



STEPHEN OSEGE ..... PLAINTIFF

VERSUS

AFRICAN TRADE INSURANCE AGENCY ..... DEFENDANT

### RULING

1. The Notice of Motion before this Court is dated 29<sup>th</sup> March 2011 but not filed herein until 1 August 2011. It is brought by the Defendant and seeks to strike out the Plaint dated 2 March 2009, filed on the 10 March 2009. It is brought on the grounds that this Court has no jurisdiction to hear or determine this suit pursuant to Section 87 of the Employment Act, 2007 (hereinafter “*the Act*”). It is supported by the Affidavit of **GEORGE ODUORI OTIENO** sworn on 29 March 2011.

2. The Plaintiff has not sworn a Replying Affidavit as regards the Application but this may be, as explained by his counsel Mr. Ouma when he appeared before me on 8 November 2011, because he has relocated to Gulu in Northern Uganda. However, the Plaintiff has filed Grounds of Opposition on 24 November 2011. Further, both parties have filed written submissions, the Defendant on 16 December 2011 and the Plaintiff on 7 February 2012.

3. The Affidavit in support of the Application details that the deponent is the Chief Executive Officer of the Defendant. It goes into the detail of the Plaintiff’s employment with the Defendant on an employment contract basis initially for 3 years from 1<sup>st</sup> July 2002 and that by a letter dated 26 August 2005, the Plaintiff’s contract was extended for 3 years through to 1<sup>st</sup> October 2008. The deponent exhibited the initial letter of appointment dated 20 June 2002 as “GOO 1” and the 2<sup>nd</sup> letter as above as “GOO 2”. He stated that the contract had expired by effluxion of time on 1<sup>st</sup> October 2008 and it was not further extended or renewed.

4. At paragraph 8 of the Affidavit in support, Mr. Otieno, having been advised by his advocate, Mr. Okong’o, set out the issues arising for determination of this suit as follows:

**“(i) whether a proposal by the Defendant’s Human Resource Committee to the Defendant’s Board of directors for upgrading of, inter alia, the Plaintiff’s salary bound the Defendant to give effect to the same.**

**(ii) Whether the Defendant’s Board of Directors set out a time limit within which the Defendant was to prepare a proposal for the grading review of inter alia, the Plaintiff’s position.**

**(iii) Whether the Plaintiff’s contract of employment expired by effluxion of time on 1<sup>st</sup> October, 2008.**

**(iv) Whether the proposal for grading of all positions within the Defendant had been approved by the Defendant’s Board of Directors as at 1<sup>st</sup> October, 2008.**

**(v) Whether the Defendant’s position had been re-graded and associated salary upgrade as at 1<sup>st</sup>**

October, 2008.

(vi) Whether the Plaintiff was entitled to a salary increase emanating from the proposal aforesaid before he was formally notified that his salary had been adjusted.

(vii) whether the Defendant had set a time frame within which the salaries for the positions that had been set for upgrading were to be upgraded; and

(viii) Whether the Defendant's Human Resource Committee's recommendation and the Defendant's Board of Directors' approval for upgrading of the salary for the position that was being held by the Plaintiff did constitute a contract between the Plaintiff and the Defendant entitling the Plaintiff to claim the proposed increment.

(ix) Whether the Plaintiff is entitled to US\$38,306.80 for the alleged breach of employment contract; and

(x) Whether the plaintiff is entitled to general damages for the alleged breach of employment contract”.

As can be seen, the issues above are all related to personnel or Human Relations matters.

5. Mr. Otieno further detailed that he had been advised by the Advocates on record for the Defendant, that since the Act had come into force, **Section 87** thereof conferred jurisdiction for any complaint or suit relating to breach of a contract of service or the rights or liabilities of employers and employees, upon the Industrial Court. Consequently, it was the deponent's opinion that this suit was wrongly brought at first instance before this Court and should therefore be struck out as the Court has inherent jurisdiction so to do.

