



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1515 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

PROFESSOR N'DRI THERESE ASSSIE - LUMUMBA.....CLAIMANT

VERSUS

FORUM FOR AFRICA WOMEN EDUCATIONISTS.....RESPONDENT

JUDGMENT

Vide memorandum of claim dated 26th August and filed on 27th August 2015, the claimant, a professor at Cornell University in the United States of America, avers that she was engaged by the Respondent, a non-governmental organisation dealing with African Women and Children Education needs with offices all over Africa and with its headquarters in Nairobi, to carry out Mid Term Review (MTR) in Freetown, Sierra Leone and to attend its General Assembly meeting due in 2011. The Claimant avers that the Respondent was to prepare the contract agreement for the same but contrary to the law, the Respondent asked the Claimant to sign the agreement with the Respondent's West Africa Regional Office based in Senegal so that the Respondent could avoid paying tax due on consultation fee to the Kenya Revenue Authority. It is the averment of the Claimant that no written agreement was thus executed and performance of the consultancy was based on oral agreement between the Claimant and the Respondent's Nairobi office.

The Claimant states that the Respondent's decision to direct her to sign a contract with its Sub - Regional Office in West Africa was in bad faith, illegal and unconscionable and was meant to defeat the course of justice.

The Claimant states that all the interviews leading to her employment had been conducted in Nairobi at the Respondents offices and so was the affirmation of her employment status.

The Claimant states that she proceeded to carry out the consultancy work even though the agreement was yet to be prepared and executed and the Respondent assured her that upon reaching Senegal, the proper Agreement prepared by the Respondent would be duly signed and executed.

The Claimant states that she was jointly hired by the Respondent to carry out the consultancy work with her colleague one Dr. Kangbai Konate.

The Claimant states that prior to undertaking the task, certain fundamental agreements were made between the Respondent and Claimant with regard to insurance cover during the course of the Assignment as the Claimant was apprehensive about the assignment without a valid insurance cover.

The Claimant states that on 19th July 2011 via email the Respondent assured and confirmed to the Claimant that consultants performing their duties for the Respondent are covered in similar terms as the Respondents regular employees. The Claimant states that the same was again reiterated by Codon Diaw (former Executive Director of the Respondent) who confirmed that the Claimant was covered for the assignment by Chartis Insurance who are the Respondents Insurers.

The Claimant states that during the period of her Assignment civil unrest broke out in Freetown, Sierra Leone. That on 1st April 2011 as the unrests were going on and in the course of her duty while crossing the road heading to the airport to safeguard her safety from the riots she was hit by motor cycle and sustained serious injuries. The Claimant was hospitalized and later released but to date of filing suit she still had recurrent pain on her leg as a result of the accident.

The Claimant did complete the assignment and presented a Report to the Respondent's General Assembly and was paid the agreed sum on account of the consultancy. The Claimant states that the Respondent however declined to pay or to forward her claim relating to the accident

to the Insurance Company. The Claimant states that the Respondent has since refused to compensate the Claimant for the injuries. That to date of filing the Claimant had incurred hospital bills amounting to US Dollars 15,044.11 (Kshs.1,549,543/=).

The Claimant states that in accordance with section 90 of the Employment Act, the claim has not been over taken by the statutes of limitation as the injuries are of a continuing nature as she still gets medical attention from the same injuries. The last medical admission and treatment was on 27th July 2015. The Claimant states that the cause of action is of a continuing nature as a result of constant medication and that the breach is also of a continuous nature as the Claimant is still undergoing medical treatment.

She prays for the following remedies –

- a. Kshs.1,549,543/= and interest on the same
- b. General Damages for pain and suffering, future medication and loss of future earnings.
- c. Cost of the suit
- d. Interest on (a) and (b) above
- e. Any other and/or further relief that this court may deem fit and just to grant in the circumstances.

The Respondent filed a Reply to Claimant's Memorandum of Claim Under Protest on 28th September 2015.

The Respondent states that in January, 2011, it invited proposals from qualified consultants and evaluation specialists to conduct a mid-term formative review of the implementation of its 2008-2012 Strategic Plan (the Mid-Term Consultancy). The Claimant, alongside 9 other interested candidates responded to the invitation, out of which she and one Dr. Kangbai Konate were selected. The two thereafter successfully negotiated the terms of a consultancy contract with the Respondent.

