



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF

KENYA AT NAIROBI

CAUSE NUMBER 981 OF 2017

STEPHANE DUBUIS.....CLAIMANT

VERSUS

KONE KENYA LIMITED.....1ST RESPONDENT

KONE S. A.....2ND RESPONDENT

RULING

1. By a notice of preliminary objection dated 13th June, 2007 the respondent contended that this court lacked jurisdiction to hear and determine the present proceedings as the Courts of France had exclusive jurisdiction to hear and determine the same under clause 22.2 of the International Assignment Agreement between the claimant and the respondent under which the claimant was assigned to work in Kenya.

2. In support of the objection Mr Amin for the respondent submitted that Courts in France had the exclusive jurisdiction in the matter and that “home country” as stated in the International Assignment Agreement in France. According to counsel this was a straight forward employment contract. The claimant was a French national and freely signed the agreement that he will return to France at the expiry of his assignment. Mr Amin submitted that no exceptional circumstances had been demonstrated.

3. Mr Kithi for the claimant on his part submitted that there was distinction between employment contract and commercial contracts. According to counsel, the International Assignment Agreement recognized two sets of contracts. One local and another foreign and further that the agreement involved three parties. Mr Kithi submitted that the contract with the home company became suspended upon the international assignment. Under clause 1 of the International Assignment.

4. Under clause 1 of the International Assignment Agreement the definition of employer assignment and who takes responsibility for the contract. According to counsel, the host country (Kenya) took responsibility for the contract. The host country issues work permit and the employee is obliged to observe Kenya’s laws. Further, according to counsel the claimant was paid in Kenya shillings.

5. Mr Kithi further submitted that the implementation of the contract was guided by the Kenya laws. According to Counsel, France became relevant after the expiry of the Kenya contract. Counsel further submitted that parties can contract as they wish but could not contract to oust jurisdiction. He further submitted that the agreement between the parties was not a foreign contract envisaged under part 9 of the Employment Act. It was a contract subject to the supervision of the Act and there had to be a bond deposited with the relevant Ministry. Counsel therefore submitted that the special nature of the contract

made clause 22.1 inapplicable. Kenya was the best available jurisdiction to determine the dispute since the potential witnesses were in Kenya and the cost of transporting witnesses would be prohibitive. This according to counsel would amount to unfair hearing. Mr Kithi further submitted that Kenya was a sovereign country hence could not cede its sovereignty over disputes which occur within it.

6. Mr Amin in response submitted that the court was being asked to ignore a clear and express agreement between the parties yet no single merited reason had been presented why the court should ignore the agreement. According to counsel, there was only one contract before the court and that contract obliged the employee to obey local laws. The local laws bound his family as well. These were normal provisions in international contracts. Regarding foreign contract, counsel submitted that the provision referred to Kenyan contracts operationalized abroad.

7. The International Assignment Agreement stated that it was entered into by and among KONE KENYA LTD situated in Kenya (host company); KONE SA situated in France (Home company) and Mr Stephane Dubuis a citizen of France (employee). The agreement acknowledged that the claimant was an employee of the Home company but was being assigned to perform duties for the Host company as well as the Home company. The agreement further defined an employer to mean the Home company or the Host company depending on the factual connection.

8. Under clause 4.1 of the agreement the claimant was obligated to perform the duties assigned to him faithfully and diligently and to the best of his ability to promote the interest of the employer and of any other company belonging to KONE. The agreement further provided that the claimant would on a day to day basis be under the direction and subject to the rules and customs of the Host company. Under clause 5.1 the Host company was responsible for the payment of the claimant's salary.

9. From the afore-cited clauses, it would appear that whereas the claimant was initially an employee of the home company, the entry into the tripartite agreement among the home company, host company and the claimant effectively and wholly assigned his services to the host company. The claimant consequently became under effective control of the host company and was in return compensated for this services by the host company. This measure of control and factual connection constitute some of the key ingredients to be noted when seeking to establish the existence of employer-employee relationship.

10. To this extent whereas clause 22.2 of the agreement provided that the parties agreed to be an exclusive subject to the jurisdiction of the home country courts for all purposes relating to the agreement, the factual connection between the claimant and the host company rendered him an employee of the host company for the period of his international assignment in Kenya. The Host company is a local company hence governed by the Kenyan Law hence the Employment Act. This legal position of the host company becomes more understandable when juxtaposed to the factual circumstances forming the dispute before the court as I understand it.

11. The claimant faces imminent disciplinary process founded on workplace incidents at the home company. There appears to have been a misunderstanding between the claimant and one of his colleagues Diana at the home company concerning allegations of inappropriate sexual affiliation which the claimant had been accused maliciously spreading rumours over. The issue was escalated to a disciplinary matter and the claimant summoned to a disciplinary hearing at the home company in France.

12. The contract and circumstances under which the present dispute arose are obtaining at the home company here in Kenya. The potential witness are also within the host company. It would therefore be unreasonable to conduct the disciplinary process in the home country in France.

13. This court having found that for all practical purposes the claimant was an employee of the host company which is bound by the Kenyan Law, there exists preemptory provisions of the host country legislation which ordain that the present dispute be adjudicated in Kenya.

14. In conclusion the court will order as regards the Notice of Motion dated 25th May, 2017 that the respondent shall be at liberty to proceed with the disciplinary hearing against the claimant if it so desires

but in Kenya under the provision of the Employment Act. Hence, no interlocutory injunction will issue in that regard. Second, pending the hearing and determination of the disciplinary process the claimant shall unless separated from duty in accordance with the respondent's operational human resource manual if any and so provides for such separation, remain in respondents' employment without loss of salary, position or benefits pending the hearing and determination of this suit.

15. Costs in the cause.

16. It is so ordered.

Dated at Nairobi this 14th day of July 2017

Abuodha J. N.

Judge

Delivered this 14th day of July 2017

In the presence of:-

..... for Claimant

.....for Respondent

Abuodha J. N.

Judge