



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1090 OF 2015**

**(Before Hon. Justice Hellen S. Wasilwa on 18<sup>th</sup> June, 2019)**

**FREDRICK KIPROTICH KOIGEL.....1<sup>ST</sup> CLAIMANT**

**JACOB ODUNGU OKOTH.....2<sup>ND</sup> CLAIMANT**

**-VERSUS-**

**AFRITRACK INVESTMENTS**

**(E.A) LIMITED.....1<sup>ST</sup> RESPONDENT**

**SABENA WOULD YOHANNES.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Claimants filed a Memorandum of Claim in which they aver that they were constructively dismissed by the Respondents and that their contracts of employment were entered in Kenya under the scope of the Employment Act. The Respondents on 22<sup>nd</sup> February 2019 filed the present application seeking the following orders:-

***a) THAT the Honourable Court be pleased to strike out the Claimant's claim herein as the same is scandalous, frivolous, vexatious and a complete abuse of the Court process.***

***b) THAT costs of this application be provided for.***

2. The application is supported by the Affidavit of Sabena Would Yohannes sworn on 21<sup>st</sup> February 2019 and is premised on the following grounds:-

***a) That the Honourable Court lacks jurisdiction to entertain the cause herein as the cause of action arose outside the territorial jurisdiction of the Honourable Court to wit, Luanda Angola.***

***b) That the Claimants signed their contracts in Angola with Afritrack Angola who are not parties to these proceedings.***

***c) That all the allegations made in the Claimants' claim arose in Angola, accordingly any remedy should be sort in the municipal courts of Angola against Afritrack Angola.***

3. The Claimant in response to the application filed both Grounds of Opposition and Replying Affidavit sworn by each of the Claimants on 12<sup>th</sup> March 2019. They aver that the Respondents are ignorant of the fact that the 1<sup>st</sup> Respondent is an autonomous limited liability company incorporated under the laws of Kenya and is capable of conducting business transactions and suing/being sued in its own name.

4. They aver that there were breaches carried out by the 1<sup>st</sup> Respondent under the supervision of the 2<sup>nd</sup> Respondent who is the Chief Executive Officer and that they entered into employment contracts with the 1<sup>st</sup> Respondent. They aver that there was no express/implied term in the employment contract that ousted the jurisdiction of the Honourable Court in the event of an employment dispute.

5. They further aver that there will be no prejudice upon the Respondents if the case is heard and determined in Kenya and that if the

Claimants signed any contracts in Angola the said contracts were procured under fraud, misrepresentation and duress and should therefore not stand.

6. The 1<sup>st</sup> Claimant in his Replying Affidavit avers that he was employed by the 1<sup>st</sup> Respondent via a letter of appointment dated 15/11/2013, as a Civil Engineer, which was executed by the 2<sup>nd</sup> Respondent on behalf of the 1<sup>st</sup> Respondent. The 2<sup>nd</sup> Claimant on his part avers that he was employed by the 1<sup>st</sup> Respondent vide a letter dated 21/10/2013, as an Architect, which was executed by the 2<sup>nd</sup> Respondent on behalf of the 1<sup>st</sup> Respondent.

#### **Respondent/Applicants' submissions**

7. The Respondents submitted that the law in the circumstances of the case herein were captured in the case of **WK & MWK (both suing as the administrators of the Estate of Dr. W.K) & Another v British Airways Travel Insurance & Another [2017] eKLR** where the Court of Appeal quoted with approval the case of **United India Insurance Company Limited v East African Underwriter (Kenya) Limited [1945] KLR 898**. It is their submission that not only was the contract made outside Kenya governed by the Angolan laws but also the breaches complained of were committed in Angola.

8. They submitted that the Claimants in their Replying affidavits attest that they signed a contract after arriving in Angola and that both the Replying Affidavit and Memorandum of Claim are unequivocal the breaches were committed in Angola and not in Kenya.