The Respondent avers that negotiations on behalf of the Respondent were carried out through its Secretariat based in Nairobi, the Respondent's Headquarters, and through the Respondent's West Africa sub-regional office based and registered in Senegal, Forum of African Women Educationists West Africa sub-Regional Office (FAWE-WASRO).

The Respondent further avers that the terms of the consultancy contract were recorded in a written and duly signed agreement entered into between FAWE-WASRO on one hand, and the Claimant and Dr. Kangbai Konate on the other hand dated 20th February 2011 (the Consultancy Agreement), for a term of just over 6 months, which commenced on 20 February, 2011 and ended on 15 August, 2011.

The Respondent further adds that the Mid-Term Consultancy was the first and only engagement of the Claimant by the Respondent and FAWE-WASRO for her consultancy services.

The Respondent states that in accordance with the scope of work agreed to at paragraph 3.1 of the Consultancy Agreement, the Claimant attended the Respondent's 8th General Assembly, which took place on the 28th and 29th of July, 2011 solely to make a presentation on the Mid-Term Consultancy's report on 29th July 2011. The Claimant's attendance and presentation at the General Assembly was part of the scope of work agreed to between the Claimant and FAWE-WASRO under the Consultancy Agreement.

The respondent denies that it compelled the Claimant to sign the consultancy agreement, and states that the same was signed by Dr. Kangbai Konate in her own capacity and on behalf of the Claimant. That there was no objection by the Claimant to contracting with FAWE West Africa Sub Regional office (FAWE-WASRO). The respondent thus denies that the performance of the Mid Term Consultancy Agreement was carried out pursuant to an oral agreement. It is the respondent's averment that the agreement was solely governed by the signed consultancy agreement.

The respondent denies that the signing of the agreement was carried out in West Africa to avoid payment of withholding tax and states that it indeed deducted and remitted the tax to Kenya Revenue Authority (KRA).

On the issue of travel insurance cover, the respondent avers that it was not responsible to take out the cover either under the consultancy agreement or at all. It further denies that consultants engaged by the Respondent and its West African Office were on insurance terms similar to that of the Respondent's regular employees. The Respondent avers that the Claimant was provided with adequate funds to purchase travel insurance on her own even though this was not part of the agreement. That with specific reference to the Sierra Leone trip where she sustained the injury that is the subject of this suit, the Claimant was paid a sum of USD 4,228.5 towards purchase of air tickets and travel insurance thus the Respondent is not liable either under the consultancy agreement or otherwise for any costs associated with the injury sustained by the Claimant. The Respondent further denies ever promising to provide insurance cover to the Claimant.

On the issue of jurisdiction and validity of the claim, the Respondent denies that there is a valid cause of action against it. The Respondent further denies that this court has jurisdiction to entertain the claim herein.

It is the Respondent's averment that no cause of action has accrued to the Claimant against the Respondent in that the Respondent is not a party to the Consultancy Agreement. That pursuant to paragraph 13 of the Consultancy Agreement, the laws applicable to the Consultancy Agreement are the laws of Senegal and not Kenya. That it was a term of the Consultancy Agreement, at paragraph 13, that any dispute between FAWE-WASRO and the Claimant would first be resolved through consultation, which if unsuccessful, the dispute must be referred to arbitration before a single arbitrator and the seat of arbitration would be in Dakar, Senegal. The Respondent avers that Claimant has not

pursued either of the mechanisms to resolve the dispute, the subject of the claim herein.

The Respondent avers that the alleged cause of action falls outside the jurisdictional ambit of this Court in terms of Article 162(2)(a) of the Constitution of Kenya and Section 12(1) of the Employment and Labour Relations Court Act, Act No. 20 of 2011, Laws of Kenya. That the alleged cause of action did not arise in Nairobi, Kenya, performance of the consultancy duties having been undertaken predominantly in West Africa, and the accident having taken place in Sierra Leone.

The Respondent prays that the claim be dismissed with costs.

The parties agreed to dispose of this claim by way of written submissions which were highlighted in court by their respective counsels, with Ms. Merichi instructed by Koceyo and Company Advocates appearing for the Claimant and Mr. Victor Mailu instructed by Anjarwalla and Khana Advocates appearing for the respondent.

