



Afritrack Investments (EA) Limited & another v Okoth & another (Civil Appeal 355 of 2019) [2025] KECA 215 (KLR) (7 February 2025) (Judgment)

Neutral citation: [2025] KECA 215 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 355 OF 2019
DK MUSINGA, MSA MAKHANDIA & S OLE KANTAI, JJA
FEBRUARY 7, 2025**

BETWEEN

AFRITRACK INVESTMENTS (EA) LIMITED 1ST APPELLANT

SABENA WOULD YOHANNES 2ND APPELLANT

AND

JACOB ODUNGU OKOTH 1ST RESPONDENT

FREDRICK KIPROTICH KOIGEI 2ND RESPONDENT

(An appeal from the Ruling of the Employment and Labour Relations Court at Nairobi (H. Wasilwa, J.) delivered on 18th June 2019 in ELRC Case No. 1090 of 2015)

JUDGMENT

1. This appeal came up for hearing on 1st July 2024. On that day none of the parties' advocates attended court, but the appellants had filed written submissions dated 3rd August 2020 through their advocates, Oyugi & Company. The Court was satisfied that both parties had been served with the hearing notice on 26th June 2024. They had earlier been directed to file written submissions, but the respondents did not file any. We therefore considered the appeal on the basis of the appellants' submissions only.
2. The brief background of the appeal is that on 24th June 2015 the respondents filed suit against the appellants before the Employment and Labour Relations Court (ELRC), being ELRC Suit No. 1090 of 2015. In their memorandum of claim, the respondents stated that on 15th November 2013, vide a letter of offer signed by the 2nd appellant, the 1st respondent entered into an employment contract with the 1st appellant as a Civil Engineer for a period of one year commencing 15th November 2013 to 15th November 2014 at an agreed monthly salary of Kshs.100,000.
3. They further stated that on or about 16th June 2014, the 1st appellant had the 1st respondent deployed to the capital city of Angola, Luanda, where the headquarters of the 1st appellant is situated, and



operates as Afritrack Angola, and was supposed to work there for a period of 3 months. The 1st respondent averred that when he reached Angola, he was given a contract dated 7th July 2014 written in Portuguese, which he was coerced into signing without fully understanding its contents as there was no interpretation of the same into English. The respondents further averred that on 21st October 2013 vide a letter signed by the 2nd appellant, the 2nd respondent entered into an employment contract with the 1st appellant as an Architect for two years commencing 21st October 2013 at an agreed salary of US\$ 800 per month. The 2nd respondent worked with the 1st appellant in Kenya for one month and thereafter he was deployed to the 1st appellant's office in Angola in the same capacity.

4. The respondents further stated that they were subjected to unfair working conditions in Angola, including torture, inhumane and degrading treatment in breach of their contracts of employment, which caused them mental suffering. They sought compensation for wrongful, unlawful and inhumane treatment. They also sought a declaration that the treatment they were subjected to by the appellants amounted to constructive termination of their contracts of employment and therefore they were liable to compensation by way of payment of specified amounts of money as well as exemplary damages.
5. The appellants denied the respondents' claim by way of a response to the memorandum of claim. At paragraph 17 of their response, the appellants stated that they would seek to have the claim struck out on various grounds.
6. On 22nd February 2019, the appellants filed an application to strike out the respondents' claim for being scandalous, frivolous, vexatious, and an abuse of the court process. The gist of the application was that the trial court lacked jurisdiction to entertain the suit as the cause of action arose outside its territorial jurisdiction, and that the respondents signed their contracts of employment in Angola with Afritrack Angola Construção Civil Industrial Limitada, who were not parties to the suit.
7. The respondents opposed the application and averred that the contracts signed in Angola were procured under fraud, misrepresentation and duress.
8. The application was canvassed by way of written submissions. In its impugned ruling, the trial court held that the application before it was in terms of a preliminary objection, but the same could not be determined without consideration of facts and evidence, and therefore, it was unsustainable and thus dismissed it.
9. Being aggrieved by the said ruling, the appellants preferred this appeal. The appellants faulted the learned judge for treating the application as a preliminary objection; for holding that some of the documents presented to court were in a language other than English language, the official language of the court; and for failing to hold that it did not have jurisdiction to try and determine the respondents' claim.
10. In the impugned ruling, the learned judge held as follows:
 - “ 18. I have examined the averments of the parties herein. The 1st Claimant Fredrick Kiprotich Koigei signed his contract dated 15/11/2013 on a letter head of Afritrack Investments (E.A) Limited whose address is 34918-00100 Nairobi.
19. The 1st claimant was later deployed in Angola vide a contract dated 16/6/2014. There is no indication that this deployment was overriding the earlier contract and ousting the jurisdiction of this Court following the contract entered into in Kenya.



