**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 442 OF 1979**

**FREDRICK KARANI M'IMATHIU.....PLAINTIFF**

**VERSUS**

**STIRLING ATSANDI (A) LTD.....DEFENDANT**

**RULING**

**At the com**mencement of the hearing a consent order was recorded the effect of which was as follows:-

1. Five exhibits were put in, being the contract in question (Exhibit 1), health travel documents (Exhibit

2), testimonial given by the defendants to the plaintiff (Exhibit 3), and termination of contract employment and letter of termination (Exhibit 4 and 5).

2. The plaintiff at the material time had a valid passport for the material purpose.

3. Before the action was filed the plaintiff was informed by the defendants as follows:-

1) There was no work for him in Yemen

2) He would not be required to travel to Yemen

The agreed issues were:-

1. Whether Ex 1 and Ex 2 constituted a valid and enforceable contract – the passport being available.

2. If there was a valid contract, was it breached by the defendant's informing the plaintiff that he would not be required to travel?

3. If there was a breach what damages the plaintiff would be entitled to?

Thereafter it was again ordered by consent that the 1st and 2nd issues only were to be argued first for the court to decide thereon. If the answer was in the negative then the suit was to be dismissed with costs. If the answer was in the affirmative then evidence was to be called for to decide the 3rd issue.

In view of the above no evidence has so far been recorded. The learned counsel made their submissions on the 1st and 2nd issues. The decision on these two issues will decide the fate of the 3rd issue.

Mr Mwirichia for the plaintiff submitted that Ex 1 constituted a valid and enforceable contract under Kenya law. All the formalities of the Employment Act (cap 226) had been complied with in that the contract was in the prescribed form, had been duly signed by both parties and attested by the labour commissioner. The 3rd rule of the Employment (Foreign Contract of Service) Rules, 1977, requiring the giving of a medical certificate to the attesting officer had also been complied with. Mr Mwirichia referred to paragraph 2 of the contract which reads as

follows:

> "2. The period of engagement shall be for two years commencing from the date on which the employee leaves the Republic of Kenya."

Mr Mwirichia argued that this condition was a contingency on which the contract was made to depend. But the period for performance of the contract did not affect the inception of the contract and the obligation came into existence and became binding as soon as the contract was concluded. The action was based on anticipatory breach of contract. He relied on the English case *Frost v Knight* (1872) 26 L Times – 77. For his claim that there was a repudiation of the contract when the defendants confirmed to the plaintiff that it would not employ him, Mr Mwirichia sought support from the case of *Reigate v Union Manufacturing Co* (1918) 1 KB paragraph 592 at page 605.

Referring to the fact that the contract envisaged the plaintiff's travelling to Yemen in order to perform his part Mr Mwirichia submitted that the court should find that the contract implied a term that the defendants were bound to transport plaintiff to Yemen. He also referred to paragraph 4 of the contract and said that it showed that provision of the transport was the responsibility of the defendants. In support of his contention that the court was entitled to imply in a contract a term which it is obvious the parties intended to be so, even if it did not appear in the contract, he cited the case of *Shirlaw v Southern Foundries Ltd & Federated Foundries Ltd* 2 All ER 1939 – page 113.

I have carefully considered the submissions made by Mr Mwirichia. However the first issue to be decided is as to whether Ex 1 constituted a contract which was enforceable. The contract (Ex 1) is claimed by the plaintiff to be in the form prescribed in the first schedule of the Employment Act (cap 226) as required by section 20 of the Act which reads as follows:-

> "Every foreign contract of service shall be in the prescribed form, signed by the parties thereto, and shall be attested by a labour officer".

As to the requirements to be satisfied before attestation by a labour officer, subsections (c) and (e) of section 21 of the Act provides as follows:-

> "Sec 21 A foreign contract of service shall not be attested unless the labour officer is satisfied:-
>
> (c) that such contract is in the prescribed form;
>
> (e) that the employee is medically fit for performance of his duties under the contract."

From the above sections and sub-sections that I have quoted it is clear that the requirements thereof have to be strictly complied with in order to render the contract enforceable. The relevant portion of rule of the rules enacted under the Act and cited as the Employment (Foreign Contracts of Service) Rules, 1977, reads as follows:-

> "All foreign contracts of service under section 20 of the Act shall be in the form set out in the First Schedule to these Rules and any security bond ….."

The use of the word "shall" makes compliance with this rule mandatory. The 1st schedule contains the prescribed form. At the end of the contract form and after the spaces left for signatures of the parties and

the attestation by the labour officer, is appended another form containing the list of terms of employment and carries a note as follows:

> "This is part of the contract".

This form is divided into 12 columns headed as follows: number, name, identity card no, district, basic rate of pay, advance if any, weekly hours, rate of overtime, house allowance, amount of leave, amount of wages remitted locally, signature or thumb/finger impression.

To the contract produced as Ex 1 is appended a form perhaps intended or purporting to serve the purpose of the above statutory form. However, the form exhibited with the contract has only 6 columns and is headed as follows: number, name, trade, passport no, R Ref and date of birth. This form not only does not comply with the statutory form appended to the form of contract in first schedule of the Act, but lacks information as regards the essential terms of service such as salary, advances, over-time, housing, leave and amount of wages to be remitted locally. Without these essential terms of service having been shown in the contract and agreed upon the contract produced in court as Ex 1 is not in the form set out in the first schedule as required by rule 2 of the Employment (Foreign Contract of Service) Rules, 1977, enacted under the Employment Act (cap 226).

The above non-compliance with the rules apart there is another fatal instance of non-compliance with the said rules. Rule 3 reads as follows:

> "No foreign contract of service shall be valid or enforceable against or in respect of any employee unless and until a medical certificate in the form set out in the third schedule to these rules has been given to the attesting labour officer in respect of that employee".

As non-compliance with this rule makes the contract invalid and unenforceable I give below the form of the medical certificate as set out in the said third schedule:

> "Third Schedule
>
> Republic of Kenya
>
> Medical Certificate
>
> To the Labour Officer
>
> …….District
>
> I hereby certify that I have examined the above-named employee(s) and, with exception of those whose names I have deleted, he is/they are physically fit to proceed to ……. and there to perform the work contemplated under this contract.
>
> Dated this day of , 19 ……..
>
> ……
>
> Medical practitioner"

Mr Mwirichia had submitted that the said 3rd rule requiring the giving of a medical certificate to the attesting officer had also been complied with. He referred to the three certificates produced as Ex 2 as the medical certificate required under the said rule 3. The said three certificates constituting Ex 2 are the three separate international certificates of vaccination against smallpox, cholera and yellow fever. These are mere health travel documents. Not even by an unduly stretched interpretation of rule 3 or the term medical certificate referred to therein can these health travel documents be equated with the form of medical certificate, or termed as such, as is set out in the said third schedule. No claim has been made on

behalf of the plaintiff that any other medical certificate was in fact shown to the attesting officer nor has any such certificate been produced as an exhibit. I have no hesitation in rejecting the three health travel documents (Ex 2) as being the medical certificate that is required under the said rule 3. I find that rule 3 also has not been complied with. Noncompliance with these two rules that is rules 2 and 3 has to my mind rendered the contract invalid and unenforceable. Further as the contract (Ex 1) is not in the prescribed form and no medical certificate in the prescribed form was produced to the attesting officer to satisfy him as to the medical fitness of the plaintiff for the required purpose I am, in view of the provisions of section 2 (c) and (e) of the Act which I have quoted hereinbefore, not satisfied and I am unable to accept that the attesting officer was satisfied that the requirements of the said two sub-sections had been complied with. I am not therefore satisfied that the contract (Ex 1) was properly attested by the labour officer as required by the section.

In view of the above findings I do not feel it necessary to deal with the rest of the submissions made by Mr Mwirichia. On the 1st issue I find that the documents Ex 1 (the contract) and Ex 2 (the health travel documents) do not constitute a valid and enforceable contract. As there was no valid contract the need to go into the 2nd issue does not arise. The suit, following the agreed issues, is dismissed with costs.

**Dated and Delivered in Nairobi this 13th day of March,1986.**

**A.M.COCKAR**

**JUDGE**