REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 626 OF 2013

(Before D.K.N. Marete)

JAMES HEATHER – HAYES……CLAIMANT

Versus

AFRICAN MEDICAL AND RESEARCH

FOUNDATION (AMREF)……..RESPONDENT

RULING

This is an application by way of Chamber Summons dated 23rd May, 2013 and filed on 24th instant. It seeks the following orders of court:-

1. ***THAT*** *the cause filed herein be stayed and the dispute be referred to Arbitration in accordance with the agreement of the parties as set out in the Service Agreement dated 1st November, 2010.*

2. ***THAT*** *the costs of this action and of the application be borne by the Claimant.*

The application is supported by the affidavit of Shadrack Kiptoo Kirui sworn on the same date, 23rd May, 2013.

The claimant/respondent opposes the application vide a replying affidavit sworn on 3rd July, 2013 and denies the claim. He sets his opposition on a technicality and then a matter of law. She avers that the matter is wrongly placed in court vide a Chamber Summons instead of a Notice of Motion and also that an agreement of the parties cannot oust the jurisdiction of this court to hear and determine matters under the Employment Act.

The claimant/respondent further argues that arbitration on an award of the orders sought would limit the jurisdiction of this court and disenfranchise the kenyan worker. Further, he submits, arbitration cannot be compelled in the circumstances of this case but only avails on a mutuality of agreement of the parties. He also argues that the instrument sought to effect arbitration is infectious as this is a matter under the Labour Relations Act, 2007.

The matter came to court severally until the 20th October, 2013 when the parties agreed to dispose the matter by way of written submissions at agreed timelines and thus today's ruling.

In their written submissions the respondent/applicants submit and contend that in the parties terms of the agreement dated 1st November, 2010, there was a mutual agreement that disputes on the subject that were not resolvable through discussion *inter partes* would be referred to arbitration. This is at paragraph 21 as follows;

"DISPUTES

Any dispute or differences arising between the parties as to the construction or interpretation of this Agreement or the rights, duties or obligations or 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 to the Labour Relations Act, 2007 or any statutory modification for the time being in force."

The agreement as it were is not non arbitrable and is always subject to the laws of Kenya and therefore subject to the Employment Act and other laws of Employment. The applicant/respondent further submits that courts should refrain and indeed be the last frontiers for re-writing contracts of employment.

The respondent/applicant further seeks to rely on the authority of **The Wrigleys Company Vs. Attorney General and 3 Others Petition 22 of 2012, 2013 eKLR** where the court held that courts cannot rewrite what has already been agreed upon by the parties as set out in the agreement. This court, in the case of **William Lonana Shena v HJE Medical Research International Inc Cause No. 1096 of 2010**(Unreported), has also upheld an arbitration clause and referred the dispute to arbitration and argued that even if the court had unlimited jurisdiction this did not defeat an arbitration process grounded on statutes.

The respondent/applicant further submits that Section 15 of the Employment and Article 159 of the Constitution of Kenya, 2010 adopt alternative dispute resolution and this does not exclude this court. The respondent/applicant also dismissed the issue of objection on the format of the application as a mere technicality which is forbidden by Rule 24(5) of the Industrial Court Procedure Rules as hereunder;

1. …
2. …
3. …
4. …
5. *The Court shall conduct the hearing in a manner it considers most suitable to the just handling and recording of proceedings and shall, if appropriate, avoid legal technicalities and formalities.*
6. …

The court should be guided to determine matters without undue regard to technicalities and this is buttressed by Article 159(2) (d) of the Constitution. The respondent therefore fronted a case for the application and in favour of Alternative Dispute Resolution – arbitration.

The respondent/applicant reiterated the above position in her further submissions dated 12th March, 2014 which emphasizes the application and practice of Article 159 (2) and S.15 of the Industrial Act, 2011.

The claimants/respondents in their submissions dated 28th October, 2010 oppose the application for being incompetent, unmeritous and one bent on frustrating the speedy and fair determination of the case.

The claimant/respondent further reiterates its position that matters relating to the claim can be referred to arbitration under the Labour Relations Act – a literal interpretation of the arbitration clause. The respondent also borrows from S.6(1) of the Arbitration Act, **1995.**

"(1) A court before which proceedings are brought in a manner 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 files any pleadings or takes any other step in the proceedings, 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;"*** [emphasis added]

and thus submits this agreement is not arbitrable within the meaning of the Labour Relations Act. It is inoperative, inapplicable and a nullity. The respondent further argues that statutory reliefs under the Employment Act are not arbitrable.

