



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1884 OF 2017

EMMANUEL FRESCO.....CLAIMANT

-VERSUS-

CAMUSAT KENYA LIMITED.....1ST RESPONDENT

CAMUSAT MAURICE LIMITED.....2ND RESPONDENT

RULING

Introduction

1. On 21.3.2019, the 2nd Respondent filed a Notice of Preliminary Objection (herein after referred to as PO), seeking for the suit against her to be struck out with costs for the following grounds:-

(a) The proper law of contract is the Law of Mauritius.

(b) That Claimant and 2nd Respondent expressly agreed that any conflict about the conclusion, performance, amendment, suspension or termination of the contract in issue would be decided by the competent court of law under the Law of Mauritius.

(c) The 2nd Respondent is a company incorporated in Mauritius, carrying on business in Mauritius, and having its registered offices in Mauritius.

(d) The contract in issue has the closest and real connection with the system of law of Mauritius.

(e) The Court of law in Mauritius have exclusive jurisdiction over the contract in issue and any disputes arising therefrom.

(f) This Honourable Court therefore lacks jurisdiction to hear and determine the Claimant's claim as against the 2nd Respondent.

(g) Consequently, having no demonstrable interest, right or claim against the 2nd Respondent, the Claimant lacks standing before this Court.

2. The said 7 grounds can be collapsed into one ground namely, that is, this court lacks jurisdiction to determine the suit against the 2nd Respondent. The said objection relates to the choice of law in the contract of employment between the claimant and the 2nd respondent dated 2.7.2014.

Facts of the case

3. Article 11 of the said contract states, in part:-

“The provisions of this contract of employment are complete with the disposition of the Law Mauritius, the collective Labour contract and the internal regulations of the employer...”

4. In addition to the foregoing Article 12 of the contracts states as follows:-

“The conflicts about the conclusion, the performance, the amendment, the suspension or termination of this employment contract shall be decided by the competent court of law under the applicable law.”

2nd Respondent's Submissions

5. The 2nd respondent submitted that this court lacks jurisdiction to hear and determine the claimant's suit against her. She submitted that the suit is founded on the unlimited term employment contract dated 2.7.2014. Article 11 and 12 of the contract expressly stated that the law applicable to the contract was the law of Mauritius and any dispute arising from the contract shall be decided by the competent court of law under the applicable law.

6. The 2nd Respondent further submitted that the court has no jurisdiction to rewrite the contract between the parties. She contended that the parties are bound by the terms of their contract unless coercion, fraud, or undue influence are pleaded and proved she urged the court to simply respect the parties choice of the forum for the settlement of their dispute settlement and enforce the agreement by the parties. She asked the court not to depart from the wishes of the parties and decline the invitation by the claimant to assume jurisdiction.

7. To fortify the foregoing, the 2nd Respondent relied on *United India Company Insurance Company Limited & 2 others Vs East African Underwriters (Kenya) Ltd [1985]KLR* where the court held that parties who have agreed to the exclusive jurisdiction of a foreign court should be held to their bargain except in exceptional circumstances and that the court will not assume jurisdiction unless:-

- (a) The contract is made in Kenya; or
- (b) The contract is governed by the laws of Kenya; or
- (c) If a breach of the contract is committed in Kenya.

8. She submitted that the claimant has not proved sufficient reasons to warrant the ousting of the choice of law/jurisdiction clause in the contract. She contended that the claimant admitted that the contract was not subject to Kenyan law. She further contended the contract neither was made in Kenya nor breached in Kenya. She also contended that the claimant was remunerated in Euros and he worked in many countries. Finally, she contended that the claimant has not suggested that he was coerced or unduly influenced into executing the country.

9. She relied on *Arthur Kawino v Population Services International (PSI) [2017]eKLR* where Ndolo J. upheld Preliminary Objection and dismissed the suits on the ground that the contract of employment had chosen foreign jurisdiction and the applicable law. She further relied on *Kenya Union of Employees of Voluntary and Charitable Organisation v Sudan Catholic Bishops Regional Conference [2013]eKLR* where Onyango J declined jurisdiction in a case where the contract was entered into in Sudan and subject to the laws of Sudan.

