



**Muthama v Tetra Pak Limited & another (Cause 324 of 2017)  
[2024] KEELRC 1254 (KLR) (3 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1254 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 324 OF 2017  
MA ONYANGO, J  
MAY 3, 2024**

**BETWEEN**

**CHARLES MUTHAMA ..... CLAIMANT**

**AND**

**TETRA PAK LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**TETRA PAK INTERNATIONAL SA ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Claimant avers that he was previously employed by the 1<sup>st</sup> Respondent and later seconded and transferred to the 2<sup>nd</sup> Respondent as an expatriate.
2. The 1<sup>st</sup> Respondent is a limited liability company duly incorporated in Kenya while the 2<sup>nd</sup> Respondent is a Swiss Corporation having its registered offices in Switzerland and incorporated in Kenya under the 1<sup>st</sup> Respondent.
3. Vide an Amended Statement of Claim dated 8<sup>th</sup> November 2021, the Claimant seeks the following Orders:
  - i. A declaration that the Dissolution Agreement made on the 2<sup>nd</sup> April 2003 between the Claimant and the 2<sup>nd</sup> Respondent is null and void.
  - ii. A declaration that the Claimant was and has been discriminated by the Respondents.
  - iii. General and Special damages for breach of employment contract, misrepresentation and discrimination.
  - iv. 6 months' salary for period January 2001 to June 2002 together with interests from June 2002.
  - v. 12 months' salary as compensation for unlawful and unfair termination



- vi. Costs of this suit plus interests at court rate until payment in full.
4. The Claimant avers that on or about 14<sup>th</sup> July 1998, he was employed by the 1<sup>st</sup> Respondent as a training manager. He contends that on 3<sup>rd</sup> May 2001, the Claimant's qualifications were recognized by Tetra Pak Group and he was thereafter seconded to work as an expatriate in Switzerland with the 2<sup>nd</sup> Respondent.
5. It is the Claimant's case that the terms and conditions of his engagement with the 2<sup>nd</sup> Respondent were:
  - a. The contract period as an expatriate was from 1<sup>st</sup> July 2001 to 31<sup>st</sup> March 2003 with a right to renew the contract for one or more years subject to agreement of the parties.
  - b. At the end of the contract period, the Respondents were to identify a suitable new position for the Claimant with a TP Company.
  - c. In the event (a) and (b) above were not possible then the Claimant would be entitled to the financial compensation to which he would have been entitled if he remained engaged with the 1<sup>st</sup> Respondent. Further, the Claimant would be entitled to relocation compensation.
  - d. Payment of a monthly salary as follows;
    - i. Basic salary.....Swedish Kroner 53,500
    - ii. Gross salary.....Swedish Kroner 69,976
    - iii. Allowances (House, transport, compensation) .....Swedish Kroner 21,441
6. According to the Claimant, in September 2020, the 2<sup>nd</sup> Respondent misrepresented to him that his contract was to be renewed and that as a result of said misrepresentation, he ended up frustrated, inconvenienced and suffered loss as he had to hurriedly make arrangements to relocate back to Kenya after learning that his contract was not to be renewed.
7. It is the Claimant's case that on 2<sup>nd</sup> April 2003, he executed a dissolution agreement under duress, undue influence, coercion, pressure and accordingly the Claimant avers that the said agreement is null and void.
8. The Claimant further states that during the time he worked with the Respondents, he was discriminated against as he had no single discussion with his manager on career plan, performance appraisal or skills development programme; that whereas the Claimant was engaged for cluster 6 work, he was never allocated such work; that the Respondents had a deliberate scheme to exploit Kenyans by sending them outside the country and thereafter disengaging them; that since the 1<sup>st</sup> Respondent was established in Kenya, it has never allowed any Kenyan to climb to the position of factory manager yet there are qualified Kenyans for such a position.
9. The Claimant therefore in his Statement of Claim sought the following reliefs:
  - a. A declaration that the Dissolution Agreement made on the 2<sup>nd</sup> April 2023 between the Claimant and the 2<sup>nd</sup> Respondent is null and void
  - b. A declaration that the Claimant was and has been discriminated by the Respondents
  - c. General and special damages for breach of employment contract, misrepresentation and discrimination
  - d. 6 months' salary for period January 2001 to June 2002 together with interest