19. The 2nd Claimant on the other hand was also employed vide a letter dated 21/10/2013 as an Architect. The contract was signed on a letter head of Afritrack Angola. From the contents of the contract, the Claimant was promised a return economy class ticket from the “place of origin” which is also not indicated.
19. Some of the documents however presented before court relate to a contract in a language other than English which is not the official language of this court and for which this court is unable to determine the contents.
19. Due to this limitation, this court is unable to fully appreciate the terms of engagement of this contract and render a just verdict.
19. This is an application before me in terms of a preliminary objection for which I need to determine without reference to facts as in the case of Mukisa Biscuit. The current application however cannot be determined without reference to further evidence and facts. The application therefore falls beyond the scope of a preliminary objection and I therefore dismiss it accordingly.
19. Costs in the cause.”
 1. The appellants application dated 21st February 2019 was a notice of motion brought under sections 1A, 1B and 3A of the Civil Procedure Act, rule 17(1) of the Employment and Labour Relations Court, Procedure (Rules) 2016, and order 2 Rule 15(1)(b) and (d) of the Civil Procedure Rules, 2010. The prayers sought were as follows:
 - “(a) That the honourable court be pleased to strike out the claimants’ claim herein as the same is scandalous, frivolous, vexatious and a complete abuse of the court process.
 - (b) That the costs of this application be provided for.”
12. The application was supported by an affidavit sworn by the 2nd appellant, who is also the Chief Executive Officer of the 1st appellant. The supporting affidavit had several annexures, some of which were in Portuguese language, but which had also been translated to English. The respondents filed grounds of opposition as well as a replying affidavit by both respondents, which equally had several annexures thereto.
13. Both parties filed lengthy submissions in respect of the application.
14. Turning to the first ground of appeal, in view of what we have stated here above, we agree that the learned judge erred in law by treating the appellants’ application as a preliminary objection, when in actual fact, it was a substantive application that required to be considered on the basis of the facts, evidence in form of affidavits that were before the court, the submissions and applicable law. Determination of a preliminary objection is different from that of a substantive application. A preliminary objection is determined on the basis that it raises a pure point of law, which is argued on the assumption that all the facts pleaded are correct, and therefore a court cannot consider the evidence adduced by way of affidavits. We therefore uphold the first ground of appeal.
15. Turning to the second ground of appeal where the learned judge was faulted for holding that some of the documents presented to court were not in the official language of the court (English), the appellants submitted that there were on record translated copies of the contract of service. We have perused the



record of appeal, and we so agree. The translations are at pages 57 to 64 of the record of appeal. The learned judge was therefore able to read and understand the terms of the contracts.

16. Lastly, on the consolidated grounds 3, 4 and 5 where the learned judge was faulted for failing to hold that the court did not have jurisdiction to try and determine the respondents' claim, we note that the learned judge, having taken the view that what was before her was a preliminary objection, did not proceed to pronounce herself as to whether the court had jurisdiction or not.
17. Although the appellants' counsel urged us to find in their favour, allow the appeal and strike out the respondents' claim before the ELRC, considering that the learned judge did not pronounce herself on the issues that were raised before her, the orders that commend themselves to us, and which we hereby make, are:
 - a. This appeal be and is hereby allowed.
 - b. The respondents' application dated 21st February 2019 before the ELRC is remitted to that court to be heard by any judge apart from Wasilwa, J.
 - c. The respondents shall bear the costs of this appeal.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF FEBRUARY 2025.

D. K. MUSINGA (PRESIDENT)

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. OLE KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

