



**REPUBLIC OF KENYA**

**High Court at Mombasa**

**Civil Case 62 of 2007**

**MARIAM SAID MWABORA & 70 OTHERS .....PLAINTIFF**

**VERSUS**

- 1. HOTEL SPAN LIMITED.....1<sup>ST</sup> DEFENDANT**
- 2. RT DUNET .....2<sup>ND</sup> DEFENDANT**
- 3. TRANS NATIONAL BANK LTD. ....3<sup>RD</sup> DEFENDANT**
- 4. SPIRE PROPERTIES (K) LTD.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. The central point to be determined in this motion is whether or not this file ought to be transferred to the Industrial Court. The Plaintiff/ applicants motion dated 16<sup>th</sup> February, 2012, seeks orders that:

**i) “This Honourable Court be pleased to make an order for the transfer of this suit from this Honourable Court to the Industrial Court of Kenya for hearing and disposal**

**ii) This Honourable Court be pleased to make an Order the costs of the suit up to and until the transfer of the suit to the industrial Court of Kenya shall be assessed and/ or taxed under the provisions of Schedule VI of the**

**Advocates (Remuneration) Order, 2006.**

**iii) The Honourable Court be pleased to make such further or other orders as it may deem just and expedient in the circumstances of this case.**

**iv) The Costs of this application be costs in the cause”.**

2. Prayers 2, 3 and 4 are consequential to prayer one. The application was disposed off by written submission of the Applicant and 3<sup>rd</sup> and 4<sup>th</sup> Defendants.

3. The background facts according to the amended plaint, are as follows: the plaintiffs were employees of Diani Reef Grand Hotel (“the Dian Reef”) owned by the 1<sup>st</sup> defendant. They allege they were permanent and pensionable employees having an annual leave entitlement. The 1<sup>st</sup> Defendant allegedly borrowed some money from the third defendant and owing to inability to pay, the 3<sup>rd</sup> Defendant put the 1<sup>st</sup>

Defendant into receivership in 1998. The 2<sup>nd</sup> Defendant who was the receiver, sold the 1<sup>st</sup> Defendant to the 4<sup>th</sup> Defendant who then terminated the employment of the plaintiff en masse.

4. The plaintiffs allege that the terminations were based on a string of fraudulent actions and decisions including corruption and bad faith on the part of the defendants. Particulars of fraud are set out in paragraph 10 of the plaint. The plaintiffs seek declarations as to their terminal benefits, judgment, for Shs. 32,457,007 in respect of such dues, general damages and costs and interest.

5. The 3<sup>rd</sup> Defendant's arguments against the transfer of the suit to the Industrial Court include the following: that there has never been a contractual employment relationship between them and the plaintiffs; and that the Industrial Court lacks jurisdiction to deal with the issues raised by the plaintiffs. Counsel argued that Article 162 (2) of the Constitution read with both Article 165 (5) should be read together with Section 22 of the 6<sup>th</sup> Schedule which requires all pending proceedings to continue in the same court.

6. The 4<sup>th</sup> Defendant's submission as highlighted by counsel, are that when the 1<sup>st</sup> Defendant was sold to them, they did not absorb the 1<sup>st</sup> Defendant's employees. They also argue that the plaintiffs' claim against them has its basis in fraud which can only be adjudicated by the High Court as this does not fill the mandatory employer-employee relationship for determination in the industrial court.

7. Article 162 (2) of the Constitution establishes the system of courts in Kenya. All the parties relied on it in support of their disparate arguments and it provides as follows:

***“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to -***

***a) employment and labour relations.....”***

The following are to be noted from these provisions: first is that that court is a superior court – like the high court and having the status of the High court. Second, it is established to deal with causes of action or disputes on employment and labour relations.

8. Article 162 (3) then provides for Parliament to determine and clarify the jurisdiction of that court, within the scope of its constitutionally established overriding function. The Industrial Court Act 2011 was thus enacted by Parliament, pursuant to Article 162 (2). Section 12 of the Industrial Court Act provides:

***“2 The court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162 (2) of the provisions or this Act or any other written law which extends jurisdiction to the court relating to employment and labour relations including:-***

***a) Disputes relating to or arising out of employment between an employer and an employee.***

9. Given the provisions of Article 162 (2) and the Industrial Court Act 2011 cited above, the primary constitutional concern in this matter is whether on a proper reading of the pleadings, the dispute herein relates to employment and labour relations. I have no doubt in my mind that the dispute herein relates to employment and labour relations. The sole monetary prayer is for payment of terminal benefits from employment of the plaintiffs who were allegedly employees of the 1<sup>st</sup> Defendant, subsequently put under receivership of the 2<sup>nd</sup> Defendant allegedly with the involvement of the 3<sup>rd</sup> Defendant.

10. The secondary question that arises in this case is whether, given the nature of the pleadings the dispute relates to or arises out of employment between an employer and employee in terms of Section 12

of the Industrial Court Act. Again by the same argument, I have no doubt that the disputes in the  
plaint arise out of an employment scenario.

11. Against this the Defendants have argued that there were no employer- employee  
relationships between the second, third or fourth defendant with the plaintiffs. I think that is a matter  
of evidence to be determined after hearing the parties. It does not detract from the claim the fact that the  
plaintiffs seek terminal dues for work done and services rendered to the 1st Defendant and for which the  
1<sup>st</sup> Defendant, and or the other defendants, became liable or partly liable expressly or impliedly, on the  
grounds indicated in the plaint.

12. In addition, as I have already noted, the Industrial Court is a superior court of record. It has the  
status of the High Court. It comprises of judges learned in the law, just like Judges of the High  
Court. Their Jurisdiction is narrowed down to all matters relating to employment and labour  
relations. Whatever legal or factual scope of such matters, whether involving fraud or receivership or  
company law, the learned judges of the Industrial Court are entitled to address them fully and  
substantively. That is how wide the scope of their jurisdiction is.

13. Thus the argument of of the 3rd and 4th Defendants that, that court cannot deal with matter of  
fraud is hollow and unpersuasive so is that that court cannot deal with employment in cases or issues of  
receivership or arraignment of contract or novation or any other legal issues affecting  
employment. Such arguments wholly misunderstand the object of Article 162 (2) which is to create a  
court similar to High court, but where focus is indeed all matter related to employment and labour  
relations.

14. For all the foregoing reasons, I hold in favour of the plaintiffs and allow their application. Costs  
shall be in the cause. The file is to be placed before a judge in the Industrial Court for directions within  
fourteen (14) days.

**Dated and signed this 4th day of April, 2013**

**R.M. MWONGO**  
**JUDGE**

**Read in open court by:**

Date 4th April, 2013

**Coram:**

Judge: Hon. M. Odero

Court clerk: **Mutisya**

**In Presence of Parties/Representative as follows:**

a).....

b).....

c).....

d).....