- e. 12 months' salary as compensation for unlawful and or unfair termination
  - f. Costs of this suit plus interest at court rate until payment in full.
10. The 1<sup>st</sup> Respondent filed its Statement of Defence dated 15<sup>th</sup> December 2005 on 16<sup>th</sup> December 2005. In that defence, the 1<sup>st</sup> Respondent denied the averments made by the Claimant in amended memorandum of claim and contended that it employed the Claimant with effect from 15<sup>th</sup> September 1998 pursuant to a written contract dated 17<sup>th</sup> July 1998. It however avers the said employment came to an end by the consent of the parties thereto when the Claimant entered into a separate employment contract on 5<sup>th</sup> June 2001 with a different party namely, Tetra Pak Information Management AB.
  11. The 1<sup>st</sup> Respondent states that any employment agreement entered into by the Claimant on 5<sup>th</sup> June 2001 was not with it and that as such, it is not legally responsible for any aspect thereof.
  12. The court was urged to dismiss the claim with costs.
  13. The 2<sup>nd</sup> Respondent entered appearance in protest but did not file a Response to the Amended Statement of Claim.

### **The Evidence**

14. At the hearing of the case, the Claimant testified as CW1. He adopted his witness statement filed in court on 17<sup>th</sup> September 2018 as his evidence in chief and relied on the documents he filed in court in support of his case.
15. The Claimant stated that he stated his career as a police constable then joined DHL where he worked in Europe and throughout Africa. He avers that the 1<sup>st</sup> Respondent head hunted him from DHL where he was HR, Project and training and appointed him as a Training and Development Manager at a salary of Kshs. 267,000 per month on permanent and pensionable terms.
16. The Claimant states that in 2000, he applied for an internally advertised position within the 2<sup>nd</sup> Respondent's company and after successfully passing a series of interviews on the phone and physically in Sweden, he was offered the position of Organization Alignment Specialist by Tetra Pak International S.A of Lausanne, Switzerland and seconded to Tetra Pak AB Sweden. The Claimant states that he moved to Sweden as an expatriate.
17. He also stated that he was never paid his salary between January and June 2001.
18. CW1 told the court that the contract period as an expatriate employee was from 1<sup>st</sup> July 2001 to April 2003 and was governed by Tetra Pak's Policies and Procedures for Expatriates and International Employees which was to the effect that, expatriation should be a positive move in the employer's career and that at the end of the contractual period, subject to the agreement of both parties, the contract will be renewed for one or more years.
19. It was the Claimant's testimony that when he assumed his new posting in Sweden on 1<sup>st</sup> July 2001, the 1<sup>st</sup> Respondent facilitated his travel as he was an employee of the 1<sup>st</sup> Respondent proceeding on an international assignment as given to him by the 2<sup>nd</sup> Respondent.
20. He avers that he worked until August 2002, when he inquired from his manager about the possibility of his contract being renewed and was assured that his contract would be renewed and that he would be relocated to Mexico.
21. He states that from November 2002, none of his managers would give him a clear and definite word about the renewal or non-renewal of his contract or repatriation back to Kenya, that he was not



