



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU**

**CAUSE NO.194 OF 2017**

**SCHOLASTICA ANYONE KILAHA.....CLAIMANT**

**VERSUS**

**EQUITY BANK KENYA LIMITED.....RESPONDENT**

**RULING**

The respondent, Equity Bank Kenya Limited filed Notice of Preliminary Objection on 15<sup>th</sup> November, 2017 on the grounds that;

*This court has no jurisdiction to hear and determine this case for the reasons 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*

Both parties filed written submissions.

The respondent submits that the claimant was an employee of Equity Bank South Sudan Limited and not the respondent. by letter of appointment dated 1<sup>st</sup> February, 2011 the claimant was employed by a subsidiary of the respondent for the position of Relationship Manager. The claimant was also issued with letter of confirmation issued by the General Manager of Equity Bank South Sudan Limited and dated 30<sup>th</sup> July, 2012. The claimant was working at the Juba branch.

By letter dated 27<sup>th</sup> May, 2014 the claimant was promoted and then issued with letter of transfer dated 15<sup>th</sup> March, 2016 from Juba branch to Amarat Supreme Branch in the same capacity with effect from 5<sup>th</sup> April, 2016. The claimant was then issued with a letter terminating employment by the employer, Equity Bank South Sudan Limited.

The cause of action arose in South Sudan where the employer was based and this court has no jurisdiction to hear and determine the matter.

Section 4 of the *Industrial Court Act, 2011* read with article 162(2) (a) of the constitution, 2010 establish the court to hear and determine employment and labour relations matters in Kenya. The court cannot hear matters which arise in South Sudan. Without jurisdiction this court cannot proceed and hear this matter as held in

**Owners of Motor Vehicle Vessel 'Lillian S' versus Caltex Oil Kenya Ltd 1989 KLR.**

In the case of **Kenya Union of Employees of Voluntary and Charitable Organisations versus Sudan Catholic Bishops Regional Conference [2013] eKLR** the court held that where the contract of employment was entered into in Kenya and subject to Kenya law but to be performed partly in Kenya and partly in Sudan, the court has no jurisdiction to hear and determine cases which are entered into in Sudan and subject to the laws of Sudan.

The claimant submits that she was an employee of the respondent and the court has jurisdiction to hear and determine this matter. By letter dated 15<sup>th</sup> March, 2016 transferring the claimant to work in Amarat Supreme Branch South Sudan at Equity Bank (Kenya) Limited, the letter noted that the transfer was to Equity Bank Kenya Ltd (EBKL). Such transfer was with terms and conditions existing at the time. The claimant also accrued benefits such as leave recognised by EBKL, pension scheme and medical insurance. The Sudan Company being a subsidiary of the respondent, the principal employer was to in doubt as the respondent.

The contract was signed in Kenya and addressed in Nairobi. The contract was subject to application of statutory requirements under NSSF and NHIF in Kenya and not South Sudan. Such contract is subject to Kenyan law as held in the case of

## **Nakuru Cause No.1 of 2017 Cyrus Waithaka Mwangi versus Equity Bank Kenya Limited.**

By letter dated 1<sup>st</sup> December, 2011 the claimant was appointed by the Equity Bank Group as the Relations Manager, Equity Bank South Sudan at a monthly salary of Kshs.150,000.00 per month. The appointment came with various benefits and including a leave allowance in Kshs.12,000.00 per annum, a medical cover in Kenya shillings, a pension scheme regulated under the RBA Rules, (Retirement Benefits Act), and statutory deductions to be effected in accordance with the law and relating to PAYE, NSSF, NHIF and HELB loans.

Under clause 15.0 of the letter of appointment, it was a term thereof that the claimant would be transferred to any of the Bank's branches/business units depending on the exigencies of service.

The claimant's address is noted to be P.O. Box 71193-00622 Nairobi.