The respondent/applicant in her reply to the claimant/respondent's submissions faults the respondent's perception of the law applicable in the circumstances. She denies allegations of being a standard form contract and submits that the same was ably negotiated and agreed on by the parties. This is presented by the claimant/respondent as follows;

4. This was the meaning and interpretation of the standard from contract drafted and prepared by the Applicant that the Respondent was compelled to accept.

5. The Clause is impractical, inapplicable, void, inoperative and incapable of logical performance by reason of 6(1)(a) of the Arbitration Act which proves that:

1. *A court before which proceedings are brought in matter which is the subject of an arbitration agreement shall, if a property so applies not later than the time when that party enters appearance or files any pleadings or takes any other step in the proceedings, stay the proceedings and refer the parties to arbitration unless if finds –*

a. *That the arbitration agreement is* ***null and void****, inoperative or* ***incapable of being performed****;"*

6. *It is obvious that this arbitration clause can only be activated and operationalized under the provisions of the "Labour Relations Act, 2007 or any statutory modification for the time being in force."*

The claimant/respondent also sought to rely on the authority of **Stephen Nyamweya & Another vs. Riley Services Limited, Industrial Cause No. 2469 of 2012** where Ndolo, J. tackled the issue of absurdities in arbitration clauses in an employment contract. It must be admitted that the protracted submissions by counsel and the findings of the learned judge in dismissing the arbitration clause was because of the absurdity inherent in that arbitration clause. The learned judge puts it thus;

40. This is the only relief that an arbitrator can award to the Claimant in the event that this matter were to be referred to arbitration.

51. It will also not be lost on this Honourable Court that to allow the application herein would be to radically and unconstitutionally destroy the very rubric underpinning dispute resolution in employment contracts.

52. What the Applicant is inviting this Honourable Court to accept is an outcome where the Industrial Court would be rendered otiose by moneyed and powerful capitalist elites who will contract out of the reliefs guaranteed to employees under the Employment Act. If this were to be allowed, employment dispute resolution mechanisms would henceforth be commercialized and "capitalized" into feudalistic vestiges where employees would be working with limited or no rights or protection.

53. The Industrial Court would, as a consequence, have few or no cases as employers would obviously prefer a dispute resolution system (arbitration) which could be compelled and forced upon employees and which system could only award maximum damages equivalent to a contractual notice period under the said contract of employment.

The learned judge seems to rule out the utility of arbitration clauses in employment contracts. She moves on at length to analyze this in her judgement as hereunder.

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 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." Emphasis added - but not indicated.

I respectfully choose to differ with the findings and sentiments of the learned judge in her analysis of the application of arbitration in employment contracts. I do not suppose, or see the possibility of there having been to contrasting and contradictory statutes on the subject of arbitration. The Arbitration Act is the critical legal authority on issues relating to arbitration. It indeed gets out of its way to define, set and provide for situations where arbitration can be had. The Employment Act and other statutes on employment law in Kenya coming to supplement this by providing various avenues where parties to employment contracts can resort to in the event of dispute resolution. The Act and other laws do not debur arbitration in employment contracts.

It would be unnatural to oust arbitration, an internationally recognized practice of Alternative Dispute Resolution or any pretensions where this was clearly the intention of the parties like in the present case. If like is argued in the Rileys Services Limited case, there is an intention to forbid arbitration on the instance of statutory provisions, the easier option would have been for parliament to expressly and explicitly set it down in writing to obviate confusing situations in practice.

The distinction between employment contracts and commercial contracts is therefore untenable in law and practice on arbitration. I also differ with the submissions by counsel for the respondent that allowing a case for arbitration in the circumstances would render the industrial court otiose as hereunder;

52. What the Applicant is inviting this Honourable Court to accept is an outcome where the Industrial Court would be rendered otiose by moneyed and powerful capitalist elites who will contract out of the reliefs guaranteed to employees under the Employment Act. If this were to be allowed, employment dispute resolution mechanisms would henceforth be commercialized and "capitalized" into feudalistic vestiges where employees would be working with limited or no rights or protection.

