



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT NAIROBI
CAUSE NO. 270 OF 2016

(Before Hon. Lady Justice Hellen S. Wasilwa on 27th February, 2017)

SHADRACK WACHIRA GIKONYO.....CLAIMANT

VERSUS

ABT ASSOCIATES INC RESPONDENT

RULING

1. The Application before Court is a Notice of Preliminary Objection dated 4.4.2016 filed in Court on 6.4.2016 where the Respondent raised the following objections:

1) That this Honourable Court lacks jurisdiction to entertain this suit for the reason that:

a) This Honourable Court cannot assume jurisdiction over a matter that is outside its territorial jurisdiction.

b) The contract of employment between the parties is governed by the laws of the Republic of South Sudan.

c) That the above contract was exclusively performed in the Republic of South Sudan.

2. In support of this Preliminary Objection, the Respondents filed submissions dated 9.9.2016 on 13.9.2016 and also filed a list of authorities on the same day.

3. The Respondents have submitted that this Court cannot assume jurisdiction over a matter outside its territorial limits because of the *lex loci laboris* principle. This is a principle of law which provides that the applicable law in employment matter is always the law of the Country in which the employee was based or working during the term of his contract.

4. They have submitted labour law is highly territorial and one cannot assume the jurisdiction of another Country and all territorial limits must be respected.

5. They submit that in this regard, Kenyan Courts cannot assume the jurisdiction of matters within the territorial limits of the Republic of South Sudan. They cited **Dede Asi Annine Amanor – Wilks vs. Action Aid Internaital (2014) eKLR** where this principle was explained as follows:

“Labour standards are viewed as falling within international public policy. States will not cede their sovereignty easily over issues that concern implementation of labour standards within their territorial boundaries. Like criminal law, labour law is highly territorial. the maximum is labour in lex loci laboris, which means that national law should be applied to every labour relationship, created within the territorial boundaries of the respective state”.

6. They aver that in paragraph 3 of the Memorandum of Claim the Claimant admitted that he was employed as an Analyst/Health Financial Advisor and he was based in Juba in the Republic of South Sudan and so by virtue of the applicable law, only the law of South Sudan is applicable in the circumstances.

7. In the **Dede Case**, the Claimant was a national of Ghana and resident of the United Kingdom but based in Kenya and it was held that Kenyan Law governed her contract.

8. In the **Dede Case, Todd vs. British Midland Airways Limited (1978) ICR 959** was cited where Lord Denning states as follows:

“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”.

9. They have submitted that the contract was transnational and was under private international law, and so the law governing this contract is the law of the Republic of South Sudan.

10. They aver that the advertisement for recruitment was from the United States of America and was written in both English and Arabic. The letter of offer of employment was from the United States of America where the Respondent is situated. The letter of acceptance of employment was from Kenya where the Claimant is domiciled but the employment was to be performed in the Republic of South Sudan.

11. The Respondents also submitted that Courts should be cautious not to assume jurisdiction over such transnational transactions outside Kenya. They cited **Raytheon Aircraft Credit Corporation and Another vs. Air All Faraj (2005) eKLR³** where Court of Appeal held as follows:

“I do not agree with respect, to the construction given by the Superior Court to Section 60(1) of the Constitution. That Section does not authorise the High Court to disregard private international law status of the choice of law.....”

12. They aver that the terms of the contract informed the Claimant that he would be subject to the local laws of South Sudan on taxation and social security. That the Claimant’s and Respondent’s office were in South Sudan and the contract was rendered in South Sudan. They cite **Bonython vs. Commonwealth of Australia (1950) UKPCHCA 3 486, 498** where the Privy Council explained the relationship between the proper law and the principle of the closest and most real connection as follow:

“the proper law of the contract (is) the system of law by reference to which the contract was made or that with which the transaction had its closest and most real connection”.

13. They state that the Court has no jurisdiction to handle the matter since jurisdiction is everything. They want the Court to dismiss this suit accordingly.

14. The Claimant opposed the Preliminary Objection herein. The Claimant filed their submissions. They stated that they filed their claim on 21.2.2014 seeking compensation for wrongful termination of employment.

15. The Respondent filed an unconditional Memorandum of Appearance dated 19.3.2014 and followed

with a Response to the Claim on 3.4.2014.

16. On 6.4.2016, the Respondent filed a Notice of Preliminary Objection.

17. The Claimants have submitted that the Respondent waived its Honourable Courts jurisdiction by filing an unconditional Memorandum of Appearance and thereby submitting to the jurisdiction of this Court in Kenya and therefore cannot be allowed to question it now.

