



**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**Civil Case 552 of 2006**

**MARTIN ERNEST .....PLAINTIFF**

**VERSUS**

**DEL MONTE KENYA LIMITED.....DEFENDANT**

**RULING**

In paragraph 3 of the plaint dated 2<sup>nd</sup> October, 2006 the plaintiff states that on 16<sup>th</sup> November, 1998 **Cirio Del Monte Foods International** employed him in the capacity of worldwide head of internal audit. And by a letter dated 14<sup>th</sup> January, 2007 he was assigned to **Cirio Del Monte Kenya Limited** as Finance director for a period of three years commencing 1<sup>st</sup> May, 2002 up to and including 30<sup>th</sup> April, 2005. He says it was a term of the said assignment that the period could be extended at the end of the term by mutual agreement. He also says that on 6<sup>th</sup> March, 2002 **Cirio Del Monte Foods International Limited** confirmed his assignment to Kenya in writing for a period of 3 years with effect from 1<sup>st</sup> February, 2002. He also states that on 30<sup>th</sup> September, 2004 **Del Monte Kenya Limited** and **Del Monte Foods International Group** came under new ownership and consequently all companies within the group removed the word **Cirio** from their names. Again he states on 16<sup>th</sup> September, 2005 the defendant unlawfully terminated his employment on the grounds of redundancy. As a result of that termination, the plaintiff has sued the defendant for special damages of Sterling Pounds 88971 of the equivalent of Kshs.12,277,998/= and interest at court rates from 16<sup>th</sup> September, 2005 until payment in full.

The defendant states that it did not employ the plaintiff and did not at any time offer the plaintiff employment elsewhere in the world as alleged or at all. It also contends that it did not and could not terminate the plaintiff's employment since there was no contract of employment between the plaintiff and the defendant as alleged or at all. In essence the defendant states that the plaintiff has no cause of action against the defendant and the present suit as framed is an abuse of the court process and ought to be struck out with costs to the defendant. And in paragraph 12 of the defence, the defendant states;

**“This court lacks jurisdiction.**

**The contract between the plaintiff and Cirio Del Monte Foods International Ltd provided as follows;**

**Jurisdiction**

***This letter of assignment is issued in England and is governed by the laws of England.***

***In event that any provision of this letter shall be held invalid or unenforceable such invalidity or unenforceability shall attach only to such provision and shall not affect other provision of this letter.***

**This clause takes away the jurisdiction of the court. The plaintiff's suit is further an abuse of the court process”.**

The defendant has now filed an application dated 15<sup>th</sup> December, 2006 seeking;

- (1) The plaintiff's plaint dated 2<sup>nd</sup> October, 2006 be struck out.
- (2) The Plaintiff do pay to the defendant the cost of this application and of the suit.

The application is brought under Order VI rule 13(1) (a) (b) (c) and (d) of the Civil Procedure Rules and it is supported by the affidavit of **Rudovick O. Kezzah**. The deponent states as follows: That the plaintiff was employed by **Cirio Del Monte Foods International Ltd** which is incorporated and based in England. The contract of employment was between **Cirio Del Monte Foods International Ltd** and the plaintiff. The defendant was neither a party nor privy to that contract of employment. It is also alleged that the plaintiff was never assigned to the defendant. It is further contended that the defendant was neither a party nor privy to the terms and conditions of the assignment letter

dated 14<sup>th</sup> January, 2002.

The deponent states that the plaintiff was subject to a contract of employment entered into with **Cirio Del Monte Foods International Ltd** and did not enter into any new contract of employment with the defendant. He also states further that **Cirio Del Monte Foods International Ltd** extended the plaintiff's contract of employment through a letter dated 7<sup>th</sup> June, 2004 and that the defendant was not privy to the extension of that contract. He also depones that the defendant and **Cirio Del Monte Foods International Ltd** are two separate legal entities.

