internal dispute resolution mechanism and which does not oust the application of the law. Clause 8 and 10 of the employment contract serves to offend the provisions of section 3(1) of the Employment Act and the court in its inherent powers should assert its jurisdiction in the interests of justice and fairness and dismiss the objections made by the respondent.

The claimant also avers that there were initial discussions for arbitration but upon further consideration of the relevant clause and for good reasons he elected to proceed with the judicial process and informed the respondent of the same.

Even where the court were to consider arbitration as operable, such would be untenable for the reasons that under section 26 of the Employment Act the court is mandated to override the terms and conditions of an employment contract and apply terms and conditions of parts V and VI of the Act to the extent that the terms and conditions under the Act are more favourable to the employee.

Under section 47(3) of the Employment Act an employee has a right to complain to the court on an issue of unfair termination of employment.

Section 26 and 47(3) of the Employment Act allow application of circumstances favourable to the employee obtaining, the right under section 47(3) may not be fettered.

The claimant also avers that arbitration is a form of dispute resolution in employment matters and is costly than the judicial process since the parties are required to meetthe costs of the advocates, the arbitrator costs and the venue costs. The balance of convenience favours the judicial system.

The claim relates to termination of employment because the claimant turned out to be the anvil at the end of the table in the respondent's quest to perpetuate a culture of corporate malfeasance and nonfeasance. Corruption is rampant both in public and private sectors and it is in the public interest that judicial organs in the exercise of judicial authority protect employees from pernicious victimisation by corporations keen to perpetuate corrupt practices within their rank.

The claim is fact sensitive on the issue of corporate malfeasance and nonfeasance and the stake against the impugned vices as the cause of termination of employment by the respondent and among other prayers seeking compensatory damages for bad faith dismissal. The court has jurisdiction to hear and determine the matter and there are no justifiable grounds submitted by the respondent why the matter should be heard by other alternative dispute resolution mechanisms.

Both parties addressed the objection by way of written submissions.

The respondent submitted that the matter should be referred to arbitration under the provisions of article 159 of the constitution

which dictates that courts should promote the use of Alternative Dispute Resolution mechanism to resolve disputes.

The claimant entered into an employment contract on 9th October, 2019 and agreed to be bound by its terms where clause 8 provided that all disputes between the parties be referred to arbitration. That where a dispute arose parties to resolve by mediation and failure to which resolve by arbitration.

The claim is filed following termination of employment vide letter dated 29h July, 2020 and the claimant was invited to arbitration but opted to file the instant suit.

By operation of the principle of party autonomy the claimant by signing his contract agreement was bound by its terms as held in **Kenya Oil Company Limited & another versus Kenya Pipeline Company [2014] eKLR.** Parties are free to choose a method to settle a dispute.

Section 6 of the Arbitration Act provides for avenues for a party to seek stay of proceedings where parties have entered into an arbitral agreement and the same has not been honoured by the other party as held in the case of **Mt Kenya University versus Step Up holding (K) Limited [2018] eKLR.**

In this case the arbitration clause should be enforced as the termination of employment does not invalidate the arbitration agreement and the matter should be referred to arbitration. The alleged public interest question does not exist in a private treaty matter where parties are bound by an agreement of employment with a given dispute resolution mechanism for arbitration.

The claimant submitted that he filed the claim herein for unfair termination of employment, breach of contract and bad faith dismissal following termination of employment by the respondent. The objections by the respondent seek to oust the jurisdiction of the court and apply the arbitration clause.

Section 6 of the Arbitration Act a party is allowed after filing suit to seek leave to stay proceedings and refer the same to arbitration. The respondent has since filed a response to the suit.

Section 3 of the Employment Act apply to all employees employed under a contract of service. section 26 of the Act apply minimum terms and conditions of service and section 47(3) of the Act allow an employee to file a complaint with regard to the contract of service with the court.

In the case of **Adrec Limited versus National Media Group Civil Appeal No.75 of 2017** the court held that the right to seek stay of proceedings under section 6(1) of the Arbitration Act is lost the moment a defence is filed. In **Mt Kenya University versus Step Up Holding (K) Limited Civil Appeal No.186 of 2013** the court held that an application seeking reference to arbitration must be filed simultaneously with entry of appearance and thereafter take no further procedural steps in the matter.

The authority to disciplinary an employee ends with termination of employment as held in **Kennedy Obala Ooga versus Kenya Ports Authority cause No.339 of 2016.**

Upon filing a defence the respondent compromised the arbitration reference and this court has jurisdiction. The arbitration provisions in the employment agreement was meant to adjudicate disputes in the course of employment and which employment has been terminated and subject of the suit herein and objections made should be dismissed with costs.

