



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL CASE NO. 223 OF 2003

ROSA A MUNYWOKI & 18 OTHERSPLAINTIFFS

VERSUS

1.INVESTIMETNS AND MORTGAGES BANK LTD

2.ATTORNEY-GENERAL.....DEFENDANTS

R U L I N G

1. This is an application (by **notice of motion dated 10th October 2012**) for an order to transfer this suit to the **Industrial Court**. A further order is sought that if the prayer for transfer is allowed “the Plaintiffs do file and serve their memorandum of claim at the Industrial Court within the next 30 days”.
2. The application is stated to be brought under **sections 3A and 18** of the **Civil Procedure Act, Cap 21** (the **Act**). The grounds for the application stated on the face thereof are –
 - (a) That the cause of action in this suit arose out of an employer-employee relationship between the Plaintiffs and the Defendant.
 - (b) That the Industrial Court (now) “enjoys wide jurisdiction (in) labour related disputes, including the issues raised by the Plaintiffs in this suit”.
 - (c) That at the time the suit was filed the Industrial Court did not enjoy such wide jurisdiction.
 - (d) That it is in the interests of justice that the orders sought are granted.
3. The application is supported by an affidavit sworn by one of the Plaintiffs. It elaborates upon the grounds for the application.
4. The 1st Defendant opposed the application by grounds of opposition dated 25th February 2013. The points taken are –
 - (i) That the Industrial Court does not have jurisdiction to entertain the dispute herein “as there has never been an employer-employee relationship between the

Plaintiffs and the 1st Defendant”.

(ii) That the dispute in this suit does not fall within the purview of **section 12** of the **Industrial Court Act, 2011**.

(iii) That the application is incompetent and does not lie in law.

No replying affidavit was filed.

5. The 2nd Defendant does not appear to have filed any papers in response to the application.

6. I have considered the submissions of the learned counsels appearing. No authorities were cited. The ground of opposition that the application is incompetent and does not lie in law was not argued by the learned counsel for the 1st Defendant, and I will not make any findings upon it. His submission was on the other two grounds.

7. Learned counsel argued that the question of fact whether or not there was an employer/employee relationship for purposes of section 12 of the Industrial Court Act, 2011 was decided by this Court in this suit by a **ruling dated 24th August 2011** (Waweru, J); that it is clear from that ruling that the Plaintiffs were employed by another company and not by the 1st Defendant; that the 1st Defendant merely purchased the assets of that other company; that in the sale agreement between the two companies employment contracts and collective bargaining agreements (CBAs) were specifically excluded; and that therefore the dispute in this suit as between the Plaintiffs and the 1st Defendant is not and cannot be an employer/employee dispute.

8. On his part learned counsel for the Plaintiff submitted that the ruling dated 24th August 2011 was not exhaustive on the issue whether or not there was an employer/employee relationship between the parties, and that the same ought to be left to the Industrial Court to determine.

9. Under **Article 165(5) (b)** of the **Constitution of Kenya, 2010** (the **Constitution**) this court no longer has jurisdiction in respect of matters falling within the jurisdiction of the Industrial Court. And under section 12 of the Industrial Court Act, the Industrial Court (established by **section 4** of the same Act in pursuance of **Article 162 (2) (a)** of the Constitution) has ***exclusive original and appellate jurisdiction to hear and determine all disputes relating to employment and labour relations, including disputes relating to or arising out of employment between an employer and an employee.***

10. In the aforesaid ruling dated 24th and delivered on 26th August 2011 this Court delivered itself thus –

“I have also perused the sale and purchase agreement dated 20th November, 2002 between the parties.

There are comprehensive definitions of the terms “Liabilities” and “Assets” given in the interpretation section of the agreement. Under the agreement,

“Liabilities” means without duplication the burden, obligations, commitments and liabilities of the seller (Biashara Bank) under or relating to:

- a. *the Deposits;*
- b. *the Borrowings;*
- c. *the Supplier Contracts;*
- d. *the Foreign Exchange Contracts;*
- e. *the Leases;*
- f. *the Contingent Liabilities;*

- g. *the Trade Creditors;*
- h. *the Sundry Liabilities*
- i. *the Documents; and*
- j. *all such other liabilities and obligations (other than those excluded and excepted under clause 3) assumed or incurred by the seller in relation to the Business between the Accounts Date and the Effective Time and which are in the nature of those liabilities and obligations listed above.'*

Contracts of employment and collective bargaining agreements between Biashara Bank and its unionized employees are not included in the definition of “Contingent Liabilities.” The two are in fact specifically excluded in Clause 3(e) and (f) of the sale and purchase agreement in the following words:-

“3. RETENTION OF ALL OTHER ASSETS AND LIABILITIES

For avoidance of doubt, nothing in this agreement shall operate to transfer any assets, rights or liabilities of the Seller or any member of the Seller’s Group) other than those specifically referred to in the definitions of Assets and Liabilities, and without limiting the generality of the foregoing, there shall be expressly excluded and excepted from the sale and purchase, and nothing in this agreement shall operate to transfer:

(a)

.....

(e) *the Employment Contracts; or*

(f) *the Collective Bargaining Agreements between the Vendor and unionized employees.”*

It is thus clear that all liabilities there may have been relating to Biashara Bank’s employees’ contracts of service, or any collective bargaining agreements entered into with their trade unions, were not transferred to the 1st Defendant. Those liabilities were specifically and particularly excluded by the sale and purchase agreement of 20th November, 2002 as seen above.”

11. It is thus clear that the issue whether or not there was an employer/employee relationship between the Plaintiffs and the 1st Defendants was fully considered by the court in the aforesaid ruling. The finding was, in effect, that there was no such relationship.

11. The suit as between the Plaintiff and the 1st Defendant thus does not belong in the Industrial Court. The application at hand must be refused. It is dismissed with costs. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 18TH DAY OF JULY 2013

H. P. G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 19TH DAY OF JULY 2013

