



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 88 OF 2017

(Before Hon. Lady Justice Hellen S. Wasilwa on 13th February 2018)

EDWARD LWANGU MAMBOLEO.....CLAIMANT

VERSUS

TRISTAR TRANSPORT LIMITED....RESPONDENT/APPLICANT

RULING

1. The Application before Court is the Preliminary Objection filed by the Respondent Applicants herein on 20th June 2017. The Preliminary Objection raised is to the effect that this Court lacks jurisdiction to entertain this claim.

2. The Respondents filed a Notice of Motion brought under Section 12 rule (3) and (4) of the Employment and Labour Relations Court Act 2014, Order 17 rule (1) and (8) of the Employment and Labour Relations Court (Rules), 2016 and seek the following orders:-

i) THAT this Honourable Court be pleased to strike out the Memorandum of Claim dated 18th January 2017 on the grounds that it is scandalous, frivolous and vexatious; or in the alternative and without prejudice to the foregoing.

ii) THAT this Honourable Court lacks the jurisdiction to adjudicate over the main suit herein as well as any further applications in and/or arising from the main suit herein.

iii) THAT all further proceedings in and/or arising from the main suit herein be stayed pending hearing and determination of this Application.

iv) THAT Plaintiff do bear the costs of the instant application.

v) THAT this Honourable Court be pleased to give such further or other directions as it may deem fit and just to grant.

vi) THAT the costs of the Application and for this suit generally be provided for.

3. The Application is based on the following grounds:-

a) THAT the Respondent/Applicant did not at any one time enter into any agreement with the Claimant giving rise to the obligations as prayed for in the main suit or at all.

b) THAT this suit is brought for the mere purpose of prejudicing and vexing the Respondent in this suit.

c) Respondent stands and continues to be greatly prejudiced should this suit continue to exist as the same is a nullity ab initio.

d) THAT this entire suit is therefore an abuse of Court process and in the interest of justice and fairness ought to be struck out with costs to the Respondent.

e) FURHTER that the Plaintiff/Respondent will not be prejudiced in any way if this application is allowed.

4. The Application is also supported by the supporting affidavit of Vilayannur Rumamoorthy Subramanian the Respondent's Human Resource Manager herein.

5. The deponent avers that the Claimant was its former employee but for a period of 5 months after which he resigned through a letter dated 30th October 2014 to seek employment with Tristar Aviation as per the letter Appendix KVM1.
6. The Respondents also aver that they were never parties to a contract of employment dated 22nd October 2014 between the Claimant and Tristar Limited Liability Company incorporated in the United Arab Emirates (UAE) that is enclosed in the Claimant's list of documents.
7. The Applicants deny seconding the Claimant to the Respondent and indicate that their relationship ended on 22nd October 2014 when the Claimant resigned.
8. The Applicants aver that the Claimant was under the employment and supervision of Tristar Limited Liability Company incorporated in the United Arab Emirates (UAE) as per the emails correspondence between Claimant and his supervisors (Appendix KVM2).
9. The Applicants further aver that the contractual agreement entered into on 22nd October 2014 stipulated that the same be governed by the Local Laws they say refer to the law of Central Africa Republic.
10. The Applicants seek that their application be allowed.
11. The Claimant Respondent opposed this Preliminary Objection. They filed their Replying affidavit sworn on 17th July 2017 on 19th July 2017. The Deponent, the Claimant herein reiterated the averments in his Statement of Claim. He avers that the Respondent's affidavit is full of untruth and lies and that the purported resignation was mere or less a transfer within the same company.
12. He avers that it is the Respondents staff who organized for his travel to Central Africa Republic (CAR) as per Annexure ELM1 which are email exchanges between him and the Respondents staff.
13. The Claimant also avers that the Respondent arranged his re-assignment (not resignation) to Central Africa Republic (CAR) who confirmed to pay his salary until December 2014 as per ELM2.
14. He avers that according to the official search conducted at the Registrar of Companies office, the Respondent's Director include Tristar Transport Limited Liability Company (ELM3) and that it is this Tristar Transport Limited Liability Company which he was reassigned to in Central Africa Republic (CAR) but all communication and his employment grievances were handled by Tristar Transport Limited in Kenya (Appendix ELM4).
15. He avers that Appendix KVM2 sworn by one Vilayannur Ramamoorthy Subramanian clearly indicate that all emails emanated from Tristar Transport.com.
16. The Respondent want this application dismissed accordingly.
17. The Applicant filed a supporting affidavit on 6th September 2017 and in their averments confirm the averments of the Respondent that Claimant resigned from the employment and so terminated the contract between themselves and himself.
18. I have examined all the averments from the parties herein. This is an application, which is in the nature of a Preliminary Objection. A Preliminary Objection is a matter, which should be decided on points of law. In the case of **Mukisa Biscuits Company vs Westend Distributors Limited (1969 EA 696)** stated as follows:-

***“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is the exercise of judicial discretion.*”**

19. In the matter before me there are issues of evidence that I will have to deal with including the real identity of the Respondent and whether they paid the Claimant's salary even after he left them pointing to a continuity in service. It will be impossible to determine those issues without going into the merits of this claim.
20. It is therefore my finding that the issues raised are not capable of being determined as a Preliminary Objection. I dismiss the Preliminary Objection and direct that the claim proceeds for hearing.
21. Costs in the cause.

Read in open Court this 13th day of February, 2018.

HON. LADY JUSTICE

HELLEN WASILWA

JUDGE

In the presence of:

Barasa holding brief Gachuru

No appearance for Claimant