



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE NO. 1801 OF 2016**

*(Before Hon. Justice Jacob Gakeri)*

**VIGNIR DEMUSON.....CLAIMANT**

**VERSUS**

**MARRIOTT DRILLING AFRICA LIMITED.....1<sup>ST</sup> RESPONDENT**

**P. R MARRIOTT DRILLING LIMITED.....2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

1. The claim herein was instituted vide a Memorandum of claim dated 5<sup>th</sup> September 2016. The Claimant avers that he was terminated unfairly on account of redundancy. He prays for the following:

- a) A declaration that the Respondents are in breach of the provisions of the Employment Act, 2007 and the law in the following respects:
- i. By failing to notify the Claimant personally or he labour officer the reasons for and the extent of the intended redundancy of the Claimant at least one month prior to the date of the intended date of termination on account of redundancy contrary to Section 40(1)(a) and (b) of the Employment Act.
  - ii. By failing to take into account, in the selection of the Claimant as an employee to be declared redundant, due regard to seniority in time and to the skill, ability and reliability of each employee of particular class of employees affected by the redundancy contrary to section 40(1)(c) of the Employment Act.
  - iii. By unfairly terminating the employment of the Claimant contrary to Section 45(1) of the Employment Act.
  - iv. Failure to enrol the Claimant into a provident and pension retirement fund contrary to Section 20(1) of the National Social Security Fund Act, No. 45 of 2013
  - v. Failure to make deductions and or make contributions for the Claimant's benefit into a provident and pension retirement fund contrary to Section 20(1) of the National Social Security Fund Act No. 45 of 2013.
  - vi. Failure to make deductions and or make contributions for the Claimant's benefit into a provident fund contrary to Sections 10, 11 and 12 of the National Social Fund Act Chapter 258 (now repealed).
- b) A declaration that the Respondents is (sic) in breach of the contract of service in the following respect:
- i. By terminating the Contract of service without any just or lawful cause.
  - ii. By failing to conduct performance evaluations for the duration of the Claimant's employment.
  - iii. By failing to pay the Claimant the performance bonus
  - iv. By failing to enrol the Claimant into a provident and pension retirement fund
  - v. By failing to make deduct and or make contributions for the Claimant's benefit into a provident and pension retirement

fund.

- vi. By unfairly terminating the Claimant's employment.
- c) A declaration that the redundancy conducted by the Respondents is unlawful.
- d) Payment of the Claimant's April 2016 salary of Sterling Pound £1,201.89 and Kes. 53,100.53.
- e) Damages for unfair termination equivalent to 12 month's gross monthly salary at the time of termination amounting to Sterling Pound £125,400.00 and Kes. 2,640,000.00 worked out as follows:

<b>Item</b>	<b>Amount in Sterling Pound</b>	<b>Amount in Kes.</b>
Annual Salary	£100,000.00	
Annual payment under the performance related bonus scheme	£20,000	
Annual House Allowance		2,640,000.00
Respondents' 12 months' refund on the tax liability on house allowance	£5,400.00	
<b>Total</b>	<b>£125,400.00</b>	<b>2,640,000.00</b>

- f) Sterling Pound £6,000.00 being the Respondents' 12 months contribution to the Pension Scheme.
- g) Sterling Pound £4,733.00 being the Claimant's underpaid salary for the period between November 2014 to March 2016 due to foreign exchange fluctuations.
- h) Sterling Pound £60,000.00 being the Claimant's unpaid performance related bonus payment between 29<sup>th</sup> April 2013 and 8<sup>th</sup> April 2016.
- i) Sterling Pound £36,000.00 being the unpaid deductions and or contributions for the Claimant's benefit into a provident and pension retirement fund.
- j) Sterling Pound £30,000.00 being the Claimant's service pay for the period of employment.
- k) In the alternative and without prejudice to (e) above severance pay of Sterling Pound £15,000.00
- l) General damages from the Respondents for breach of a statutory duty.
- m) Costs of the suit.
- n) Interest on (d) through (m) above.
- o) Any other or further relief or compensation that the court may deem fit to grant.

