



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.211 OF 2015

(Before D. K. N. Marete)

PETER OCHOLA OMBURO.....CLAIMANT

VERSUS

INTER-DIOCESAN PROPERTIES LIMITED.....RESPONDENT

R U L I N G

The matter in issue here is a preliminary objection raised by the respondent in her Statement of Response dated 8th July, 2015 as follows;

21. “The Respondent avers that this claim has been filed in the wrong jurisdiction both the claimant and respondent being based in Kisumu and shall at the earliest opportunity raise a preliminary objection to have this struck out.”

This questions the jurisdiction of the court in dealing with the matter on ground of lack of jurisdiction occasioned by the fact that both the claimant and the respondent are based in Kisumu and therefore the issue in dispute.

When the matter came up for hearing of the preliminary objection on 28th January, 2016 counsel for the respondent opened by submitting that the cause as filed and presented raised an issue of territorial jurisdiction and that it should either be transferred to the Employment & Labour Relations Court at Kisumu or struck out altogether. This is on grounds that the parties engaged in an employment contract for nineteen (19) years in Kisumu and therefore under Section 15 of the Civil Procedure Act, this suit should have been filed where the cause of action arose and also where the defendant resides. The defendant in the circumstances is a body corporate based in Kisumu.

It is the respondent’s further case that Section 3 of the Industrial Court Act, 2011 provides for the principle objective of the court. This is however, left hanging and utterly unsubstantiated. She submits that the respondents would in the circumstances incur expenses if the suit is tried by this court.

The respondent disagrees with the submissions of the claimant/respondent that the preliminary objection is not based on a pure point of law. She also disagrees with the authorities cited in opposition to the preliminary objection by the claimant/respondent and in the penultimate prays that the matter be transferred to Kisumu for hearing.

The claimant/respondent in opposition to the preliminary objection submits a case for the jurisdiction of

this court in dealing and hearing of this suit. He further seeks to rely on his skeleton submissions dated 27th January, 2016 and filed on 28th instant.

It is the submission of the claimant/respondent that he resides in Kericho and that there are no material particulars to support the respondent's contention that the contract was performed in Kisumu. Again, Section 15 of the Civil Procedure Act is not applicable but instead, Section 12 of the Industrial Court Act which defines the jurisdiction of this court.

The claimant/respondent further submits that no prejudice shall be occasioned by the hearing of this suit by this court and also that financial consequences are not enough or adequate support for the objection. He closes by submitting that this is a delay tactic intended to occasion backlog contrary to the principle objective of court as stipulated at Section 3 and Section 29 (1) of the Industrial Court Act, 2011 coupled with the judicial authority vested to the court under Article 159 of the Constitution.

The claimant/respondent in his skeleton submissions further seeks to rely on the following authorities in support of his opposition to the preliminary objection. He opens with a definition of a preliminary objection as follows;

*“That a preliminary objection is a point of law if taken would dispose of the suit **in limine**. It is what was formerly known as a “**demurrer**” (from the French word demurrer “to wait or stay”.*

Additionally, the claimant/respondent submits as follows;

*This point was the subject of consideration very recently by **Justice Nzioki wa Makau in Industrial Cause No. 1981 of 2011 as considered workers Union -VS- Moi University and Rivatex E.A Ltd where the Court reiterated the principles for preliminary objection as:***

- a. *A preliminary objection raises a point of law.*
- b. *A preliminary objection 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.*
- c. *It cannot be raised if what is sought is the exercise of judicial discretion.*

Again, the claimant/respondents position is that the respondent's preliminary objection does not fit the definition of a preliminary objection per the leading authority of **Mukhisa Biscuits Manufacturing Co. Ltd – VS- West end Distributors Ltd (1969) E.A. 696**. In the celebrated case Sir Charles Newbold defined a preliminary objection 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.”

It is the claimants submission that the respondent does not seek the exercise of judicial discretion. The preliminary objection as it stands does not state its basis on points of law. What the preliminary objection seeks to achieve is, without legal foundation, to determine the issue of whether the honourable court has territorial jurisdiction to hear and determine the suit herein.

..... the issue of jurisdiction like in the instant case may not be obvious and may only be resolved after significant consideration of the issues in dispute. One of such issue is whether the claimant was employed by the respondent and if so where was the claimant posted within the boundaries of the republic of Kenya and where does the claimant reside at the present time or when the instant suit was instituted. In such instances, the issue of jurisdiction ceases to be a preliminary point and it becomes a substantive issue for determination alongside the other substantive issues in dispute. Thus, whether jurisdiction is a substantive

or preliminary issue will depend upon whether the circumstances leading to jurisdictional dispute are largely obvious or largely intricate.