- assigned any work and was asked to leave two team meetings which he had been invited to with his team mates.
22. The Claimant states that he was given a dissolution agreement on 2<sup>nd</sup> April 2003, which he signed under duress, undue influence, coercion and pressure, and that the effect of the agreement was to rescind the initial International Service Agreement dated 3<sup>rd</sup> May 2001 on allegations of redundancy by the 2<sup>nd</sup> Respondent.
  23. The Claimant contends that he was confused since he had legitimate expectations that his contract would be renewed.
  24. On cross examination, the Claimant stated that the contract he entered into of 1<sup>st</sup> July 2001 was with regard to a Swiss company and not a Kenyan company. The Claimant admitted that the International agreement he entered into had terms that were subject to Swiss laws.
  25. CW2 was Weveti Nyagah who adopted her witness statement filed in support of the Claimant's case as her evidence in chief.
  26. CW2 told the court that she knew that Claimant after the Claimant recruited her to work under him in 2001. She stated that she was employed as Human Resource Attachee in the Claimant's department and that she was recruited so that she would handle his docket for a period of 6 months as the Claimant was travelling to Sweden.
  27. On cross examination, CW2 told the court that during the period she was with Tetra Pak company, she never saw any documentation relating to the Claimant's travel to Sweden.
  28. At the Close of the Claimant's case, the 1<sup>st</sup> Respondent's counsel Mr Ojiambo informed the court that he will not call any witness but would rely on the documents on record.
  29. The court then directed the parties to file written submissions.

### ***The Claimant's submissions***

30. In his submissions dated 28<sup>th</sup> September 2022, the Claimant submitted that he was constructively dismissed from employment as he was frustrated by the Respondents in terms of humiliation, racial profiling and discrimination. It is contended that with the legitimate expectation that his contract would be renewed, he was coerced to sign a dissolution agreement. The Claimant submitted that the Respondent frustrated the Claimant and that the dissolution agreement and lack of a job opening back in Kenya were meant to constructively terminate the Claimant from employment.
31. The Claimant also submitted that he worked for the 1<sup>st</sup> Respondent as a permanent and pensionable employee before he was seconded to the 2<sup>nd</sup> Respondent to a position that had been internally advertised. The Claimant cited the case in Nairobi ELRC Cause No. 1352 of 2016 between Willian Njoroge vs Versus Kenol Kobil Limited where the court established a parent-subsidiary relationship of the oil company in Kenya and Rwanda.
32. On the prayer for compensation for the unlawful termination, the Claimant submitted that he worked for the Respondents in a senior position earning Kshs 250,000 from the year 1998 to 2003 when he was unlawfully terminated.
33. The court was urged to enter judgment for the Claimant as prayed in the Amended Statement of Claim and award damages for unfair termination of employment equivalent to a period of twelve months together with costs and interests.



