REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.109 OF 2020

NICK MUSILI MUSYOKA..CLAIMANT

VERSUS

DAC AVITION (E.A) LIMITED..........................RESPONDENT

RULING

Judgement herein was due on 25th November, 2021 which was placed in abeyance after the respondent filed application dated 19th November, 2021 seeking for orders that;

1. Spent.

2. Pending hearing and determination of this application the court do stay the orders directing that the claim herein proceed as undefended and all consequential orders arsing therefrom including determination of the suit as such by way of a judgement on 25/111/2021.

3. Spent.

4. The claim herein by way of a Statement of Claim dated and filed on 21/02/2020 be and is hereby struck out.

5. In the alternative to prayer 4 above, the court be pleased to set aside the Order directing this claim to proceed as undefended and be determined by way of judgement on 25/11/2021 and grant leave to the respondent to defend the claim in terms of the respondent's reply to the statement of claim dated 18/11/2021 filed herewith together with List of Witnesses. List and Bundle of Documents and said documents filed herewith with the same being deemed as properly on court record.

6. Cost being cause.

The application is supported by the annexed affidavit of Peter Muga the general manager and on the grounds that this court lacks jurisdiction to adjudicate the dispute herein as the contract of employment dated 31sst October, 2014 between the parties at clause 23 parties agreed to be governed by the law applicable in the district of Montreal Quebec, Canada. Such agreement and jurisdiction is not disputed by the claimant. The matter is incompetent before this court.

The failure to file notice of objection to jurisdiction was not deliberate but due to the inadvertent mistake of counsel for the respondent who having been fully instructed failed to file any defence.

On 8th November, 2021 the respondent was informed by its advocates on record and who is on retainer of the discovery of this matter listed and took note that no defence had been filed and a hearing date was allocated for 15th November, 2021.

The respondent has been unable to trace any communication, instructions or any document relating to the conduct of the defence filed by its previous advocates until 16th November, 2021 when the current advocates retrieved and shared returns of service filed by the clamant and which demonstrated that its advocates on records Clive Mshweshwe Advocate was on record had been served but failed to file defence.

The respondent has now filed a defence through its current advocates, which defence is good and should be heard on the merits.

The respondent is willing to pay throwaway costs to the claimant so as to secure its right to a defence and the same be heard on the merits. The mistakes of advocate should not be visited against the client.

In reply, the claimant filed Grounds of Opposition and outlined the steps taken in ensuring the respondent attended to this matter but failed to

and despite being given more time by the court to file defence and attend at the hearing, the respondent failed to oblige. The respondent should not be allowed to feign ignorance of the law and the rules.

The application does not offer any plausible reason to justify the non-attendance of the respondent in court for defence or hearing despite being invited and issued with notices to attend technicality cannot apply to redress a lapse that the respondent was aware of but failed to address. The application should be dismissed for being in abuse of court process.

Parties made oral submissions which are analysed and the issues which emerge for determination are whether the court has jurisdiction to hear and determine this matter and whether the matte should proceed undefended and the respondent allowed defending the suit.

The issue of jurisdiction should be addressed at the earliest possible opportunity and before the court has delved into the matters before it as where jurisdiction is challenged, the court must stop and address as held in the case of **Owners of**

Motor Vehicle Vessel 'Lillian S' versus Caltex Oil Kenya Ltd 1989 KLR.

In this case, the court's jurisdiction is challenged on the basis that under clause 34 of the Employment Contract between the parties it was agreed that the dispute resolution mechanism would apply the judicial jurisdiction in Montreal, Quebec, Canada which the claimant has failed to invoke rendering the proceedings herein invalid for want of jurisdiction.

In his Supporting Affidavit dated 19th November, 2021 Peter Muga has attached the contract agreement where the claimant's employment commenced on 6th October, 2014 as a First Officer. His address is in Kenya and the respondent Company address is noted to be in Kenya, Nairobi.

In the case of **Kenya Union of Employees of Voluntary and Charitable Organisations versus Sudan Catholic Bishops Regional Conference [2013] eKLR** the court held that where the contract of employment was entered in Kenya and place of work was in Kenya with travel to different countries, such was subject to Kenya law.

