



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

CAUSE NO. 1393 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

ADAM MILLER.....CLAIMANT

VERSUS

WS INSIGHT LIMITED.....RESPONDENT

RULING

Before me for determination is a notice of preliminary objection dated 2nd February 2018 by the respondent seeking to have the claim herein dismissed with costs on the following grounds –

1. This Court has no jurisdiction to hear and determine the claimant's claim, the claim not having arisen from a dispute between an employee and an employer.
2. The claimant's assertions and pleadings demonstrate that he seeks the enforcement of an illegal contract against the age-old maxim of *ex-turpi cause oritur non actio*.
3. The claimant's claim lacks merit and should be dismissed with costs to the Respondent.

The preliminary objection was disposed of by way of written submissions.

Determination

The parties have made elaborate submissions on jurisdiction and nature of claimant's engagement, that is, whether he was an employee or independent contractor.

The parties however failed to address the issue as to whether the suit is suitable for a preliminary objection.

In the celebrated case of **MUKHISA BISCUIT MANUFACTURERS LIMITED -V- WEST END DISTRIBUTORS LIMITED**, the court defined a preliminary objection as –

"A preliminary objection is in the nature of what used to be a demurrer. It raises a 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 if what is sought is the exercise of judicial discretion"

By filing the notice of preliminary objection, the respondent, whose defence is not on record is presumed to be admitting that all the facts pleaded in the memorandum of claim are correct.

By extension the respondent is therefore admitting the facts pleaded at paragraph 5 of the claim to the effect that –

"The respondent and the claimant engaged in detailed negotiations prior to the Claimant's employment in which the remuneration that the Claimant was to be paid was set out. The Claimant finally agreed to take up the position of CEO upon reaching an agreement that he would be paid inter alia a salary of Kshs.1.5 million per month."

It is further presumed that the respondent is admitting the facts at paragraph 18 of the claim to the effect that –

“The Claimant has suffered emotional distress on account of the manner in which he was dismissed from the Respondent’s employment, the financial constraints endured and the Respondent’s harassment of the Claimant at his current place of work by virtue of the non-compete clause.”

The Claimant thus humbly submits as follows in support of his claim:

- i. The claimant served the respondent diligently and did not breach any of his obligations as set out under his employment contract.
- ii. The claimant’s summary dismissal was unlawful and unjustified and due process was not followed contrary to articles 41, 50 and 232 of the constitution of Kenya, 2010 as read together with sections 41, 43 and 45 of the employment act no. 11 of 2007.
- iii. The respondent has violated the rules of natural justice, equity and fair play in failing to give the claimant an opportunity to be heard before making a decision on her dismissal.
- iv. In the circumstances the claimant seeks damages" for the respondent’s unlawful and unprocedural dismissal, as well his terminal dues and general damages.”

If the foregoing is the position then it means that the preliminary objection is misplaced as the respondent does not dispute the fact that the claimant was an employee of the respondent and that the employment was terminated unprocedurally. It further implies that this court has jurisdiction to hear this matter and the first ground of preliminary objection must therefore fail.

The second ground of preliminary objection is a matter that cannot be raised

by way of preliminary objection as it is subject to evidence. As was held in the case of **STANLEY MUNGAI MUCHAI -V- NATIONAL OIL CORPORATION** where the court stated –

“The court holds that whether the relationship between parties’ amounts to a contract of service or contract for service is an issue both of law and fact but largely *one of fact*.”

The Judge continued thus –

“The court holds that an issue whether the contract of service exists in any case is not a preliminary issue going to jurisdiction of the court. It is a substantive issue of law and fact to be determined after the hearing of the case. Accordingly, the court holds that the Industrial Court always has jurisdiction to determine matters in dispute as to whether a contract of service exists and the appropriate stay for such determination is not a preliminary point of law but a mixed point of law and fact, substantively taken up at the hearing and backed with comprehensive consideration of each case on its own merits.”

The same position was taken by the court in the case of **REPUBLIC -V- ELDORET WATER AND SANITATION COMPANY LIMITED EX-PARTE BOOKER ONYANGO AND 2 OTHERS (2007) eKLR** wherein the court held–

“A party raising a preliminary objection on a point of law must proceed on the basis (only for the preliminary point) that all facts pleaded by the other side are correct and albeit this, the cause of action is not sustainable as a matter of law. The Objector in such a situation is deemed to accept the correctness of the other party’s facts for the purposes of the application. To do otherwise would render the preliminary objection to be not a true demurrer. An objector cannot introduce any factual dispute or controversy and must stick to pure points of law”

The foregoing are sufficient grounds to dismiss the preliminary objection. This ruling will however be incomplete if I do not mention the issue as to whether the relationship between the claimant and the respondent falls within the jurisdiction of this court. The only court that can make that determination is this court. And it can only do so after hearing evidence on the subject. This therefore narrows down to an issue of fact and falls outside the preview of a preliminary objection.

For the reasons stated herein, I find no merit with the preliminary objection and dismiss the same with costs to the claimant.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26TH DAY OF OCTOBER 2018

MAUREEN ONYANGO

JUDGE