2. The Respondents responded to the memorandum of claim vide memorandum of defence dated 8<sup>th</sup> November 2016. They deny that the Claimant is entitled to the orders sought in his claim on grounds that the 1<sup>st</sup> Respondent was not his employer and therefore the claim against it should be struck out on a preliminary basis.

3. In addition, they aver that this court lacks jurisdiction to hear matters in dispute between the 2<sup>nd</sup> Respondent and the claim should therefore be struck out on a preliminary basis.

4. Notwithstanding the foregoing, the Respondents state that the termination of the Claimant's employment contract on grounds of redundancy was lawful and justified and that the Claimant was fully paid his terminal dues and is therefore not entitled to the orders sought.

#### **Claimant's Case**

5. The Claimant avers that he was employed by the 2<sup>nd</sup> Respondent to be the 1<sup>st</sup> Respondent's Country Manager for Kenya with effect from 29<sup>th</sup> April 2013. He states that both the substance and the object of employment was to be performed and was indeed performed exclusively in Kenya.
6. The Claimant avers that subject to his letter of engagement and contract of employment, his annual salary would be Sterling Pound £100,000 or Sterling Pound £8,333.33 per month which would be paid in Sterling Pounds.
7. The Claimant states that the Respondents, acting on advice on the 1<sup>st</sup> Respondent's accountant made a decision to pay part of his salary in Kenya Shillings. This would be with the understanding that the Respondents would bear the foreign exchange difference and that a foreign exchange correction would be done by the Respondents periodically to take into account any fluctuations in the exchange rate.
8. The Claimant avows that sometime in March 2014 the Respondents, acting on the advice of the 1<sup>st</sup> Respondent's tax accountant decided to split the Claimant's salary with the 1<sup>st</sup> Respondent paying the Kenya Shilling equivalent of Sterling Pound £3,333.33 into the Claimant's Kenya Shilling Account and the 2<sup>nd</sup> Respondent paying Sterling Pound £5,000.00 into the Claimant's Sterling Pound Account.
9. He states that as at the date of termination of employment, the Respondents owed him Sterling Pound £4,733.00 arising from their failure to correct the foreign exchange loss in his salary.
10. The Claimant avers that subject to his contract, he would be entitled to a monthly house allowance of Kes. 220,000.00 and further that the Respondents would be responsible for meeting the monthly tax liability of Sterling Pound £450 of the same.
11. He states that he was also contractually eligible to participate in a performance related bonus scheme where he was entitled to earn a quarterly bonus of Sterling Pound £5,000.00, with a maximum bonus of Sterling Pound £20,000.00 per annum. That the Respondents were under an obligation to conduct his performance appraisal of enable him to participate in the performance related bonus scheme.
12. The Claimant further states that the Respondents jointly, severally and in the alternative neglected, refused or otherwise failed to conduct a performance appraisal or review. That in spite of this, he avers that he was a top performer.
13. The Claimant avows that he was statutorily and contractually entitled to be enrolled in and for the Respondents to pay at least 6% of his monthly pensionable earnings into a provident and pension retirement fund. He was also entitled to have the Respondents deduct from his earnings a contribution at 6% and pay it into a provident and pension retirement fund.
14. The Claimant avers that on or about the 18<sup>th</sup> January 2016 the 1<sup>st</sup> Respondent issued him with a redundancy notification. That in due course, the 1<sup>st</sup> Respondent purported to declare him redundant on 2<sup>nd</sup> February 2016.
15. He maintains that there were no meaningful consultations between himself and the Respondents as they appeared to have already formed a firm opinion to terminate his employment and he had no chance to influence the decision. In addition, he had not been made aware of any job evaluation being conducted by the Respondents or given an opportunity to suggest alternative responsibilities within the Respondents' organization or Group.
16. The Claimant avers that sometime in May 2016, the Respondents paid him Sterling Pound £4,977.00 and Kes.107,000.00, which was alleged by the Respondents to represent the Claimants April salary and severance pay. He contends that the amounts were a gross underpayment of his terminal dues.
17. Subject to the above, the Claimant avers that the Respondents were jointly and severally in breach of the terms of the Contract of service and mandatory provisions of the law. He also contends that his termination was unfair and that his salary was underpaid.
18. The Claimant states that he is willing and capable of continuing in service of the Respondent with utmost dedication and drive as he in no way contributed to the circumstances that led the Respondent to declare him redundant.
19. He concludes that he is 56 years old and reasonably expected to remain in service of the Respondents and that with his level of skill and experience, it will take a considerable amount of time to secure comparable or suitable employment.