The plaintiff filed a replying affidavit and a further affidavit in response to the allegations set out in the application and in the supporting affidavit to the application. He states as follows: That prior to his employment to defendant he worked for **Cirio Del Monte Foods International Ltd** based in the **United Kingdom**. By a letter dated 14<sup>th</sup> January, 2002 he was assigned to a sister company known as **Cirio Del Monte Kenya Ltd** based in **Thika** within the Republic of Kenya for a period of 3 years to work in the position of Finance Director. And that his letter of assignment did not raise the issue of relationship between **Cirio Del Monte Foods International Ltd** and **Cirio Del Monte Kenya Ltd**. He states that in a letter dated 6<sup>th</sup> March, 2002 by the Human Resource Manager of **Cirio Del Monte Foods International Ltd** his assignment to **Cirio Del Monte Kenya Ltd** was duly confirmed. And in a further letter dated 12<sup>th</sup> August, 2002 signed by a director of **Cirio Del Monte Kenya Ltd** his employment was transferred to **Cirio Del Monte Kenya Ltd** rather than the **Del Monte Group Limited**.

He also states that between March, 2004 and June, 2004 **Cirio Del Monte Foods International Ltd**, **Cirio Del Monte International**, and **Cirio Del Monte Kenya Ltd** underwent corporate restructuring and change of ownership, whereupon the said companies removed the word **Cirio** from their corporate name and continued operating as **Del Monte Foods International Ltd**, **Del Monte International** and **Del Monte Kenya Ltd**. The plaintiff states that through a letter dated 7<sup>th</sup> June, 2004 the Managing Director of **Del Monte International Ltd** in his capacity as the Chief Executive of **Del Monte Kenya Ltd** informed him that his assignment to **Del Monte Kenya Limited** was extended for further period of 3 years.

The application was argued before me by **Miss Kirimi** Advocate on behalf of the applicant/defendant and by **Mr. Nyaoga** Advocate on behalf of the respondent/plaintiff. They also cited various authorities in support of their respective positions. I have considered the submissions in line with other materials put forward by the parties. The starting point is that a party is required to set out his cause of action against the opposite party by setting out in clear terms the actual dispute to be determined between the parties. That cause of action must be reasonable and must not be frivolous. In order to determine whether a reasonable cause of action has been disclosed by the plaintiff against the defendant, it is necessary to examine the allegations set out in the plaint. The test to be applied in determining whether a proper cause of action has been disclosed by the plaintiff is well enumerated in the case of **D. T. Dobie & co. Limited vs Muchina & another [1982] KLR** where it was held;

**“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits “without discovery, without oral evidence tested by cross-examination in the ordinary way.” (Sellers LJ (supra)). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.**

**If an action is explainable as a likely happening which is not plainly and obviously impossible, the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuit it.**

**No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it”.**

It is clear that the plaintiff was initially employed by **Cirio Del Monte Foods International Ltd** and it is that company which assigned him to **Cirio Del Monte (Kenya) Ltd** through a letter of assignment dated 14<sup>th</sup> January, 2002. In the letter of assignment the plaintiff was required to report to the Chief Executive of **Cirio Del Monte Kenya Ltd** based in **Thika**, Kenya. The letter stated in part;

**“Whilst on an assignment in Kenya your employment will transfer to Del Monte Group Ltd. You will however be expected to conform to Cirio Del Monte Kenya Ltd terms and conditions of employment in so far as they are applicable to the day to day working arrangements.”**

Two things clearly emerge from the contents of the letter of assignment which are;

- (1) That at the time of posting, the initial employment of the plaintiff by **Cirio Del Monte Foods International Ltd** changed or was transferred to **Del Monte Group Ltd**.
- (2) The plaintiff was required to conform to **Cirio Del Monte Kenya Limited's** terms and conditions of employment, where and when applicable.

Again in a letter dated 12<sup>th</sup> August, 2002 by **Cirio Del Monte Kenya Limited** the plaintiff was informed that his employment would transfer to **Del Monte Group Ltd**. The said letter states;

**“I write to confirm your recent discussion with Shelly Webb concerning your terms and conditions of employment and, in particular, the letter dated 14 January 2002.**

**In that letter it was agreed that while on assignment in Kenya, your employment would transfer to Del Monte Group Limited (“DMG”).**

**As you know, a consequence of the corporate restructure is that DMG will no longer be in a position to continue to employ you.**

**We therefore propose that with your agreement, Cirio Del Monte Kenya Ltd, will, with effect from 1<sup>st</sup> September 2002 become your employer in place of DMG. All other terms and conditions of your assignment will otherwise remain unchanged.**

**I would be grateful if you would sign the enclose copy of this letter as indicated below to confirm that you are in agreement with these new arrangements and to confirm that you have no claim and will not bring any claims, against DMG, any of its associated companies or their directors, officers and/or employees arising out of the termination of your employment by DMG.” (emphasis mine).**

My understanding of the plaintiff’s position is that he has a very substantial cause of action against the defendant, in that the defendant took over the plaintiff as its employee. The plaintiff relied on the contents of the letter dated 12<sup>th</sup> August, 2002 as a basis of suing the defendant in the present case. The letter states that with the agreement of the plaintiff, **Cirio Del Monte Kenya Ltd** will with effect from 1<sup>st</sup> September, 2002 become the employer of the plaintiff in place of **Del Monte Group**. **Mr. Nyaoga** learned counsel for the plaintiff submitted that **Del Monte Group** was the first employer but the employment of the plaintiff was later transferred to the defendant. In essence the plaintiff changed his employer from initial employer to the defendant. It is undisputed that the plaintiff’s employment was terminated through a letter dated 16<sup>th</sup> September, 2005 by the Managing Director of **Del Monte Kenya Limited**. The letter states in part;

**“We refer to the contract of employment with the company. Pursuant to the pertinent clauses in the letter of the terms and conditions of your assignment in Kenya this is to give you three months notice to bring the contract of employment to an end. Please note that your last working day will be 16<sup>th</sup> September, 2005.”** (emphasis mine).

It is clear from the contents that the person who gave the termination notice was the Managing Director of **Del Monte Kenya Limited**. There is also uncontroverted evidence to show the word “**Cirio**” was removed or changed from the corporate names of all the companies which are related to the present defendant.

In the case of **D. T. Dobie** quoted above the Court of Appeal defined a cause of action as; **“an act on the part of the defendant which gives the Plaintiff his cause of complaint, and reasonable cause of action to mean “action with some chance of success when the allegations in the plaint only are considered.”**

**Miss Kirimi** learned counsel for the applicant submitted that the letter dated 12<sup>th</sup> August, 2002 does not derogate from the letter of assignment dated 14<sup>th</sup> January, 2002. **Miss Kirimi** also submitted that the employer of the plaintiff is **Cirio Del Monte Foods International Ltd** and not **Del Monte Group Ltd**. In her view the letter dated 12<sup>th</sup> August, 2002 did not change the nature of the parties to the contract.

My answer is that this court has no jurisdiction to undertake a construction and/or interpretation of the various documents placed before it by the parties. The question that arises is whether the plaintiff is employed by the defendant or by other parties not before court. The defendant has relied on the letter of assignment while the plaintiff seeks protection in the letter dated 12<sup>th</sup> August, 2002. This requires an inquiry to be made as to the party who employed the plaintiff, however, such a task would require this court to undertake minute examination of the documents before a trial. Such an exercise would prejudice the rights of the parties to have a fair hearing to their dispute. In the absence of special factors, I think the correct approach is to allow the parties to proceed to full hearing and prove their respective cases. It is my humble view, that there are sufficient grounds to sustain the pleadings of the plaintiff since the documents relied on by the parties is somewhat contradictory. The letter dated 12<sup>th</sup> August, 2002 and the one dated 16<sup>th</sup> September, 2005 shows that the plaintiff has a maintainable cause of action. The law is that a pleading will not be struck out if it is merely demurrable. I do not think that the pleadings of the plaintiff is so bad that even a legitimate amendment would not cure its defect.

Bearing in mind that I am exercising a jurisdiction which should be exercised with extreme caution and only in obvious cases, I do not think the case of the plaintiff calls for a summary determination. I am satisfied that the plaint discloses a justiciable wrong by the defendant and it is only through a hearing, that a court would determine the dispute between the parties in a proper manner. At the trial, this court will be called upon to determine whether the plaintiff’s employment and/or assignment has been transferred and/or assumed by the defendant. There is a conflict and contradiction as to the true position and that can only be determined through oral evidence. **I therefore think that the application by the defendant is premature and an abuse of the court process. It is hereby dismissed with costs to the plaintiff.**

Dated, signed and delivered at Nairobi this 30<sup>th</sup> day of April, 2008.

**M. A. WARSAME**

**JUDGE**