9. They further submitted that the Respondents are wrongly sued in the suit as they were not the Claimant's employer at the time the allegations were committed and relied on the definition of employer provided under section 2 of the Employment Act and submitted that the in accordance with the Claimants' contracts their employer was Afritrack Angola Civil & Industrial Limitada.

10. They submitted that for the Court to assume jurisdiction it has to consider whether the contract was made in Kenya, whether the contract was to be governed by Kenyan laws and whether the breaches complained of were committed in Kenya. It was therefore their submission that none of these factors exists to the facts and circumstances of the case thus the Court cannot assume jurisdiction.

#### **Claimants/Respondents' submissions**

11. The Claimants submitted that the nature of the reliefs sought in their Memorandum of Claim reveals that the prayers sought are within the powers of the Honourable Court as provided under Section 12 of the Employment and Labour Relations Court Act.

12. They submitted that the 1<sup>st</sup> Claimant's letter of appointment was on a letter head indicated Afritrack Investment (E.A) Limited and indicated that the company had a valid location in Kenya. In respect of the 2<sup>nd</sup> Claimant they submitted that his letter dated 21<sup>st</sup> October 2013 indicated that his appointment was as staff of Afritrack Investment (E.A) Limited.

13. It was therefore their submission that the contracts of service were between the Claimants and a Kenyan company that was capable of being an employer within the definition of Section 2 of the Employment Act.

14. They further submitted that they were deployed by their employer to undertake assignments outside Kenya. The 1<sup>st</sup> Claimant argued that he was informed to sign the document titled *Contracto De Trabalho de Estrangeiro Nao Residente* which he did not understand and that the 2<sup>nd</sup> Respondent did not sign the document.

15. The 2<sup>nd</sup> Claimant argued that he never signed any other contract apart from his employment contract except with the 1<sup>st</sup> Respondent though he was merely deployed in a site outside Kenya.

16. They submitted that while they do not deny the existence of an Angolan organisation, they were neither its employees nor did they enter into any contractual relationship with it and if there was any contractual relationship it was under undue influence and pressure. They relied on the decision in **Barakat Exploration Inc v Taipan Resources Inc [2014] eKLR**.

17. They submitted that there exists no provision in the contracts signed by the Claimants and the 2<sup>nd</sup> Respondent expressly ousting the jurisdiction of this Court and relied on the decision in **P.O v Board of Trustees, AF & 2 Others [2014] eKLR**. They urged the Court to find that in the absence of such a provision, this Court is properly vested with the jurisdiction to determine this dispute and therefore dismiss the Respondents' application.

18. I have examined the averments of the Parties herein. The 1<sup>st</sup> Claimant Fredrick Kiprotich Koigei signed his contract dated 15/11/2013 on a letter head of Afritrack Investments (E.A) Limited whose address is 34918-00100 NAIROBI.

19. The 1<sup>st</sup> Claimant was later deployed in Angola vide a contract dated 16/6/2014. There is no indication that this deployment was overriding the earlier contract and ousting the jurisdiction of this Court following the contract entered into in Kenya.

20. The 2<sup>nd</sup> Claimant on the other hand was also employed vide a letter dated 21/10/2013 as an Architect. The contract was signed on a letter head of Afritrack Angola. From the contents of the contract, the Claimant was promised a return economy class ticket from the "place of his origin" which is also not indicated.

21. Some of the documents however presented before Court relate to a contract in a language other than English which is not the official language of this Court and for which this Court is unable to determine the contents.

22. Due to this limitation, this Court is unable to fully appreciate the terms of engagement of this contract and render a just verdict.

23. This is an application before me in terms of a Preliminary Objection for which I need to determine without reference to facts as in the case of **Mukisa Biscuit**. The current Application however cannot be determined without reference to further evidence and facts. The application therefore falls beyond the scope of a Preliminary Objection and I therefore dismiss it accordingly.

24. Costs in the cause.

**Dated and delivered in open Court this 18<sup>th</sup> day of June, 2019.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Manyara for Applicants – Present

Respondents – Absent