



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2563 OF 2016

(Before Hon. Lady Justice Hellen S. Wasilwa on 7th October, 2019)

ARTHUR KAWINO.....CLAIMANT

VERSUS

POPULATION SERVICES

INTERNATIONAL (PSI).....RESPONDENT

RULING

1. The Claimant/Applicant, Arthur Kawino, filed a Notice of Motion application dated 24/04/2019 brought under *Rule 33 of the Employment & Labour Relations Court (Procedure) Rules 2016, Sections 3, 12(3)(vii), 16 and 29 of the Employment & Labour Relations Court Act and Articles 41(1), 48, 50(1), 159 and 162(2)(a) and (3) of the Constitution* against the Respondent, Population Services Limited.

2. He seeks for Orders to review, vary and or set aside the Court's orders made on 17.11.2017 striking out his claim herein and that the Court reinstates the claim and further directs that the matter be heard and determined on its merits. The Application is based on the following grounds that:-

1. On 17/11/2017, this Honourable Court struck out the Claimant's claim on the ground that the Claimant's employment contract with the Respondent dated 21/01/2016 expressly ousted the jurisdiction of this Honourable Court by providing that any dispute arising out of the said contract would be resolved by a single arbitrator in Washington, DC in the United States of America.

2. The Claimant has however realised that he is unable to raise the requisite air fare, legal fees and enough money to enable him live in America for the duration of his case and therefore successfully lodge his claim in the said United States of America.

3. The Claimant has also noted he does not qualify for the appropriate visa which would enable him travel to the United States of America.

4. These new developments and or discoveries have made it imperative that the ruling of this Honourable Court given on 17/11/2017 be reviewed in the interest of justice.

5. This Honourable Court has through judicial authorities established that the place of suing in an employment and labour dispute shall always be determined based on the convenience of the employee.

6. That both parties in this matter are based in Kenya and the evidence of the case is in Nairobi and that the Claimant would be greatly prejudiced should this Court decline to hear his case and refer him to the United States of America.

7. The issues raised by the Respondent in the said PO therefore involved matters of disputed facts which ordinarily should not and could not be resolved by way of a notice of preliminary objection.

8. There appears to be errors apparent on the face of the record which should warrant a review of the orders of this Court given on 17/11/2017.

9. This application in the circumstances of this case has been brought without any unreasonable delay and should therefore be determined on its merits.

10. That the interest of justice tilts in favour of allowing the Applicant's application herein.

11. The Applicant stands to suffer irreparable harm and damage if the instant application is not heard and determined as a matter of urgency.

12. The Applicant's Constitutional Rights under Articles 41(1), 47, 48 and 50(1) of the Constitution are now threatened with likely and imminent violation unless this application is heard and allowed as prayed.

3. The Application is supported by the Affidavit sworn by Claimant who avers that by conservative estimate, he would need approximately USD 50,000 to cater for his air ticket and other travel expenses, accommodation and legal fees in order to effectively pursue his claim in the United States of America.

4. That he is therefore unable to travel to the United States as he cannot raise the requisite finances and further, cannot meet the stringent visa requirements by the United States Government to enable him travel. That he also has a young family in Kenya, with one wife and two children aged 11 and 9 years and his first born sitting for his KCPE exams this year and that his travel and extended stay in the United States of America would have a negative disruptive impact on them.

5. That the Respondent has a Regional Office in Kenya through which it manages the office in Southern Sudan and that he was recruited in Nairobi and thus all his employment records are in the Respondent's Nairobi office. That his former supervisor in Southern Sudan is also a Kenyan who would be readily available in Nairobi as a potential witness and that the reason for termination of contract involved travelling with Kenya Airways from Kenya to Juba.

6. That the Respondent is aware of his financial situation but insists on having this dispute referred to the United States of America so as to unfairly defeat his claim. That the Respondent will not suffer any prejudice if this matter is heard and determined in Kenya.