Submissions by the Claimant

It is the Claimant's submissions that she did not sign any contract nor did she authorise Dr. Kangbai Konate to sign the contract on her behalf. That she declined to sign the contract as it did not embody the terms agreed between herself and the respondent.

The Claimant submits that she was an employee of the Respondent and was involved in an accident while in the course of employment. That she incurred heavy hospital bills and still suffers from recurrent pain on her leg to date thus she requires medication to date.

The Claimant submits that she was assured by the Respondent on 19th July 2011 that she was covered by the same insurance provider that covers FAWE staff and EC members when on official travel. That the same is extended to consultants and others travelling on behalf of the respondent.

The Claimant submitted that she was an employee and not a consultant, relying on the decision of Rika J. in **Kenneth Kimani Mburu v Muigai Holding Limited (2014) eKLR** where the Judge stated that where employment documents made reference to the employees as consultants, the use of such terminologies alone do not constitute an employee as consultant. The Claimant further relied on the decision in **Dr. Zipporah Gathuya v The Registered Trustees of Getrude Garden T/A Getrudes Children's Hospital** where the court held that the employer's description of an employee as a consultant does not of itself mean that the employee is a consultant, that the court will look into all the aspects of the engagement. It is submitted for the Claimant that in the instant case –

- a) The Respondent had control on the work and how it was to be done by the Claimant and where to perform it including attending meetings as and when demanded.
- b) The Claimant was to be covered by the Insurance cover just like all other staff.
- c) No consultancy contract was executed thus the provision of the Employment Act kicked in.
- d) The Respondent provided the Claimant with the tools of trade.

The Claimant further submits that the respondent is guilty of unfair labour practice by virtue of –

- a) Failure to draw a contract of employment -it's the legal duty of the Respondent to draw the contract of employment. The Respondent failed to perform their obligation.
- b) Employing the Claimant in Kenya but demanding and drawing an agreement purporting to be drawn from Senegal West Africa to divest the Court of its local jurisdiction -This was meant to deny the Claimant access to justice.
- c) Failing to take out an insurance cover for the Claimant whereas all other staff enjoyed the same which amounted to discriminatory practice.

In the submissions the Claimant prays for the following reliefs –

- a) Special damages in terms of cost of treatment for an injury incurred while in employment on account of the Respondent's failure to take out insurance Kshs.1,549,543/= at the time of filing case and further costs of medical treatment of Kshs.978,419/= as at date of filing submissions.
- b) Damages for unfair labour practice and damages for pain and suffering and future medication at Kshs.5,000,000/= taking into account the permanent nature of injury.
- c) Costs of the suit
- d) Cost follow the event - the Claimant spent USD 970.03 for travel to attend hearing on 4th April 2019 and USD 533.80 on accommodation at Boma Hotel, (the Airline Invoice and Hotel receipt attached) total being Kshs.150,383/=.

Respondent's Submissions

The Respondent submits that the claim herein is time barred under Section 90 of the Employment Act, the course of action having occurred on 1st April 2011 and this claim having been filed 4 years later on 27th August 2015. It is the respondent's submissions that the Court of Appeal has settled the issue of the applicable time limit in cases of continuing injuries. It relies on the case of **G4S Security Services (K) Limited v Joseph Kamau and 468 Others [2018] eKLR**, where the court held –

"In the absence of a definite period, the learned Judge erred in concluding that the claims had no limitation of time. Further upon the claimant's dismissal, any claim based on a continuing injury ought to have been filed within one year failing which it was time-barred."

That it is trite law that a Court cannot entertain an action that is time-barred including an application to extend the time for filing as was held in the cases of **Maria Machocho v Total (K) Industrial Cause No. 2 of 2012** and **E. Torgbor v Ladislaus Odongo Ojuok [2015] eKLR**.

The respondent further submits that it is not privy to the contract that is the subject matter of this claim. The respondent relies on the preamble of the agreement which reads –

"This Agreement is made on 20th February, 2011

BETWEEN:

1. Forum of African Women Educationists West Africa Sub-

Regional Office (FAWE-WASRO) a non-governmental organization registered in Senegal, for purposes hereof IFAN/UCAD, BP 206, Dakar Senegal (hereinafter called "FAWE", which expression shall, where the context so requires, include FAWE's successors in title and assigns); and

2. The Consultants: N'Dri T. Assie Lumumba and Kangbai Konate"

It submits that the Respondent is clearly not contemplated in the Agreement. That it is trite law that contractual obligations cannot be enforced against a third party. That the Respondent was not privy to the Agreement and therefore the agreement cannot be enforced against the Respondent. The respondent relied on the case of **Savings and Loan (K) Limited v Kanyenje Karangaita Gakombe and Another [2015] eKLR**, where a three (3) Judge bench of the Court of Appeal observed that –

"...In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party..."

