



**Muchura v Safari Collection Limited (Petition E216 of 2022)
[2023] KEELRC 1476 (KLR) (8 June 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1476 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E216 OF 2022
BOM MANANI, J
JUNE 8, 2023**

BETWEEN

ANNE MARIE MUCHURA PETITIONER

AND

THE SAFARI COLLECTION LIMITED RESPONDENT

RULING

Background

1. The parties to this action were in an employer-employee relation until September 23, 2022 when it was terminated. The Petitioner has challenged the propriety of the decision to terminate the contract. As a result, she has filed the current Petition.
2. Upon entering appearance in the matter, the Respondent's lawyers objected to the court's jurisdiction to hear the dispute. This objection is evidenced in the Respondent's application dated December 30, 2022.
3. The gist of the objection is that the dispute between the parties ought to have been referred to arbitration as opposed to this court. Consequently, and in terms of section 6 of the *Arbitration Act*, this matter ought to be stayed and the dispute referred to arbitration.
4. The Petitioner has opposed the prayer by the Respondent. The reasons for the objection are set out in the replying affidavit to the application and the submissions by the Petitioner.



Analysis

5. The basis for the objection by the Respondent to the court's jurisdiction is clause 17 of the contract of employment between the parties dated July 30, 2021. The clause provides as follows:-

“Any dispute or difference arising between the parties hereto as to the construction or interpretation of this agreement or rights, duties or obligations of either party hereunder or any matter arising out of or concerning the same or the employee's employment hereunder which cannot be satisfactorily settled by discussion shall first be referred to mediation by a single mediator appointed jointly by the parties failing which by a representative of each of the parties or by the Strathmore University Dispute Resolution Centre of Nairobi and if this fails to resolve the dispute or difference then by arbitration by a single arbitrator similarly appointed.”
6. According to the Respondent, this clause binds the parties to submit all disputes arising from the employment relation between them to arbitration. Therefore, the Petitioner's move to file this cause before the court was improper. Relying on section 6 of the *Arbitration Act*, the respondent submits that the court ought to refer the matter to arbitration. Contemporaneous with the referral order, the Respondent prays that the court stays the proceedings before it.
6. It is trite law that where parties have agreed that disputes arising from a particular transaction between them ought to be resolved through arbitration, courts should be hesitant to assume jurisdiction over such disputes. This is necessary in order to give meaning to the principle of party autonomy. Respect for party autonomy is critical in upholding the principle forbidding courts from re-writing contracts between parties.
7. The court is however entitled to decline to refer a dispute to arbitration if it arrives at the conclusion that:-
 - a. The arbitration agreement is inoperative or incapable of being performed in the circumstances of the case; or
 - b. The dispute between the parties does not fall within the scope of the matters they agreed to refer to arbitration.
6. Arbitration proceedings primarily fall in the realm of private law. They are usually intended to resolve non public law disputes. The proceedings are usually centered on disputes arising from commercial transactions and other private law matters. Whether actors with disputes anchored on public law can seek to resolve them through this mechanism remains doubtful.
10. I have scrutinized the Petition before the court. In part, it alleges violation of rights in the Bill of Rights. These include rights of: freedom of expression; freedom from torture, inhumane and degrading treatment among others. Although these violations are alleged to having arisen in the course of execution of the contract of service between the parties, the question whether they form part of the issues that the parties contemplated as suitable for referral to arbitration and whether they can be adequately remedied through arbitration proceedings becomes a matter of concern to the court.



11. The Supreme Court has suggested that disputes raising constitutional questions may not be suitable for arbitration (see *Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 others* (Petition 15 of 2020) [2023] KESC 14 (KLR)). In the matter, the court made the following observations: -

“The jurisdiction of the arbitrator is limited by the appointing document and largely operates with the consent, cooperation and participation of the parties before it. This is commonly referred to as “party autonomy”. Breaches, violations and infringements of *the Constitution* do not fall within the jurisdiction of arbitrators.....’

12. The court further observed as follows: -

“The mandate of an arbitrator largely proceeds on the basis of the agreement by parties, and is mainly tasked with the resolution of a dispute as set out in the governing agreement. Where the dispute, however, transcends the commercial dispute, well into the constitutional sphere, as is the case before us, every person is free to access courts and have their day in court. As we see it, there is no tension between arbitration and enforcement of constitutional rights as distinct dispute resolution mechanisms. A court of law cannot turn a blind eye to alleged constitutional breaches in order to invoke the principle of party autonomy that binds parties to their agreements. This in itself does not mean that any person who sets out to petition the court alleging violation of fundamental rights and freedoms under the Bill of Rights must succeed, as cases are determined on their merits.”

