IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: O'KUBASU, GITHINJI & ONYANGO OTIENO, JJ.A.)

CIVIL APPEAL NO. 111 OF 2006

BETWEEN

D. P. BACHHETA.....APPELLANT

AND

THE GOVERNMENT OF THE UNITED STATES OF AMERICA.....RESPONDENT

(Appeal from an order of the High Court of Kenya at Nairobi (Aluoch, J.) dated 17th September, 2004

in

H.C.C.C. NO. 4973 OF 1992)
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JUDGMENT OF THE COURT

This is an appeal from the ruling of Aluoch, J. (as she then was) dated 17th September, 2004 dismissing an application by the appellant seeking the determination of *"point of law"*, before the assessment of damages for breach of a contract of employment.

The appellant D. P. Bachheta was employed on 3rd August, 1965 as Warehouseman by the United States Agency for International Development (USAID) in Kenya, which is one of the several agencies comprising the United States Mission in Kenya. The contract of employment is contained in a CONTRACT AGREEMENT which was executed by the appellant and an Executive Officer of USAID. The Contract Agreement contained the terms and conditions of service including the salary which was agreed as payable at the rate of five shillings and thirty cents (Kshs.5.30) per working hour including overtime worked payable fortnightly in arrears.

On 14th September, 1992, the appellant filed a suit in the High Court to wit *H.C.C.C. No. 4973 of 1992* alleging that USAID, the principal of the respondent unlawfully terminated the contract on 10th April, 1992 and claimed Kshs.729,634.35 as computed in the plaint and general damages. The plaint was amended and subsequently further amended with leave of the court.

The defendant filed a defence denying liability. It averred, among other things, that the appellant's employment was terminated for false and deliberate misrepresentation in the cause of official investigations; that the relevant machinery stipulated in the contract was followed; that the employment

was lawfully terminated, and, that, the appellant was paid all sums due on termination.

Nevertheless, on or about 24th September, 2001 when the suit was listed for hearing before Aganyanya, J. (as he then was), the respective advocates for the parties recorded a consent judgment, thus:

"By consent judgment on liability be and is hereby entered for the plaintiff against the defendant".

The appellant's counsel then proposed to the defendant's counsel that the question of damages and the law applicable should be referred to arbitration. The defendant's counsel successfully applied for adjournment to seek instructions and the suit was thus adjourned. There was no positive progress in the resolution of the remaining dispute.

On 12th April, 2002, the appellant filed an application dated the same day under **Order XIV Rule 2** *Civil Procedure Rules* (CPR) (now renumbered **ORDER 15** though not in identical terms). By the application, the appellant asked the High Court to determine a point of law before reception of evidence which point of law was framed, thus:

"WHETHER IT IS KENYA OR UNITED STATES OF AMERICA (AMERICAN) LAW/S WHICH SHOULD BE INVOKED IN DETERMINATION/ ASSESSING THE DAMAGES PAYBALE/DUE TO THE PLAINTIFF".

Rule 2 of **Order XIV** Civil Procedure Rules (CPR) which order dealt with framing of issues provided in part:

"If it appears to the court that there is in any suit a question of law which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried, or before any reference is made to a referee or an arbitrator, the court may order accordingly ……..".

There is no equivalent provision in the new **Order 15** which also deals with the issues arising in a suit.

The application was based on three grounds, namely; that the appellant was an employee of USA Government; that terms and conditions applicable to the contract were subject to the invocation of the U.S.A. law and that though the parties had submitted to Kenya jurisdiction the parties elected that the contract is to be always subjected to USA law. The appellant referred, in supporting affidavit to two provisions in two documents he annexed as proof that the contract of employment was subject to the American law. The first is clause 13 of the conditions of employment which provides:

"That the United States Government is not bound by the laws and regulations of Kenya governing employers terms and conditions of employment, social security, et cetera.

The second is clause 13 of a Handbook – *Personnel Policies and Practices for Foreign service National Employees* (Handbook) which provides in part.

Local laws and regulations relating to appointments, termination social security, or other conditions of employment do not govern the service of a national employee.

"Local personnel programs conform as closely as feasible with local law and customs, but must be based on and administered in accordance with U.S. laws and regulations".

The respondent opposed the application on nine grounds, *inter alia*, that the plaint pleads employment in Kenya; that the question whether foreign law applies to a contract is a matter of fact which must be pleaded and proved; that foreign law is not one of the issues in the case; that damages are always governed by the law of the forum deciding the case, and, lastly, that the issue was raised after judgment on liability had been entered and when the sole issue was the quantum of damages.

The superior court dismissed the application saying in part:

"From the evidence I have gone into in great detail, I find that the plaintiff accepted in his contract agreement to be paid in Kenya shillings *"at the rate of five shillings and thirty cents per working hour"***.**

This according to my findings must be the reason why the plaintiff's claim in the plaint, the amended plaint and the further amended plaint is in Kenya shillings.

Further, I am satisfied from the evidence on record fell (sic) within the scheme *"FSN/PSC employees of the US mission in Kenya"* **who are paid in Kenya shillings"** (sic).