The claimant was confirmed in her employment and by letter dated 15<sup>th</sup> March, 2016 was transferred to Amarat Supreme Branch.

From the foregoing, the contract of employment was secured in Kenya, for work outside Kenya. This is in accordance with section 10(3)(f) of the Employment Act, 2007 which provides as follows;

*(f) where the employee is required to work outside Kenya for a period of more than one month—*

*(i) the period for which that employee is to work outside Kenya;*

*(ii) the currency in which remuneration is to be paid while that employee is working outside Kenya;*

*(iii) any additional remuneration payable to the employee, and any benefits due to the employee by reason of the employee working outside Kenya; and*

*(iv) any terms and conditions relating to the employee's return to Kenya.*

Must be addressed as terms and conditions of the contract of service/employment. Upon securing such rights and benefits, such a contract having been made and secured for a Kenya citizen to work outside the Republic of Kenya and such protection being based under Kenyan law, the court cannot be denied its requisite jurisdiction to hear and determine any matter(s) arising therefrom.

So serious is a matter where a Kenyan citizen is removed from the Republic to work abroad under provisions that are deceptive, outside and contrary to the provisions of the Employment Act, 2007. Section 86 of the Act makes it an offence to entice any person to work outside of Kenya without an appropriate foreign contract of service. Such security is anchored in the Employment Act, 2007 and nowhere else. This court cannot be denied jurisdiction with regard to any claims arising therefrom pursuant to the provisions of section 89 of the Act;

*(1) Nothing in this Act shall prevent an employer or employee from enforcing their respective rights and remedies for any breach or non-performance of a lawful contract of service made outside Kenya, but the respective rights of the parties under that contract as well against each other as against third parties invading those rights may be enforced in the same manner as other contracts*

In my humble view this was the position subsisting 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.*

My reading of the award in **Kenya Union of Employees of Voluntary and Charitable Organisations versus Sudan Catholic Bishops Regional Conference [2013]** is that the parties had an agreement with regard to which law was to be applicable. The law in the Sudan. With respect, the clarity of section 86 and 89 of the Employment Act, cited above, any citizen of Kenya removed to work abroad is thus secured. In **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 be heard laid out several relevant principles as follows;

*The ouster clause in contract giving exclusive jurisdiction to foreign court by Kenya Courts was extensively discussed in the Kenyan case of **United India Insurance Co. Ltd. vs. E.A. Underwrites (Kenya) Ltd. [1985] KLR [898]**. This authority is quoted by both parties and is Court of Appeal decision. In that case there was a clause in contract conferring exclusive jurisdiction on a foreign court. The application was made to stay the suit instituted in Kenya and the principles for consideration in such circumstances were set out clearly. The court held:*

1. *Kenya Courts have discretion to assume jurisdiction over an agreement which is made to be performed in Kenya notwithstanding a clause in it conferring jurisdiction on a foreign court. The discretion should be exercised by granting a stay of proceedings in local courts unless a strong reason for not doing so is shown.*

2. *The onus of establishing a strong reason for avoiding the jurisdiction of Kenya courts is on the party who seeks to avoid*

*that jurisdiction and that burden is a heavy one.*

*3. In exercising its discretion, the court should take into account all the circumstances of the particular case.*

*In the present case the facts show that the evidence of drivers and authorities under the traffic and licensing laws are here in Kenya and such evidence would be more readily available in Kenya and it would be convenient and less expensive in Kenya courts (and the law of foreign courts would not be applicable.*

It would follow in this case that the benefits accruing to the claimant under the contract of employment with the respondent are well secured under Kenyan law and it would suffice for the matters herein to be heard and determined by this court.

**Accordingly the court has jurisdiction to hear and determine matters herein and the objections by the respondent are hereby dismissed. Costs to the claimant.**

**Dated and delivered in Nakuru this 15<sup>th</sup> day of November, 2018.**

**M. MBARU**

**JUDGE**

In the presence of: .....