18. They cited **Kanti and Company Limited vs. South British Insurance Company Limited (1981) eKLR** where the Hon. J. Madan with the concurrence of the other members of the Court had the following to say:

“I am of the opinion that the defendant by entering an unconditional appearance submitted to the jurisdiction of the High Court, and it could not therefore abrogate or annul it unilaterally by entering an amended appearance even under protest without an order of Court releasing it from its admission and acceptance of the jurisdiction. Once a defendant submits to the jurisdiction of the Court, the Plaintiff acquires a vested interest which the defendant cannot deprive him of at his whim by entering a conditional appearance or an appearance under protest. As long as the unconditional appearance stood, as it stands even today, the Court was seized of jurisdiction to try the suit”.

19. The Claimant cited **Petra Development Services Limited vs. Evergreen (Singapore) PTE Limited and Another (2014) eKLR** where the jurisdiction of Kenyan Courts was considered *vis a vis* the English Courts. The Court stated as follows:

“it follows that by filing an unconditional Memorandum of Appearance on 20th June 2014, the Carrier (the defendant) waived that jurisdiction of English and wholly submitted to this jurisdiction...”.

20. They also cited **Universal Pharmacy (K) Limited vs. Pacific International Lines (PTE) Limited and Another (2015) eKLR** where Lady J. Mary Kasango held that by entering appearance unconditionally the defendant in that case could not contest the jurisdiction of the High Court of Kenya in favour of Singapore Courts.

21. They aver that this Court has jurisdiction to handle this matter and they want the Preliminary Objection dismissed.

22. They submit that the action and conduct of the Parties confirm jurisdiction of this Court as the contract was executed in Kenya and the place of execution will determine where the contract is made.

23. They also state that Claimant was entitled to overseas allowance which is Sudan in this case and he was required to comply with tax requirements of country of the assignment (which is Sudan).

24. The claimant avers that the Respondent agreed to evacuate employees abroad so Sudan was abroad here as per their Appendix 5.

25. On a balance of convenience, the Claimants avers that in case of **United India Insurance Company Limited and Others versus East African Underwriters (K) Limited (1985) eKLR** they submit that Respondents have an office in Kenya and this is where they were served with suit documents.

26. Claimant resides in Nairobi and contract was executed in Nairobi so going to Sudan is not convenient. The Respondents are insisting on jurisdiction to frustrate the contract. They cite **American Express International Banking Corporation vs. Atul (1990-1994) EA 10** where the issue of a debt incurred in Singapore and guarantor was in Uganda, the Supreme Court of Uganda ruled that the Uganda Court was best suited to handle matter on a balance of convenience.

27. They contend that in 2014 when war broke out in Sudan, it is Respondent who evacuated Claimant to Kenya. They contend that this Court has jurisdiction and insist case should proceed. They state that *lex laboris* principle will not apply in our context because the Employment Act has a provision on foreign contracts of service.

28. Having considered submissions of both parties, I note that Appendix 1 is the employment contract which was executed in Kenya on 10th February 2012. According to the letter of offer, the position offered to the Claimant was based in Juba, South Sudan but the Claimant was informed that he was responsible for complying with tax laws and obligations in his home country as well as in the country of assignment.

29. From the authorities cited by the Respondent, labour law is highly territorial and the maxim applicable is *lex loci laboris* which means that national law should be applied to every labour relationship created within the territorial boundaries of the respective states.

30. The Claimant in this case executed his contract in Kenya but he was informed that he would be based in Juba South Sudan and so going by the law of *lex loci laboris*, the South Sudan labour law was to apply to him.

31. Is there however any principle that would allow parties to waive jurisdiction?

32. Authorities cited by the Claimant above – see **Kanti & Company Limited versus South British Insurance Company Limited; Petra Development Services Limited versus Evergreen (Singapore) PTE Limited and Another (2014) eKLR; Universal Pharmacy (K) Limited versus Pacific International Lines (PTE) Limited and Another (2015) eKLR** point to the fact that filing an unconditional Memorandum of Appearance is tantamount to submitting to the jurisdiction of the Court where the Memorandum of Appearance is filed and is therefore waiving jurisdiction to accept jurisdiction where the Memorandum is filed. This, the Claimant did.

33. Apart from the above stated position, the Claimant submitted that the Court would decide on the matter based on a balance of convenience. Reference is made once more to the case of **American Express International Banking (Supra)** where SC of Uganda considered the principle of balance of convenience and decided that the right forum to handle the case would have been Singapore but for the reasons of convenience decided that the High Court of Uganda was the convenient Court to handle the case of all Parties.

34. In this case, 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. Infact 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 Respondent also is an International Organization and has offices in several Countries and Kenya is one of them. The Respondents were served with pleadings in this case in Kenya at their offices along Ngong Road in Nairobi.

36. It is apparent therefore that the Respondent waived jurisdiction to have this case determined in any other jurisdiction other than Kenya and the balance of convenience is to have the matter handled in Kenya where Respondents have an office.

37. I will therefore find the Preliminary Objection lacking merit and I dismiss it accordingly and order the case to be set down for hearing.

Read in open Court this 27th day of February, 2017.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mulindi for Respondent - Present

Weru holding brief for Obura for Claimant- Present