7. The Respondent filed its Grounds of Opposition dated 17/06/2019 opposing the application herein on the following grounds:-

1) This Honourable Court is functus officio and lacks the jurisdiction to consider the prayers sought after delivery of the ruling on 17/11/2017.

2) The application is a belated appeal in disguise and an attempt to circumvent provisions of law relating to appeals in blatant abuse of court process.

3) The prayers sought in the application are akin to inviting the Honourable Court to rewrite the contractual terms voluntarily entered into between the parties and which is not permissible. The Application offends the principle of contractual freedom and sanctity of contracts.

4) The application does not meet the threshold for review under Order 45(1) of the Civil Procedure Rules and Rule 33 of the Employment and Labour Relations Court (Procedure) Rules to warrant the review of the ruling delivered on 17/11/2017 because:-

a) There is no error apparent on the face of the record;

b) No new and important material has been exhibited that could not be reasonably availed prior to the delivery of the Court's ruling on the Respondent's PO; and

c) The Application does not raise any issues for clarification in relation to the ruling delivered on 17/11/2017.

d) The Applicant is guilty of inordinate and inexcusable delay of over 16 months and therefore not deserving of any of the orders sought.

Applicant/Claimant's Submissions

8. The Applicant submits that under **Rule 33 of the Employment and Labour Relations Court (Procedure) Rules**, this Court has a wide and unfettered discretion to review its orders, judgment or ruling if an applicant can demonstrate discovery of new and important evidence among others. He cites the case of **JMK v MWM & another [2015] eKLR**.

9. He contends that the new regulations governing issuance of visa to the United States were facts not within his knowledge as at the time of determination of the Notice of PO and that he could not have brought the same to the attention of the court. That this falls within the meaning and intent of **Rule 33(1) (a) and (d) of the Rules**.

10. He submits that the mere existence of an arbitration clause in an employment contract does not in itself divest this court of the jurisdiction to hear this matter and that the court has in the past declined to uphold arbitration clauses in employment contract if their effect is to frustrate an employee's access to justice.

11. That this was demonstrated in the case of **Stephen Nyamweya & another –v- Riley Services Limited [2013] eKLR** where the court struck out a clause from the Claimant’s contract of employment and directed that the case proceed as if the said clause did not exist.

12. That this Court will also note that under the *United States Guideline for Non-Migrant Visa Categories*, there is no provision for a visa category allowing an applicant to travel to the United States for purposes of filing a lawsuit against a US citizen.

13. That this Court has jurisdiction to hear and determine this matter in the interest of justice and the right to a fair hearing and despite being ousted by the Contract. He cites the case of **Universal Pharmacy (K) Limited –v- Pacific Lines Limited & another [2015] eKLR** where the Court stated that:-

*“The position adopted by the Court of Appeal in the case of **United India Insurance Co. Ltd (supra)** and which I entirely agree with is that Kenyan Courts, despite the existence of an exclusive foreign jurisdiction clause in a contract, would assume jurisdiction when the case is filed in Kenya. The said case laid down the circumstances and the factors that the court has to consider in order to determine whether it should assume jurisdiction or not. The court (Madan, JA) stated as follows:-*

“The Courts of this country have discretion to assume jurisdiction over an agreement which is made to be performed in Kenya notwithstanding a clause therein conferring jurisdiction upon the Courts of some other country. The exclusive jurisdiction clause however should normally be respected because the parties themselves freely fixed the forums for the settlement of their disputes; the Court should carry out the intention of the parties and enforce the agreement made by them in accordance with the principle that a contractual undertaking should be honoured unless there is a strong reason for not keeping them bound by their agreement.”

