



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 124 OF 2016

(Before D. K. N. Marete)

ABRAHAM KIMUTAI CHERUIYOT.....CLAIMANT

VERSUS

AGA KHAN HOSPITAL KISUMU.....RESPONDENT

RULING

This is a Preliminary Objection by the respondent raised in her Reply/Defence to the Memorandum of Claim/Statement of Claim dated 17th October, 2016 as follows;

20. The respondent states that the claim is fatally and fundamentally defective and shall raise a preliminary objection seeking the dismissal of the claim with costs.

21. The jurisdiction of this Honourable Court is denied. The respondent states that the cause of action arose in Kisumu where the claimant was employed and carried out his duties and hence this court lacks jurisdiction. The respondent gives notice that it shall raise the issue of jurisdiction as a preliminary point at the first date this cause is listed seeking transfer of the cause to Kisumu Court.

The Respondent in her written submissions dated 18th February, 2017 submits that the employment contract in the instant case was executed and performed in Kisumu and therefore in accordance with Section 14 and 15 of the Civil Procedure Act, governing the place of suing this matter ought to be at the Employment & Labour Relations Court – Kisumu.

Section 15;

“Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction;

(a) the defendant or each of the defendants (where there are more than one) at the time of commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain; or

(b) any of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain, provided either the leave of the court is given, or the defendants who do not reside or carry on business or personally work for gain, as aforesaid acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises.”

Again, the respondent submits that this suit is fatally defective and does not disclose a cause of action in terms of the provisions of the Employment Act, 2007 and also lacks form. This is as follows;

...as we shall endeavor to prove, the claimant has not disclosed any cause of action. The statement of claim is a poor draftsman's work and is essentially vague in content and in effect. A reading of the claim seemingly suggests that the claimant avers that he was unfairly dismissed from employment. However, this is further complicated by the fact that the claimant does not pray for a declaration of unfair or wrongful dismissal but rather goes to compensation. It is difficult to see why compensation should preclude a declaration of unfairness in the whole process. Assuming a claim for unfair dismissal sections 44, 45 and 46 of the Employment Act are the determinants.

It is the Respondent's conclusive submission that the claimant merely cites frustration and indeed was unable to pursue the procedures and routines of the respondent and therefore should not claim default on her part. Further, his was resignation and in any event, he was taken through disciplinary process but turned down the offer.

The claimant opposes the preliminary objection and submits that this does not meet the criteria in the authority of Mukhisa **Biscuits Manufacturing Co. Ltd – Vs – West End Distributors Ltd (1969) E.A 696** as follows;

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure 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.”

He further relies on the authority of Samuel **M. W' Njuguna Versus Benjamin Achode and 8 Others, Nairobi Milimani Commercial & Admiralty Division Civil Case No. 711 of 2012** in disclaiming territory jurisdiction as follows;

“ Be that as it may, given that the Constitution of Kenya Act, 2010 give this court unlimited original jurisdiction in civil and criminal matter and given the supremacy of the Constitution over the Civil Procedure Act, and given further article 159(2) (d) of the Constitution vouches for substantive justice even in the face of procedural technicalities, a party seeking to oust the jurisdiction of one station of the High Court in favour of another, must in my view go beyond the face value of the tenets of convenience stipulated in Section 15 of the Civil Procedure Act, At the minimum, the applying party must demonstrate that the right of access of justice under Article 48 of the Constitution is at threat. This should be advance by placing before the court material showing that beyond the pillars of convenience stipulated in Section 15 of the Civil Procedure Act, there is a verifiable motive on the part of the Plaintiff to use geographical inconvenience to defeat the substantive ends of justice. A mere apprehension of such a possibility may not suffice. Further, the Applicant should demonstrate that it has come to court at the earliest opportunity with its request”

Again, the authority of **Peter Ochalo Omburo versus Inter-Diocesan Properties Limited, Kericho Employment and Labour Relations Cause No. 211 of 2015**, this court observed as follows;

We need not belabor, Article 162(2) (a) of the Constitution of Kenya, 2010 sets out this court as a court with the status of the High Court and therefore it is conferred with unlimited original jurisdiction in matters under its purview. An issue of territorial jurisdiction would in the circumstances be difficult to establish.

This preliminary objection fails on both fronts. It does not afford the tenets of a preliminary objection as set out in the authority of Mukhisa Biscuits aforecited or even atune to the constitutional provisions on the jurisdiction of this court. It is speculative and unworthy of grant.

I am therefore inclined to dismiss the preliminary objection with costs to the claimant.

Delivered, dated and signed this 26th day of April 2017.

D. K. Njagi Marete

JUDGE

Appearances

1. Mr. Nyamoronge Instructed L.G. Menezes & Company Advocates for the Respondent.
2. Mr. Bii Instructed by Bii V.K. & Company Advocates for the Claimant.