6. The Grounds of Opposition filed by the Plaintiff detailed that **Section 87** of the *Employment Act 2007* could not oust the jurisdiction of this Court as the substantive issues herein arose before the Act came into force. The Plaintiff also maintained that the dispute between the parties is not in the strictest sense an industrial or labour dispute but involved a breach of specific terms of a contract. There was further reference to the preamble to the Act as to declaring and defining the fundamental rights of employees and the Plaintiff had nowhere in his pleadings made any reference to his claim coming under the provisions of the Act. The Plaintiff pointed out that to make his claim subject to the Act would be to make it operate retrospectively as it would seek to define the Plaintiff's fundamental rights which were already defined and in existence before the Act came into operation. Thereafter, the Grounds of Opposition reflected upon the decisions of the Board of the Defendant which if such had been properly implemented by the Chief Executive Officer would have resulted in considerable improvement in the Plaintiff's terms and conditions of his contract of employment, as well as he being able to receive the benefits of the Board recommended increments. Finally, the Plaintiff detailed that the jurisdiction of the Industrial Court is confined to dispute contemplated under the Industrial Disputes Act and in so far as the Plaintiff's claim herein does not involve a collective bargaining agreement or a collective or unionisable dispute, it is within the jurisdiction of this Court to enforce the Plaintiff's contractual rights.

7. The Defendant's written submission herein opened with reference to **Section 87** of the Act and underlined the provisions of **Section 87 (2)** thereof as:

**“(2) No court other than the industrial Court shall determine any complaint or suit referred to in subsection (1)”.**

The Defendant continued by detailing as follows:

**“From the Plaintiff's Plaint filed herein and the Defendant's Defence, the main and substantial issues arising for determination by the Court relate directly or indirectly to the Plaintiff's contract of employment. The said issues can only be heard and determined by the Industrial Court pursuant**

to the Employment Act, 2007”.

Accordingly, the Defendant submitted that this Court had no jurisdiction to hear this suit. I was referred to the persuasive authority of Lady Justice Ang’awa in *Judicial Review No. 15 of 2009 Angalia vs. Masinde Muliro University of Science and Technology & Others* [2010] eKLR.

8. The Plaintiff’s written submissions detailed that the Act came into force on 2 June 2008 when the old *Employment Act (Cap 226)* was repealed. The contract to which this dispute refers, dates back to December 2005, way before the Act came into force. The submissions continued by quoting the provisions of **Section 93** of the Act as follows:

**“93. (1) A valid contract of service ... entered into in accordance with the Employment Act (now repealed) shall continue in force to the extent that the terms and conditions thereof are not inconsistent with the provisions of this Act, and subject to the foregoing every such contract shall be read and construed as if it were a contract made in accordance with and subject to the provisions of this Act and the parties thereto shall be subject to those provisions accordingly”.**

The Plaintiff interpreted the above section to mean that as his contract had commenced before the Act and under the provisions of the repealed *Employment Act (Cap 226)*, it was the repealed Act that applied to the Contract and these proceedings as the Act does not operate retrospectively.

9. The Plaintiff continued with its submissions reflecting upon the characteristics of the parties. It noted that the Plaintiff was a Ugandan citizen and that the Defendant although having its offices based in Kenya is a legal entity created by numerous international instruments ratified by 8 African countries. The Plaintiff then asked the question that bearing the above in mind, could the Defendant take advantage of **Section 87** of the Act to oust the jurisdiction of this Court. The Plaintiff maintained that as the Defendant had submitted in its Pleadings herein to this Court, can it now seek the Court’s inherent powers under **Section 3A** of the *Civil Procedure Act*? Finally, the Plaintiff raised 2 points in his conclusion to his submissions. Firstly, if this Court finds that it lacks jurisdiction can it make an Order transferring this suit to the Industrial Court under **Section 1A** of the *Civil Procedure Act*? Secondly, the Plaintiff submitted that the authority quoted to me by the Defendant being the **Angalia vs. Masinde Muliro University** case (supra) was only persuasive having been delivered by a Court of concurrent jurisdiction.