14. The learned Judge in the **Universal Pharmacy case** above continued to state that in exercising its discretion, the court should take into account all the circumstances of the particular case and the following matters where they arise, may be considered, as set out in the case of **The Eleftheria (1969) 2 All CR 641** and which are:-

- 1) *In what country the evidence on the issues of fact is situated or more readily available and the effect of that on the relative convenience and expense of trial as between the Court of the country and the Court of the foreign country.*
- 2) *Whether the law of the foreign country applies, and if so, whether it differs from the law of the country in any material respects.*
- 3) *With what country either party is connected, and how closely.*
- 4) *Whether the defendants genuinely desire trial in a foreign country, or are only seeking procedural advantage.*
- 5) *Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would be deprived of security for their claim, be unable to enforce any judgment obtained, and be faced with a time bar not applicable in their country.*

15. The Applicant also cites and relies on the case of **Dorcias Kemunto Wainaina v IPAS (2018) eKLR** where Radido J supported the assertion that the question of application of foreign law may be irrelevant to the question of jurisdiction in certain instances.

16. He submits that the Constitution of Kenya does not envisage a situation where a Kenyan citizen would be denied justice on the ground that the cost of justice is too expensive for a citizen to afford. That if this Court declines to hear this matter it is highly unlikely that he will be able to travel to the United States and that his right under Article 50 of the Constitution will be curtailed. He prays that his application is allowed as prayed.

17. The Respondent did not file any submissions in this case.

18. I have considered all the averments of the Parties herein. Under rule 33, this Court can review its orders in the following circumstances:-

- 1) *“A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling:-*
 - a) *if there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;*
 - b) *on account of some mistake or error apparent on the face of the record;*
 - c) *if the judgment or ruling requires clarification; or*
 - d) *for any other sufficient reason”.*

19. In the case of the Applicant herein, he opines that there is an error on the face of the record in that the orders of the Court given on 17/11/2017 tilts the interest of justice against the Applicant who stands to suffer irreparable harm and damage if the orders sought in this application are not granted.

20. The Applicant prays that this Court reviews its orders for the reason that the Applicant will not get justice if the orders granted stay requiring him to proceed with the resolution of this dispute by a single Arbitrator in Washington.

21. In considering this application, I refer to Shadrack Wachira Gikonyo vs ABT Associates INC eKLR (2017) where I cited various case law among them Kanti and Company Limited vs South British Insurance Company Limited (1981) eKLR where Madan J in concurrence with members of the Court had this to say:-

“I am of the opinion that the defendant by entering an unconditional appearance submitted to the jurisdiction of the High Court, and it could not therefore abrogate or annul it unilaterally by entering an amended appearance even under protest without an order of Court releasing it from its admission and acceptance of the jurisdiction. Once a defendant submits to the jurisdiction of the Court, the Plaintiff acquires a vested interest which the defendant cannot deprive him of at his whim by entering a conditional appearance or an appearance under protest. As long as the unconditional appearance stood, as it stands even today, the Court was seized of jurisdiction to try the suit”.

22. This came position was cited by Lady J Mary Kasango in Universal Pharmacy (K) Limited vs Pacific International Lines (PTE) Limited and Another (2015) eKLR who held that by entering appearance unconditionally the defendant in that case could not contest the jurisdiction of the High Court of Kenya in favour of Singapore Courts.

23. In the current case, the Respondent/Applicant entered appearance unconditionally on 9/1/2017. The Preliminary Objection was filed on 31/3/2017 some 2 ½ months later.

24. However, the position of the law is as stated in the cited authorities above which indicate that the Respondent had submitted to this Court’s jurisdiction unconditionally and so he could not turn against that position.

25. Other than that non-conditional submission to this Court’s jurisdiction, I note that the Respondents have an office in Nairobi. They stand to suffer no prejudice if this dispute is handled in Kenya. Indeed the Claimant if he has to resolve this dispute would have to travel all the way to the USA and incur even more expenses which this Court can mitigate for both Parties.

26. It is therefore my position that there is an error on the record by this court having returned a verdict that the Claimant should resolve the dispute with Respondent in USA whereas this Court is already seized of the matter the Respondent having submitted to Court’s jurisdiction.

27. I therefore find this application has merit and I allow it and review the Court’s ruling of 17/11/2017 striking this claim out and reinstate it for hearing and disposal before this Court.

28. Costs in the cause.

Dated and delivered in open Court this 7th day of October, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Ogulla for Respondent – Present

Siahi holding brief Kenyatta for Claimant