



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. APPLICATION NO. 424 OF 2013

REPUBLIC.....APPLICANT

VERSUS

THE HIV AND AIDS TRIBUNAL.....RESPONDENT

EX PARTE: DYNCORP INTERNATIONAL

J K M.....INTERESTED PARTY

**JUDGEMENT**

**Introduction**

1. By a Notice of Motion dated 16<sup>th</sup> December, 2013, the *ex parte* applicant herein, **Dyncorp International**, seeks the following orders:

1. An order of Certiorari do issue to remove into the High Court for purposes of being quashed the decision made by the HIV and AIDS Tribunal in its ruling dated 15<sup>th</sup> November 2013 in HIV/AIDS Cause No. 1 of 2013.
2. An order of Prohibition do issue prohibiting the Respondent from conducting any further proceedings in HIV/AIDS Cause No. 1 of 2013.
3. The Honourable Court be pleased to grant further orders and directions as it may deem fit.
4. The costs of this application be provided for.

**Ex Parte Applicant's Case**

2. The same application was supported by a verifying affidavit and supplementary affidavit sworn by **Virginia E. Robinson**, the Chief Labor and Employment Counsel of the Applicant on 22<sup>nd</sup> November 2013 and 6<sup>th</sup> December, 2013 respectively.

3. According to the deponent, these proceedings arise from the Ruling and orders of the HIV and AIDS Tribunal (hereinafter referred to as "The Respondent") made on 15<sup>th</sup> November 2013 in HIV/AIDS Cause No. 1 of 2013 which matter arose from a claim by filed **Mr. J K M**, the interested party herein on 19<sup>th</sup> June 2013 in which he sought *inter alia* general damages and exemplary damages for the alleged

discrimination against him whilst in the employment of the Applicant.

4. According to the deponent, the interested party's cause of action arose out of a Foreign Service Employment Agreement (hereinafter "**the agreement**") entered into between the interested party and the Applicant on 7<sup>th</sup> February & 12<sup>th</sup> October 2103 by which the interested party was employed to work as a LG4 Billeting Lead in Afghanistan.

5. It was deposed that the dispute arose out of the agreement as the medical testing that was carried out on the Applicant pursuant to clause 14 of the agreement which provides that the contract was contingent upon the Applicant obtaining a satisfactory medical examination. Further, the interested party signed an agreement authorising the Applicant to use and disclose his protected health information. It is thus not true that the dispute does not arise out of the agreement. The contractual terms cannot be ignored for the simple reason that the parties came together under the terms of the agreement. It was not an '*ad-hoc*' relationship with no applicable terms. The Respondent therefore acted *ultra vires* by assuming jurisdiction to entertain the dispute and exceeded its jurisdiction as clause 20 provides that all disputes arising under the agreement are subject to the jurisdiction of the courts of the Commonwealth of Virginia in the United States of America.

6. The said agreement, it was deposed provided that the contract was to governed by and interpreted under the laws of the Commonwealth of Virginia in the United States of America and clause 20 thereof provided that any disputes arising under the contract were to be exclusively resolved in the courts of the Commonwealth of Virginia in the United States of America.

7. Based on the foregoing, the Applicant filed an application dated 17<sup>th</sup> October 2013 seeking orders to have the claim before the Respondent struck out for want of jurisdiction which applicant was heard and by a ruling delivered on 15<sup>th</sup> November 2013, the Respondent held that it had jurisdiction to entertain the dispute.

8. To the Applicant, the Respondent has no jurisdiction to consider and make a substantive finding on any dispute arising out of the employee's employment as the ***HIV and AIDS Prevention and Control Act*** Cap 246a (hereinafter "**the Act**") is inapplicable to the parties by virtue of the fact that the contract was to be governed by and interpreted under the laws of the Commonwealth of Virginia in the United States of America. It was further contended that Section 20 (1) of the Act is inapplicable as all disputes relating to the agreement are subject to the jurisdiction of the courts of the Commonwealth of Virginia in the United States of America hence the Respondent acted *ultra vires* by assuming jurisdiction to entertain the dispute and exceeded its jurisdiction.

9. Having freely and voluntarily entered into the agreement with the Applicant, it was deposed that the interested party was at all material times aware that the all disputes were to be determined by the Courts in the Commonwealth of Virginia and the contract was to be governed by and interpreted under the laws of the Commonwealth of Virginia in the United States of America hence the parties are bound by the terms of their contract and a court cannot re-write a contract between the parties. In any event, it was averred the Respondent has no presence in Kenya and the employee's contract was to be carried out in Afghanistan.

