



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 2065 OF 2016**

**DR. WANJIRU MWAL.....CLAIMANT**

**VERSUS**

**UNIVERSITY OF BRITISH COLUMBIA ..... RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 18th October, 2019)

**RULING**

The respondent filed the application on 06.05.2018 through Michuki & Michuki Advocates. The application was by the notice of motion under rule 13(5) and rule 17 sub rule (1), (2) and (3) of the Employment & Labour Relations Court (Procedure ) Rules 2016 and all enabling provisions of law.

The substantive prayers are for the memorandum of claim dated 05.10.2016 to be struck out and the cause herein be dismissed for want of jurisdiction; and costs of the application and the entire cause be provided for. The application is supported by the attached affidavit of Hubert Lai, QC and upon the following grounds:

- a) The Court lacks jurisdiction because the contract provides choice of laws is British Columbia (BC) and the more appropriate forum to apply its own laws is BC to address the matters in dispute.
- b) Filing the suit in Kenya clearly violates the jurisdiction clause in parties' contract.
- c) The respondent is located in the Province of British Columbia, Canada and operates under the authority of the British Columbia University Act, R.S.B.C 1996, c. 468. Its two main campuses are situated in Vancouver, BC; and Kelowna, BC and the respondent provides clinical education to students in its Faculty of Medicine at 75 healthcare facilities in the Province of British Columbia.
- d) The respondent employed the claimant as a Postdoctoral Research Fellow pursuant to a one year written contract effective 05.07.2014. The contract was to lapse on 04.07.2015 but the respondent terminated it on 09.04.2015 and the claimant was paid 2 months' salary in lieu of notice per terms of the contract.
- e) The contract provides that the contract is governed by the respondent's procedures and policies. Policy 61 thereof provides that the parties to the contract shall adhere to the applicable legislation including the Employment Standards Act, RSC 1996, c. 113 and Human Rights Code, RSBC 1996, C. 210 (Page 3, sections 1.3, 5.1, 5.1.7).
- f) The claimant has already commenced complaints and proceedings in BC all of which have been investigated and decided upon in BC. They were dealt with as provided in the respondent's Policy 61. Dr. Feldman acting as an impartial facilitator has considered the claimant's complaints and made findings that the claimant's termination with pay in lieu of notice complied with the respondent's Policy 61 and the governing Employment Standards Act, RRSB 1996 on terms of service for non-union employees in BC, Canada; on claims for outstanding allowances the claimant had not submitted her claims of the expenses in issue to the respondent and was told to do so; and he complaints of harassment and discrimination would be considered and reviewed by the Director, Equity Complaint Management - and the Director had reviewed the case and returned that Dr. Lester did not discriminate against the claimant as was alleged by the claimant that she was harassed and discriminated against while carrying out her Postdoctoral Fellowship in Canada.
- g) In the circumstances the respondent's case is that Canada is the *jurisdiction simpliciter* and conversely Kenya is *forum non conveniens* to wit:
  - i. The contract of employment concerned employment of the claimant by BC.

- ii. The choice of law in the contract is the law of BC.
- iii. The BC is more convenient forum to apply its own laws.
- iv. BC, Canada is therefore appropriate jurisdiction to hear and determine the claimant's case.
- v. The complaints subject of the suit were raised by the claimant before appropriate authority and the same should not be entertained.
- vi. The witnesses are based in BC.

h) Further the respondent has no assets in Kenya and Kenya is not a reciprocating state under the British Columbia's Court Order Enforcement Act, R.S.B.C. c. 78 and as such for the ensuing court order to be enforced in BC, a whole new suit will have to be initiated in BC.

The claimant filed the replying affidavit on 11.07.2019 through Chigiti & Chigiti Advocates. She opposed the application upon the following grounds:

- a) The respondent employed her as a postdoctoral scientist between February 2013 to April 2015 and from July 2014.
- b) She was deployed under supervision of Dr. Richard Lester to lead in the evaluation of the Grant Challenges Canada funded Weltel Project which was being implemented in the Northern Arid Lands of Kenya.
- c) The claimant and her supervisor were required to split their time between Kenya and Canada. In Kenya the operational base was the Weltel office at AMREF Kenya office (Lang'ata Road, next to Wilson Airport) and Weltel project sites in Kibera, Kenya. The work required frequent travel to Isiolo District Hospital and AMREF Isiolo office, and, neighbouring facilities in Nanyuki, Meru and the Northern Arid Lands of Kenya.
- d) The Weltel project management team spend a significant time working in Kenya and at material time the coordinator of the project Jay Carmichael was working in Kenya full time.
- e) The contract was therefore partly performed in Kenya and as at the time of the cause of action the claimant and her supervisor Dr. Lester were in Kenya.
- f) The contract of service was terminated on 09.04.2015.
- g) Under section 5 of the Employment Act, 2007 of Kenya, Part IV and section 87 of the Act applied to the contract of service and the Court enjoys jurisdiction to hear and determine the case. Section 12 of the Employment and Labour Relations Court Act confers the Court the exclusive jurisdiction to hear and determine the suit. Section 12(3) confers the Court with jurisdiction to order compensation as prayed for in the suit. Under section 13 of the Act, the Court has power to enforce its decisions. The claimant will invoke appropriate mechanisms to enforce any favourable order as may be given by the Court.
- h) The respondent enjoyed the claimant's services while working in Kenya and the cause of action arose in Kenya. In event of a favourable judgment, the claimant has capacity to file a fresh suit in Canada as may be necessary.
- i) The respondent submitted itself to Kenya Courts when it allowed the claimant to work in Kenya.
- j) The proceedings invoked by the claimant were respondent's internal procedures and do not diminish or replace the Court's jurisdiction.
- k) There is no contractual clause ousting the Court's jurisdiction.
- l) That the respondent's witnesses are in Canada is irrelevant to the jurisdictional issue.
- m) The application lacks merit and it should therefore be dismissed.
- n) The claim is based on the Bill of Rights per Articles 27, 28, 29, and 41 of the Constitution of Kenya 2010.

The Court has considered the parties' respective cases and makes findings as follows.

**First**, the Court has perused the contract of service. The relevant provision states thus, "**Continuation of employment beyond this probationary period will be dependent on satisfactory performance, availability of funds and compliance with University of British Columbia policies....**" The Court returns that as urged for the claimant, even in light of Policy 61 as invoked for the respondent, there is no established contractual provision that ousted the jurisdiction of the Court. The effect is that the Acts cited in Policy 61 would be the substantive law applicable in resolving the dispute as parties are bound accordingly by reason of Policy 61. The Acts cited in Policy 61 have not been established to oust this Court's jurisdiction or to impose the exclusive jurisdiction of the Canadian or BC courts. The Court follows the holding in Captain (Rtd) Charles K.W. Masinde –Versus- Intergovernmental Authority on Development [2018]eKLR that the

choice of law to apply to a contract of service is not synonymous to jurisdiction although they converge – the former relating to the law to govern a particular dispute and the latter to the authority or mandate of a court or tribunal to determine the dispute based on the chosen or applicable law.

**Second**, it has not been shown that the claimant invoked jurisdiction of a court with appropriate jurisdiction in Canada. The respondent has not disputed the claimant's case that she only invoked the respondent's internal dispute resolution mechanisms as per the applicable respondent's policies. Thus, there is no pending or determined suit by appropriate court in Canada about the matters in dispute in the present case so that the present suit is not an abuse of Court process.

**Third**, the evidence so far is that the cause of action accrued when the claimant and her supervisor were in Kenya and the contract of service was performed in Kenya and partly in Canada. Accordingly and as urged for the claimant, the Court has jurisdiction to determine the cause of action as it accrued at a time the claimant was serving as deployed in Kenya.

**Fourth**, as submitted for the respondent and as was held in **Raytheon Credit Corporation & Another –Versus- Air Al-Faraj Limited [2005]2 KLR 47** (cited with approval in **Barakat Exploration Inc Talpan Resources Inc. [2014] eKLR**), the Court has to grant leave to serve a party with summons to enter appearance, outside jurisdiction. The record shows that the claimant applied for such leave and it was granted on 13.02.2017 and the respondent entered appearance on 04.08.2017. The leave granted to serve summons outside the jurisdiction upon the respondent has not been challenged and the Court will not delve into the merits or otherwise of the leave as granted and upon the principle of *res judicata*.

**Fifth**, the Court returns that as submitted for the claimant, she'd avail herself such necessary legal mechanisms to enforce the resultant decree if decree turns out to be favourable to her. There is no doubt that the respondent would readily enforce a favourable decree against the claimant as may be given by the Court. The parties did not submit on provisions of the Employment Act, 2007 on the foreign contracts of service and the evidence is that in this case the contract was performed partly in Kenya, and, for avoidance of doubt, the Act does not remove foreign contracts of service from the jurisdiction of the Court but instead sections 83 to 86 of the Act expressly reinforce such jurisdiction.

In conclusion the application filed for the respondent dated 19.09.2017 is hereby dismissed with costs in the cause and parties are directed to take appropriate steps for expeditious hearing and determination of the suit.

**Signed, dated and delivered in court at Nairobi this Friday 18th October, 2019.**

**BYRAM ONGAYA**

**JUDGE**