A contract of employment executed in Kenya by Kenyans and for work within the Republic of Kenya, Such contract is subject to Kenyan law as held in the case of **Nakuru Cause No.1 of 2017 Cyrus Waithaka Mwangi versus Equity Bank Kenya Limited.**

The currency of the contract of employment is Kenya Shillings.

From the foregoing, the contract of employment was secured in Kenya, for work in and outside of Kenya due to the nature of the respondent's business. This is in accordance with section 10(3) (f) of the Employment Act, 2007 which provides as follows;

> *(f) where the employee is required to work outside Kenya for a period of more than one month—*
>
> *(i) the period for which that employee is to work outside Kenya;*
>
> *(ii) the currency in which remuneration is to be paid while that employee is working outside Kenya;*
>
> *(iii) any additional remuneration payable to the employee, and any benefits due to the employee by reason of the employee working outside Kenya; and*
>
> *(iv) any terms and conditions relating to the employee's return to Kenya.*

Upon securing such rights and benefits, such a contract having been made and secured for a Kenya citizen to work inside and outside the Republic of Kenya and such protection being based under Kenyan law, the court cannot be denied its requisite jurisdiction to hear and determine any matter(s) arising therefrom.

Even in a case where the claimant was required to work outside the country, which is not the case here as his contract of employment was entered into in Kenya and between Kenyans the respondent being a company registered in Kenya Section 86 of the Employment Act, 2007 makes it an offence to entice any person to work outside of Kenya without an appropriate foreign contract of service. such security is anchored in the Employment Act, 2007 and nowhere else. This court cannot be denied jurisdiction with regard to any claims arising therefrom pursuant to the provisions of section 89 of the Act;

> *(1) Nothing in this Act shall prevent an employer or employee from enforcing their respective rights and remedies for any breach or non-performance of a lawful contract of service made outside Kenya, but the respective rights of the parties under that contract as well against each other as against third parties invading those rights may be enforced in the same manner as other contracts*

In my humble view this was the position subsisting in the case of **Shadrack Wachira Gikonyo versus Abt Associates Inc [2017] eKLR** it was held that;

> *... the contract was executed in Kenya and Claimant resides in Kenya. The Claimant was required to comply with tax laws and obligations of his home country as well as in the country of assignment. In fact he was a third country national employee meaning it was recognised that he was employed in Kenya and assigned in South Sudan on a foreign contract of service under Kenyan law.*

My reading of the award in **Kenya Union of Employees of Voluntary and Charitable Organisations versus Sudan Catholic Bishops Regional Conference [2013]** is that the parties had an agreement with regard to which law was to be applicable.

In **Universal Pharmacy (K) Limited versus Pacific International Lines (PTE) Limited & another [2015] eKLR** the High Court while addressing the question as to which forum the parties ought to be heard laid out several relevant principles as follows;

> *The ouster clause in contract giving exclusive jurisdiction to foreign court by Kenya Courts was extensively discussed in the Kenyan case of United India Insurance Co. Ltd. vs. E.A. Underwrites (Kenya) Ltd. [1985] KLR [898]. This authority is quoted by both parties and is Court of Appeal decision. In that case there was a clause in contract conferring exclusive jurisdiction on a foreign court. The application was made to stay the suit instituted in Kenya and the principles for consideration in such circumstances were set out clearly. The court held:*
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> 1. *Kenya Courts have discretion to assume jurisdiction over an agreement which is made to be performed in Kenya notwithstanding a clause in it conferring jurisdiction on a foreign court. The discretion should be exercised by granting a stay of proceedings in local courts unless a strong reason for not doing so is shown.*
>
> 2. *The onus of establishing a strong reason for avoiding the jurisdiction of Kenya courts is on the party who seeks to avoid that jurisdiction and that burden is a heavy one.*
>
> 3. *In exercising its discretion, the court should take into account all the circumstances of the particular case.*
>
> *In the present case the facts show that the evidence of drivers and authorities under the traffic and licensing laws are here in Kenya and such evidence would be more readily available in Kenya and it would be convenient and less expensive in Kenya courts (and) the law of foreign courts would not be applicable.*

It would follow in this case that the benefits accruing to the claimant under the contract of employment with the respondent are well secured under Kenyan law and it would suffice for the matters herein to be heard and determined by this court.

