

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 579 OF 2011

TELKOM KENYA LIMITED.....PLAINTIFF

VERSUS

SHEIKH ALFRED MWANZA.....DEFENDANT

RULING

1. There are two applications before this court for determination. The first one is a Notice of Motion dated 4th April, 2012 seeking to transfer this suit to the Industrial Court for hearing and determination. The Defendant's contention is that the subject matter of this suit arises from an employment contract with the Plaintiff whereupon he claims compensation for unlawful termination from employment and that the Industrial Court is the court with jurisdiction to determine that issue. The Defendant contended that he transfer of the matter to the Industrial Court will occasion no prejudice to either of the orders sought.
2. In response to the application, Lois Allela swore a Replying Affidavit on 22/5/12 in which she stated that this suit arose from the Defendant's misappropriation and conversion of imprest received from the Plaintiff thereby breaching his obligation to the Plaintiff and that due to the aforesaid averment, the issue of unlawful or unfair termination of employment does not arise. That the Defendant had voluntarily resigned from the Plaintiff's employment and in the premises, the counter-claim is not premised on any reasonable cause of action. She contended that nothing stopped the Defendant from filing a separate claim at the Industrial Court for the alleged unlawful termination. She contended that the Industrial court has no jurisdiction to hear this matter.
3. The second Application is the Plaintiff's Motion dated 27th January, 2014. The Plaintiff seeks orders that its claim as raised in the Plaint be separated from the Defendant's claim as raised in the counter-claim and that consequently, the two claims be tried separately in that the Plaintiff's claim be determined before the High Court while the Defendant's claim be transferred to the Industrial Court. In the affidavit in support of the motion, Laurence Karanja stated that the Plaintiff's claim is based on tortuous cause of action of conversion and misappropriation of money while the Defendant's claim in the counter-claim is for a declaration that his employment was unlawfully terminated for reinstatement, salary in lieu of notice and salary until retirement. He stated that the Defendant's claim is a labour dispute which should be handled by the Industrial Court. He contended that the Plaintiff's claim stands a risk of being struck out if transferred to the Industrial Court.
4. The submissions tendered by the respective Counsels essentially reiterated the averments in the respective affidavits of their clients. The Defendant in its submissions cited Section 12 of the Industrial Court Act, 2011 which sets out the disputes which the Industrial Court is mandated to determine amongst them being disputes relating to or arising out of employment between an employer and an employee.
5. I have carefully considered the pleadings of the parties. In the Plaint, it is alleged that there was a contract between the Plaintiff and the Defendant whereby the Defendant was to promote and activate the Plaintiff's products within Nairobi. In so doing, the Defendant would receive an imprest from the Plaintiff to facilitate his duties as aforesaid. It was alleged that between May and July, 2011, the Defendant received a total sum of Kshs. 5,301,731/=from the Plaintiff for the aforesaid purposes but in breach of his obligation to the Plaintiff, the Defendant misappropriated and or converted the monies to his personal use. On the other hand, the Defendant filed a counter-claim claiming that the Plaintiff terminated his employment as a sales manager unlawfully.
6. It is not in dispute that the Defendant was an employee of the Plaintiff as a sales manager. The

imprest is claimed to have been misappropriated by the Defendant in the course of the Defendant's employment with the Plaintiff. The Industrial Court established under Section 4(1) of the Industrial Court Act of 2011('the Act') has jurisdiction under Section 12 of the Act to hear and determine among others, ***disputes relating to or arising out of employment between an employer and an employee***. Articles 165 (3) and (5)(b) takes away the jurisdiction of the High Court in regard to matters falling within the purview of the Courts contemplated in Article 162 (2) of which the Industrial Court is one. Although the Plaintiff argues that its claim arises out of tortious cause of action of conversion and misappropriation of money, such tort was done in the cause of employment by the Defendant. In my view, it arose in the cause of the employer-employee relationship between the parties. It is therefore a dispute arising out of employment between the Plaintiff and the Defendant. In the circumstances, I find that the respective claims of the parties fall squarely within the jurisdiction of the Industrial Court and this court lacks jurisdiction to determine it.

7. In the premises, I find merit in the motion dated 4th April, 2012 and no merit in the motion dated 27th January, 2014. I order that this suit be transferred to the Industrial Court for hearing and determination.

Dated, Signed and Delivered at Nairobi this 10th day of July, 2015

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A. MABEYA

JUDGE