The respondent also relied on the case of **City Council of Nairobi v Wilfred Kamau Githua T/A Githua Associates and Another [2016] eKLR** where the Court of Appeal observed that under **Halsbury's Laws of England, 4th Edition. Vol. 9 (1) Para. 748** states:

"The doctrine of privity of contract is that, as a general rule, at common law, a contract cannot confer rights or impose obligations on strangers to it; that is, persons who are not parties to it. The parties to a contract are those persons who reach agreement and, whilst it may be clear in a simple case who those parties are, it may not be so obvious where there are several contracts, or several parties, or both, for example in the case of multilateral contracts; collateral contracts, irrevocable credits; contracts made on the basis of the memorandum and articles of a company; collective agreements, contracts with unincorporated association; and mortgage surveys and valuations."

The respondent further relied on the case **Agricultural Finance Corporation v Lengetia Limited [1985] KLR 765**, the court held that: -

"As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be murdered a party to the consideration does not entitle him to sue upon the contract."

The respondent also relied on the case of **Julius Kigen Kibiego v Angeline Korir and Another [2012] eKLR**, the High Court held that –

"...Just as in a contract, the parties to a contract can only agree on rights and duties amongst themselves. Parties to a contract cannot rope in a third party without his consent as this will go against the doctrine of privity of contract. An agreement attempting to bind a third party is one that cannot be binding on the third party without his consent..."

It is further the respondent's submission that the Claimant was not an employee but a consultant, that the Claimant pleaded at paragraphs 7, 10 and 15 as follows –

"Paragraph 7: "The Claimant state that she nonetheless proceeded to carry out the consultancy work even though the agreement was yet to be prepared and executed..."

Paragraph 10: "The Claimant was jointly hired by the Respondent to carry out the Consultancy work with her colleague Kangbani Konate."

Paragraph 15: "The Claimant did complete the assignment and presented a report to the Respondent's General Assembly and she was paid the agreed sum on account of the consultancy."

It is submitted that the Claimant sought travel insurance as a consultant and not an employee of the respondent. It is further respondent's submission that consultancy agreements are not contemplated under Article 162(2) of the Constitution of Kenya 2010 and Section 12 of the Employment and Labour Relations Court Act where the jurisdiction of this court is contemplated. That the difference between an employee and a consultant is not set out in statute. That Kenyan Courts, however, have set out the distinction extensively. Some of the distinguishing factors are the degree of control exercised, the hours worked, tools of work, duration of engagement and payment terms.

The respondent submits that the Agreement does not contain provisions for sick leave, annual leave provisions or payment of housing allowance to the Claimant which are some of the basic elements that would be present in an employer-employee relationship. The allowances provided to the Claimant were solely for the purpose of catering to her consultancy travel and in-country costs. The respondent submits that an analysis of the provisions of the Consultancy Agreement demonstrates that it lacked the basic elements of an employment relationship under Section 10 of the Act.

That respondent submits that the Claimant has failed to prove on a balance of probabilities as required that she was an employee. She has completely failed to satisfy the tenets set out by this Court in the case of **Martin Juma Kundu v Kemu Salt Packers Production Limited [2016] eKLR**.

The respondent further relied on the case of **Maurice Oduor Okech v Chequered Flag Limited [2013] eKLR**, where the court held that the Claimant was a consultant and not an employee as alleged after it considered the documentation provided and the mode of payment. In that case the Court held that the Claimant was paid after each completed job, the documents provided and the modes of payment were not ordinary to an employer-employee relationship, therefore the Claimant was deemed to be an independent contractor and all claims premised on an employment relationship were dismissed.

The respondent submits that the Claimant having worked as a consultant and having executed her mandate as provided for in the Consultancy Agreement is estopped from disregarding the provisions of the Agreement, relying on the case of **Seascapes Limited v Development Finance Company of Kenya Limited [2009] eKLR**. In that case the court held that the doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person or by a previous pertinent judicial determination.