10. She further relied on *KMWK v British Airways Travel Insurance & Another [2017]eKLR* where the Court of Appeal confirmed a decision by the High Court which upheld a Preliminary Objection disputing jurisdiction of the Court on ground that the contract sought to be enforced has the closest and real connection with the system of the England. The 2nd Respondent therefore submitted that Mauritius law has the closest and most real connection for the following reasons:-

- (a) The 2nd Respondent's registered office was in Mauritius.
- (b) She had no place of business in Kenya
- (c) She was not operating in Kenya directly or through any agent.
- (d) The claimant was not resident in Kenya during the period of his employment by the 2nd Respondent.
- (e) The claimant was not subject to the local laws of Kenya on taxation and social security, nor did he remit any taxes to Kenya.
- (f) The claimant was paid in euros rather than Kenya shillings.

Claimant's submissions

11. The claimant submitted that the applicability of the Mauritius law to the contract of service herein does not dispose the Kenyan Courts of jurisdiction to deal with the matter. He contended that the choice of law does not oust the jurisdiction of the Kenyan courts to determine the dispute. In his view, the choice of Mauritius law by the parties only means that the Employment Act does not apply to the contract but its equivalent in Mauritius applies.

12. He relied on *Dorcus Kemunto Wainanina v IPAS [2018]eKLR* where Radido J. held that a domestic court may be called upon to apply foreign law in a contractual situation and clarified that choice of law is distinct from the choice of jurisdiction. The claimant therefore argued that this court ought to apply the Mauritius Employment Law on the claim against the 2nd Respondent.

13. He relied on the *United India Insurance Co. Ltd v E.A. Underwriters Ltd [1985]KLR 998* where the court held that the onus of establishing a strong reason for avoiding the jurisdiction of Kenyan Courts is upon the party seeking to avoid the jurisdiction.

14. Finally, the claimant submitted that notwithstanding the application of the choice of law, the court still has jurisdiction to offer protection to the employee in accordance to the Kenyan Law. He relief on *Halsbury's Laws of England 4th Edition Re-issue Vol. 8(3)* to support the foregoing submissions.

Analysis and determination

15. The issue for determination is whether this court has jurisdiction to hear and determine the claimant's suit against the second respondent. There is no dispute that the clause 11 of the contract of employment between the claimant and the 2nd respondent dated 2.7.2014 provides that it was completed with the disposition of the law of Mauritius. It is also not disputed that clause 12 of the contract provides that an conflict arising from the contract including performance and termination of the contract shall be decided by the competent court of law under the applicable law.

16. Courts in this land have made decisions that choice of law does not necessarily mean choice of jurisdiction. In *Dorcas Kemunto Wainaina v IPAS [2018]eKLR*, Radiido J held that:-

“23. Although the question of jurisdiction is connected to the issue of choice of law, the two are conceptually distinct.

24. In other words, question of application of foreign law may be irrelevant to the question of jurisdiction in certain instances.

25. For instance, an employment contract may be governed by the law of the United states but the Employment and Labour Relations Court of Kenya would have jurisdiction to arbitrate in disputes alleging breach of contract, but applying the law of United States where the parties have expressly agreed so, or where the court after assessment of the connecting or dominant festures and the law assumes jurisdiction.

26. It needs no authority therefore to state that a domestic court may be called upon to apply foreign law in a contractual situation as obtain herein. The distinction in simple terms is on choice of jurisdiction and choice of law.”

17. I am persuaded by the foregoing decision of my brother judge. What the parties chose in this case was only the law applicable to their employment contract and not the jurisdiction . If the parties intended that their disputes be done by a court in Mauritius, nothing was simpler then expressly stating so. It is therefore my view that this court has jurisdiction to hear and determine the dispute between the claimant and the 2nd Respondent herein provided that it applies the Law of Mauritius.

18. Even if the parties had expressly chosen the or conferred jurisdiction to a foreign court, this court sill has discretion to assume jurisdiction if there is a strong reason for overriding the jurisdiction clause in the contract. In *United India Insurance Co. Ltd & 2 Others v East African Underwriters (Kenya) Ltd [1985]KLR 998*, the Court of Appeal held that:

“The courts of this country have a discretion to assume jurisdiction over an agreement which is made to be performed in Kenya notwithstanding a clause therein conferring jurisdiction. 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 the bound by their agreement.”