Further, the claimant sought to rely on the authority of **KENYA PLANTATION AND AGRICULTURAL WORKERS UNION – VERSUS – KAKUZI LIMITED NAKURU CAUSE NO. 71 OF 2014** where it was held as follows:-

“That the court will determine the place of hearing of the proceedings that fall within its jurisdiction from case to case as will be necessary to do so. That the Industrial Court of Kenya as established is vested with nation-wide territorial jurisdiction. That despite the place the court may sit; it constitutes one forum and platform for resolving the disputes that fall within its jurisdiction”

The issue of universality of jurisdiction for this court was emphasized in the authority of **TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE – VERSUS – NAKURU WATER AND SANITATION SERVICES COMPANY and the ATTORNEY GENERAL, NAKURU PETITION NO. 5 OF 2013** where the court observed and held as follows:-

“That in mapping out the boundaries to determine jurisdiction, the court must consider the four crucial traditional elements of jurisdiction namely parties, territory or geographical area, remedies that may issue and subject matter in dispute. That the authority to decide will relate to the parties, the territory or geographical area of the dispute, the remedies that may issue and the subject matter involved. Depending on the authority to decide as may be conferred, all the four parameters may be pertinent or one or two of them may apply. In the opinion of the court, unless any of the four results into a bar to jurisdiction in the given case or circumstance, presence of any of the four as permitting jurisdiction will be sufficient for the court to assume jurisdiction and proceed to entertain and determine the case at hand. It is given that constitutionally, this court exercises territorial jurisdiction throughout the Republic of Kenya.”

This is the lesser option to the finding in Kakuzi Ltd aforesaid.

The claimant/respondent further relied on the authority of **Nairobi Milimani Commercial & Admiralty Division Civil Case No. 711 of 2012 Samuel M. W'njuguna versus Benjamin Achode and 8 Other** where the court observed as follows;

“Be that as it may, given that the Constitution of Kenya Act, 2010 gives this court unlimited original jurisdiction in civil and criminal matters, and given the supremacy of the Constitution over the Civil Procedure Act, and given further that 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 to justice under Article 48 of the Constitution is at threat. This should be advanced 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.”

Faced with this kind of situation, Rika J, in the case of **Kenyatta Maita Mwawashe Versus Plan International Kenya, Industrial Court of Kenya at Mombasa, Cause No.5 of 2014** observed as follows;

1. The Application for transfer on its face, does not appear to this Court to raise a substantive issue. It is based on Sections 15 and 18 of the Civil Procedure Act, and made under the Civil

Procedure Rules.

2. The Civil Procedure Act Cap 21 of the Laws of Kenya applies to proceedings in the High Court and subject to the Magistrate's Court Act, to proceedings in the Subordinate Courts.

3. The Industrial Court is neither the High Court, a Magistrate's Court, nor a Subordinate Court, but a Specialized Court with the status of the High Court, created under the Industrial Court Act number 20 of 2011, pursuant to Article 162 (2) of the Constitution of Kenya. Its procedure is regulated through the Industrial Court Procedure (Rules), 2010.

4. There is no requirement under the Industrial Court Act and the Industrial Court (Procedure) Rules, 2010, for filing of employment and labour disputes in the geographical jurisdictions where they are deemed to arise.

5. Until recently the Court was located entirely in Nairobi, with Judges travelling out of station on circuits. The question of transfer has therefore not arisen in the past. The circuits aimed at bringing justice close to the people, easing the cost of litigation to the disempowered.

6. The Judges of the Industrial Court traditionally determined the geographical place of the trial, on the basis of the convenience of the Employee. Sections 15 and 18 of the Civil Procedure Act are completely irrelevant.

7. However Plan International is a Worldwide Organization with a presence in many Cities and States, as borne out in its letterhead. It was submitted by the Claimant that the Respondent has a presence in Mombasa. The Claimant has since leaving employment settled in Mombasa. As a former Employee seeking terminal benefits and compensation from the Respondent, the Court must exercise its discretion in his favour, as to the place of the trial.”

This elaborate citation of the ruling by my brother Rika, J is intended to set the record straight on the law and practice of this court on issues of jurisdiction. Luckily, the matter before him was an application for reinstatement and revival of an application for transfer of the cause to another court. Here, we are faced with a preliminary objection and therefore must apply a slightly different parameter in determination, in as much as the subject matter is the same.

I buy the sentiments and submissions of the claimant/respondent that this preliminary objection is not based on a pure point of law as would be required per

the authority of **Mukhisa Biscuits Manufacturing Co. Ltd – VS- West end Distributors Ltd (1969) E.A. 696** aforecited. The issue of geographical jurisdiction like is submitted would require a verification of data and evidence to establish thus falling short of tenets of a preliminary objection. Overall, the issue of the jurisdiction of this court cannot be sustained on geographical or territorial grounds, this court having the exercise of territorial jurisdiction throughout the Republic of Kenya.

We need not belabor, Article 162 (2) (a) of the Constitution of Kenya, 2010 set 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. I am therefore inclined to dismiss the preliminary objection with no order as to costs.

Delivered, dated and signed this 17th day of February 2016.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Olel instructed by Olel, Onyango Ingutia & Company Advocates for the respondent/applicant.
2. Mr. Kirwa instructed by Mwakio Kirwa & Company Advocates for the claimant/respondent.