The respondent further relied on the case of **Starsky Limited v Five Forty Africa Limited and Another [2016] eKLR** where this court held that an employment relationship had not been established and thus the court lacked the jurisdiction to entertain the Claimant's claim which arose from contract.

The respondent further submits that the dispute is filed in the wrong jurisdiction. The respondent submits that it is trite law that in disputes arising out of contracts, the *forum conveniens* is the place that is most connected with the contract. Kenya is not *forum conveniens* because:

- a) the Agreement was to be undertaken predominantly in Sierra Leone.
- b) the *lex loci contractus* was Senegalese law.
- c) the Agreement was between the Claimant and FAWE-WASRO, not the Respondent, who have no nexus to Kenya; and
- d) the alleged injuries were sustained in Sierra Leone.

The respondent submitted that it is established law that where parties have decided on a governing law, the Court should uphold the same unless strong and sufficient reasons for departing from the forum have been given. That the Claimant has not provided any reason for departing from the jurisdiction of Senegalese law. The Court of Appeal in **Raytheon Aircraft Credit Corporation and Another v Air Al-Faraj Limited [2005] eKLR**, held that:

"The general rule is that where parties have bound themselves by an exclusive jurisdiction clause, effect should ordinarily be given to that obligation unless the party suing in the non-contractual forum discharges the burden case on him showing strong reasons for suing in that forum."

That the cause of action arose in Senegal. That the consultancy

agreement expressly provides for jurisdiction at Clause 13.1 to the effect that the agreement shall be governed and construed in accordance with the laws of Senegal. That Clause 13.3 provides that disputes shall be referred to arbitration and the seat of arbitration shall be Dakar, Senegal.

On the travel insurance cover, the respondent submits that FAWE-WASRO was not responsible for consultant's insurance cover. This was the consultant's personal responsibility.

The respondent submits that FAWE-WASRO, however, voluntarily provided the Claimant with USD 4,228.50 towards the purchase of an air

ticket and travel insurance, unlike FAWE-WASRO employees who have an automatic insurance cover. This was done before the Claimant's travel to Sierra Leone and before the injury complained of was sustained. That it is clear that the Claimant wilfully failed to purchase the requisite travel insurance cover, hence exposing herself to the attendant risk.

With reference to the documents filed with the Claimant's submissions, the respondent prays that the same be expunged for violating Rule 1a7(1) of the Industrial Court (Procedure) Rules, 2010 (repealed).

The respondent concluded that the Claimant has approached the wrong forum and is seeking remedies against the wrong party. That even if the Court holds that this is the right forum, the claim is statute barred.

That the jurisdiction of this Court is anchored primarily on Article 162(2) of the Constitution and Section 12(1) of the Employment Act. The claim that arises in this matter is not an employment or labour-related matter and the Claimant has failed to establish there existed an employment relationship between the Claimant and either the Respondent.

The respondent submits that the claim is un-meritorious and should be dismissed with costs to the Respondent.

In a brief rejoinder Ms. Merichi submitted that the further documents filed with the submissions are in support of the prayer for general damages which were not available at the time of filing suit and constitute medical bills. That the documents are further in respect of future medical bills.

Analysis and Determination

The pleadings and submissions raise the following issues for determination.

1. Whether the claim is statute barred.
2. Whether the respondent is privy to the consultancy agreement.
3. Whether the Claimant was an employee or a consultant.
4. Whether the court has territorial jurisdiction to entertain the suit.
5. Whether the Claimant is entitled to the prayers sought.

Limitation of Actions

The respondent submits that the cause of action arose in 2011 while the suit was filed in 2015, more than 4 years later, in contravention of Section 90 of the Employment Act.

The Claimant does not dispute that the cause of action arose in 2011. It is the Claimant's position that her injury constitutes a continuing injury and since at the time of filing suit she had not recovered, the limitation of actions clause in Section 90 of the Employment Act does not bar her from coming to court as she filed suit within the limitation period.