10. Based on legal advice received from the Applicant's advocate **Mrs. Kinyenje-Opiyo** the deponent believed the Ruling and Order made by the Respondent dated 15<sup>th</sup> November 2013 is null and void.

11. On behalf of the applicant it was submitted that the Respondent's jurisdiction is limited to complaints arising from breaches of the provisions of the Act. It was reiterated that since the agreement is governed by the laws of the Commonwealth of Virginia the Act does not apply since the disputes arising from the agreement are to be resolved in the Courts of the said State. It was submitted that the Respondent erred in holding that the contract did not contain any clause dealing with mandatory HIV testing or unauthorized disclosure of confidential information.

12. Based on **National Bank of Kenya Ltd vs. Pipeplastic Samkplit (K) Ltd [2002] 2 EA 503**, it was

submitted that the Court cannot rewrite the contract for the parties.

13. It was submitted that on the authority of **Republic vs. Funyula Land Dispute Tribunal & 3 Others [2005] eKLR**, if the Respondent had no jurisdiction, its decision is a nullity.

### **Interested Party's Case**

14. On his part the interested party herein, **J M**, filed a replying affidavit sworn on 21<sup>st</sup> February, 2014.

15. According to him, the application is misconceived and frivolous, and the Applicant's application by way of Judicial Review is not available as a remedy in the dispute before the court, since the remedy lies in appeal from the decision by the HIV and AIDS Tribunal. It was deposed that the contracts of employment touching on this matter were signed by the interested party and the employer's/respondent's representatives at their office located at Agip House, in Nairobi. He averred that copies of his passport and visas to travel also established that he was in Kenya on the respective dates of signing of the contracts of employment and that the Respondent had a recruiting office in Nairobi.

16. According to the interested party, the claim before the Respondent is not a claim for breach of the contract of Employment. Rather it is a claim arising out of the breach of an Act of Parliament in Kenya which Act sets out the remedies and forum for seeking redress against statutory breach. He deposed that a good number of the HIV tests complained of were carried out in Kenya hence the Respondent has jurisdiction to hear and determine the dispute herein.

17. It was averred that the decision delivered by the HIV and AIDS Tribunal in its Ruling dated 15<sup>th</sup> November 2012 in HIV/AIDS Cause No. 1 of 2013 is therefore lawful and that the Applicants have not proved any illegality, irrationality and/or impropriety or any other ground known in law to warrant the grant of the judicial review orders sought hence the application is an abuse of this honourable court process.

18. In urging the Court to dismiss the application, it was submitted on behalf of the interested party that from clause 20 of the Agreement, the disputes that are to be referred to the courts of the commonwealth of Virginia are those that arise under the contract, but not other disputes. It was submitted that the Respondent did not attempt to assume jurisdiction to entertain the issue of termination of contract nor exceed its jurisdiction as evidenced in its ruling but only focused itself on issues contrary to the Act. Since the interested party is Kenyan citizen; the respondent has an office in Kenya or had a branch in Kenya at the time of the entry into the contract; the contract was entered into in Kenya; the law violated is a Kenyan Statute together with the Constitution of Kenya; the contract was partially performed in Kenya; and a good number of the tests were carried out in Kenya, the Respondent had the jurisdiction to hear and determine the issues in the suit. In support of its submissions, the interested party relied on **Jones vs. Solomon Civil Appeal No. 85 of 1986**, a decision of the Court of Appeal of Trinidad and Tobago.

19. It was submitted based on the authority of **Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others [2012] KLR** that the applicant's remedy lies in an appeal rather than judicial review.

### **Determination**

20. The first issue for determination is the effect of clause 20 of the Agreement on the parties. The clause provided as follows:

***This contract shall be governed by and interpreted under the laws of the Commonwealth of Virginia, United States of America. Any disputes arising under this contract shall be exclusively resolved in the Federal District Court for the Eastern District of Virginia, if applicable, or the courts of the Commonwealth of Virginia. Employer and Employee mutually agree to waive their right to a trial by jury.***[Underlining mine].