This court has the requisite jurisdiction to hear and determine this matter.

On whether the respondent should be allowed to defend the suit, indeed the respondent has admitted that summonses were served and a Memorandum of Appearance filed on 3rd March, 2020. The respondent hence complied with Rule11 and 13 of the Employment and Labour Relations Court (Procedure) Rules, 2016 by entering appearance and opting not to file any response.

On this basis the respondent cannot be found to state that the suit is undefended or was denied the opportunity to defend the suit herein.

As the record shall demonstrate, the respondent was at all material times aware of these proceedings, was in court on several occasions represented by the appointed advocates and failed to file any response.

On 19th November, 2020 both parties attended court represented by their advocates and the court allowed the respondent 14 days to file a defence and further that pleading were to close within 30 days.

On 23rd March, 2021 the claimant attended at the registry and was allocated a hearing date for 22nd April, 2021 save the respondent was absent.

On 27th September, 2021 the claimant attended at the registry and was allocated hearing date for 25th October, 2021 and the respondent was served with a hearing notice when Litoro Advocate attended for the respondent save he had not regularised his appearance for the respondent who had advocates on record, Clive Mushweshwe Advocates and the court taking into account such attendance adjourned the hearing and allocated the 15th November, 2021 in the presence of Mr Litoro.

On the due date, 15th November,, 2021 the respondent remained absent despite the advocates on record Clive Mushweshwe Advocates being served and Litoro Advocate being aware of the hearing date which had been allocated in his presence.

Such indulgences were generous and gave the respondent ample and sufficient time to attend at the hearing.

The respondent cannot be found to fault the claimant or the court and state that the orders directing the claim to proceed undefended be set aside. Such would impede on the course of justice and prejudice the claimant.

The respondent has made a case that the mistake of advocate should not be visited against the client. Such matter should only arise where the inadvertence and mistake of advocate is so removed from the client that an ordinary look at the circumstances would be satisfied the client should not be blamed.

The respondent's advocates, Clive Mshweshwe Advocate attended court on several occasions and requested for more time to file defence/response herein and was allowed ample time. Such matter is not challenged. Indeed the respondent and Peter Muga have admitted this much.

In the case of **Habo Agencies Limited v Wilfred Odhiambo Musingo [2015] eKLR** the Court of Appeal in addressing a similar matter

held that;

> *… Habo blamed all acts of omission and commission on its advocates on record at the relevant time. The Advocates were supposed to, but did not, serve the defence; did not apply for extension of time to serve the defence; did not file a valid appeal the first time round; and failed to attend court leading to the dismissal of the appeal the second time round. The affidavit further asserts that the Advocates did not inform Habo about the dismissal for more than one year until March 2014 when Habo somehow "became aware" of the dismissal and instructed the Advocates now on record to seek explanation from his erstwhile Advocates. …*
>
> *It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel. …. in **Murai v. Wainaina** **(No.4) [1982] KLR 38,** held;*
>
> ***"A mistake is a mistake. It is not a less mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it, but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate."***

As correctly submitted by the claimant, Article 159 of the Constitution, 2010 in not a panacea and cure to all forms of mistakes by the parties including where the law and the rules of procedure give directions.

In **Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others [2013] eKLR** the Court of Appeal in addressing the application of Article 159 of the Constitution vies-a-vies applicable statues and rules of procedure held that;

> *… I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned…*

This resonates herein in that the mistakes of Counsel as is the present case should not be visited upon a party but it is equally true when Counsel as agent is vested with authority to perform some duties and does not perform as principal and does not perform it, surely such principal should bear the consequences. The respondent is not without recourse. A negligent counsel must be brought to bear and carry the burden, loss and damage incurred.

Accordingly, the proceedings herein have come this far with the full knowledge of the respondent and to offer to pay throwaway costs is not a cure to the inaction and omission to file response. Such window is closed as judgement is due for good cause.

The court finds not matter to justify the application dated 19th November, 2021 which is dismissed with costs to the claimant. Judgement put in abeyance on 25th November, 2021 shall be delivered on 16th December, 2021 at 8.30AM.

DELIVERED IN COURT AT NAIROBI THIS 15TH DAY OF DECEMBER, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

………………………………………………and ……………………………………..