Semiti v Mercy Ships & another (Employment and Labour Relations Cause E755 of 2024) [2025] KEELRC 2978 (KLR) (30 October 2025) (Ruling)

Neutral citation: [2025] KEELRC 2978 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS CAUSE E755 OF 2024

BOM MANANI, J

OCTOBER 30, 2025

BETWEEN

EDNA SANDRA SEMITI .... CLAIMANT

AND

MERCY SHIPS .... 1ST RESPONDENT

GP BUSINESS CONSULTING KENYA LIMITED .... 2ND RESPONDENT

RULING

Background

1. The Claimant has instituted this suit against the Respondents alleging that the two had an employment relationship with her. She asserts that the 1st Respondent employed her through the 2nd Respondent (as the employer of record) vide a contract of service dated 30th January 2023. She further contends that the Respondents irregularly terminated the aforesaid relationship through an alleged redundancy. Consequently, she seeks various reliefs as particularized in the Memorandum of Claim dated 9th September 2024.

2. Both Respondents entered appearance in the cause. In addition, the 2nd Respondent filed a defense to the cause whilst the 1st Respondent filed an objection to the court's jurisdiction to entertain the case.

3. In the Notice of Preliminary Objection, the 1st Respondent avers that since it is a foreign corporation registered in Texas in the United States of America, it cannot be sued in Kenya particularly in view of the fact that it has no place of business in the country. It is its (the 1st Respondent's) position that it is only subject to the U.S federal laws.

4. Although the 1st Respondent's preliminary objection in the Notice of Preliminary Objection is couched along the aforesaid lines, its lawyers on record introduced a second aspect of jurisdiction through their submissions. They contend that the court is not entitled to assume jurisdiction over the

1st Respondent since the Claimant did not serve the Summons to Enter Appearance on it in accordance with the applicable law. They aver that since the 1st Respondent is a foreign entity which is registered in the United States of America, Summons to Enter Appearance could only be served on it with the court's leave in accordance with Order 5 of the Civil Procedure Rules.

Analysis

5. The record shows that the court issued Summons to Enter Appearance in the cause on 19th September 2024. However, there is no affidavit of service to speak to whether the Claimant served the said Summons and if so, how she effected the said service. As such and going by the court record, it is not obvious whether or how the Summons were delivered to the Respondents since there is no affidavit of service on the court file.

6. Although there is no evidence to speak to the fact of service of Summons to Enter Appearance on the Respondents, it is apparent that the two entered appearance in the cause. However, absent the affidavit of service, the court cannot determine how the Respondents came to learn of the suit before they entered appearance in the matter.

7. The court notes that there is an instrument on the court file dated 30th January 2023 which purports to speak to an employment relationship between the parties. The instrument is purported to have been executed by the Claimant and the 2nd Respondent on 30th January 2023.

8. The instrument mentions that the 2nd Respondent signed it as the employer of record for the 1st Respondent. As such, it is apparent that the 2nd Respondent was purportedly acting as an agent of the 1st Respondent in the transaction that resulted in the alleged employment relationship between the parties.

9. In the face of the supposed evidence that the 2nd Respondent acted as the agent of the 1st Respondent in establishing the alleged employment relation between the parties, could it be that it (the 2nd Respondent) was served with the Summons to Enter Appearance on behalf of the 1st Respondent in that capacity? If not, could it be that the 2nd Respondent notified the 1st Respondent of existence of the suit prompting the latter to enter appearance in the cause even before the Claimant applied for leave to deliver the Summons to Enter Appearance to it? Or could it be that the Claimant purported to serve the 1st Respondent with the Summons to Enter Appearance outside the court's jurisdiction without first invoking the procedure prescribed under Order 5 of the Civil Procedure Rules?

10. Further and as has been indicated above, the alleged employment contract between the parties suggests that the 2nd Respondent hired the Claimant as the employer of record for the 1st Respondent. The instrument purports that the Claimant was hired to manage the 1st Respondent's concerns in Kenya. Specifically, clause 1.3 of the instrument required the Claimant to provide a warranty that she was entitled to work in Kenya. This insinuates that the Respondents had ongoing programs in Kenya.

11. Considering that the supposed agreement between the parties suggests that the Respondents hired the Claimant to oversee activities associated with the 1st Respondent in Kenya, it is arguable that the 1st Respondent had a presence in the country. As such, could it be that the Summons to Enter Appearance were delivered to the 1st Respondent at its place of operation in Kenya? Or could it be that it (the 1st Respondent) authorized the 2nd Respondent, being its purported agent, to accept service of the said Summons to Enter Appearance on its behalf?