### *The Respondents' submissions*

34. The 1<sup>st</sup> Respondent submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are entirely different, separate and distinct entities as evidenced by the documents produced by the Claimant. That the employment out of which the Claimant complains is not the one that was entered into by the 1<sup>st</sup> Respondent but the one commenced on 1<sup>st</sup> July 2001 with the 2<sup>nd</sup> Respondent.
35. It is therefore the 1<sup>st</sup> Respondent's case that it was a stranger to the employment created by the contract of 5<sup>th</sup> July 2001 and was clearly erroneously included in this suit. That the Claim against it should be struck out for misjoinder.
36. The 1<sup>st</sup> Respondent also raised an issue on jurisdiction and maintained that firstly, the claim against the 1<sup>st</sup> Respondent is premised on an employment contract between the Claimant and the 2<sup>nd</sup> Respondent which the 1<sup>st</sup> Respondent is not privy to. Secondly, that the claim against the 2<sup>nd</sup> Respondent is essentially against a foreign corporate entity which is neither incorporated nor domiciled in Kenya. According to the counsel for the Respondents, the subject contract was governed by Swiss Law and was entered into mainly to be performed outside Kenya. It is the Respondents submission that the domestic courts of Kenya lack jurisdiction to determine any dispute between the parties in such contract. In support of this position, the following cases were cited; James Finlay (Kenya) Limited vs Elly Okongo Inganga & 6 others (2019) eKLR, Miguna vs Lufthansa Group Operating as Lufthansa German Airlines & 6 others, Kenya National Commission on Human Rights & Another (Interested Parties) (2021) eKLR.
37. According to the 1<sup>st</sup> Respondent, the assumption that the court has assumed jurisdiction over the 2<sup>nd</sup> Respondent as a matter of right is misguided. It is submitted that to invoke jurisdiction, the Claimant had to comply with Order 5 Rule 21 of the Civil Procedure Rules (2010) which provides for service of summons outside the jurisdiction of the Court.
38. The 1<sup>st</sup> Respondent submitted that the principle that the requirement for leave to serve summons outside the jurisdiction of the court is a mandatory requirement before a court may assume jurisdiction over a foreign defendant.
39. It is the 1<sup>st</sup> Respondent's case that the fact that the subject contract between the Claimant and the 2<sup>nd</sup> Respondent was governed by Swiss law by virtue of section 48 of the Evidence Act. It is submitted that the Claimant herein has not made any attempt whatsoever to lead evidence on the nature and effect of Swiss Law on the dispute in this case.
40. Lastly, the Respondents submitted that the suit before court is incompetent and premature for reasons that the Claimant's employment letter contained an arbitral clause which provided that any dispute arising therefrom would be adjudicated only by an arbitral tribunal of three members in accordance with the arbitral rules of the Chamber of Commerce and Industry, Geneva, with the aid of the tribunal initially being in Lansame Switzerland.
41. It is the Respondent's submission that the duty of the Court where a forum for dispute resolution has been chosen by parties to a contract to give effect to the clause. The cases in National Bank of Kenya Ltd vs Pipe Plastic Samkoli (K) Ltd & Another (2001) eKLR, Health & Water Foundation vs Intervita Onlus (2015) eKLR and Areva T 7 D India Limited vs Priority Electrical Engineers & Another (2012) eKLR were cited.
42. In the end, the 1<sup>st</sup> Respondent submitted that even if this court had jurisdiction to determine this claim, the claim is without merit and the prayers sought cannot be granted as the Claimant's employment



contract was a fixed term contract which ended by effluxion of time. In addition, the 1<sup>st</sup> Respondent submitted that the Claimant voluntarily signed a Dissolution Agreement dated 2<sup>nd</sup> April 2003 by which agreement he agreed to part ways with the 2<sup>nd</sup> Respondent in exchange for payment of dues which he was paid and duly accepted.

43. The 1<sup>st</sup> Respondent thus submitted that the Claimant is not entitled to the reliefs he is seeking in his Amended statement of Claim.

### **Analysis and Determination**

44. Having considered the pleadings, the evidence of the parties as well as their submissions, I find the issues for determination to be:

- i. Whether the court has assumed jurisdiction over the 2<sup>nd</sup> Respondent
- ii. Whether the Claimant has established a cause of action against the 1<sup>st</sup> Respondent
- iii. Whether the Claimant's claim, is in any case, is merited

45. On the first issue, from the evidence on record, it is apparent that the Claimant was previously employed by the 1<sup>st</sup> Respondent and thereafter seconded to the 2<sup>nd</sup> Respondent, a constituent of the 1<sup>st</sup> Respondent.

46. The instant suit, from the pleadings and evidence on record, was filed by the Claimant after the 2<sup>nd</sup> Respondent allegedly terminated his employment. According to the Claimant, he had a legitimate expectation that his contract would be renewed after an agent of the Respondents intimated to him that upon the expiry of his contract with the 2<sup>nd</sup> Respondent, he would be retained and moved to work in Mexico.

47. On its part, the 1<sup>st</sup> Respondent avers that it was not a party to the agreement between the Claimant and the 2<sup>nd</sup> Respondent. The 2<sup>nd</sup> Respondent in the submissions filed on behalf of both Respondents contended that it is a foreign corporate entity which is neither incorporated nor domiciled in Kenya and further, that the subject contract was governed by Swiss Law and was entered into mainly to be performed outside Kenya. According to the 2<sup>nd</sup> Respondent, this court lacks jurisdiction to determine any dispute between the parties in such a contract.

