



Uchendu v Smec International Pty Limited & another (Employment and Labour Relations Cause E153 of 2023) [2023] KEELRC 2847 (KLR) (9 November 2023) (Ruling)

Neutral citation: [2023] KEELRC 2847 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E153 OF 2023
BOM MANANI, J
NOVEMBER 9, 2023**

BETWEEN

CHIKE VALENTINE UCHENDU CLAIMANT

AND

SMEC INTERNATIONAL PTY LIMITED 1ST RESPONDENT

ECCL SINGAPORE PTE LTD 2ND RESPONDENT

RULING

1. This suit arises from the alleged unfair termination of the claimant's contract of service by the 1st respondent. The claimant avers that the 1st respondent unfairly terminated his services under the guise of operational requirements of the employer.
2. Upon entering appearance, the respondents filed a Notice of Preliminary objection to the court's jurisdiction to hear and determine the case. The objection is premised on clause 17 of the letter of appointment.
3. According to the respondents, at the point of entering the contract the parties agreed that the law that would regulate their engagement was that of Singapore. Further, it was agreed that in the event of a dispute arising from implementation of the contract, the matter shall be adjudicated upon by the courts of Singapore. In the respondents' view therefore, this case has been filed in a court that has no jurisdiction to hear and determine it and ought to be struck out.

Analysis

4. The employment agreement dated November 10, 2016 and which the claimant has supplied to the court was not signed by him. It was only signed by a representative of the 2nd respondent.



5. Despite this anomaly, both parties appear to agree that the instrument is a reflection of the terms of their engagement. As a matter of fact, the claimant has extensively referred to the instrument in his Statement of Claim. On the other hand, the respondents' advocates have invoked clause 17 of the instrument as the basis for their preliminary objection. In the premises, I am of the view that notwithstanding the absence of the Claimant's signature on the instrument that was presented to court, the parties acknowledge that their contract of employment was anchored on the terms that are set out in the said document.
6. Clause 17 of the letter provides as follows:-
 - “ Governing Law and Dispute Forum
 - 17.1 This agreement is governed by the laws of Singapore.
 - 17.2 In the event of a dispute arising from this agreement, the parties submit to the jurisdiction of the courts in Singapore.”
7. The import of this clause is plain. By it, the parties chose the law that was to govern their contract. By this clause, the parties chose the dispute resolution forum in the event that a dispute arose between them over the aforesaid contract. The parties agreed that the law of Singapore was the one that was to govern their relation and that in the event of a dispute arising from the relation, they will submit to the courts of Singapore to adjudicate on the matter.
8. As indicated above, the claimant's contention is that the 1st respondent unfairly terminated the aforesaid contract of service. The claimant has now filed this suit before the Kenyan courts to adjudicate over the dispute. From the Statement of Claim, it is evident that the claimant seeks to rely on Kenyan law to resolve the dispute.
9. For all intents and purposes, the grievance that the claimant raises through his pleadings is a dispute that stems from the employment agreement with the respondents. Therefore, it is covered by clause 17 aforesaid.
10. In a bid to fend off the preliminary objection, the claimant has raised several matters suggesting that the matter is not fit for a preliminary objection. For instance, he contends that there is need to determine who, between the two respondents, his actual employer was. The claimant further contends that the fact that the contract was entered into and performed in Kenya renders Kenya the best place to adjudicate disputes that arise from it. In the claimant's view, witnesses to such disputes will be in Kenya and it will be expensive to take them to Singapore should the matter be filed in Singapore.
11. The claimant further argues that most facts in the case are not agreed. Therefore and in terms of the guidelines in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* [1969] EA 696, this matter ought to go to full trial.
12. The claimant also alludes to the imbalance of power between employers and employees at the point of negotiating terms of employment contracts. In the claimant's view, such imbalance should push the court into rejecting some clauses in contracts of service such as the one in contention.
13. Although I agree that parties to a contract of service generally stand in a position of imbalance, I do not think that the court should adopt an inflexible attitude in this respect. Every case must be adjudicated on its merits. In the case before me, the claimant did not allude to the fact of undue influence at the time of entering into the impugned contract. No such averment is made in the claimant's Statement of Claim. The claimant has only resorted to this plea to fight off the preliminary objection.



14. A court of law should not invalidate a term of a contract between parties unless there is cogent evidence that the term was procured through coercion, undue influence or mistake (*National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR). In the case before me, the claimant has not presented evidence to suggest undue influence or coercion against him.
15. It will be improper for me to go behind plain terms of the contract of service between the parties and question the clause on the choice of the forum for dispute resolution without cogent reasons for such intervention. It does not matter that potential witnesses to the dispute between the parties are in Kenya. In my view, this is a matter that the parties must have considered at the time of entering into the contract.
16. The parties voluntarily agreed that the laws of Singapore will govern their relation. What will be the basis of this court substituting this agreement with directions that the contract be governed by the laws of Kenya?
17. The issues that relate to whether the claimant was an employee of the first or second respondent are, in my humble view, matters that the court with jurisdiction should inquire into. This court, not being seized of jurisdiction over the matter, cannot purport to determine the foregoing.
18. It suffices at this point to merely point out that although the letter of employment pointed to the 2nd respondent as being the claimant's employer, the said instrument underscored the fact that the claimant was to be available to serve the SMEC Group of companies where the two respondents are members. Therefore, nothing much may turn on the fact that the claimant's work permit was applied for by another entity within the group of companies.
19. As was indicated in the case of *United India Insurance Co Ltd Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co Ltd v East African Underwriters (Kenya) Ltd*, although a local court may assume jurisdiction over a matter in respect of which parties have elected to be governed by laws of a foreign nation if the contract has been performed in Kenya, the court must nevertheless and as a general principle, respect the choice of forum by the parties. The court has a duty to give meaning to the intention of the parties by respecting their choices so long as they are within the law.

Determination

20. In my view, the preliminary objection by the respondents is merited.
21. The parties voluntarily chose the laws of Singapore and the Singaporean courts as the law and forum for resolution of disputes that may arise in the course of implementation of their contract.
22. Thus, the laws of Kenya do not apply to the contract.
23. Similarly, Kenyan courts do not have jurisdiction to entertain the instant dispute.
24. Accordingly, the objection is allowed with the consequence that the suit is struck out for want of jurisdiction with costs to the respondents.

DATED, SIGNED AND DELIVERED ON THE 9TH DAY OF NOVEMBER, 2023

B. O. M. MANANI

JUDGE