10. Before this Court gets to determine whether it has jurisdiction to hear this suit, one needs to have a look at the dispute resolution set up under the Contract of employment as between the Plaintiff and the Defendant. In both the Letters of Appointment, there is a Dispute clause detailing that any dispute between the employee and the Agency shall be resolved with the procedures laid down in the Agreement establishing the African Trade Insurance Agency and the Staff Manual. This Court has not been availed of either of those documents but it seems that whatever they say about the methodology of the resolution of disputes should have been the route followed by the Plaintiff before coming before this Court.

11. However, I am not required to make a finding as between the parties on that point. The argument as put forward in the Affidavit in support and the Defendant’s submissions herein as compared to the Grounds of Opposition and the Plaintiff’s submissions herein, is whether it is this Court or the Industrial Court, or indeed any other court, which has the jurisdiction to hear and determine this dispute between the parties. The Plaintiff submitted that as the dispute between the parties had materialized before the Act came into operation; it was the repealed *Employment Act (Cap 226)* which applied to the dispute. Under that Act, the jurisdiction to hear employment disputes was conferred by **Section 40** thereof on a Magistrate’s Court of the First and Second class, this Court having only appellate jurisdiction. This would mean that the Plaintiff filed suit in the wrong court anyway. Be that as it may, I differ with the Plaintiff as regards the transitional provisions of **Section 93 (1)** of the Act. As I read that section, I am of the opinion that the Act does apply to this dispute. The relevant passage reads:

**“..... and subject to the foregoing every such contract shall be read and construed as if it were a contract made in accordance with and subject to the provisions of this Act, and the parties thereto shall be subject to those provisions accordingly”.**

I find that the Act does indeed apply to this dispute between the parties.

12. I was referred to the **Jane Angalia** case and asked by the Plaintiff to treat the same as merely persuasive authority. This I am not inclined so to do. In *Misc. Civil Appl. No. 23 of 2010 (Nyeri)* my learned brother Seron J in **Julius Gicheru Njoroge vs. Nyeri Plantations** [2011] eKLR had this to say:

**“It is obvious that the dispute before the Chief Magistrate’s Court is that between an employee and an employee. The competent court with exclusive jurisdiction to hear and determine such a dispute is the industrial Court under Section 87 (2) of the Employment Act No. 11 of 2007”.**

Here too the dispute is between employee and employer. I have no doubt that the proper court to hear that dispute is the Industrial Court.

13. The Plaintiff under paragraph 3.3 of the conclusion to his submissions has stated that in the event that I am persuaded that this Court has no jurisdiction to hear and determine this suit, this Court does have jurisdiction under **Section 1A** of the *Civil Procedure Act*, to make an order transferring this suit to the Industrial Court. Regrettably in that, I do not think that I am able to assist the Plaintiff. **Section 1A** of the *Civil Procedure Act* details the overriding objects of that Act and the rules made thereunder in order to facilitate the just, expeditious, proportionate and affordable resolution of civil suits governed by the Act. In my opinion, the dispute between the parties here is not governed by the Act. It does not come under the Act but is then governed by the rules and procedure of the Industrial Court under the *Industrial Court Act [2011]*. Moreover, the powers of this Court as to the transfer of cases is explicitly set out in **Section 18** of the *Civil Procedure Act* and relates specifically to this Court’s powers to withdraw and transfer cases in courts subordinate to it. The *Industrial Court* under the *Constitution 2010* is not subordinate to this Court; it is on an equal footing therewith.

14. The upshot of the above reasoning is that I find myself unable to transfer the suit to the Industrial Court. The same has been filed in the wrong Court and I have no alternative but to dismiss the suit by granting the Defendant’s Notice of Motion dated 29 March 2011, with costs to the Defendant.

**DATED and DELIVERED at NAIROBI this 20<sup>th</sup> day of March 2012.**

**J. B. HAVELOCK**  
**JUDGE**