



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO 1266 OF 2012**

**ISAAC OPICHO MUKHWANA.....CLAIMANT**

**VS**

**DIAKONIA SWEDEN.....RESPONDENT**

**RULING**

1. On 25<sup>th</sup> July 2012, the Claimant filed a claim for wrongful termination of employment against the Respondent. The Respondent filed a Memorandum of Response on 16<sup>th</sup> October 2012 and the matter opened for trial on 7<sup>th</sup> May 2014.

2. The matter was adjourned on several occasions at the parties' instance and when it came up on 14<sup>th</sup> March 2016, the attention of the Court was drawn to a preliminary objection raised by the Respondent by notice dated 11<sup>th</sup> March 2016. This ruling responds to that objection.

3. The basis of the objection is that this Court lacks jurisdiction to entertain the Claimant's claim because his employment contract expressly provided that the applicable law would be that of the place of work being Garowe, Somalia.

4. The Claimant opposes the objection and states that having entered an unconditional appearance and thereafter filed a Memorandum of Response and Counterclaim, the Respondent had submitted to the jurisdiction of the Court.

5. The Claimant further submits that the Court had raised the issue of jurisdiction *suo moto* and had made a determination assuming jurisdiction which was not challenged. The Claimant reads mischief in the objection being raised in the course of the proceedings.

6. The Claimant states that the contract of employment dated 11<sup>th</sup> April 2011 was entered into, signed and concluded in Nairobi, Kenya. Consideration was also paid to the Claimant in Kenya. Further, the Respondent maintained its main office in Kenya and only operated a field office in Garowe, Somalia.

7. The Claimant referred to a document titled '*Somalia Country Programme:*

*Human Resources Issues for International Staff based in Garowe, Puntland*' providing for Rest and Recuperation (R&R) as follows:

(a) 8 weeks in field and 7 days in Nairobi

(b) Flights for R&R arranged by Diakonia on EC and UN flights

8. This document further provides for work at the Regional office in which case per diem rates for Kenya would apply.

9. From the aforementioned document, the Claimant concludes that his employment contract was to be performed partly in Kenya and partly in Somalia.

10. In urging its case, the Respondent relied on the famous case of ***Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR*** where the Court of Appeal held that without jurisdiction, the Court has no power to make any step. Reference was also made to the Supreme Court decision in ***Samuel Kamau Macharia & Another v Kenya Commercial Bank & 2 Others [2012] eKLR*** where it was held that jurisdiction is not an issue of mere procedural technicality as it goes to the very heart of the matter.

11. Regarding the Claimant's employment, Counsel for the Respondent referred to Clause 4.1 of the Respondent's Human Resource Handbook which provides as follows:

***"Conditions of employment shall be regulated between the employer and the employee in accordance with existing labour laws and collective agreements in the country where the workplace is situated."***

12. The Claimant's employment contract dated 11<sup>th</sup> April 2011 was executed in Nairobi with the place of work being Garowe-Somalia.

13. The question before the Court is whether the contract of employment as read together with Clause 4.1 of the Respondent's Human Resource Handbook ousts the jurisdiction of this Court.

14. In order to answer this question, I need to inquire into the Respondent's legal form and the nature of its operations. A perusal of the documentary evidence filed in Court, reveals that the Respondent is an international non-governmental organisation with a wide global network. It operates a regional office in Nairobi where the Claimant's employment contract was executed and issued.

15. It further emerges that the Respondent operates in security zones where field staff work in a non-accompanied environment for a fixed period of time after which the Respondent facilitates their travel for rest and recuperation (R&R).

16. In light of this background, can one say that it was the intention of the parties to the employment contract dated 11<sup>th</sup> April 2011 that disputes arising therefrom would be outside the jurisdiction of this Court? While 4.1 of the Respondent's Human Resource Handbook makes reference to existing labour laws and collective agreements generally, the Court found no evidence of any specific law or agreement incorporated into the Claimant's employment contract.

17. As held by the Court of Appeal in ***Kanti & Co Ltd v South British Insurance Co Ltd [1981] eKLR*** a jurisdiction ouster clause must be clear and unequivocal. I have looked at Clause 4.1 of the Respondent's Human Resource Handbook together with the Claimant's employment contract and find nothing stripping this Court of jurisdiction to entertain the Claimant's claim.

18. That being the case, I find the objection raised by the Respondent not well taken and proceed to overrule it with costs being in the cause.

19. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 13<sup>TH</sup> DAY OF JANUARY 2017**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Masila for the Claimant

Mr. Tebino for the Respondent