



**Sang v Ceva Logistics Limited & another (Cause E832 of 2021)
[2022] KEELRC 3777 (KLR) (19 August 2022) (Ruling)**

Neutral citation: [2022] KEELRC 3777 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E832 OF 2021
SC RUTTO, J
AUGUST 19, 2022**

BETWEEN

ROSE SANG CLAIMANT

AND

CEVA LOGISTICS LIMITED 1ST RESPONDENT

CEVA INTERNATIONAL MOBILITY LTD 2ND RESPONDENT

RULING

1. The claimant filed a memorandum of claim on October 6, 2021 through which she avers that she was exclusively interviewed by officers of the 1st respondent and on July 21, 2020, she was offered a position of CEVA HR Director East & South Africa within the 1st respondent’s establishment and was to be based in Nairobi. That upon discussion of the remuneration package, the 1st respondent introduced the 2nd respondent to the claimant, clearly indicating that the 2nd respondent would be only in charge of drafting the contract.
2. The claimant avers that she was summoned on or about May 21, 2021 to a virtual meeting to discuss c-people implementation but was surprised when she was informed that the respondents had made a decision to terminate her contract but no reasons were proffered. The claimant seeks various reliefs against the respondents jointly and severally in the form of compensation for unfair termination. She also pleaded that the court has jurisdiction to hear and determine the claim.
3. The 1st respondent entered appearance under protest and filed a notice of preliminary objection on the following grounds: -
 1. That this honourable court lacks jurisdiction to hear and determine this matter in view of the express provisions of clause 20 of the employment contract read together with clause 5 of the addendum to the contract dated 6 October 2020 entered into between the claimant and the 2nd respondent which provides that the contract shall be governed by Swiss Law and exclusively



vests jurisdiction to the courts in Geneva, Switzerland to hear and determine any litigation stemming from or in relation to the employment contract.

2. That this honourable court has no jurisdiction to hear and determine the issues raised in this claim as the parties, in exercising their freedom to contract, elected to be bound by the applicable swiss law.
3. That accordingly the claim filed herein is incompetent, misconceived and bad in law.
4. The objection was canvassed by written submissions.

1st Respondent's Submissions

5. The 1st respondent submitted that its preliminary objection is proper in form as it raised the question of jurisdiction which is a clear question of law. The case of *Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd* (1969) EA 696 and *Kandara Residence Association & another vs Ananas Holdings Limited & 4 others* (2020) eKLR was cited in support of this position.
6. The 1st respondent further submitted that the court lacks jurisdiction to hear and determine the issues raised in the claim as they arise from the employment contract and addendum which were governed by Swiss Law and which granted jurisdiction to Geneva law courts. The 1st respondent invited the court to consider among others, the determinations in *Areva T & D India Limited vs Priority Electrical Engineers & another* (2012) eKLR, *Raytheon Aircraft Credit Corporation & another vs Air Al-Faraj Limited* (2005) eKLR and *United Nida Insurance Co. Ltd vs East African Underwriters (Kenya) Ltd* (1985) eKLR. It was thus submitted by the 1st respondent that the preliminary objection is proper in substance.
7. On the other hand, the claimant submitted that she was employed, granted a position and on boarded by the 1st respondent. That as such, the role of the 2nd respondent was to simply prepare and have the contract executed in its name. The claimant further submitted that she worked exclusively for the 1st respondent. The case of *PO vs Board of Trustees, AF & 2 others* (2014) eKLR was cited to fortify this argument.
8. It was the claimant's further submission that there exists plethora of strong reasons for the exercise of the court's discretion not to give effect to the exclusive jurisdiction clause in this matter. In this regard, it was submitted that the claimant is a Kenyan citizen, was employed in Kenya and performed her duties exclusively in Kenya. To buttress its argument, the claimant cited the case of *Joao Soares vs Tuegest Guerma & another* (2014) eKLR. The claimant further submitted that it will be expensive to have her and the respondents who are all based in Kenya to travel to Switzerland to conduct a hearing over a subject matter that arose within the territories of Kenya. In further submission, the claimant stated that the dispute is clearly connected to the Kenyan courts and legal jurisdiction. That further, the 1st respondent is registered and operates in Kenya. The case of *Todd vs British Airways Limited* (1978) ICR 959 was cited in support of this argument. The cases of *Shadrack Wachira Gikonyo vs Abt Associates Inc* (2017) eKLR and *Stephane Dubuis vs Kone Keya Limited & another* (2017) eKLR, were cited in further support of the claimants' submissions. The claimant called for the dismissal of the preliminary objection.