### **Respondents' Case**

20. The Respondents aver that the Claimant was not an employee of the 1<sup>st</sup> Respondent. They state that the Claimant was employed by 2<sup>nd</sup> Respondent with effect from 29<sup>th</sup> April 2013 as the Country Manager, Kenya and was subsequently seconded to the 1<sup>st</sup> Respondent.
21. The Respondents aver that the 2<sup>nd</sup> Respondent, a company in the business of providing water well drilling oil and gas and geothermal services in the United Kingdom; won a tender in 2013 to provide drilling services in Kenya.
22. That as a consequence the 1<sup>st</sup> Respondent was established to contract with the said client and provide business development in East Africa and other geothermal areas. The Respondents state that they depend wholly and exclusively on the economic viability of exploration activities in order to be engaged to provide drilling services.
23. They state that despite efforts to grow its business, the 1<sup>st</sup> Respondent's business growth was not as envisaged as no new or additional

business was obtained beyond that of its initial client.

24. That further, from mid 2014 into 2015, the global price of oil suffered a down turn and it progressively became less economically viable for oil and gas exploration companies to commence new exploration projects or continue with existing projects. That the exploration industry as a whole suffered and as a result, its clients engaged in exploration put on long term hold their exploration plans.

25. The Respondents aver that it is against this background that in 2015, the 1<sup>st</sup> Respondent's client indicated its intention to terminate the contract with the 1<sup>st</sup> Respondent. That through various cost cutting and price adjustment exercises undertaken by the 1<sup>st</sup> Respondent, the contract was maintained through 2015. In early 2016, despite its best efforts to sustain the contract, the 1<sup>st</sup> Respondent's client gave formal notice of termination of the drilling contract effectively bringing to an end the 1<sup>st</sup> Respondent's primary source of revenue from March 2016.

26. The Respondents state that a redundancy programme was thus initiated in the United Kingdom in 2015 and all remaining staff on United Kingdom contracts were subject to a pay cut. This pay cut was not imposed on the 2nd Respondent's staff members working in Kenya whilst the project in Kenya was still running.

27. However, because of the downturn in business prospects there were no imminent plans for any work, the 1<sup>st</sup> Respondent avers that the cost of maintaining a working office in Nairobi with a full complement of staff would have resulted in substantial losses. Therefore, steps were taken to mitigate by *inter alia* closing the Nairobi office which would have had no revenue after the termination of the drilling contract with its client.

28. The 1<sup>st</sup> Respondent states that this resulted in the commencement of the redundancy programme and the role of Country Manager held by the Claimant alongside rig staff and administrative staff were declared redundant.

29. It maintains that the criteria was fair and reasonable in the circumstances. That without any other work in Kenya, the Claimant's position became redundant. A total of 12 staff members were declared redundant.

30. A skeleton crew was however kept on to finish the maintenance off on the rig to put it back into certification ready for the next client, which is standard procedure. It states that the number of expatriates was reduced from 18 expatriates to 4 on location and as soon as they shut down all day rates were reduced by a 40% pay cut.

31. The Respondents aver that throughout the redundancy process, the Claimant was aware of and involved in the process being undertaken. As such, they avow that his claims in this case are false, misleading and an afterthought.

32. Further, the Respondents state that the Claimant's redundancy dues were computed at the equivalent of 4.5 weeks as per the calculation policy under UK law. They maintain that the termination of the Claimant's employment was lawful and justified in the circumstances and that due process was followed in compliance with the law in the United Kingdom applicable to the Claimant's employment.

33. The Respondents avow that the Claimant's claims to the contrary are therefore misadvised and without any legal or factual basis.

34. On the claims relating to underpayment or alleged foreign exchange losses, the Respondents state that the same are false and without any basis. They aver that the exchange difference on his dues was £2,374.20 and that he was compensated with an extra £4,356 to cover exchange difference that he believed applied.

35. The Respondents aver that the Claimant has been more than adequately compensated in respect of the above and is not entitled to any other or further payments in this regard or at all.

36. The Respondents urge the court to take note of the fact that the Claimant was managing the payroll with his wife who was the Office Manager and they determined the exchange rate to apply. As such, the Respondents states that the Claimant is estopped from disputing the same in the circumstances.

37. The Respondents deny any claims of tax liability and state that any related tax liability was met by the Claimant's employer. They also affirm that the Claimant received his full house allowance entitlement of Kshs.220,000 paid monthly and that he also received a monthly tax refund of £450. In addition, they state that the Claimant's rent, utility bills and cleaning costs were all paid by the employer.

38. The Respondents deny the claim for payment under a bonus related scheme and aver that bonuses are granted on a discretionary basis. They also confirm that the Claimant's entitlement to participate in the bonus scheme did not guarantee him any entitlement to a bonus.

39. In addition to the above, the Respondents aver that no bonuses were awarded in calendar years 2013/2014 or 2014/2015 due to the prevailing circumstances.

40. The Respondents aver that the Claimant neither sought an appraisal nor a bonus in his first two years of employment as he was fully aware of the company's challenges.

41. The Respondents aver that the Claimant is not entitled to any pension or provident fund entitlements as claimed or at all because he never enrolled for any scheme. They aver that the Claimant only established a pension scheme after receiving his redundancy notification.

42. The Respondent deny the claim for payment of the Claimant's April 2016 salary. They aver that the Claimant was given notice of

redundancy on 2<sup>nd</sup> February 2016 and offered three months' notice. That on 16<sup>th</sup> March 2016, he sought to cut short his notice period and end his contract early. His request was granted and by agreement his contract terminated accordingly. He was fully paid his terminal dues to his last date of employment and is not entitled to further payments as alleged or at all.

43. The Respondents also deny the Claimant's claim for service and severance pay and state that he is not entitled to the same as he was fully paid his severance pay and all other terminal dues. They aver that the claim as filed is false and an afterthought.

44. The Respondents conclude that the particulars of breach as alleged by the Claimant are denied. They pray for the dismissal of the suit with costs.

### **Evidence**

45. The Claimant testified as CW1 in support of his claim and adopted his witness statement dated 5<sup>th</sup> September 2016 as his evidence in chief.

46. On cross examination, CW1 confirmed that he was offered a position with the 2<sup>nd</sup> Respondent and was seconded thereafter to the 1<sup>st</sup> Respondent who was not a party to the contract of employment. The witness confirmed that he was an employee of a UK company.

47. CW1 also testified that he was paid until he asked to leave earlier before the notice period had expired. He confirmed that he had discussions on redundancy before the same was effected and that he did not contest the redundancy process.

48. The witness further confirmed that he filed the case under Kenyan law to benefit from its provisions. The Claimant provided the job description of the Office Manager, who was his wife as well as his own job description which placed human resource matters as part of his duties and took responsibility for any lapses.

49. On the claim based on exchange rates the witness confirmed that he had no documentary evidence of the actual exchange rate at the time to prove his claim.

50. On tax liability for housing of £450, the Claimant confirmed that he had no documentary evidence that he was using his own house and did not raise it as an issue in his email dated 16<sup>th</sup> March 2016.

51. On bonus, the witness confirmed that paragraph 63 of the employment contract rendered him liable to participate in performance related bonus. That he had no evidence to prove that he qualified for any bonus and the company paid no bonus.

52. That he had no evidence to support the claim for pension dues.

53. Further, the witness confirmed that he requested to leave before the notice period lapsed.

54. On redundancy, the Claimant admitted having received an email from Steve Handman dated 19<sup>th</sup> January 2016 and confirmed that he had discussions on the redundancy before it was effected as evidenced by an email dated 2<sup>nd</sup> February 2016. That the timetable for his exit was discussed. That he had no evidence that he met his objectives and did not claim bonus for the duration he worked.

