



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR REATIONS COURT OF KENYA AT NAKURU

CAUSE NO.1 OF 2017

CYRUS WAITHAKA MWANGI.....CLAIMANT

VERSUS

EQUITY BANK LIMITED.....RESPONDENT

RULING

1. The respondent, Equity Bank Kenya Limited by Notice and Preliminary Objection filed on 9th November, 2017 and under paragraph 6 of the Statement of Response object to the claim on the grounds that;

(a) The cause of action arose in South Sudan outside the jurisdiction of this court.

(b) The claimant was an employee of Equity Bank South Sudan Limited.

2. The parties addressed the objection by way of written submissions.

3. The respondent submit that the claimant was employed by Equity Bank South Sudan Limited by letter dated 17th August, 2011 as Relations Manager, Equity bank Limited – Sudan Subsidiary. The letter of appointment is co-signed by the executive director of Equity bank South Sudan Limited and the Director Human Resources and Customer Experience. The letter of confirmation dated 1st march, 2013 is also signed by Hai – Malakal Branch, the General Manager, Equity bank South Sudan Limited.

4. The letter posting the claimant dated 17th September, 2012 is issued by the General Manager, Equity Bank South Sudan Limited and which indicates the claimant was posted to Juba branch as a Trainee Branch Manager. The claimant was also issued several posting letters under the general manager to work in different branches.

5. The claimant was issued with a Certificate of Service by Equity Bank South Sudan Limited stating he was their employee from 3rd June, 2012 and was terminate din his employment on 31st July, 2016.

6. The respondent submits that the cause of action arose in South Sudan. Al correspondence relates to South Sudan. The appropriate forum to file suit is South Sudan.

7. Section 4 of the Industrial Court Act, 2011 sets out the jurisdiction of the court read together with article 162(2)(a) of the Constitution, 2010. The court is granted jurisdiction within the Kenyan borders only.

8. The objections raised by the respondent meet the requisite threshold established in the case of **Mukisa Biscuits Manufacturing Co. Ltd versus West End Distributors Ltd (1969) EA**. Any objections on points of law which arise out of the clear implications of the pleadings can be addressed by the court. in **The Owners of the Motor Vessel Lillian ‘S’ versus Caltex Kenya Limited (1989) KLR 1** and the findings that questions with regard to the jurisdiction of a court must be addressed and raised at the earliest opportunity. The court should decide on the issue right away based on the material before it.

9. The respondent also submits in the case of **Kenya Union of Employees of Voluntary and Charitable Organisations versus South Sudan Catholic Bishops Regional Conference [2013] eKLR**. The court held that it had no jurisdiction to hear and determine claims where the cause of action arose in Sudan and subject to the law of Sudan and proceeded to dismiss the case.

10. This court lack territorial jurisdiction to hear and determine this matter and should allow the objections raised.

11. The claimant on his part submits that the objections raised by the respondent lack merit and should be dismissed with costs.

12. The claimant was an employee of the respondent, Equity Bank Limited vide letter dated 30th December, 2014 and was transferred to South Sudan at Equity Bank (Kenya) Limited. Such letter addressed the transfer of the claimant by the respondent to South Sudan with effect from 1st January, 2015. The claimant was to retain his work benefits with the respondent.

13. The letter of appointment submitted by the respondent and dated 17th August, 2012 and letter of posting dated 9th August, 2016 confirm the South Sudan entity is a subsidiary of the respondent, Equity Bank Limited.

14. The contract of employment was signed in Kenya and such allow either party to file suit in Kenya. The claimant's pensions were to be paid in Kenya and the employer in South Sudan had to channel all such benefits to Kenya.

15. The claimant also submits that the letter terminating the claimant's employment and dated 7th August, 2016 the employer describes itself as a subsidiary of Equity Bank (Kenya) Limited. The claimant was though recruited in South Sudan, his benefits were to be transferred to Kenya.

16. The court has jurisdiction to hear the matter

Determination

17. The single question to be addressed herein is whether the court has territorial jurisdiction to hear this matter.

18. Before addressing the issue at hand, and though not addressed by either party, and following principles laid in the case of **Mukisa Biscuits Manufacturing Co. Ltd versus West End Distributors Ltd [1969] E.A.** preliminary objections should relate to questions of law and not on facts. Preliminary Objections should consist a point of law which has been pleaded, or which arises by clear implication out of pleadings. This is settled.

19. The respondent in the preliminary objections raised has relied on the provisions of the *Industrial Court Act, 2011*. Such law does not exist. Such law was repealed in 2016. The Court is now regulated and governed under the provisions of the Employment and Labour Relations Court Act, 2011.

20. The above put into account, the substantive issue shall be addressed on its merits.

21. The Supreme Court in the case of **Macharia and Another versus Kenya Commercial Bank Ltd & 2 Others** [sup ct Civil Appl. No. 2 of 2011] (UR), held that;

exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of Law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings.

22. Article 162(2)(a) and (3) of the Constitution, 2010 read together with section 12 of the Employment and Labour Relations Court Act, 2011 give the court exclusive jurisdiction over matter of employment and labour relations in Kenya.

23. The preamble to the constitutive Act is crucial to quote;

An Act of Parliament to establish the Employment and Labour Relations Court to hear and determine disputes relating to employment and labour relations and for connected purposes

24. The Court is established and clothed with jurisdiction to hear and determine disputes relating to employment and labour relations and for connected purposes.

25. Some relations that relate to employment and labour relations are outlined under section 12 of the constitutive Act, the Employment and Labour Relations Act, 2011. The relations relating to the *connected purposes* are not outlined. It is however acknowledged under section 12 of the Act that the court shall address all employment and labour relations disputes and;

... or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—

26. The claimant, in the Memorandum of Claim at paragraph 3 avers that on 17th August, 2012 he was employed by the respondent as the Relationship Manager and on 30th December, 2014 he was transferred to Equity Bank (Kenya) Limited and on 25th August, 2016 he received his letter terminating employment on 9th August, 2016.

The claimant has attached these letters to his pleadings.

27. The letter of appointment dated 17th August, 2012 is executed between the claimant and **Equity Bank Limited** and signed for by Gerald Warui, Director HR & Customer Experience and Paul W Gitahi, Executive Director – Equity South Sudan. The contract has set out the terms and conditions of employment for the claimant as the Relationship Manager – Operations Equity Bank Sudan Subsidiary.

28. The letter terminating employment and dated 9th August, 2016 is issued **Equity Bank (S.S.) Ltd.**

29. Clause 15.0 of the letter and contract of employment makes provision that the claimant would be subject of transfer to any of the respondent's branches/business units depending on the exigencies of service. the letter does not provides for the *place of work* in terms of section 10 of the Employment Act, 2007.

30. It is however clear that the claimant's address in the letter of appointment is Nairobi. Such is a city in Kenya. The nationality of the claimant is not in issue and can be surmised from the letter of appointment and his address that he is a person of Kenyan origin and was sourced from Nairobi to work as the respondent's Relationship Manager- Operations Equity Bank Sudan Subsidiary. Clause 3.0 on remuneration, the salary due was in Kenya shillings. Clause 7.3 has a medical cover benefit for self and family quantified in Kenya Shillings. Clause 8.0 on statutory deductions relates to the law applicable with regard to deductions for PAYE, NSSF, NHIF and HELB.

31. By letter dated 17th September, 2012 the claimant was posted to Juba Branch after his *successful completion of your induction program*. This posting was by *Equity Bank South Sudan Limited*.

32. On 4th March, 2016 the claimant had a temporary transfer by *Equity Bank (S.S.) Limited* to the Head Office.

33. In the letter of appointment parties have not set out the law to be applied in case of any dispute. Equally, without setting out what protections became due to the claimant as a foreign national of Kenyan origin working in Kenya in terms of part 11 (XI) of the Employment Act, 2007 he cannot be denied audience before this court.

34. In the case of **Shadrack Wachira Gikonyo versus Abt Associates Inc [2017] eKLR** it was held that;

... the contract was executed in Kenya and Claimant resides in Kenya. The Claimant was required to comply with tax laws and obligations of his home country as well as in the country of assignment. In fact he was a third country national employee meaning it was recognised that he was employed in Kenya and assigned in South Sudan on a foreign contract of service under Kenyan law.

35. The employer has the duty to ensure all employment letters and contracts clearly and concisely spell out the terms and conditions to be applicable between the parties. Any lapse, vague provision and ambiguous provisions must be interpreted for the benefit of the employee. In this case, where the claimant was issued with a letter of employment without details as to which law is to apply where there was a dispute, the place of work and place of execution, and he now opts to attend before this court, he cannot be locked out.

36. In the case of **Dede Case, Todd versus British Midland Airways Limited (1978) ICR 959** the court held that;

A man's base is where he should be regarded as ordinarily working even though he may spend days, weeks or months, working overseas. I would only make this suggestion. I do not think that the terms of the contract held much in these cases.....You have to find at the material time where the man is based.

37. In the case of **Universal Pharmacy (K) Limited versus Pacific International Lines (PTE) Limited & another [2015] eKLR** the High Court while addressing the question as to which forum the parties ought to have filed suit set out the conditions precedent to be addressed and also established the exceptional circumstances under which a court can assume jurisdiction. In a proper case which that would warrant the court to assume jurisdiction over the dispute despite the existence of the exclusive foreign jurisdiction clause such reasons must be articulated.

38. In this case the letter of employment being clear to the extent that employment was by the respondent entity, Equity Bank Limited and with the analysis above, the court has the requisite jurisdiction to hear and determine the suit. The claimant cannot be denied audience with the court.

Accordingly, the preliminary objections by the respondent lack merit and are hereby dismissed. Costs to the claimant.

Dated and delivered at Nakuru this 11th day of October, 2018.

M. MBARU JUDGE

In the presence of: