



**Masoni v Farmforce AS (Cause E730 of 2022)
[2023] KEELRC 1967 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1967 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E730 OF 2022
AN MWAURE, J
JULY 28, 2023**

BETWEEN

ROSE NANZALA MASONI CLAIMANT

AND

FARMFORCE AS RESPONDENT

RULING

1. The Applicant has filed an application dated November 21, 2022 seeking to have the Claimant suit struck out claiming that the court lacks jurisdiction to entertain a claim against the Respondent/Applicant.
2. The Applicant relied on the ground that the Respondent is a limited liability company incorporated and registered in Oslo, Norway and has no registered office in Kenya. Further, that clause 14 of the Contractor Agreement entered between the parties provides any matter herein is subject to the Norwegian law and the courts in Oslo which have jurisdiction to settle all disputes arising from the Agreement which both parties signed agreeing to the said terms.
3. In response to the Application, the Claimant filed grounds of opposition dated December 20, 2022 opposing the Application on grounds that despite clause 14 of the Contractor Agreement this court ought to assume jurisdiction on grounds that the Agreement was made and concluded in Karen Connection, Office No. 25 along Karen Road, Off Lower Plains in Nairobi within the Republic of Kenya; that the alleged unlawful termination of the contract was committed in Kenya and lastly the contract was performed in Kenya and at no point did the Claimant ever work for the Respondent outside the boundaries of Kenya.
4. The Application was canvassed by the Respondents submissions and a replying affidavits sworn by the Claimant. The said submissions are dated March 24, 2023 and the court did consider them. The replying affidavit is dated November 20, 2022.



Determination

5. The court in *Areva T & D India Limited v Priority Electrical Engineers & Another* [2012] eKLR held:-

“The test in determining the effect of exclusive jurisdiction clauses was outlined by Willmer, J (as he then was) in *The Fehmarn* [1957] Lloyds Law Reports, 511, as follows:-

“Where there is an express agreement to a foreign tribunal, clearly it requires a strong case to satisfy this Court that that agreement should be overridden and that proceedings in this country should be allowed to continue.”

In the *EI Amria* [1981] 2 Lloyds Law Reports, 119 Brandon, LJ laid down the following principles:-

- “(1) where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within the jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not.
- (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown.
- (3) The burden of proving such a strong case is on the plaintiffs.
- (4) In exercising its discretion the Court should take into account all the circumstances of the particular case.”

6. In the case of *United India Insurance Co Ltd v East African Underwriters (Kenya) Ltd* [1985] KLR 898 Madan, JA observed as follows:-

“The Courts of this country have a discretion to assume jurisdiction over an agreement which is made to be performed in Kenya notwithstanding a clause therein conferring jurisdiction upon the Courts of some other country. The exclusive jurisdiction clause however should normally be respected because the parties themselves freely fixed the forums for the settlement of their disputes; the Court should carry out the intention of the parties and enforce the agreement made by them in accordance with the principle that a contractual undertaking should be honoured unless there is strong reason for not keeping them bound by their agreement.

Everybody accepts that the general rule is that the jurisdiction clause must be obeyed. There must be something exceptional to justify departure from it and the exceptional circumstances must be such as to afford strong reasons for such departure. (per Cairns, LJ, in the *Makefjell* [1976] 2 Lloyds Reports 29).

7. The aforementioned decisions were reiterated in the case of *Areva T & D India Limited v Priority Electrical Engineers & Another* [2012] eKLR the court held:-

“I fully agree that the rule that the parties should be held to their bargain should only be departed from in a special and exceptional case. Here, in the case before us, as I have pointed out, no such special and exceptional circumstances have been established to depart from the contract that the parties had freely and voluntarily agreed upon. The learned Judge’s conclusion that his Court “would fail in its duty to do justice to the parties if it allowed an unjust clause in an agreement to be enforced by one party to the detriment of the other



party where clearly there is no legal or logical justification” is based on no evidence that we can discern from the record, and the Judge’s order that the arbitration be conducted by “a single arbitrator to determine the dispute between them within fourteen (14) days of today’s date failure of which the chairman of The Institution of Engineers of Kenya shall appoint a single arbitrator to determine the dispute” is without jurisdiction.”

8. In view of the foregoing, the Claimant has the burden of proof to prove to the court that there are special and exceptional cases in this case for the court to assume jurisdiction of the matter. The Claimant has not satisfactorily proved to the court that the Respondent has a presence in Kenya and that she will be in any way prejudiced if the matter is referred to the Norwegian courts in Oslo as envisaged in the contract she voluntarily signed understanding the terms and its implications.

9. The contractor agreement signed between the parties and dated November 4, 2021 provided in clause 14 unequivocally that:

This agreement shall be subject to Norwegian law, excluding the principles of conflict of laws. The ordinary courts of the City of Oslo Norway shall finally settle all disputes arising in connection with the agreement. Negotiations will be conducted in English. By affixing their signature below, the undersigned hereby certify and warrant that they understand the legal significance of the terms of this agreement and that they have the legal authority to bind the organizations they represent to the terms contained herein.

10. the court being cognizant that jurisdiction is everything in a case as held in the celebrated Case of owners of the *motor vessel Lillian “s” v Caltex Oil (Kenya) Ltd* [1989] eKLR where court held:

“Jurisdiction is everything and without it the court has no power to make one step”.

11. The court is empathetic that the claimant can only file her suit in Oslo but then this court is tied by their very contract the parties signed willingly and knowingly. The claimant in her replying affidavit paragraph 14 depones that the contract was prepared by the respondent and at the time she was imbalanced as she desperately needed employment.

12. That as it may that is why parties are encouraged to seek professional advice just as she has done in filing this suit through an advocate. It would have been prudent for her to seek legal advice before signing the agreement.

13. Flowing from the above and having considered the pleadings and submissions, the court finds the respondent’s application is merited. This court has no jurisdiction to hear this suit and so is stuck out accordingly.

14. It is fair each party meets its on costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 28TH DAY OF JULY, 2023.

ANNA NGIBUINI MWAURE

JUDGE

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 has 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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