55. The Respondent had one witness, Jonathan Hobday who testified as RW1. He adopted his witness statement dated 18<sup>th</sup> January 2017 as his evidence in chief and produced all filed documents as exhibits.

56. On cross examination, he maintained that the applicable law was the United Kingdom's. RW1 testified that the Respondents had complied with the Kenyan law on redundancy because some of the employees were Kenyan. In addition, he testified that there was no doubt on the Claimant's performance and that he had met his objectives as per the contract.

57. He also maintained that no bonuses were paid out as the company had performed poorly. RW1 confirmed that the Claimant performed his duties based on the daily activities and met objectives of the contract.

### **Claimant's Submissions**

58. The Claimant identified three issues for determination namely whether: –

- i. This court has jurisdiction to preside over this suit;
- ii. The termination of the Claimant's employment was fair and lawful; and
- iii. The Claimant was paid all his terminal dues.

59. The Claimant submitted that the provisions of Article 162(2) of the Constitution and Section 12 of the Employment and Labour Relations Court Act confer original and exclusive jurisdiction to the Court to hear and determine disputes relating to or arising out of employment between an employer and an employee. It is submitted that the suit is properly before the right forum. Reliance is made to the decisions in of **Petra Development Services Limited v Evergreen Marine (Singapore) PTE Ltd & Another (2014) eKLR** as cited in

**Universal Pharmacy (K) Limited v Pacific International Lines (PTE) Limited & another (2015) eKLR** to support this position.

60. Further, the Claimant submits that while it is true that he was employed by the 2<sup>nd</sup> Respondent and seconded to the 1<sup>st</sup> Respondent, the *lex loci solutonis* was Kenya and not the 2<sup>nd</sup> Respondent's Danesmoor offices. In addition, he stated that it was undisputed that the *lex loci contractus* was Nairobi.

61. The Claimant made reference to the decision in **M. G Radia v Transocean (Uganda) Ltd (1975) eKLR** where the court held that the proper law is that which the transaction has its closest and most real connexion. In addition, the Claimant argued that by entering an unconditional appearance on 30<sup>th</sup> September 2016, the Respondents had submitted to the jurisdiction and authority of the court.

62. The Claimant submitted that courts have gone beyond the wordings of a contract to determine such issues. Reliance is made on the decision in **Karachi Gas Co. Limited v Isaaq (1965) E.A. 42 at 53** to bolster his argument. He argued further that in **Fairdeal Upvc Aluminium & Glass Ltd v Ase Europe N.V (2020) eKLR**, the court held that where the breach of a contract takes place in Kenya, the cause of action arises in Kenya and Kenyan courts therefore have jurisdiction in the matter.

63. The Claimant concluded on the issue of jurisdiction by submitting that in determining the *forum conveniens* of a contractual dispute, the court weighs the appropriateness of applying the governing law clauses against the actual place where the contract has the most real connection. He stated that it would be an outright denial of simple facts to determine otherwise when the above factors exclusively took place in Kenya.

64. As regards redundancy, the Claimant submits that the provisions of Section 40 of the Employment Act make it mandatory for an employer to issue a month's notice to both the employee and the Labour officer. He argued that non-compliance with the above provisions entitles the Claimant to compensation for unfair and unlawful termination. He placed reliance on the case of **Caroline Wanjiru Luzze v Nestle Equatorial African Region Limited [2016] eKLR**.

65. That the Respondents failed to issue the mandatory notice of redundancy as required under the Act. The decision in **Hesbon Ngaruiya Waigi v Equatorial Commercial Bank Limited (2013) eKLR** was relied upon in support of the submission.

66. As to whether he was indeed paid his terminal dues, the Claimant maintained that he was entitled to a performance based bonus and that it was not his fault that the contract was drafted with displayed ambiguity, or that no performance appraisal was done. He also argued that the onus of conducting the performance appraisal fell on the Respondents and that with the knowledge that said appraisal would cement the Claimant's entitlement to the bonus, the Respondents failed to conduct the exercise.

67. On the dues paid on account of redundancy, the Claimant submits that he was underpaid. He concluded by stating that the Respondents in their decision to terminate his employment did not pay attention to the requirements of the law which in turn occasioned injustice upon him. He therefore invited the court to consider facts and the law in granting him the prayers sought.

