



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 128 OF 2017

(Before Hon. Justice Mathews N. Nduma)

FREDRICK OTIENO OLUOCHCLAIMANT

VERSUS

ORYX ENERGIES (K) LIMITED.....1ST RESPONDENT

ORYX ENERGIES LIMITED2ND RESPONDENT

JUDGMENT

1. The claimant filed suit on 31st March 2017 against the 1st and 2nd Respondents seeking the following reliefs:

(i)A declaration that the contract of employment between the claimant and the 1st Respondent dated 6/1/2012 has not been terminated and the same is legally binding on both parties.

(ii)A declaration that the expatriate contract of employment dated 20/12/2015 was null and void from the outset and of no effect.

(iii)In the alternative and without prejudice to (b) above, a declaration that the termination of the expatriate contract of employment dated 29/12/2015 was wrongful and unfair.

(iv)A declaration that the purported termination of the contract of employment dated 6/1/2012 by the respondents is wrongful and unfair.

(v)An order for reinstatement/re- engagement of the claimant by the respondents and payment of the monthly salary he earned in March 2016 from April 2016 until such reinstatement/re-engagement or compensation in equivalent payments for the remainder of his working years to retirement with effect from April 2016.

(vi)General damages in compensation for infringement/violation of his rights in the Bill of rights.

(vii)Costs

(vii)Interest.

3. The claimant testified as CW1 and adopted a written statement dated 28th March 2017 and filed on 31st March 2017 as his evidence in chief. CW1 testified that he was a citizen of Kenya married with two children and was 36 years old and had 24 remaining working years up to the retirement age of 60 in Kenya.

4. That the 1st respondent is an international subsidiary of Oryx Energies (parent company) a multinational Swiss company with its registered office in Geneva, Switzerland engaged in the business of import of crude and refined oil products in Kenya for the Kenyan market and for re – exporting to Southern Sudan, Uganda and Tanzania.

5. CW1 referred the court to Oryx Energies website: www.oryxenergies.com as at 6th February 2017 as evidence of the aforesaid statement of facts.

6. CW1 stated that Oryx Energies set base in Kenya in the year 2004 under the name Addex Kenya Ltd which name was changed in April

2012 to Oryx Energies Kenya Ltd, the 1st Respondent.

7. The claimant testified that he was employed by the respondent as a Depot Assistant in Eldoret with effect from 1st February 2012 at a Kshs. 80,000 per month and the parties signed a contract of employment on 6/1/2012.
8. The claimant produced a copy of the signed contract and a pay slip for the month of April 2012.
9. The claimant was confirmed to the position of Depot Assistant Eldoret with effect from 1st May 2012 and his gross monthly pay was enhanced to Kshs. 95,688 per month.
10. CW1 testified that the confirmation followed delivery by himself to the respondent exemplary performance. That in the year 2014 in recognition of the good performance the claimant's salary was increased to Kshs. 100,222 by a letter dated 18th February 2014.
11. The 1st respondent also used to pay the claimant Annual bonus in the month of December each year. 1st December 2014 the claimant received an annual bonus of Kshs. 190,444.80.
12. CW1 testified that around the year 2015 the 1st respondent established a business in Juba, South Sudan which business was registered in the name of Oryx Energies Ltd, the 2nd respondent. The 2nd respondent represented the 1st respondent in Southern Sudan in its business operations.
13. CW1 testified that the respondent through its office over saw the establishment of the 2nd respondent including registration, acquisition of office space and recruitment of a skeleton staff in Southern Sudan.
14. Sometimes in January 2015 the claimant was identified for promotion to the position of supply and operations manager Juba, South Sudan.
15. The claimant testified that he was appointed to that position by an email dated 3/2/2015. The Managing Director of the respondent wrote an email to the claimant dated 4/2/2015 confirming the said promotion.
16. CW1 testified further that he was sent by the 1st respondent on a business familiarization to Juba South Sudan from Eldoret between 18th to 23rd May 2015 and CW1 submitted a report to the 1st respondent operations Manager upon return. Report was produced before court sent by email on 26/5/2015.
17. CW1 testified that the Managing Director of the 1st respondent presented to the claimant a document titled Expatriate Contract of Employment in terms of which, same was to commence on 1st January 2016.
18. CW1 testified that he signed and dated the said Expatriate Contract of Employment as instructed and sent it back to the Managing Director of the 1st Respondent in Nairobi by G4S courier on 1st January 2016.
19. CW1 testified that he did not meet the Managing Director in person to negotiate the terms of the Expatriate Contract but it was drafted by the office of the 2nd respondent at the Head Office in Nairobi.
20. The Expatriate Contract provided for payment of a gross monthly salary of USD 3,000 together with accommodation of up to a maximum of USD 3,000 per month to be organized and arranged for by the 2nd respondent exclusively and paid for by the 2nd respondent directly.
21. CW1 testified that he reported to his new work station on 2nd January 2016 and commenced work.
22. The 2nd respondent searched for accommodation for the claimant with a landlord known as Limestone properties Limited and payments were made to the landlord directly by the 2nd respondent. The tenancy agreement was signed by the Managing Director of the 2nd respondent and was dated 3rd February 2016.
23. CW1 testified that the salary for the staff based in Juba, South Sudan was arranged and paid for by the 1st respondent through a dollar bank account under the name of the 2nd respondent in Juba South Sudan and the 1st respondent prepared the pay slips accordingly and same were emailed to the staff in Juba by the head office of the 1st respondent at Nairobi.
24. CW1 testified that the 1st respondent continued to make deductions from his monthly salary in the new position for pension for remittance to the pension scheme of all staff of the 1st respondent in Kenya and also made deductions for the Claimant's car Loan repayments which loan was taken under 1st respondent's arranged car loan scheme for its staff.
25. CW1 testified further that the operations of the 2nd respondent were overseen, supervised and directed by the 1st respondent and the Managing Director of the 2nd respondent reported to the managing director of the 1st respondent and he visited Nairobi office regularly.
26. The claimant left his family in Eldoret, Kenya. Around March 2016, the claimant visited Kenya on a compassionate leave approved by

the managing Director of the 2nd respondent. The claimant returned to Juba on or about 22/3/2016 and reported to office on 24/3/2016 and was prevented from returning to office on instructions from the Managing Director of the 2nd respondent who had travelled to Nairobi head office at the time.

27. The information was conveyed to the claimant by a junior officer by the name Garang Kuany, a citizen of South Sudan who was sitting at the desk ordinarily occupied by the claimant. The claimant left and returned to the office to see the Managing Director of the 2nd respondent on 32/3/2016. The claimant was served with a letter of termination of employment dated 31/3/2016 by the Managing Director and was asked to leave the office.

28. The managing Director did not allow the claimant to collect his personal belongings from his office. The termination was by the Managing Director of the 2nd respondent. CW1 testified that the same was under the advisory of the 1st respondent.

29. The claimant states that the termination of his employment was unlawful and unfair and a breach of his contract of employment with the 1st and 2nd respondents jointly and severally.

30. That there was no valid reason to terminate his employment and no fair procedure was followed to terminate the contract. The claimant prays to be awarded as prayed as the termination was actuated by malice hatred and discrimination whilst he was on compassionate leave.

31. That same was visited with malice and vendetta in the manner it was executed. CW1 stated that the Managing Director of the 2nd respondent was on M/s Amel Awadalla who in his view colluded with Garang Kuany to terminate his employment.

32. The 1st respondent sent the claimant a one-way ticket to Nairobi Kenya from Juba. The Claimant was given personal belongings left in his office at Juba and was informed the same had been brought to Nairobi by the Managing Director of the 2nd respondent.

33. The Managing Director of the 1st respondent had sent a letter to all staff on 31/3/2016 informing them that the claimant was no longer part of the Oryx Energies Group with effect from 31/3/2016.

34. The claimant was unable to meet the Managing Director of the 1st respondent at Nairobi so he wrote a letter to the Managing Director of the 1st respondent dated 13/4/2016 raising his grievances.

35. The Managing Director of the 1st respondent then wrote a letter dated 16/5/2016 to the claimant informing him that the contract of employment with the 1st respondent stood terminated upon the claimant's signing of the Expatriate contract.

36. The claimant testified that the purported termination of contract with the 1st respondent was unlawful and unfair as it was without notice; violated terms and conditions of the contract as there was no meeting to discuss the alleged termination yet his contract was permanent and pensionable and the reasons for the termination were not valid and no proper procedure was followed preceding the purported termination.

37. CW1 testified that the respondents jointly and severally violated his rights under Articles 27 and 41 of the constitution of Kenya 2010 for failing to accord him equal protection and benefit of the law and engaging in unfair labour practice.

38. CW1 vide his advocates wrote a demand letter to the respondents dated 16/5/2016 which was not responded to hence the suit.

RESPONSE

39. The 1st and 2nd respondents filed a joint statement of defence on 26th May 2017 in which is pleaded that the 1st respondent is a Limited liability company established under the companies Act of Kenya whereas the 2nd respondent is a company established under the South Sudan Companies Act.