Both parties filed a list of authorities to support the written submissions. **Determination**

The single issue herein is whether the court should refer the matter to arbitration pursuant to the Arbitration agreement under the contract of employment.

The court is conferred with jurisdiction under the provisions of article 162(2) read together with section 12 of the Employment and Labour Relations Court Act, 2011 to address employment and labour relations disputes and for connected purposes. The court is given original jurisdiction under the constitution and by statute over matters of employment and labour relations and connected purposes as held in by the

Supreme Court in the case of **Samuel Kamau Macharia & another versus Kenya Commercial Bank & 2 others [2012] eKLR**:

A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings. … Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

In this case, the respondent's case is that under clause 8 of the contract of employment the parties agreed to be bound by the arbitration process to resolve any dispute(s) arising out of the employment relationship.

It is the claimant's case that the arbitration agreement was only applicable during his employment by the respondent which has since been terminated and he should not be subjected to arbitration as the respondent has since filed a defence opting out of such alternative dispute resolution mechanism.

Turning to the question whether the court can refer the dispute to Arbitration, it is apparent that the parties have not agreed to refer the matter to arbitration. Section 6(1) of the Arbitration Act provides as follows:

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 the 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.

The dispute must therefore be the subject of an arbitration agreement or the parties consent to arbitration. In the case of **Kenya Pipeline Company Limited versus Kenolkobil Limited [2013] eKLR the court held;**

- a plain reading of Article 159 of the Constitution of Kenya, 2010 requires the court to promote settlement of disputes by way of alternative dispute resolution. That may be so but such referral must be by the consent of the parties because of the very nature of the resolution methods. It is for that reason that the Constitution uses the words "promote" and not "shall refer to" alternative dispute resolution. … It is clear that it is only where other methods of alternative dispute resolution are concerned that the court can on its own motion; refer a matter under such methods. On the other hand, referral of a matter to arbitration that is in court must be by the consent of the parties. If the court had the power to refer matters pending in court for arbitration **suo moto**, nothing would have been easier than for the drafters of the legislation to

have explicitly stated so. …

In the case of **Martin Otieno Okwach & Charles Ongondo Were T/a Victoria Clearing Services versus Kenya Post Office Savings Bank [2014] eKLR** the court held as follows;

Unless, parties consent to have the matter referred to arbitration under Order 46 Rule (1) of the Civil Procedure Rules, 2010, they are firmly stuck in the court system. Indeed, while Article 165 of the Constitution of Kenya, 2010 gives the High Court supervisory jurisdiction over any person, body or authority exercising a judicial and quasi-judicial function to ensure the administration of justice, such authority can only be exercised within the parameters of Section 10 of the Arbitration Act which provides as follows;

"Except as provided in this Act, no court shall intervene in matters governed by this Act."

The above position is buttressed by the Court of Appeal in the case **of Adrec Limited versus Nation Media Group Limited [2017] eKLR** and as submitted by the claimant with regard to the application of section 6(1) of the Arbitration Act and the requirement by the court to ascertain whether;

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 this regard with employment terminated and the claimant having taken the option to urge his case as herein done the parties thus regulated by an employment contract which is subject to the jurisdiction of the court, the court retains its original jurisdiction to hear the matter. The matter cannot be removed from the jurisdiction of the court by dint of clause 8 of the contract of employment.

Taking the above into account, under section 15 of the Employment and Labour Relations Court Act, 2011 it is recognised that the court has power to refer parties to alternative disputes resolution mechanisms at any stage of the matter.

1. 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.

2. …

3. …

4. If at any stage of the proceedings it becomes apparent that the dispute ought to have been referred for conciliation or mediation, the Court may stay the proceedings and refer the dispute for conciliation, mediation or arbitration.

This is in recognition that employment and labour relations matters are best resolved at the shop floor. however, when employment has terminated and there is a claim of unfairness, breach of contract and unfair dealing, to refer the matter back to the shop floor would only cause a delay of justice for the employee who alleges violation of fundamental rights in employment or to an employer who has addressed itself to the conduct of the employee would not meet the ends of justice.

In this regard and by dint of section 7 of the Arbitration Act empowering the Court to issue orders regardless of the presence of an

arbitration clause in an agreement, application and objections made by the respondents dated 29th September, 2020 are hereby found without merit. The claim shall be heard on the merits. Costs to the claimant.

DELIVERED AT NAIROBI THIS 17TH DAY OF DECEMBER, 2020.

M. MBAR"

JUDGE