The appeal is essentially on the main ground that the trial Judge misdirected herself on the proper law applicable to the contract. Miss. Kinyanjui, learned counsel for the appellant submitted, among other things, that the court made a wrong inference from the currency stipulated in the contract that the proper law was the Kenya law; that the intention of the parties was to exclude Kenya law; that parties agreed to exclude Kenya law and that the law relating to damages is both substantial and procedural.

On the other hand, Mr. Fraser, learned counsel for the respondent submitted, *inter alia*, that the real question was whether it was the American law or Kenya law which was applicable in assessment of damages; that under the rule, the point of law should be capable of determination without any evidence; that the appellant relied on the annexed documents as evidence to support the point of law; that courts are reluctant to decide points of law in abstract; that foreign law is not pleaded; that American law depends on the particular State and that since judgment has been entered on liability it is Kenya law which applies to the question of the quantum of damages.

The appeal of necessity involves the construction of former **Rule 2** of **Order XIV** CPR in relation to the pleadings and the proceedings. Two questions arise from the application which was made in the superior court. The first is whether the application fell within the scope of **Rule 2** of **Order XIV**. The second is whether the suit in fact raised a question of foreign law.

Regarding the first question, it is clear from the wording of the **Rule 2** that the rule applies before any evidence is given and also where the question of law is discernable from the pleadings.

The commentary to *Annual Practice of 1942* vol. 2 at page 579 relating to English **Rule Order 25 rule 2** which was in identical terms indicates that the procedure applies where the question of law is adequately raised in the pleadings and that the rule has reference only to a case where the action has not yet come on for trial.

Secondly, it would be a wrong exercise of discretion for the court to allow a question of law to be raised as a preliminary point of law where in order to decide the question of law it is necessary or desirable to ascertain the facts beyond those that appear in the pleadings or where the law is unsettled or obscure (**Tulling v Whiteman** [1979] 1 All ER 737).

In the instant case, the court was moved to allow the point of law to be tried about 11 years after the suit had been filed and over 6 months after the consent judgment on liability had been entered. Since the appellant's claim, save the assessment of damages had been determined by a consent judgment, the application did not in our view fall within the scope of the rule.

Secondly, foreign law being a matter of fact should be specifically pleaded giving full particulars of the statute and further proved at the trial by expert evidence (see **Bullen & Leake & Jacob precedents of pleadings**, 13th Ed. Section 41). The appellants did not plead the American law specifying the statute and the State in which it is applicable.

Lastly, the appellant annexed documents to his affidavit as proof that the American law was applicable yet the documents had not been accepted by the respondent nor admitted in evidence. It is clear in this case that the question of law does not arise from the pleaded facts and that it was necessary to ascertain the facts by acceptable evidence in order to determine the question of law.

From the foregoing, the application for determination of the question of law was not within the purview of the rule.

Regarding the second question whether the suit infact raised a question of foreign law, the appellant pleaded in paragraph 9 of the Plaint, thus:

"The said contract was entered into and the services of employment rendered in Nairobi aforesaid within the jurisdiction of this Honourable Court".

The appellant claims two heads of damages, namely, the amount of Kshs.729,634.35 being entitlement upon termination of contract computed in terms of the contract and general damages for wrongful termination of the contract. The Handbook indicates that the Kenya employees who are non US citizens are known as Foreign Service National Employees (FSN) and Personal Services Contract Employees (PSC) employed by US Government around the world; that it is the policy of US Government to establish local personnel programs and policies which comply as closely as feasible with local laws; customs and practices; that the fact that one is an employee of US Government does not exempt the employee from obligations to observe laws of Kenya including tax obligations and that the employees are paid in Kenya shillings.

The characteristics of the contract, are not in dispute. It was made in Kenya; it was between USAID which has offices and operates in Kenya and the appellant, a non US citizen, who is apparently resident within the jurisdiction. It was to be performed in Kenya. The salary and other allowances were being paid to the appellant in local currency. The appellant has computed his claim in Kenya shillings. Lastly, the appellant has invoked the jurisdiction of High Court of Kenya. The contract agreement does not contain an express choice of law and exclusive jurisdiction clause in favour of any state of USA nor does it attach similar provisions to the respective clause – see **Forville v Kelly III and Others** [2005] 2 KLR 47 and in **Raytheon Aircraft Credit Corporation & Another v Air Al-Faraj Ltd.** [2005] 2 KLR 47.

The two provisions quoted from documents by the appellant to support the application in the superior court do not expressly or by implication provide that USA law is applicable.

Having regard to the contents of the contract and in the absence of law and jurisdiction clause, there is no conflict of laws situation and the question of whether it is the Kenya law or USA law which applies does not arise. The question as framed is theoretical. It is undoubtedly clear that the proper law of the contract is the Kenya law.

For those reasons, the appeal has no merit. It is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 8th day of July, 2011.

E. O. O'KUBASU

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JUDGE OF APPEAL

E. M. GITHINJI
.....
JUDGE OF APPEAL

J. W. ONYANGO OTIENO
.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR