



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 325 OF 2020 (E301/2020)

VINCENT MUINDA NZUI.....CLAIMANT

VERSUS

HERITAGE COMMUNICATIONS LIMITED.....RESPONDENT

RULING

1. The suit was filed by the claimant on 15/7/2020 praying for compensation for unlawful termination of employment and payment of terminal benefits set out in the Statement of Claim.

2. The Respondent filed a notice of Preliminary Objection under Order 51, Rule 14 (9) of the Civil Procedure Rules of 2010 (*As Amended*): That this Honourable Court lacks and/or is not clothed with jurisdiction to entertain, hear and determine the Memorandum of Claim dated 30th June, 2020.

3. The claimant filed grounds of opposition and pursuant to Rule 17(9) of the Employment & Labour Relations Court (Procedure) Rules 2016 that the point of law raised is not a fine point of Law determinable at the preliminary stage as determined in **Mukhisa Biscuits Manufacturers Limited –vs- Westend Distributors Limited (1969) E.A.**

4. That the objection is bad in law and incompetent as same was not pleaded in the Statement of Defence which defence the respondent is yet to file.

5. That this Court has jurisdiction to hear and determine all employment and Labour Relations matters in terms of Article 162 (2) (a) of the Constitution of Kenya, 2010 as read with Section 12(1) (a) (2) (3) of the Employment and Labour Relations Court Act, 2014 read together with Section 87 of the Employment Act, 2007.

6. The respondent filed an affidavit in support of the Notice of Preliminary Objection in which is deposed facts to wit that Heritage Communications Limited, the respondent is incorporated and duly registered in the Republic of South Sudan with a Registration Number 7212 under the laws of the Republic of South Sudan.

7. That the said company solely carries out and/or operates its business in the Republic of South Sudan.

8. That the said company has no presence in the Republic of Kenya.

9. That on 16/1/2015 the company and the claimant entered into a contract of employment attached to the claim in terms of which the claimant was employed by the respondent whose address of service was stated to be P.O. Box 24, Juba and the claimant being of P.O. Box 3471 – 00506 Nairobi.

10. The claimant was employed in the position of **Finance & Administration Consultant, based in Juba South Sudan** (*emphasis*) mine. The contract was for the period 1/2/2014 to 30/7/2019 renewable. The salary payable was at Kenya Shillings 100,000 per month. The claimant was provided with accommodation in South Sudan, and the work by the claimant was to be performed in South Sudan.

11. The six months period was on probation subject to confirmation. The probation could be extended for a further 3 months.

12. The claimant served the respondent until 31/12/2017 and thus served the respondent for a period of 2 years.

Determination

13. A careful reading of the Memorandum of claim does not disclose on the face of the pleadings facts which indicate that the employment of

the claimant was in South Sudan and that the respondent is a limited liability company based in South Sudan.

14. This in itself amounts to material non-disclosure by the claimant of facts which go to the jurisdiction of the Court to hear and determine the suit.

15. However, a perusal of the contract of Employment between the parties attached to the statement of claim confirms the facts in the objection by the respondent that the respondent is a limited liability company based and duly registered in South Sudan in terms of the company laws of South Sudan.

16. This undisputed fact alone removes the respondent from the jurisdiction of this Court in that the jurisdiction of the Court is solely in the Republic of Kenya and does not extend to the Republic of South Sudan.

17. There is no explanation whatsoever by the claimant in the statement of claim why the claimant did not file the suit in the Republic of South Sudan.

18. A perusal of the contract of employment indicates that the contract does not have choice of law clause.

19. What is manifestly clear is that the employer is based in South Sudan; the work was to be wholly performed in South Sudan and the claimant was for the purposes of employment provided with accommodation in south Sudan.

20. The only connection to the contract with the Republic of Kenya is that the salary was payable in Kenya Shillings. The contract is silent on the place where it was executed.

21. In the case of **Fredrick Otieno Oluoch –vs- Oryx Energies (K) Limited and Another ELRC** Nduma J. held in construing a contract of employment that was concluded between parties in Kenya but was to be performed in South Sudan that: -

“From the totality of the facts of this case being that the claimant entered into a contract with a limited liability company registered and domiciled in South Sudan, the employment of the claimant was situated in Juba South Sudan and the work was wholly to be performed in South Sudan, the Court has confidently found that the tacit choice of the parties in the new contract between the claimant and the Respondent was that the law of South Sudan was applicable to the merits of any dispute arising from the said contract.”

21. This decision is *mutatis mutandis* applicable to the present case. In the present case, there is even no indication yet from the pleadings the place where the said contract was concluded. The decision by Maureen Onyango in **Kenya Union of Employees of Voluntary and Charitable Organizations –vs- Sudan Catholic Bishops Regional Conference, ELRC No. 786 of 2016** supports this finding.

22. The Court finds that the reference to “**Employment Act**” in Clause 3(d) of the contract must be construed to refer to the Labour Act of 2017 of South Sudan and not the Kenya Law.

23. Therefore, this Court lacks jurisdiction to entertain this dispute and the same ought to be filed and litigated in the Republic of South Sudan.

24. Accordingly, the Preliminary Objection is upheld and the Statement of claim filed on 15/7/2020 struck out for lack of jurisdiction of this Court to hear and determine the same.

Dated and delivered at Nairobi this 8th day of February, 2021.

MATHEWS N. NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent. 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 18 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.

MATHEWS N. NDUMA

JUDGE

Appearances

Amalemba & Associate Advocates for the Claimant

Mwesigwa for Respondent/Objector

Ekale: Court clerk.