48. In order to bring into context the dispute herein, it is important that I reproduce the Claimant's contract of employment with the 2<sup>nd</sup> Respondent. It reads:

Tetra Pak EMPLOYMENT CONTRACT

Temporary Employment

Made between Tetra Pak Information Management AB

Ruben Rausings gata

221 86 Lund

And Charles Muthama, 641207

Tetra Pak Ltd

Enterprise Road, Industrial Area

Box 78340

Nairobi, KENYA



With conditions and terms as stated below

Position Organisational Alignment Team Member

Employee number 3653

Department ISP Programme / cost centre 413800

Reporting to Ian Whyte

Duration of employment From 2001-07-01 to 2003-03- 31 with possibility to extend for one or more years if both parties agree.

Salary You are entitled to an annual gross amount in SEK which equals to SEK 360 000 net after you have been compensated for costs for housing. Next salary review 2002-01-01.

Working hours 40 hours, excluding lunch break

Vacation 25 days per year

Overtime and business travel Shall be undertaken in accordance with the demands of the business and position. When travelling on Tetra Pak business the applicable conditions are stated in Tetra Pak's travel policy plus Rules and regulations for cost compensation during business

Compensation for overtime No compensation for overtime.

Other general conditions As stated in current collective agreement between the Swedish Employers Association and the Swedish Central Organisation of Salaried Employees as well as company specific local agreements, protection and work rule.

Special agreements Car allowance (4400 SEK/ Month)

This contract is drawn up in duplicate whereof each of the signing parties will receive one.

Lund on the 5<sup>th</sup> of July 2001

Tetra Pak/Information Management AB

Signed Signed

Lennart Ljunggren Charles Muthama

49. A cursory examination of the above employment contract shows that it is an international contract governed by the Swiss Laws. Evidently, the Claimant was to work in Sweden which is outside this court's jurisdiction. In my view, the court cannot therefore assume jurisdiction.
50. On the second issue, the Claimant has sued the 1<sup>st</sup> Respondent on account of his previous engagement with it prior to his alleged secondment. According to the Claimant, he worked for the 1<sup>st</sup> Respondent as a permanent and pensionable employee before he was seconded to the 2<sup>nd</sup> Respondent. The Claimant urged the court to find that there existed a parent-subsidiary relationship between the 1<sup>st</sup> and 2<sup>nd</sup> Respondent.
51. Although the Claimant has averred that he was seconded by the 1<sup>st</sup> Respondent to work for the 2<sup>nd</sup> Respondent, in his testimony before court, he stated that the position at the 2<sup>nd</sup> Respondent was internally advertised and he was subjected to several interviews before he was issued with the offer letter.
52. No documentary evidence in form of a secondment letter or a separation agreement has been produced by the Claimant to show that there was an arrangement between himself and the 1<sup>st</sup> Respondent that he would be re-employed when his contract with the 2<sup>nd</sup> Respondent expired.



53. In my view, the Claimant accepted the employment offer by the 2<sup>nd</sup> Respondent and subjected himself to the terms and conditions of that contract which converted his employment terms to a fixed term contract. The 1<sup>st</sup> Respondent cannot therefore be held accountable for the alleged termination of employment by the 2<sup>nd</sup> Respondent which it was not a party to.
54. Consequently, I find that there is no valid cause of action against the 1<sup>st</sup> Respondent and in view of the finding that this court cannot assume jurisdiction over the 2<sup>nd</sup> Respondent, it follows that the prayers sought by the Claimant herein cannot issue.
55. In the end, I find the Claimant's claim to be without merit and hereby dismiss it. There will be no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY ON

THIS 3<sup>RD</sup> DAY OF MAY 2024

**MAUREEN ONYANGO**

**JUDGE**

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**NRB ELRC NO. 324 OF 2017 JUDGMENT**