40. That the respondents are subsidiary companies of the Swiss Multinational company Oryx Energy a leading independent provider of oil and gas products and services in Africa and has incorporated subsidiary companies in 18 African Countries which companies provide different goods and services depending on the market.

41. RW1 Joy Mwendu Muthengi testified for the respondent and adopted a written statement filed on 24/10/2018 as her evidence in chief.

42. RW1 testified that the 1st and 2nd respondents are separate Limited Liability companies and subsidiaries of Swiss Multinational Company Oryx Energy.

43. That 1st respondent is incorporated in Kenya under Kenyan Companies law whereas the 2nd respondent is incorporated in South Sudan under the Southern Sudan companies law.

44. That the 1st respondent assisted in the establishment of the 2nd respondent but the two are separate and distinct legal entities with capacity to enter into contracts and own property.

45. That the claimant was firstly employed by the 1st respondent as a Depot Assistant reporting to the Western Kenya Operations Manager vide a Contract of employment dated 16th January 2012 where he served for 4 years.

46. That on or about January 2016 the claimant was offered the position of Supply Operations Manager for the Oryx Energies South Sudan Ltd. That the claimant accepted the position and negotiated a contract in respect to the position.
47. That the Claimant signed a contract with the 2nd respondent and was to commence work in South Sudan on 1st January 2016. That the terms and conditions of the new employment contract were clearly set out and the claimant voluntarily agreed to the same.
48. The said terms were significantly different from the contract the claimant had with the 1st respondent including his new station was in Juba, South Sudan and reported to Managing Director of Oryx Energies South Sudan Ltd.
49. Further the Claimant's new salary was increased to USD 3,000 and subject to South Sudan taxation laws. His Job title was also different as Supply and Operations Manager.
50. RW1 emphasized that the new contract of employment was to be implemented wholly in South Sudan.
51. That on or about March 2016, Oryx Energies South Sudan Limited communicated to the 1st respondent that it had terminated the employment of the claimant.
52. RW1 testified that the employment of the claimant was terminated on account of having provided to the 2nd respondent over stated rent in the sum of USD 2,500 payable by the 2nd respondent directly to the landlord when in actual fact the landlord had charged the claimant a monthly rent of USD 700.
53. That the claimant had taken advantage of a clause in his new contract of employment which provided for a maximum of USD 3,000 per month.
54. RW1 Concluded that the claimant's employment was terminated in South Sudan by the 2nd respondent for engaging in fraudulent activities and the 1st respondent based in Kenya has nothing to do with the said termination.
55. That the claimant, if has any recourse at all would be against the 2nd respondent to be pursued in Juba South Sudan and not in Kenya.
56. That the suit be dismissed with costs.

Determination

57. The issues for determination are as follows: -

- I. Whether the Court based in Kenya has jurisdiction over the dispute.
- ii. If the answer to (i) above is in the affirmative whether the Claimant has a valid claim against the 1st or the 2nd respondent or both.
- iii. Whether the claimant is entitled to the reliefs sought.

Issue I

58. On the issue of jurisdiction, the respondent has submitted that the court lacks jurisdiction to determine the dispute because in terms of Article 162(2)(a) of the constitution of Kenya 2010 read with section 4 of the Employment and Labour Relations Court Act, Cap 234 Laws of Kenya this court has jurisdiction to hear and determine employment and labour relations matters in Kenya.
59. The claimant herein was offered and accepted a new contract with the 2nd respondent which was signed and performed entirely and exclusively in South Sudan and which contract was subject to the Laws of South Sudan.
60. That the alleged cause of action was in South Sudan outside the jurisdiction of the Court. That the claimant was an employee of the 2nd respondent which is a separate and distinct legal entity from the 1st respondent and registered and domiciled in Juba South Sudan.
61. That the above facts are common cause and not in dispute since the 1st and 2nd respondents are subsidiaries of Oryx Energies (the parent company).
62. The claimant submitted the 2nd respondent was a creation of the 1st respondent. That the claimant's 1st contact with the 1st respondent was not terminated by his signing a new employment contract with the 2nd respondent.
63. The claimant submits that the fact that the 1st respondent provided money to the 2nd respondent for payment of salaries; the fact that pay slips of the claimant were originated and emailed from Nairobi Kenya; the headquarters of the 1st respondent; the fact that the 1st respondent continued to deduct from the salary of the claimant pension contributed and remitted same to the group pension scheme in Kenya; and the fact that the Managing Director of the 2nd respondent reported and was supervised by the Managing Director of the 1st respondent is

overwhelming evidence that the claimant continued to remain in the permanent and pensionable employment if the 1st respondent in Kenya and therefore the court has jurisdiction over the dispute as against the 1st and 2nd respondents.