Analysis and Determination

9. In light of the submissions by both parties, it is evident that the main issue for determination is whether the parties should comply with the jurisdiction clause in the contract of employment?



10. From the record, it is evident that the contract between the parties at clause 20 and 21, provide that the same was to be governed by the Swiss Law and that any claim or other dispute arising therefrom was to be determined by the Swiss Federal Court. Clause 20 of the provides as follows: -

“The current contract is created and drawn up in accordance with and is subject to swiss law.”

11. Clause 21 which is in respect to jurisdiction is couched as follows: -

“Every contestation that stem from or is in connection with this contract will fall under the jurisdiction of the *ratione materiae* du de Geneve, Suisse Law court. Both parties accept the exclusive jurisdiction of the competent law court in the Geneve du canton, recourse to the Swiss federal court should be filed.”

12. It is trite that courts cannot re-write contracts between parties. That said, it is not automatic that the existence of an exclusive foreign jurisdiction clause in a contract ousts the jurisdiction of the Kenyan courts. Such was the position taken by the Court of Appeal in the case of *United India Insurance Co. Ltd (Kenya) Ltd vs East African Underwriters* (Kenya) [1985] KLR 898, where Madan JA, found that despite the existence of an exclusive foreign jurisdiction clause in a contract, Kenyan courts would assume jurisdiction when the case is filed in Kenya. To this end, the learned Judge reckoned 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.”

13. In exercising its discretion, the court stated that regard should be had to all the circumstances of the particular case and the following matters, where they arise, may properly be considered: -

- 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.

14. The 1st respondent has submitted that the circumstances surrounding this claim do not constitute strong reasons that would necessitate the court assuming jurisdiction and failing to honour the exclusive foreign jurisdiction for the reason that: -



- i. The evidence in the issues of fact is available online;
 - ii. Swiss law applies to the employment contract as agreed upon by the parties and is vastly different from the Kenyan law;
 - iii. The 2nd respondent, the claimant's employer, is a permanent resident of the Switzerland; and
 - iv. The Geneva law courts conduct court sessions including hearings virtually and therefore the claimant and her witnesses if any, would not be required to travel there for trial hence the expense of trial would not be high or inordinate.
15. On its part, the claimant posits that: -
- i. She is a Kenyan citizen, was employed in Kenya and performed her duties exclusively in Kenya;
 - ii. It will be expensive to have her and the respondents who are all based in Kenya to travel to Switzerland to conduct a hearing over a subject matter that arose within the territories of Kenya; and
 - iii. The dispute is connected to the Kenyan courts and legal jurisdiction.
16. Revisiting the contract of employment, it is evident that the same was executed in Nairobi, Kenya between the 2nd respondent and the claimant. It is also apparent that the claimant's initial posting was Kenya. As per clause 1 the addendum to the contract, the 1st respondent was identified as the host company with its location being Nairobi, Kenya. It is therefore evident that the 1st respondent has presence in Kenya.
17. Further, there is no evidence that during the duration of her employment contract, the claimant was ever posted to work in another country besides Kenya. It is therefore apparent that her contract was performed in Kenya. She was also terminated while performing her contract in Kenya. In this regard, her letter of termination of contract reads in part "Consequently, this will end your contract with CEVA Kenya". It is thus evident that the cause of action accrued in Kenya. The contract is therefore closely connected with Kenya.
18. Bearing in mind the attendant financial and logistical challenges of filing the suit in Switzerland, I am of the firm view that there would be greater convenience of a trial within the Kenyan jurisdiction as opposed to the Swiss jurisdiction. In as much the trial may be conducted virtually, what about the filing of the case? Is it possible to undertake every process from filing to execution remotely? I highly doubt. Besides, there is no guarantee that the filing of the suit will be undertaken through an online platform and the conduct of the trial will be undertaken virtually.
19. It is clear that the 1st respondent has offices in Nairobi and it has not stated what inconvenience or prejudice it will suffer if the trial is to be undertaken within the Kenyan jurisdiction. That said, I also find it rather curious that it is the 1st respondent that is keen to enforce the foreign jurisdiction clause whereas it is the 2nd respondent that executed the employment contract with the claimant.
20. In light of the foregoing, the objection is declined.
21. There will be no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF AUGUST, 2022.

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STELLA RUTTO



JUDGE

Appearance:

Mr. Ogembo for the claimant

Ms. Kyalo for the respondent

Court Assistant Abdimalik Hussein

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 had 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.

STELLA RUTTO

JUDGE