13. What I understand from the above excerpts is that once a party to a dispute alleges breach of a constitutional provision that prima facie cannot be adequately adjudicated upon by reference to some other statute, the party should be permitted to ventilate his case in court instead of locking him out on account of the principle of party autonomy. Whether his case will ultimately succeed is a different issue that will turn on the merits of the matter. The position expressed in *Lipisha Consortium Limited & another v Safaricom Limited* [2015] eKLR ought to be understood in the context of the observations by the Supreme Court in the foregoing decision.
14. In any event I understand the court in the Lipisha case as stating that even as it took the view that some constitutional disputes can be resolved through mediation, it nevertheless acknowledged that this is only applicable in appropriate cases. In the case before me, I personally doubt that the proposed arbitrator (as opposed to a judicial officer sitting in another High Court division as was the case in *Gulf Energy Limited v Rubis Energy Kenya PLC* [2021] eKLR) will be juridically suited to inquire into and provide remedies for alleged violation of the rights to freedom of expression and freedom from degrading and inhumane treatment provided for under articles 29 and 33 of *the Constitution* and which the Petitioner specifically pleads.
15. Importantly, the jurisdiction to adjudicate on and enforce these rights is granted to the High Court by virtue of article 165(2) (b) of *the Constitution 2010*. Where their violation is alleged to have been occasioned in the context of an employment relation, the Employment and Labour Relations Court is empowered to adjudicate on the rights (see *Pamoja Women Development Programme & 3 others v Jackson Kihumbu Wangombe & another* [2016] eKLR).
16. To the extent that article 165 (2) (b) of *the Constitution* confers jurisdiction to enforce the Bill of Rights on the High Court generally or on courts of equal status where the violation occurs in the context of disputes falling within their jurisdiction, there is a sense in which an arbitration agreement purporting to refer such dispute to an arbitrator is rendered inoperative. Further, it is also clear that disputes touching on the Bill of Rights even though arising from the execution of a contract fall outside the scope of disputes that parties are deemed to have agreed to refer to arbitration under an arbitration



clause in the contract. The constitutional requirement to foster alternative dispute resolution processes under article 159 (1) (c) of *the Constitution* does not in my view operate so as to dilute the exclusive original jurisdiction granted to the High Court (and courts of equal status where appropriate) to adjudicate on disputes on the Bill of Rights under article 165 (2) (b) of *the Constitution*.

17. In this context, I am of the view that the claims by the Petitioner of violation of rights in the Bill of Rights in effect rendered inoperative the arbitration agreement between the parties at least on those constitutional issues. These claims can only be interrogated by this court as they are said to have arisen in the course of execution of the contract of employment between the parties. The position I take is consistent with the views expressed in the Supreme Court decision of *Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 others* (supra).
18. The Respondent is within its rights to insist on referral to arbitration of issues that are unrelated to claims for violation of constitutional rights. However, this implies that the parties have to consider isolating and pigeonholing claims that are to be handled through arbitration and those that are to remain before this court for trial. Such endeavor will be highly undesirable and inconvenient to the efficient administration of justice. As the issues in dispute relate to and have arisen from one transaction, it is only sensible that the court, which has jurisdiction to deal with the constitutional issues that have been raised, determines all of them.
19. The decision by the High Court in *Gulf Energy Limited v Rubis Energy Kenya PLC* appears to suggest that parties to an arbitration agreement must submit to arbitration notwithstanding that their dispute raises questions relating to violation of constitutional rights and fundamental freedoms. In this context, the Gulf Energy decision appears to express a view that does not sit well with that of the Supreme Court in the Bia Tosha case. As I am bound by the Supreme Court pronouncements by reason of article 163 (7) of *the Constitution*, I will rely on its decision Bia Tosha decision.
20. It is perhaps critical to mention that the Court of Appeal decision of *Kenya Breweries Limited & another v Bia Tosha Limited & 5 others* [2020] eKLR that the Respondent relies on to advance its argument that the constitutional issues raised by the Petitioner should be addressed through arbitration was set aside by the Supreme Court in *Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 others* (Petition 15 of 2020) [2023] KESC 14 (KLR). As a result, I decline to issue an order staying the proceedings and referring the matter to arbitration.

Determination

21. The upshot is that the application dated December 30, 2022 is declined.
22. Costs of the application shall abide the outcome of the case.

DATED, SIGNED AND DELIVERED ON THE 8TH DAY OF JUNE, 2023

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Petitioner

.....for the Applicant/Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived



compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