64. The respondents dispute the assertions by the claimant and insist that the 1st respondent merely facilitated setting up of the 2nd respondent in South Sudan as is customary in the operations of the parent company and this was not in any way an indicator of the 1st respondent running and supervising and/or being one entity with the 2nd respondent.

65. The court has carefully considered the four corners of the contract of employment dated 27th January 2015 between the claimant and Oryx Energy South Sudan Ltd, the 2nd respondent and have noted the following salient features of the contract:

66. The claimant was appointed into a new position of Supply and Operations Manager to be served at Juba, South Sudan.

67. The claimant in the new position was to coordinate product supply distribution and logistics business of Oryx South Sudan in order to ensure ongoing availability of core products, (Fuel,LPG and Lubricants) and efficiency service delivery to the company's customers.

68. In this regard the claimant was to liaise with Oryx Energies Kenya on products available in the interface with South Sudan Revenue Authority to ensure seamless cross border supply of the products and payment of taxes to the authority and ensure safe delivery of products to customers in South Sudan.

69. The claimant worked under supervision of Managing Director in Juba, South Sudan.

70. It is not in dispute that the claimant entered into this new agreement with 2nd respondent freely and voluntarily and consequently left the employ of the 1st respondent freely and voluntarily there being no evidence of any resistance or protest in the transition made by the claimant from Kenya to Southern Sudan.

71. The claimant was under the new contract placed under probation contract terminable giving one-month notice. The claimant signed the new contract of employment on 29th December 2015 and duly reported to work on 1st January 2016.

72. The decision of Maureen Onyango J in **Kenya Union of Employees of voluntary and charitable organization –VS- Sudan Catholic Bishops Regional Conference, ELRC No. 786 of 2016** where the Learned Judge stated: -

73. *“From the particulars contained in the memorandum of claim and the appendix it is clear that the 1st contract was entered into in Kenya and subject to Kenyan Law but to be performed partly in Kenya and partly in Sudan. When the contract expired, the grievant was offered a second contract which was signed and performed in entirety in the Sudan. The contract that expired is subject to the laws of Sudan. This court has no jurisdiction to hear and determine cases which are entered into in Sudan and subject to the Laws of Sudan. The case therefore is dismissed for want of jurisdiction’* is pertinent in this matter.

74. The facts of the aforesaid case are in many respects similar to the present one. However, the contract of employment between the claimant and the 2nd respondent does not expressly state which law is applicable to it.

75. The contract was concluded between the parties in Kenya but to be performed in South Sudan. The question is whether there is a tacit choice by the parties of the law applicable to the contract between the claimant and the 2nd respondent. A tacit choice is also sometimes referred to as an implied or inferred choice should only be found if it is reasonably clear that it was a genuine choice by the parties. **See Redfern & Hunter (3ed) 129.**

76. 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 to be wholly 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 2nd respondent was that the law of South Sudan was applicable to the merits of any dispute arising from the said contract.

77. The Court also finds that the 1st respondent is a stranger to the contract between the claimant and the 2nd respondent and merely provided sisterly facilitation to a sister subsidiary to set up in a new Country and no more.

78. The court therefore strikes out the 1st respondent from the suit and finds that the court has no jurisdiction to determine the dispute between the claimant and the 2nd respondent.

79. It is not necessary in this case to involve the application of conflict of laws rules to determine the presumed intention of the parties. The court was able to clearly discern and establish the tacit or implied choice of the parties in the present case, being in this case the law with the close connection to the place of characteristic performance of the contract and there being no circumstances pointing equally to either Kenya or South Sudan as the place of performance of the contract.

See Coastliner Ltd –VS- Huding and Vede Chartering NV (1972) 2 QB 34(CA) 44.

80. It is manifestly clear that all circumstances of this case point to South Sudan as the place of performance of the contract and therefore the parties intended that the laws of South Sudan apply to the contract.

81. Accordingly, the entire suit is struck out for want of jurisdiction as concerns the 2nd respondent, the court having struck out the 1st respondent from the case for lack of any relevant evidence to link the 1st respondent to the dispute.

82. The court finds this an appropriate case for each party to meet their costs of the suit.

Dated, Signed and Delivered at Nairobi this 17th Day of September 2020

Mathews N. Nduma

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 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

Appearance:

Mr. Mauma Oluoch for claimant

Mr. Nyakundi for 1st and 2nd respondents.

Chirspo: Court Clerk