These arguments beg the question "*What is the cause of action in this suit?*"

The prayers by the Claimant are for general damages for pain and suffering, future medication and loss of future earnings. In my opinion, the pleadings and prayers are not in consonance. From the pleadings, the Claimant's complaint is that the respondent having failed to pay for her medical insurance, should be held responsible for payment of the hospital and medical bills and to pay her compensation for injury she sustained. The respondent having not been responsible for the injury, which as pleaded, was sustained in Sierra Leone through an accident when the Claimant was hit by a motor cycle, cannot be responsible for the injury. The injury is thus not the cause of action but rather failure of the respondent to pay Claimant's medical insurance which would have paid the medical bills. This is what is pleaded at paragraphs 16 and 17 as reproduced below –

"16. The Claimant states that the Respondent however declined to pay to the Claimant nor to forward her claim relating to the accident to the Insurance Company.

17. The Claimant states that the Respondent has since refused to compensate the Claimant for the injuries suffered while in the course of the duty assigned to her by the Respondent. To date the Claimant has incurred hospital bills amounting to US Dollars 15,044.11 (Kshs.1,549,543/=)."

The cause of action thus arose on the date the respondent declined to take responsibility for the accident which was by letter dated 21st August 2012 at appendix 9 of the respondent's bundle. This being the case, the limitation period lapsed on 21st August 2015. This suit having been filed on 27th August 2015, is thus statute barred.

This issue alone is sufficient to conclude this suit. However, since parties made submissions on the other issues, this judgment would be incomplete if I do not touch on the said issues.

The second issue is whether the respondent is privy to the contract. The respondent argues it is not, as the contract for the consultancy in which the claimant was engaged was between FAWE-WASRO and the claimant jointly with Dr. Kangbai Konate. The Claimant however argues that there was no written contract and that she did not give Dr. Konate authority to sign the contract on her behalf. She has made other arguments about avoidance of taxation by the respondent having motivated the failure by the respondent to prepare the contract.

It is noteworthy that the Claimant who denies having given Dr. Kangbai authority to sign the consultancy contract on her behalf, did not join the said Dr. Kangbai to this suit or call her as a witness to either admit the averments against her. The consultancy agreement filed in the court by the claimant at pages 20 to 29 shows that Dr. Kangbai signed “*for Kangai Konate and N’Dri T. Assie-Lumumba*”. The document has the signature of Kangbai Kanote. It will therefore not be possible for the claimant to establish from Dr. Kangbai whether or not she had the authority to sign the contract on her own behalf and on behalf of the claimant.

The respondent also filed a copy of the consultancy agreement at appendix “*FANE4*” which is signed by both the parties with Dr. Kangbai’s signature for the consultants and a signature of an unidentified person for FORUM FOR AFRICAN WOMEN EDUCATIONISTS: WEST AFRICA SUB-REGIONAL OFFICE.

The burden of proof of a fact lies with the person who alleges the same and to whose benefit the facts are made, in this case, the claimant. Since the documents before the court show that Dr. Kangbai signed on behalf of the claimant and herself, it is the burden of the claimant to prove that Dr. Kangbai had no authority to sign on behalf of the claimant and herself. Such evidence has not been adduced by the claimant.

It is thus my finding that the claimant has not proved that Dr. Kangbai had no authority to sign on her behalf. The court therefore concludes that the agreement was validly signed by Dr. Kangbai on her own behalf and on behalf of the claimant.

The agreement having been between FAWE-WASRO on the one hand and the claimant and Dr. Kangbai on the other, I find that the respondent is not party to the consultancy agreement. The agreement is clear on the addresses of the parties as set out at

paragraph 11.3 thereof being –

“Oley Dibba Wadda

FAWE

FAWE WASRO

IFAN/Universite Cheikh Anta Diop

BP 206, Dakar, Senegal

Email: ODibba-Wadda@fawe.org,

aruna.ramakrishnan@fawe.org

Kangbai Konate

2480 16th Street, NW

Suite 725

Washington, D.C. 20009, U.S.A.

Email: yakmanou@gmail.com

and

N’Dri T. Assie-Lumumba

Cornell University

Africans Studies and Research Center Ithaca

310 Triphammer Road Ithaca, New York 14850, U.S.A.

Email: N.Assie-Lumumba@cornell.edu”

The Agreement is also express on the applicable law as set out at paragraph 13.1 thereof being the laws of Senegal.