### **Respondents' Submissions**

68. The Respondents submit that the Court has no jurisdiction to hear and determine the dispute before it. Reference is made to the decisions in **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (1989) KLR 1** and **Tabitha Wambui Munyao & 7 Others v Peter Ngugi Kainamia & another (2015) eKLR** to buttress the submission.

69. The Respondents argue that the contract; the subject matter of the proceedings as concluded between the Claimant and the 2<sup>nd</sup> Respondent provided that the law applicable would be English law and the parties had submitted to the jurisdiction of English courts. That this provision was couched in mandatory terms.

70. The Respondents urge the court to be guided by the principle of non-interference by a court whereby a party has unreservedly resigned itself to a particular avenue of dispute resolution. They argue that the principle that a party is bound by the terms of a contract it has lawfully entered into is entrenched in Kenyan jurisprudence. The decision in **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another (2001) eKLR** is relied upon in support of the submission.

71. The Respondents also relied on the decision in **Dorcas Kemunto Wainana v IPAS (2018) eKLR** where the court cited the South African case of **Kleinhans v Parmalat SA (Pty) Ltd (2002) ILJ 1418** where the Labour Court found that as regards international employment contracts, consistent with the common law principle of party autonomy, parties to an international contract are free to agree, expressly or tacitly, on the specific legal system to govern their contract, and as to which country law would govern the relationship and where there is no provision, it is for the court to assign the proper law of contract and jurisdiction.

72. As to whether the claim against the 1<sup>st</sup> Respondent is misadvised, the Respondents maintains that the 1<sup>st</sup> Respondent is not a party to the employment contract relied on by the Claimant in the matter. Reference is made to the decision in **David Barasa v British Peace Support Team & another (2016) eKLR** on the law on secondment.

73. Reliance is also made on the decision in **Mary Nyangasi Ratemo & 9 others v Kenya Police Staff Sacco Limited & another (2013) eKLR**. It is submitted that the Claimant has not demonstrated any contract relationship between himself and the 1<sup>st</sup> Respondent that would give rise to an employment relationship.

74. On redundancy, the 2<sup>nd</sup> Respondent submits that the same was lawful and justified within the meaning of Section 2 of the Employment Act. The Court of Appeal case of **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others (2014) eKLR** is relied

upon to buttress the submission. In addition, the 2<sup>nd</sup> Respondent submits that it has proved that the decision to declare the Claimant redundant was involuntary and influenced by externally driven factors and therefore based on a genuine belief as required under Section 43(2) of the Employment Act.

75. The decision in **Caroline Atieno Osweto v Kenya Yungheng Plate Making Limited (2013) eKLR** is relied upon to urge that the right of the employer to declare redundancy is well secured in the law. It also argued that the Claimant had not proved that the 2<sup>nd</sup> Respondent had failed to follow the law on redundancies.

76. As to whether the Claimant is entitled to the orders sought, the Respondents deny the same and submit that the Claimant had not proved that he is entitled to the same as the burden of proof rests with him. They argue that the foregoing is provided for under Section 47(5) of the Employment Act. The decision in **Kennedy Maina Mirera v Barclays Bank of Kenya Limited [2018] eKLR** is relied upon to reinforce the submission.

77. As regards the claim for general damages for breach of statutory duty, the Respondents submit that such award is not available as a remedy in law in cases of wrongful termination. The decision in **Kenya Broadcasting Corporation v Geoffrey Wakio (2019) eKLR** is relied upon in support of the submission.

78. As regards the performance related bonus payment, the Respondents maintain that this was not a mandatory entitlement to warrant a demand in law. The decision in **Kenya National Private Security Workers Union v Kenya Kazi Security Services Limited [2013] eKLR** is relied upon in support of the submission.

79. The Respondents conclude by submitting that the Claimant had failed to prove his claims against them and urge the court to dismiss the suit with costs.

