



**Noor v Dabashil Group t/a Money Transfer Co Ltd (Cause E284 of 2023) [2024] KEELRC 1234 (KLR) (9 May 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1234 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E284 OF 2023  
NZIOKI WA MAKAU, J  
MAY 9, 2024**

**BETWEEN**

**ABDIRIZAK ADEN NOOR ..... CLAIMANT**

**AND**

**DABASHIL GROUP T/A MONEY TRANSFER CO LTD ..... RESPONDENT**

**RULING**

1. The Respondent/Applicant filed a Notice of Preliminary Objection dated 14<sup>th</sup> February 2024 opposing the suit herein on the grounds:
  - a. That this Honourable Court lacks jurisdiction to hear the matter in view of the ouster provisions of clauses 15 and 16 of the Subcontract Agreement between the Claimant herein and the Respondents.
  - b. That this Honourable Court lacks the requisite Jurisdiction to take cognizance, hear and determine the intended Claim since the cause of action is based on a contract of employment for the position of a Chief Finance Officer in Hargeisa, Somaliland office.
  - c. That the intended Claim offends section 15(c) of the *Civil Procedure Act*, CAP 21, which establishes that every suit shall be instituted in a court within the local limits.
  - d. That the Claimant's suit is fatally defective as it does not comply with the provisions of section 15(c) of the *Civil Procedure Act* which outlines that in suits arising out of a contract, the cause of action arises within the meaning of this section at any of the following places, namely:
    1. The place where the contract was made;
    2. The place where the contract was to be performed or the performance thereof completed;





## Respondent/Applicant's Submissions

5. The Respondent/Applicant submitted that the main issue for determination before this Honourable Court is whether it has jurisdiction to entertain the matter at hand. On this issue, it cited the decision of the Supreme Court in the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank & 2 others* [2012] eKLR (Application No. 2 of 2011), that a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. The Applicant invited this Court to take cognizance of its jurisdiction as conferred to it by *the Constitution* and the *Civil Procedure Act*, and acknowledge that entertaining this matter would be a derogation from the pronouncement of Nyarangi JA in the locus classicus case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1 that jurisdiction is everything and without which a Court has no power to make one more step.
6. The Respondent/Applicant submitted that the Claimant was offered a position of Chief Finance Officer by the Respondent's Subsidiary located in Hargeisa Somaliland, and not the Holding Company sued herein. That the Claimant has produced a Letter of Offer dated 19<sup>th</sup> March 2022 that clearly specified the duty station as being in Hargeisa Somaliland thus corroborating the same. That evidently, the subject Contract was entered between the Claimant and the Respondent's Subsidiary located in Hargeisa, Somaliland. It was the Applicant's further submission that a holding company is by law a separate legal entity from its subsidiaries and in this case, it was thus not privy to the Claimant's Contract or any other contracts entered by its subsidiaries. That this position was affirmed in the case of *Chai Trading Co. Limited v Muli Mwanzia & 2 others* [2019] eKLR wherein the Court held that a company is separate and distinct from its directors, shareholders and promoters and which principle holds even where a company is wholly owned by a holding company.
7. The Respondent/Applicant further submitted that the entire Statement of Claim including the reliefs sought against it are misdirected, erroneous and inappropriate and should be dismissed. It relied on the decision of the Court in *Mosi v National Bank of Kenya Limited* [2001] eKLR where the Court struck out the plaint after affirming that a holding company cannot be sued for breach of contract by its subsidiary and further finding that a plaint which initiates a suit against a parent company on behalf of its subsidiary does not disclose a reasonable cause of action against the defendant. The Respondent/Applicant posited that considering the Claim herein arises from a breach of contract between the Claimant and the Respondent Company's subsidiary located in Somalia, the jurisdiction of this Court would still have been ousted for want of territorial jurisdiction even if it had been filed against the right party. That this position is by virtue of section 15 of the *Civil Procedure Act* that a suit should be instituted either where the cause of action arises or where the defendant resides.
8. The Applicant also relied on section 15(c) of the *Civil Procedure Act*, which asserts that in suits arising out of a contract, the cause of action arises at the place where the contract was made, where the contract was to be performed or was completed, or where any money payable in performance of the contract was expressly or impliedly payable. In light of the foregoing, the Applicant maintained that the subject contract was to be performed in Hargeisa Somaliland, where the Claimant was meant to be deployed as a Chief Finance Officer and where any incidental payments would have been made. Furthermore, seeing as the Somali Office initiated the Contract by sending an offer letter to the Claimant and executed the Contract electronically, it is only right to conclude that the Contract was made in Somalia as opposed to Kenya. That consequently, the suit herein should not be heard within the Kenyan territory subject to the principle of *lex loci laboris*, to the effect that the labour laws applicable to the Claimant herein should not be Kenyan laws, but the Somali laws. In support of this submission, the Applicant relied on the Court's discussion of the said principle in the cases of *Dede Esi Annie Amanor-Wilks v Action Aid International* [2014] eKLR and *Shadrack Wachira Gikonyo v Abt*