The next issue is whether the claimant was an employee or a consultant. Paragraph 6 of the consultancy agreement expressly provides for the status for the consultants as follows –

“6. STATUS OF THE CONSULTANT

6.1 *Nothing contained herein shall constitute the consultants a partner, an employee or agent of FAWE and the relationship of the consultants to FAWE shall be one of an independent contractor.”*

The preamble of the consultancy agreement further describes the parties as follows; -

This Agreement is made on February 20th, 2011

BETWEEN:

1. Forum of African Women Educationalists West Africa sub-Regional Office (FAWE-WASRO) a nongovernmental organization registered in Senegal, for the purposes hereof of IFAN/UCAD.BP 206, Dakar, Senegal (hereinafter called “FAWE” which expression shall, where the context so requires, include FAWE’s successors in title and assigns); and

2. The consultants: N’Dri T. Assie-Lumumba and Kangbai Konate.”

The correspondence between the parties is further proof of the capacity and relationship of the claimant in relation to the respondent. As submitted by the respondent, this fact is admitted by the claimant at paragraphs 7, 10 and 15 of the memorandum of claim where she pleads –

“7. The Claimant state that she nonetheless proceeded to carry out the consultancy work even though the agreement was yet to be prepared and executed but the Respondent assured her that upon reaching Senegal that the proper Agreement prepared by the Respondent would be duly signed and executed.

10. The Claimant was jointly hired by the Respondent to carry out the consultancy work with her colleague Kangbai Konate.

15. The Claimant did complete the assignment and presented a Report to the Respondent’s General Assembly and she was paid the agreed sum on account of the consultancy.”

I thus find that the claimant was a consultant and not an employee of the respondent. This also resolves the issue on insurance, being that the claimant having been a consultant was not covered under the insurance cover for the respondent’s staff. She had not denied having been paid USD4,228.50 to purchase an air ticket and insurance cover for the trip to Sierra Leone where she was injured.

On the issue whether this court has territorial jurisdiction to this court, paragraph 13.1 of the consultancy agreement provides as follows –

“13. JURISDICTION

13.1 This Agreement shall be governed by and construed in accordance with the laws of Senegal,

13.2 Any dispute, controversy or claim arising out of or relating to this Agreement or a termination hereof (including without prejudice to the generality of the foregoing, whether in its interpretation, application or implementation) shall be resolved by way of consultation held in good faith between the parties. Such consultation shall begin immediately after one party has delivered to the other party written request for such consultation. If within fifteen (15) Business Days following the date on which such notice is given the dispute cannot be resolved, the dispute, controversy or claim shall be submitted to arbitration in accordance with the provisions of clause 13.3.

13.3 Should any dispute arise between the parties concerning this Agreement or a termination hereof (including, without prejudice to the generality of the foregoing, whether in its interpretation, application or implementation) and the consultation process referred to in clause 13.2 shall not have resolved such dispute, the dispute shall upon application by any party, be referred to and finally resolved by arbitration. The provisions of the Arbitration Act, 1995 shall apply to all such arbitration proceedings. The number of arbitrators shall be one (1) and the place of arbitration shall be in Dakar, Senegal. The language to be used in the arbitral proceedings shall be French. If for any reason an arbitrator is unable to perform his function, a substitute shall be appointed in the same manner as the original

arbitrator.

13.4 The determination of the arbitrator shall be final and binding upon the parties and, so far as the law permits, not subject to appeal.

13.5 Notwithstanding the foregoing, a party is entitled to seek preliminary injunctive relief or interim or conservatory measures from a court of competent jurisdiction pending the final award.”

As was held by the Court of Appeal in the case of **Raytheon Aircraft Credit Corporation and Another v Air Al-Faraj Limited (supra)**

"The general rule is that where parties have bound themselves by an exclusive jurisdiction clause, effect should ordinarily be given to that obligation unless the party suing in the non-contractual forum discharges the burden cast on him showing strong reasons for suing in that forum."

The parties to the consultancy agreement bound themselves as to jurisdiction and applicable law being that of Senegal. This court therefore has no territorial jurisdiction to determine this suit.

Whether the claimant is entitled to the prayers sought

Having found in the negative on all the issues referred to above, I

find that the claimant has no cause of action against the respondent. She is thus not entitled to any of the prayers sought. The result is that the entire claim fails and is accordingly dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23RD DAY OF APRIL 2020

MAUREEN ONYANGO

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 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 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.

MAUREEN ONYANGO

JUDGE