12. I raise these questions to demonstrate the fluidity of attempting to address the question of service of the Summons to Enter Appearance in the cause in the absence of an affidavit of service to demonstrate how

the Respondents learned about the existence of the suit. Having regard to the foregoing, it is apparent that if the court were to make a determination on this issue, it will be acting on conjecture.

13. In the absence of an affidavit of service to speak to the matter, it is not possible for the court to positively assert that the Claimant served the 1st Respondent with the Summons to Enter Appearance out of jurisdiction in contravention of the procedure that is prescribe by law. What if it turns out that the 1st Respondent entered appearance in the suit after learning of the suit through the 2nd Respondent but before the Claimant had taken steps to serve it (the 1st Respondent)? What if the 1st Respondent authorized the 2nd Respondent to accept service of the Summons on its behalf?

14. Because of these doubts which arise due to the absence of an affidavit of service to speak to the issue of service of Summons to Enter Appearance, the court has no basis upon which it can make a finding that the Summons to Enter Appearance were delivered to the 1st Respondent outside jurisdiction in contravention of the law. As such, it (the court) declines to make a definitive finding on the issue as such finding will be purely speculative.

15. It is further noteworthy that the contention that the 1st Respondent was served with Summons to Enter Appearance out of jurisdiction was raised for the first time by the 1st Respondent's lawyers in their written submissions in support of the preliminary objection. There is no evidence that the Respondents raised the matter either in their pleadings or by way of an affidavit or a notice of objection.

16. Whether the Summons to Enter Appearance in the cause were delivered to the 1st Respondent outside jurisdiction is a matter of fact which the Respondents ought to have raised through their pleadings or affidavit before the matter could be made the subject of submissions by counsel. The court cannot make a finding that the 1st Respondent was improperly served outside jurisdiction based on the bare submissions of counsel without the matter being anchored on the averments of the Respondents. It would have been appropriate if the Respondents had sworn an affidavit on the issue to provide an anchor for their advocate's submission on the subject.

17. But even assuming that the Claimant had filed an affidavit of service to demonstrate that the Summons to Enter Appearance in the cause were delivered to the 1st Respondent, would an objection to the court's jurisdiction on this ground have been valid in the context of this case? It appears that the answer to the question is in the negative.

18. Although the 1st Respondent's lawyers contend that their client is a foreign corporation exclusively based in the United States of America with no presence in Kenya, the material on record suggest that the contention is not entirely accurate. Whilst it is apparent that the 1st Respondent was incorporated in the United States of America, it is not accurate to suggest that its operations are confined to that country and that it has no presence or business in Kenya. As the purported employment agreement between the parties suggests, the 2nd Respondent employed the Claimant to work for the 1st Respondent in Kenya (see clause 2.4 of the instrument). This implies that the two Respondents have ongoing programs and presence in Kenya.

19. Importantly, the 2nd Respondent insinuates through its Statement of Defense that the 1st Respondent had ongoing programs in Kenya. For instance, at paragraph 8(d) of the said Respondent's Statement of Defense, it contends that discussions to restructure the 1st Respondent's operations which led to the loss of the Claimant's job were undertaken at global level and did not include the 1st Respondent's regional staff in its Kenya or Africa operations implying that the 1st Respondent had presence and ongoing programs in Kenya. This debunks the 1st Respondent's lawyers' assertion that the 1st Respondent has no presence in Kenya.

20. The law allows service of court processes on a corporation which has presence in the country at its place of business (see Order 5 rule 3 (b) (iii) of the Civil Procedure Rules). This is irrespective of whether the corporation is locally or foreign registered.

21. In the instant case, both the alleged employment agreement between the parties and the letter of 24th June 2024 through which the Claimant's alleged employment was purportedly terminated on account of redundancy suggest that the 1st Respondent was running programs in Kenya through the 2nd Respondent, its disclosed agent. If this is the case, Summons to Enter Appearance could properly be served on it (the 1st Respondent) by delivering them at the business premises of the 2nd Respondent which personified the 1st Respondent for purposes of the transaction that yielded this dispute.

22. The situation would have been different if the 1st Respondent did not have ongoing programs and presence in Kenya,either directly or indirectly, and was out of the country at the time when the Summons to Enter Appearance were allegedly delivered to it. In such case, the provisions of law on service of court processes out of jurisdiction would strictly apply.

23. The 1st Respondent cited a number of Court of Appeal decisions to support its objection to the court's jurisdiction. However, the court found them (the decisions) distinguishable from the instant case.