*Associates Inc* [2017] eKLR. It was the Respondent/Applicant's submission that the suit herein having been filed before a court that lacks jurisdiction to entertain it is fatal and should be considered a nullity, as affirmed by the Court in the case of *Boniface Waweru Mbiyu v Mary Njeri & another* [2005] eKLR.

### Claimant/Respondent's Submissions

9. According to the Claimant/Respondent, the issues for determination by the Court are whether the Court has jurisdiction to hear and determine the matter, whether the Respondent's Preliminary Objection dated 14<sup>th</sup> February 2024 is merited, and whether the Respondent is liable for the actions of its Subsidiary based In Somaliland. The Claimant/Respondent submitted section 12 of the *Employment and Labour Relations Court Act* stipulates that this 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 Constitution* of Kenya including disputes relating to or arising out of employment between an employer and an employee. That the Claim herein passes both the constitutional test and the statutory test under the *Employment and Labour Relations Court Act* and thus filed in the proper Court. The Claimant relied on the case of *Adeyo Waga Samuel & 10 others v Western Steel Mills Ltd & 2 others* [2018] eKLR in which the Court observed that where jurisdiction is conferred under any established law for the purpose of addressing employment and labour relations, the Court in addressing 'such purpose' is clothed with the requisite mandate. The Claimant further submitted that he had also established the Common Law position that the employer-employee relationship commences once the prospective employee executes the offer letter irrespective of whether he has reported to work or not. In support of this argument, he cited the case of *Ogenga v Kenya Pipeline Co Ltd (Cause 327 of 2016)* [2022] KEELRC 14677 (KLR) (2 February 2022) (Judgment) and submitted that this warrants this Court to determine any dispute that may arise from such a relationship.
10. It was the Claimant/Respondent's submission that section 15 of the *Civil Procedure Act* succinctly details that a suit should be instituted within the local limits of whose jurisdiction the defendant actually and voluntarily resides or carries on business and where the cause of action arose either wholly or in part. He argued that it is undisputed that the Respondent carries on business in both Kenya and Somaliland that the Respondent is the parent company with a subsidiary company in Somaliland. According to the Claimant, the principal place where the Respondent carries on business is therefore here in Kenya and the Respondent has been sued in such capacity. That in addition, he is the one who actualised the employment relationship between him and the Respondent by executing the Contract while here in Kenya and not in Somaliland. The Claimant relied on the case of *Dhahir Adow Ismail & another v Kenfreight (ER) Limited & another* [2016] eKLR wherein the Court held that the plaintiffs were entitled to institute the suit against the defendants because the defendants carried on business within the jurisdiction of the Court. The Claimant thus submitted that this Court is clothed with sufficient jurisdiction to hear and determine the instant Claim as the same raises matters that only this Honourable Court can handle.
11. The Claimant/Respondent submitted that it is trite law that a preliminary objection must be on pure points of law. He argued that the Respondent's Preliminary Objection raised grounds that delve to the merits and/or demerits of the case and that this Court risks addressing at this juncture issues regarding privity and existence of a contract, and breach thereof. He urged the Court to defer the points of fact touching on evidence to the opportune moment when parties will have a chance to adduce evidence in support of their positions and the Court would have a chance to evaluate the same on merit. The Claimant/Respondent asserted that the issue whether the Respondent is a separate legal entity as the holding company and thus not liable for the actions of its subsidiary company in Somaliland is not a pure point of law. He nevertheless challenged the authority of *Chai Trading Co. Limited v Muli Mwanzia & 2 others (supra)* cited by the Respondent/Applicant and submitted