19. The Court of Appeal then went ahead to set out the principles to be considered before local court exercises discretion to assume jurisdiction and thus:-

“(a) in exercising its discretion the court should take into account all the circumstances of the particular case;

(b) in particular, but without prejudice to (a), the following matters, where they arise, may properly be regarded:-

(i) 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 expenses of trial as between the court of the country and the court of foreign country;

(ii) whether the law of the foreign Court applies, and if so, whether it differs from the law of the country in any material respects;

(iii) with what country either party is connected, and how closely.

(iv) whether the defendant genuinely desire trial in the foreign country or are only seeking procedural advantage; (v) 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, be faced with a time bar not applicable in their country.”

20. The Court of Appeal concluded that Kenya was the national forum for the dispute because it is where all the alleged breached took place, therefore the evidence of the issues of fact was both wholly situated and readily available as also the place where all essential witnesses were situated. The court further held that if the trial was to be done abroad, the witnesses were likely not to travel there and they could not be compelled to travel there to give evidence. The court further noted that the expense of the trial abroad would be staggering. The court also found that the law applicable to the case both in India and Kenya was the same and further that two out of four of the partes were closely connected to Kenya because they were locally incorporated companies and voluntarily domiciled in Kenya. Finally, the court considered that sending the parties away to India for trial and brining the foreign decree to Kenya for execution faced a possibility of rejection or challenge that may result to prolonged wrangles.

21. In the instant case, the claimant employee, is a French National born in Paris while the respondent, employer is a company registered in Mauritius but with operations in Kenya, East Africa and other regions of Africa as per the contract of Employment between the two parties dated 2.7.2014. The contract provides that:-

“ARTICLES 2.1 – The Employee’s activity is conducted in Nairobi Company office, in Kenya.

2.2 The Employer has the right to ask the Employee to work in other cities and/or other local company offices, respectively in areas of interest: Caribbean, Bulgaria, Romania, Lebanon, I rake, Morocco, Egypt, Cameroon, Uganda, Botswana, Guinea, Mali, Ivory Coast, Benin, Togo, Niger, Senegal, Congo, Tanzania, Madagascar, French Polynesia, Vanuatu and Myanmar...

ARTICLE 3 – The Employee’s position/function are REGIONAL MANAGING DIRECTOR IN ENYACAM COMPANY...

ARTICLE 6 – The employee will be paid a monthly net salary of 7886 (Seven Thousand eight hundred eighty six euros)...”

22. The foregoing excerpts of the contract confirm that although both parties to the contract were foreigners, the claimant was based in Nairobi where the second respondent has a regional office. The foregoing view is fortified by salary amendment letter dated 1.1.2016 signed between the claimant and the 2nd Respondent which states in part:-

“RE: AMENDMENT TO SALARY TRANSFER FOR

MR. EMMANUEL FRESCO

This is to certify that the above named person is an employee of Camusat Mauritius and Camusat Kenya from 01/07/2014 and serves the company as Regional Managing Director based in Nairobi – Kenya.”

23. The dispute leading to this case involves alleged misconduct by the claimant herein Kenya and disciplinary proceedings and the consequential separation took place herein Kenya. It follows that, therefore that the witnesses and the evidence for use in the trial are both readily available here in Kenya and as such referring it for trial in Mauritius will lead to increase in costs to the claimant.

24. Applying the facts of this case to the Court of Appeal decision in **United Indian Insurance Co. Ltd Case** [supra], I find that this court is the natural forum connected to the dispute herein. The reason beings that:-

- (a) The contract was performed in Kenya.
- (b) Claimant was and is resident in Nairobi Kenya while the 2nd respondent has a regional office in Nairobi.
- (c) The alleged misconduct and breaches leading to the suit herein took place in Kenya
- (d) Referring to the suit to Mauritius will add to expenses of the trial in travel costs for claimant and witnesses from Kenya to the foreign court.
- (e) The claimant enjoyed protection of Kenyan Employment Law under the international Law.

25. Consequently, I find that there is a strong reason shown to warrant this court exercise discretion to assume jurisdiction over this dispute. Accordingly, I reject the P.O and dismiss it with costs.

Dated, Signed and Delivered in Open Court at Nairobi this 22nd day of November, 2019

ONESMUS N. MAKAU

JUDGE