21. That parties may validly, in their contract incorporate a clause which provides that their dispute shall be determined by a foreign court is not in doubt. As was held in Maneklal Purshottam vs. Kehsvlal Talakchand (London) Ltd Civil Appeal No. 21 of 1954 ([1954] 21(1) EACA 111:

**“Parties may agree among themselves that a suit may be brought in any one of the two or more competent Courts...The common law embodied in a general rule recognised in the English Courts prohibits all agreements purporting to oust the jurisdiction of the Courts...It is also a principle of the common law that the parties to a contract may make it one of the express or implied terms of the contract that they will submit in respect of any alleged breach thereof or any matter having relation thereto, to the jurisdiction of a foreign Court, and a person who has thus contracted is bound by his own submission.” See also Tononoka Steels vs. The E & S Africa Trade Bank & Development Bank Civil Appeal No. 255 Of 1998 [2000] 2 EA 536**

22. However, whether or not a provision that states that the dispute between parties be referred to a foreign Court is binding upon local courts and tribunals is moot. In The Despina Pontikos Civil Appeal No. 5 of 1975 [1975] EA 38 it was held:

**“Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for stay, the English court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. The burden of proving such strong cause is on the plaintiffs. In exercising its discretion, the court should take into account all the circumstances of the particular case. In particular, but without prejudice to the foregoing, the following matters, where they arise, may properly be regarded: (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts; (b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects; (c) With what country either party is connected, and how closely; (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages; (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would – (i) be deprived of security for that claim, (ii) be unable to enforce any judgement obtained, (iii) be faced with a time –bar not applicable in England, or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial...English courts are in charge of their own proceedings: and one of the rules which they apply is that a stipulation that all disputes should be judged by the tribunals of a particular country is not absolutely binding. Such a stipulation is a matter to which the courts will pay much regard and to which they will normally give effect, but it is subject to overriding principle that no one by his private stipulation can oust these courts of their jurisdiction in a matter that properly belongs to them.”**

23. Similarly, in United India Insurance Co. and Another vs. East Africa Underwriters and Another [1985] KLR 898; [1976-1985] EA 579 the Court of Appeal expressed itself as follows:

**“The Courts in this country have a discretion to assume jurisdiction over an agreement, which is made to be performed in Kenya notwithstanding a clause therein conferring jurisdiction. Clauses however should normally be respected because the parties themselves freely fixed the forums for the settlement of their disputes; the courts should carry out the intention of the parties and enforce the agreement made by them in accordance with the principle that a contractual undertaking should be honoured unless there is a strong reason for not keeping them bound by their agreement... The burden which is a heavy one is upon those who seek to avoid the exclusive jurisdiction clause to prove a strong reason... In exercising its discretion the court should take into account all the circumstances of the particular case; in particular and without prejudice the following matters, where they arise may be regarded: (i). In what country the evidence on the issues of fact is situated, or more**

readily available and the effect of that on the relative convenience and expense of trial as between the court of the country and the court of the foreign country; (ii). whether the law of the foreign court applies, and if so, whether it differs from the law of the country in any material respects; (iii) with what country either party is connected, and how closely; (iv). whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantage; (v). whether the plaintiff would be prejudiced by having to sue in the foreign court because they would be deprived of security for their claim, be unable to enforce any judgement obtained, be faced with a time bar not applicable in their country....A stipulation that all disputes should be judged by the tribunals of a particular country is not absolutely binding. It is a matter to which this courts will pay much regard and to which they would normally give effect but it is subject to the overriding principle that no one by his private stipulation can oust these courts of their jurisdiction in a matter that properly belong to them...The possibility cannot be excluded that there are still some countries in whose courts there is a risk that justice will not be obtained by a foreign litigant in particular kinds of suits whether from ideological or political reasons, or because of inexperience or inefficiency of the judiciary or excessive delay in the conduct of the business of the courts or unavailability of appropriate remedies.”

24. The question which was before the Respondent was whether the compulsory testing of the applicant for HIV and publication of the results thereof was in breach of the Act. The interested party however contends that the issue was not limited to the provisions of the Act but also went to the interested party's fundamental rights enshrined in the Constitution. Can a dispute which arises as a result of an alleged contravention of legal and constitutional provisions be said to be a subject of an Agreement of Employment as in the instant case? Whether or not a dispute falls within the contract being interpreted in my view is both a question of mixed law and fact. As held in **Owners of the Motor Vessel “Lillian S” vs. Caltex Oil (Kenya) Ltd [1989] KLR 1:**

**“By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”**

25. Therefore where the Tribunal's jurisdiction depends on a particular set of facts, it is upon the Tribunal to determine whether the said facts exist and such a determination cannot be said to be either in excess of or without jurisdiction. Therefore if the Respondent had jurisdiction to determine whether the facts before it brought the matter within the ambit of the Agreement the Respondent had the jurisdiction to make a determination either way and the mere fact that it made one decision and not the other did not necessarily render its decision liable to be quashed on an application for judicial review. In reaching its determination on the facts the Respondent had jurisdiction to err and the mere fact that a Court errs on the merits is not a ground for quashing the decision by way of judicial review as opposed to an appeal. Whereas the decision may be overturned on an appeal it does not necessarily qualify as a candidate for judicial review. In **East African Railways Corp. vs. Anthony Sefu Dar-Es-Salaam HCCA No. 19 of 1971 [1973] EA 327,** it was held:

**“It has been recognised for a long time past, that courts are empowered to look into the question whether the tribunal in question has not stepped outside the field of operation entrusted to it. The court may declare a tribunal's decision a nullity if (i) the tribunal did not**

follow the procedure laid down by a statute on arriving at a decision; (ii) breach of the principles of natural justice; (iii) if the actions were not done in good faith. Otherwise if none of these errors have been committed, the court cannot substitute its judgement for that of an authority, which has exercised a discretionary power, as the tribunal is entitled to decide a question wrongly as to decide it rightly..... And so have the courts repeatedly held that they have an inherent jurisdiction to supervise the working of inferior Courts or tribunals so that they may not act in excess of jurisdiction or without jurisdiction or contrary to law. But this admitted power of the Superior Court's to supervise inferior Courts or tribunals is necessarily delimited and its jurisdiction is to see that the inferior court has not exceeded its own, and for that very reason it is bound not to interfere in what has been done within that jurisdiction, for in so doing it would, itself, in turn transgress the limits within which its own jurisdiction of supervision, not of review, is confined. That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise..... Even if it were alleged that the Commission or authorised officer misconstrued the provision of the law or regulation, that would still not have entitled the court to question the decision reached. If a magistrate or other tribunal has jurisdiction to enter on the enquiry and to decide a particular issue, and there is irregularity in the procedure, he does not destroy his jurisdiction to go wrong. If he has jurisdiction to go right he has jurisdiction to go wrong. Neither an error in fact nor an error in law will destroy his jurisdiction.....Where the proceedings are regular upon their face and the inferior tribunal had jurisdiction, the superior Courts will not grant the order of *certiorari* on the ground that the inferior tribunal misconceived a point of law. When the inferior tribunal has jurisdiction to decide a matter, it cannot (merely because it incidentally misconstrues a statute, or admits illegal evidence, or rejects legal evidence, or convicts without evidence) be deemed to exceed or abuse its jurisdiction.”

26. In this case, it was however contended that there is no right of appeal against the decision of the Respondent. It must however be noted that the Tribunal's decision are only executed by the High Court and section 29 of the Act provides:

- (1) Where the Tribunal awards damages or costs in any matter before it, it shall, on application by the person in whose favour the damages or costs are awarded, issue to him a certificate stating the amount of the damages or costs.
- (2) Every certificate issued under subsection (1) may be filed in the High Court by the person in whose favour the damages or costs have been awarded and, upon being so filed, shall be deemed to be a decree of the High Court and may be executed as such.

27. Once such a decision is deemed as a decision of the High Court, it is my view that consequential provisions relating to High Court decision would be applicable to the decision including the provisions relating to appeals. See Commissioner of Income Tax vs. Menon [1985] KLR 104; [1976-1985] EA 67.

28. It is therefore my view that the applicant had an opportunity of appealing against the decision of the Respondent. The law is that judicial review proceedings are special proceedings and ought not to be resorted to as an alternative to ordinary civil litigation or an appellate process. As was held by **Ochieng, J** in John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003, for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort; the applicant however will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. Therefore, unless due to the inherent nature of the orders granted to appeal against the same where there is a right of appeal would be less convenient or otherwise less appropriate, the adversely affected party ought to appeal against the said order rather than to challenge a decision in respect of which an application has been made and dismissed by the Tribunal by way of judicial review proceedings.

29. Having considered the application herein it is my view that the applicant ought to have pursued the appellate process rather than challenging the Respondent's decision in these judicial review proceedings.

**Order**

30. In the premises I find no merit in the Notice of Motion dated 16<sup>th</sup> December, 2013 which I hereby dismiss. However as the Respondent did not participate in these proceedings and as the interested party did not press for costs each party will bear own costs.

31. It is so ordered.

**Dated at Nairobi this 27<sup>th</sup> day of January, 2015**

**G V ODUNGA**

**JUDGE**

***Delivered in the presence of:***

***Miss Aluvale for Mrs Opiyo for the Applicant.***

***Mr Ombasa for Mr Munyao for Interested Party***

***Cc Patricia***