that in the case of *Victor Mabachi & another v Nortun Bates Limited* [2013] eKLR, the Court of Appeal was equivocal that a company is a persona juridica with a separate independent identity in law, distinct from its shareholders, director and agents unless there are factors warranting a lifting of the veil. That it therefore follows that the principle of separate legal entity in Company Law is a general rule and available for exceptions where there are factors warranting lifting of the veil to hold the Parent Company liable for the actions of the Subsidiary. He further relied on the case of *DHN Food Distributors Ltd v London Borough of Tower Hamlets* [1976] 1 WLR 852 in which Lord Denning opined that where a group of companies in the same line of business have “common commercial interest” and are represented by a “single economic entity”, such a scenario would lead to the general tendency to ignore the separate legal entities within the entire group, and to look instead at the economic entity of the whole group. The Claimant noted that it is undisputed that the Respondent herein is wholly owned by a single sole shareholder who also owns the Subsidiary based in Somaliland. That it is also uncontroverted that the Respondent operates in the same line of business with its Subsidiary in Somaliland with a same theme of colour and closely related aesthetic features to the extent that the two entities are indistinguishable. It was the Claimant’s submission that the foregoing analysis evidences that a holding company can be held liable for the acts, contract or delict of the subsidiary thereby ignoring the separate corporate entity and shifting liability. He implored the Court to treat the measure of lifting the veil as a remedy that can be readily invoked in order to balance the scales of justice, to dismiss the Objection in its totality with costs, and to set down the matter to proceed for a full determination on merits.

12. This matter has been objected to allegedly because the Respondent is a foreign based entity and that the Claimant was to serve in its offices at Hargeisa, Somaliland. It is clear that a question of jurisdiction is key and has to be determined at the onset. *The Constitution* of Kenya 2010 is what birthed the Employment and Labour Relations Court. In Article 162(2)(a) *the Constitution* makes provision as follows:-
  - (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to- (a) employment and labour relations;
13. Parliament in response to the constitutional imprimatur established the Court through the enactment of the *Employment and Labour Relations Court Act*. The Act under section 12 thereof makes provision as follows:-
  12.
    - (1) 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 Constitution* and the provisions of 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;
      - (b)... [Emphasis supplied]
14. The provisions of the constituting act as well as the grund norm clearly place this matter within the jurisdiction of the Employment and Labour Relations Court. The issue of the employer being located in Hargeisa, Somaliland is a question of fact and therefore not fit for determination in a preliminary objection. In my considered view, granted the finding in the celebrated case of *Mukisa*



*Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, the learned judges of the Court of Appeal made an observation:

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. The improper raising of points of preliminary objection does nothing but unnecessarily increases costs and, on occasion, confuses issues. This improper practice should stop”.

15. In the matter before me it is evident that facts have to be ascertained. As a result of the finding by this Court I dismiss the objection raised with costs to the Claimant. The Court will proceed to issue directions on the disposal of the suit immediately after this Ruling.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF MAY 2024**

**NZIOKI WA MAKAU**

**JUDGE**