### **Analysis and Determination**

80. After careful consideration of the pleadings, oral and written evidence submissions and the law, the issues for determination are: -

- (i) Whether the Court has jurisdiction to entertain the matter before it;

Depending on the finding in (i) above

- (ii) Whether termination of the Claimant's employment was fair and lawful;
- (iii) Whether the Claimant is entitled to the reliefs sought.

81. As to whether the Court has jurisdiction to hear the cause before it the starting point is the contract of employment between the Claimant and the 2<sup>nd</sup> Respondent dated 29<sup>th</sup> April 2013. The parties to the contract are P. R. Marriott Drilling Limited Company No. 2592487 registered office Springwater House, Pilsley Road, Danesmoor Chesterfield, Derbyshire, S45 9BQ, UK and Mr. Vignir Demusson, the Executive. The Claimant was appointed as the Country Manager for the company and seconded to Marriott Drilling Africa Limited for a minimum period of three years and the place of work was the company's registered office "*or such other place of business of the company inside and/or outside the United Kingdom as the company may require and it is a condition of the Executive's employment that the executive complies with any such requirement*".

82. Evidently the 1<sup>st</sup> Respondent was not party to the employment contract.

83. It is trite law that jurisdiction is a threshold issue and may be raised at any point in the course of proceedings. It is a point of law and qualifies as a preliminary objection.

84. The classical articulation of the place of jurisdiction are the celebrated sentiments of Nyarangi JA in **The Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1** where the Judge expressed himself as follows:

*"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."*

85. Similar sentiments have been expressed in other decisions such as **Mercy Kirito Mutegi v Beatrice Nkatha Nyaga & 2 others [2013]**

eKLR as well as **Tabitha Wambui Munyao & 7 others v Peter Ngugi Kainamia & another [2015] eKLR**.

86. Whereas the Claimant argues that the Court has jurisdiction by virtue of the decisions in **Karachi Gas Co. Limited v Isaaq (supra)**, **M.G Radia v Transocean (Uganda) Ltd [1975] eKLR**, **Fairdeal Upvc Aluminium & Glass Ltd v Ase Europe N.V (supra)** and **Petra Development Services Limited v Evergreen Marine (Singapore) PTE Ltd & another (supra)**, the Respondents rely on the decision in **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another (supra)** and other decisions to submit that the duty of the Court is to give a contract the meaning the parties intended not to rewrite it, since it was freely negotiated and should respect party autonomy.

87. It is not in dispute that the contract between the Claimant and the 2<sup>nd</sup> Respondent had an exclusive foreign jurisdiction clause. Paragraph 23 – 24 of the contract provides as follows:

*“This agreement will be governed by and interpreted in accordance with English law and the parties irrevocably agree to submit to the jurisdiction of English courts over any claim or matter or to settle any dispute which may arise out of or in connection with the agreement and that accordingly any proceedings may be brought in such courts.”*

88. In **Arnold v Britton [2015] UKSC 36** the Supreme Court of the United Kingdom, stated as follows:

*“When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to ‘what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean...’*

89. Similarly in **Five Forty Aviation Limited v Lonzim Air (BVI) Limited [2013] eKLR** the Court reiterated the holding in **United India Insurance Company Ltd v East African Underwriters (Kenya) Ltd [1985] KLR** where Madan J.A stated as follows:

*“The Courts of this country have 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. This exclusive jurisdiction clause however should normally be respected because the parties themselves 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 the agreement.”*

*Everybody accepts that the general rule is that the jurisdiction clause must be obeyed. It must be something exceptional to justify departure from it and the exceptional circumstances must be such as to afford strong reasons for such departure.”*

90. In addition, the Court underscored the fact the strong reason must be demonstrated for the Court to depart from the exclusive jurisdiction clause including balance of convenience and the following other factors:

i) *“In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the court of the country and the court of the foreign country.*

ii) *Whether the law of the foreign court applies, and if so, whether it differs from the law of the country in any material respects.*

iii) *With what country either party is connected, and how closely.*

iv) *Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantage.*

v) *Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would be deprived of security for their claim, be unable to enforce any judgment obtained, be faced with a time bar not applicable in their country.”*

91. In **Areva T & D India Limited v Priority Electrical Engineers & Another [2012] eKLR** the Court of Appeal stated that:

*“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...”*

92. In **The Makefjell [1976] 2 Lloyds Reports 29**, Gordon Willmer stated –

*“Once the general rule is accepted that parties who have agreed to the exclusive jurisdiction of a foreign court should be held to their bargain, any departure from that rule must of necessity be regarded as to that extent exceptional, and the only question can be whether the case is so exceptional as to justify holding that there is strong reason for departing from the rule...”*

93. The Court is in agreement and bound by these sentiments.

94. The decision in **Karachi Gas Co. Limited v Isaaq (supra)** relied upon by the Claimant is distinguishable since it related to circumstances in which the parties had by their contract not identified the law or the jurisdiction to which the contract was subject. It was not clear where the contract had been made.

95. In a similar vein, the decision of Otieno J. **Fairdeal Upvc Aluminium & Glass Ltd v Ase Europe N.V (supra)** relate to the supply of

goods as opposed to a contract of service as is the decision in **M.G Radia v Transocean (Uganda) Ltd (supra)** as well as **Universal Pharmacy (K) Limited v Pacific International Lines (PTE) Limited & another [2015] eKLR**.

96. The issue before the Court is whether the Court should exercise its discretion to assume jurisdiction over an agreement performed in Kenya notwithstanding the exclusive jurisdiction clause as agreed upon by the parties.

97. The instant case is peculiar in that neither of the parties is a citizen or resident in Kenya. Except for the duration the contract when the Claimant resided in Kenya, he has not been a resident of Kenya and even requested to leave before the notice period expired in April 2016. The Claimant is a resident of Iceland

98. Relatedly, the 2<sup>nd</sup> Respondent, the employer is a permanent resident of the United Kingdom.

99. The Claimant was seconded to the 1<sup>st</sup> Respondent based in Kenya but remained an employee of the 2<sup>nd</sup> Respondent reporting to the managing director of the 1<sup>st</sup> Respondent and had an office manager and administration assistant. The Claimant submits that the *lex loci contractus* was Nairobi, Kenya and part of the salary was paid in Kenya shillings and the cause of action arose in Kenya.

100. I will now proceed to apply the test by Madan JA herein above:

- (i) The evidence in this case is exclusively documentary, email communications and record all available online.
- (ii) The law of the United Kingdom applies to the contract of employment as agreed upon by the parties and is different.
- (iii) Both parties are closely connected with the United Kingdom where the 2<sup>nd</sup> Respondent is resident.
- (iv) The 2<sup>nd</sup> Respondent the Claimant's employer is a permanent resident of the United Kingdom.

101. Similarly, the Claimant has not raised any concerns about a trial in the United Kingdom having previously agreed that it was the *lex loci contractus* on 29<sup>th</sup> April 2013.

102. As regards the Respondents entering appearance and filing of a response as a waiver of jurisdiction of the UK Courts, the Claimant relies on the decision of Kasango J. in **Universal Pharmacy (K) Limited v Pacific International Lines (PTE) Limited & another (supra)** where the Judge stated as follows:

*"... By entering appearance unconditionally and failing to object to the court's jurisdiction in their Defences, the Defendants waived the jurisdiction of the Singapore courts and wholly submitted to this court's jurisdiction."*

103. Whereas the holding by the Learned Judge is undeniably persuasive, the circumstances in the instant case are different in that the Respondents objected to the Court's jurisdiction in the memorandum of defence filed on 8<sup>th</sup> November 2016.

104. In the premises, the Court is not satisfied that by entering appearance, the Respondents waived the jurisdiction of the UK courts.

105. The upshot of the foregoing is that the Claimant has not on a balance of probabilities demonstrated sufficiently strong reasons why the Court should depart from the general rule that he should be held to his bargain. The fact and circumstances relied upon do not in the Court's view make the case exceptional to justify departure from the general rule that the jurisdictional clause must be obeyed.

106. It is the finding of the Court that it has no jurisdiction to proceed and hereby downs its tools.

107. Parties to bear their own costs.

108. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 13<sup>TH</sup> DAY OF APRIL 2022**

**DR. JACOB GAKERI**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 Civil 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.

**DR. JACOB GAKERI**

**JUDGE**