24. In the case of Raytheon Aircraft Credit Corporation & another v Air Al-Faraj Limited [2005] KECA 312 (KLR), the parties to the impugned contract had expressly agreed on the law of the State of Kansas as the applicable law to their contract. Further they had agreed that any dispute arising from the contract was to be decided by either the United States District Court for the district of Kansas located in Wichita, Kansas or the Eighteenth Judicial District Court of Sedgwick County in Kansas. However, the Lessor reserved the right to bring proceedings for repossession of the subject matter of the suit or for recovery of money owed by the Lessee in any other jurisdiction where the subject matter of the suit would be located at the time or where the Lessee had assets in the event of breach of the contract.

25. Further, in that case (Raytheon Aircraft Credit Corporation & another v Air Al-Faraj Limited (supra)), the Court of Appeal found as a matter of fact that the Lessor was a foreign company with no business interests in Kenya. The court expressed itself on the matter as follows:-

> ''The first appellant Raytheon is a foreign corporation incorporated under the laws of Kansas, USA, and having its registered office in Kansas. It was not trading within the jurisdiction by a subsidiary company at the time it was sued and it is not domiciled in Kenya. In such a case, the High Court will not assume jurisdiction in relation to any matter arising from the contract unless the contract is of the nature specified in order V rule 21 (e) Civil Procedure Rules, that is, inter alia, the contract is made in Kenya or if it is governed by the Laws of Kenya or if a breach of contract is committed in Kenya.''

26. Conversely, in the case before me, the parties agreed that any dispute arising from their contract was to be resolved by the courts in Kenya. Further they (the parties) covenanted to apply Kenyan law to resolve any such dispute. Thus, it is apparent that whilst the parties in the case of Raytheon Aircraft Credit Corporation & another v Air Al-Faraj Limited (supra) chose foreign courts and law to resolve any disputes that arose from their contract, the parties in the case before me chose Kenyan courts and law for this purpose.

27. Further, the court in Raytheon Aircraft Credit Corporation & another v Air Al-Faraj Limited (supra) found as a matter of fact that the lessor was a foreign corporation with no presence or business interests in Kenya. In contrast, the 1st Respondent in the case before me, whilst being a foreign corporation, has presence and ongoing programs in Kenya as established earlier in the judgment. As such and to this

extend the case of Raytheon Aircraft Credit Corporation & another v Air Al-Faraj Limited (supra) is distinguishable from the instant case.

28. The other decision which the 1st Respondent relied on to support the preliminary objection is the Court of Appeal case of Misnak International (UK) Limited v 4MB Mining Limited C/O Ministry of Mining, Juba Republic of South Sudan & 3 others [2019] KECA 471 (KLR). In that case, the Appellant objected to the High Court's jurisdiction over it on the ground that it was a foreign corporation with no interest or presence in Kenya and had not been served with Summons to Enter Appearance with leave of the court.

29. The brief facts of the case are that the 1st Respondent in the appeal was granted a contract by the Government of Southern Sudan to undertake mining activitiesin Juba and Luri in the aforesaid Republic. To enable it (the 1st Respondent) to undertake the exercise, it entered into a contract with the Appellant, a UK based company, to supply it (the 1st Respondent) with mining equipment.

30. The equipment were to be transited to Sudan through the port of Mombasa in Kenya. However, the Appellant had no business interest or presence in the Republic of Kenya.

31. When the equipment arrived at Mombasa, a billing dispute arose between the Appellant and the 1st Respondent. As a result, the Appellant detained the equipment at the port in exercise of its right of lien.

32. Aggrieved by this development, the 1st Respondent instituted proceedings against the Appellant in the High Court in Kenya. The Appellant objected to the court's jurisdiction on the ground that the 1st Respondent had not sought leave to serve it with Summons to Enter Appearance out of jurisdiction despite it (the 1st Respondent) being aware that it (the Appellant) was a foreign company with no presence or business interests in Kenya. The Court of Appeal upheld the objection.

33. It is noteworthy that in the aforesaid case of Misnak International (UK) Limited v 4MB Mining Limited C/O Ministry of Mining, Juba Republic of South Sudan & 3 others (supra), the Court of Appeal found as a matter of fact that the Appellant, a foreign company, had no presence or business interest in Kenya. As such, the court held that it (the Appellant) ought to have been served with Summons to Enter Appearance in the cause with leave of the court before the trial court could assume jurisdiction over it.

34. In contrast, in the case before me, although the 1st Respondent is a foreign company, there is preliminary material which imply that it had ongoing programs in Kenya at the time this dispute arose. This reality is evident from the fact that the 2nd Respondent hired the Claimant to undertake activities in the country on behalf of the 1st Respondent. In this context, the court finds that the instant case is distinguishable from the case of Misnak International (UK) Limited v 4MB Mining Limited C/O Ministry of Mining, Juba Republic of South Sudan & 3 others (supra).

35. The other jurisdictional matter which the 1st Respondent raised relates to whether, not being a local corporation, it can legitimately be sued in Kenyan courts. As mentioned earlier in the ruling, the position which the 1st Respondent takes on the matter is that since it is a foreign corporation, it cannot be sued in Kenya. It contends that it is only subject to the federal laws of the United States of America.

36. The issue which the 1st Respondent raises in this respect falls within the purview of private international law. It is a misconception for it (the 1st Respondent) to contend that merely because it is a foreign corporation, it cannot be sued in Kenyan courts. It (the 1st Respondent) does not enjoy such absolute immunity.

37. Only those foreign bodies that are covered by the *Privileges and Immunities Act* Cap 179 Laws of Kenya can claim immunity from suits within Kenyan courts. The 1st Respondent has not demonstrated that it is covered by this legislation. As such, the claim for absolute immunity from suits in Kenya is, in my humble view, misguided.

38. Under private international law, the court is enjoined to resolve questions relating to where a foreign national, whether natural or corporate, may be sued by a Kenyan national. In order to address such questions, certain factors are taken into account. These include: whether the forum court has the power to resolve the dispute in question; and which law is to be applied to resolve the dispute.

39. In determining the first of the aforesaid elements, the court ought to consider factors such as: the nationality and residence of the parties to the dispute; the location of the asset that is in dispute; the place where the contract which gave rise to the dispute was entered into, performed and or breached; and whether the forum court is able to conveniently grant the remedies which the parties seek.

40. Together, the aforesaid factors are referred to as the connecting factors (Dorcas Kemunto Wainaina v IPAS [2018] KEELRC 2065 (KLR)).They enable the court to determine the link which a particular dispute has to a particular legal system.

41. In the instant case, the alleged contract in dispute was purportedly entered into in Kenya. It is also apparent that the alleged contract was purportedly performed in Kenya. This is evident from the 2nd Respondent's letter to the Claimant dated 24th June 2024 which states that it (the 2nd Respondent) hired the Claimant to work for the 1st Respondent in Kenya.

42. The Claimant contends that the Respondents breached the contract through an irregular redundancy process. She has presented letters dated 24th May 2024 and 24th June 2024 purporting to be the letters which the Respondents issued to terminate her services.

43. A cursory perusal of the two documents suggests that they were issued in Kenya by the 2nd Respondent. The letter dated 24th June 2024 suggests that the decision to declare the Claimant redundant was informed by the 1st Respondent's contention that her role, which was tied to Kenya, was no longer required. As such, it appears that the contract between the parties was purportedly breached in Kenya.

44. Having regard to the foregoing, it is apparent that all the aforesaid factors connect the instant dispute to Kenya. As such, the Kenyan court has jurisdiction to entertain the matter.

45. The other element to consider in resolving the issue at hand is the choice of the law to be applied to resolve the dispute. Since the purported contract between the parties was allegedly entered into, performed and allegedly breached in Kenya, Kenyan law would be the ideal law to resolve the dispute.

46. In any event, the purported contract between the parties does address both issues of jurisdiction and choice of law. Clause 24.1 of the instrument states thus: ''your contract of employment with the company shall be governed by and construed in all respects in accordance with the laws of Kenya. You and the company each irrevocably submit to the non-exclusive jurisdiction of Kenyan courts''.

47. As was pointed out earlier, the purported contract was ostensibly concluded by the 2nd Respondent as the employer of record for the 1st Respondent. As such, the 2nd Respondent purported to be the agent of the 1st Respondent with the consequence that the purported contract ostensibly binds both of them.

48. By the aforesaid clause in the purported instrument, the parties not only submitted to the jurisdiction of the Kenyan court in respect of any disputes that may arise from their engagement. They also

covenanted to resolve any such disputes using Kenyan law. As such, this court has jurisdiction over the instant dispute.

Determination

49. Having regard to the aforesaid, the court arrives at the conclusion that the 1st Respondent's preliminary objection to the court's jurisdiction is not merited.

50. Consequently, the objection fails.

51. Costs of the objection shall abide the outcome of the suit.

DATED, SIGNED AND DELIVERED ON THE 30TH DAY OF OCTOBER, 2025

B. O. M. MANANI

JUDGE

In the presence of:

.... for the Claimant

..................for the 1st Respondent

..................for the 2nd Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M. MANANI

JUDGE