

Enforceability of Arbitration Clauses in Employment Contracts under Kenyan law

Did Stephen Nyamweya & another v. Riley Barasa Services Limited [2013]eKLR change Kenya's Employment law on Enforceability of Arbitration Clauses in Employment Contracts? Arbitration clauses in employment contracts are enforceable under Kenya's Employment & Labour relations laws. Nyamweya & another v. Riley Barasa Services Limited [2013]eKLR did not change this legal position. What Nyamweya did was to clarify the legal position that arbitration clauses in employment contracts will not be enforceable if they are "incapable of implementation owing to certain absurdities".

Equally important, the absurdities test in Nyamweya is not a new innovation. Section 6 of the Arbitration Act, 1995 already states that arbitration clauses in agreements (including employment contracts because arbitration laws apply to employment contracts in Kenya- see, e.g., James Heather-Hayes v. African Medical and Research Foundation (AMREF) [2014]eKLR) will not be enforceable if the arbitration clause is null and void, inoperative or "incapable of being performed".

Accordingly, the absurdities test in Nyamweya is rightly within the purview of Kenya's arbitration laws.

There is need, therefore, for employers (drafters of employment contracts) to ensure that the arbitration clause in an employment contract, if any, is capable of being performed/implemented. The arbitration clause must be self-executing otherwise disputes arising out of the contract may not be subjected to arbitration.

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