This is unfortunate. Contracts generally are undertaken by sober and willing parties. It cannot be rightly argued, like in the present circumstances, that this contract of employment was standard form and a product of the employer which did not give the employee a chance to participate in its making. Parties are expected to execute contractual documents on their free will or else issues of duress and undue influence come to their rescue. In the circumstances of this case, these are yet to be thrashed and determined. The claimant having entered into this contract on his will must accede and go by its provisions.

The respondent/applicant in her reply to claimant/respondent's submissions reiterates her submissions filed on 10th October, 2013. She puts in a case for honouring the arbitration clause in the employment contract *inter partes* and calls this court to adopt and agree with the agreement of the parties. It thus concludes in submissions

In concluding, an arbitration agreement is a contractual undertaking by which the parties agree to settle disputes by way of arbitration rather than proceedings in court. When a dispute arises both parties are

bound to comply with the terms therein. The court cannot rewrite the contract. Further and in any event, the Claimant's fears regarding its remedies in law are unfounded, the provisions of the Employment Act would still apply as the agreement provides for application of Kenyan law. We urge the court to uphold the arbitration clause and refer the dispute to arbitration.

The submissions of the parties herein are diametrically opposing and leave the court at crossroads. The issue for determination in this pretentiously easy matter is whether the court should or should not accept the arbitration clause in the employment contract as the reality of the matter or not.

I have had occasion to peruse the pleading and submissions of the parties and analyzed the same as hereinabove. An arbitration agreement takes its definition from S.3(1) of the Arbitration Act, Chapter 49, Laws of Kenya as hereunder:-

"arbitration agreement" *means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not."*

In the instant case, the parties included an arbitration clause No. 21 which in law and effect made the employment contract subject to arbitration. The applicant/respondent now seeks that this be enforced and the dispute be referred to arbitration but the claimant/respondent would not budge.The claimant/respondent argues and submits that contracts of employment are specific and provided for under S.10 of the Employment Act and any attempt to disarm or deal with them differently by referring them to arbitration would be an abrogation of the law on the subject.The arbitration clause should therefore be abandoned and the matter be heard and determined by this court. She seeks to rely on the authorities of **Stephen Nyamweya & Another vs Riley Services Limited** (Supra) and also the preamble to the Labour Relations Act No. 14 of 2007 including 58 S.9, 10, 10(b) and 58(1)(b) of the Act in support of this case. I beg to differ. The absurdity aspect as presented earlier was only related to the arbitration clause and circumstances of the **Riley Services Limited** case. The Labour Relations Act does not in any way oust any element of arbitration but enhances this by providing other avenues for the same. In any event, the definition of an arbitration agreement under S. 3(1) of the Arbitration Act does not oust arbitration in contracts or other legal relationships

..... in respect of a defined legal relationship, whether contractual or not."

It is not lost to all that Alternative Dispute Resolution is the preferred and fashionable kid on the block in dispute resolution. Article 159 and S.15 of the Constitution of Kenya, 2010 and the Employment Act are a clear indicator of this position. These provide for resolution of disputes through alternative dispute resolution.

Arbitration is a choice of the parties insofar as alternative dispute resolution is concerned. One of is undisputed advantages is its granting of party autonomy whereby parties to an arbitration agreement are awarded the autonomy of choosing their own judge(s) and other facilities in dispute resolution. This was so in the instant case and the parties contract and must be honoured.

The claimant/respondent in the circumstances of this case is not agreeable on this kind of move. He brings out arguments on the illegality, impracticability and unviability of referring this dispute to arbitration as earlier agreed by the parties. I disagree.

It is not the duty of this court to redraw agreements by parties. The court can only come in to facilitate an interpretation and implementation of these contracts and no more. I agree with the

applicant/respondent that there is a subsisting contract that issues in dispute shall be referred to arbitration and I find as such.

I am therefore inclined to allow this application and order costs to the applicant/respondent.

Delivered, dated and signed this 18th day of June, 2014.

D.K. Njagi Marete

JUDGE

Appearances

1.Mrs. Wetende instructed by Kaplan Straton Advocates for the Applicant/Respondent.

2.Mr. Kiplagat instructed by Okoth Kiplagat Advocates for the Claimant/Respondent.