



**Kanwagi v D -TreeInternational & 3 others (Cause E1049 of 2023)
[2024] KEELRC 1825 (KLR) (12 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1825 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E1049 OF 2023**

**SC RUTTO, J
JULY 12, 2024**

BETWEEN

ROBERT KANWAGI CLAIMANT

AND

D -TREE INTERNATIONAL 1ST RESPONDENT

J& I CONSULT LIMITED 2ND RESPONDENT

CAREER AFRICA OPTION GROUP 3RD RESPONDENT

AFRICA DEPLOYMENTS 4TH RESPONDENT

RULING

1. What is before me for determination is the Respondents' Preliminary Objection dated 11th January 2024, which is premised on the following grounds: -
 - a. That the contract No. RK 2023-COR-01 between the Claimant and the 1st Respondent is a Consultancy Contract and pursuant to Clause 17 (a) thereof, expressly provides that the same shall be governed by the laws of the Commonwealth of Massachusetts in the United States.
 - b. That pursuant to the express provisions of Clause 17 (c) of the aforesaid Consultancy Contract between the Claimant and the 1st Respondent, the parties are independent contractors incapable of creating an employment relationship hence depriving this Honourable Court the jurisdictional competence to determine the Claim as between the Claimant and 1st Respondent.
 - c. That the statement of Claim discloses no reasonable cause of action as against the 3rd and 4th Respondent.



Submissions

2. The Preliminary Objection was canvassed by way of written submissions. Both parties complied and I have considered their respective submissions.

Analysis and Determination

3. I find it imperative to first start by describing what a proper Preliminary Objection is. The law is now settled on this issue hence I will not reinvent the wheel. In the celebrated case of *Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd* (1969) EA 696, a Preliminary Objection was described in the following manner: -

“A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.

4. As per Sir Charles Nebbold, JA: -

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.

5. Further, the Court in the case of *Avtar Singh Bhamra & Another vs Oriental Commercial Bank*, Kisumu HCCC No.53 of 2004, determined that: -

“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

6. Essentially, for a Preliminary Objection to pass muster, the following elements ought to be satisfied: -

- a. It should raise a pure point of law;
- b. It is argued on the assumption that all the facts pleaded by the other side are correct; and
- c. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

7. Back to the instant case, the first ground raised in the instant Preliminary Objection, is that clause 17(a) of the Consultancy Contract provides that the same shall be governed by the laws of the Commonwealth of Massachusetts in the United States.

8. The Claimant holds otherwise and has submitted that the contract of employment provides under clause 18 that in the event of a dispute, the Kenyan laws should be used to adjudicate any such dispute.

9. Therefore, the question as to whether the dispute between the parties is to be governed by the Kenyan judicial system or the laws of the Commonwealth of Massachusetts in the United States cannot be determined by merely looking at the pleadings. In this regard, the facts cannot be said to be settled as



the true position on the issue can only be ascertained upon evaluation of the facts and evidence on record. Therefore, to this extent, the Preliminary Objection does not raise a pure point of law.

10. The second ground of objection is that the consultancy contract, between the parties is incapable of creating an employment relationship hence depriving this Court jurisdictional competence to determine the claim.
11. Similarly, the question as to whether the Claimant was engaged as an employee or an independent contractor is a question of fact and can only be ascertained by reference to the facts and evidence.
12. It is also notable that annexed to the Memorandum of Claim is a copy of an Employment Contract between the Claimant and the 2nd Respondent as well as a Consultancy Agreement between the Claimant and the 1st Respondent. No doubt, the Court will be called upon to review the aforementioned documents in order to establish the relationship between the Claimant and each of the Respondents.
13. Therefore, the instant Preliminary Objection does not raise a pure point of law since the Court will have to ascertain the parties' relationship from the evidence to be adduced during the trial.
14. It is trite that a Preliminary Objection should be based on a pure point of law and should not be marred with issues of fact as the case herein.
15. As to the distinction between a question of law and fact, I wish to draw guidance from the expression of Mativo J (as he then was) in the case of *J N & 5 others v Board of Management, St. G School Nairobi & another* [2017] eKLR, where the learned Judge held that: -

“ 14. In law, a question of law, also known as a point of law, is a question that must be answered by applying relevant legal principles to interpretation of the law. Such a question is distinct from a question of fact, which must be answered by reference to facts and evidence as well as inferences arising from those facts.

15. In law, a question of fact, also known as a point of fact, is a question that must be answered by reference to facts and evidence as well as inferences arising from those facts. Such a question is distinct from a question of law, which must be answered by applying relevant legal principles. The answer to a question of fact (a "finding of fact") usually depends on particular circumstances or factual situations.”

16. Applying the above precedent to the case herein, the instant Preliminary Objection cannot be determined without undertaking a factual evaluation of the evidentiary material presented in order to determine the law applicable in the circumstances and whether there was an employment relationship between the parties as well the applicable judicial system.
17. Needless to say, the Preliminary Objection raised by the Respondents has not met the legal threshold of a Preliminary Objection.
18. In view of the reasons set out above, the Respondents' Preliminary Objection dated 11th January 2024 is overruled with an order that costs will be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF JULY 2024.

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STELLA RUTTO



JUDGE

In the presence of:

For the Claimant Mr. Ochieng Opiyo

For the Respondents Mr. Orina

Court assistant Millicent Kibet

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

