



**REPUBLIC OF KENYA**

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

**CAUSE NO 366 OF 2014**

**HALIMA MUEKE NGEI.....CLAIMANT**

**VS**

**SIMBA COACH LIMITED.....RESPONDENT**

**RULING**

**Introduction**

1. This ruling emanates from a preliminary objection taken by the Respondent by notice dated 5th June 2014, challenging the jurisdiction of this Court to entertain the Claimant's claim. The parties agreed to dispense with the objection by way of written submissions.

**The Preliminary Objection**

2. The preliminary objection is based on the following grounds:

a) That the Claimant was at all material times engaged in the specific functions for a company incorporated and trading in the Republic of South Sudan and her engagement for the performance of those functions was strictly and exclusively in the Republic of South Sudan. As the cause of action herein, the performance of the actions and all matters relating to the claim herein arose at and took place in the Republic of South Sudan, the Kenyan Courts are not the proper forum for urging the present claim. This Court therefore lacks the requisite jurisdiction to hear and determine such disputes as arose outside the territorial limits of the jurisdiction of Kenya;

b) That the Claimant's suit as drawn and filed otherwise contravenes Section 4(3) of the Industrial Court Act (No 20 of 2011) and the Constitution of Kenya;

c) To the extent that this claim arises from the Claimant's purported discharge of duties for a company which was solely incorporated in the Republic of South Sudan and which had specifically engaged the Claimant to perform functions in South Sudan, there is no jurisdiction to institute and maintain a claim against the Respondent, a company duly incorporated and trading in Kenya as a separate and distinct entity from that against whom the Claimant's cause of action arose in South Sudan;

d) Without prejudice to the foregoing, there was otherwise no employer/employee relationship

between the Claimant and the Respondent to found the present claim against the Respondent.

### **The Respondent's Submissions**

3. In its submissions filed in support of the objection on 25th July 2014, it is submitted that the Claimant was employed by a company known as Simba Coach (K) Limited and not Simba Coach Limited, the Respondent herein. Since it was Simba Coach (K) Limited whose incorporation in South Sudan the Claimant was engaged in and who subsequently engaged her to handle various assignments in South Sudan, the Claimant had wrongly invoked the jurisdiction of this Court to sue a party with whom she had no contractual engagement.

4. Making reference to the principle of distinct legal existence for limited liability companies, Counsel for the Respondent submitted that even assuming that Simba Coach Ltd, the Respondent as incorporated in Kenya was to be regarded as the parent company of Simba Coach (K) Ltd, incorporated in South Sudan, this fact alone could not confer jurisdiction upon the Court to hold the parent company liable for matters which essentially belong to the subsidiary company.

5. Reference was also made to Section 4(3) of the Industrial Court Act which provides for the territorial jurisdiction of this Court. The Respondent urges that Simba Coach (K) Limited which had engaged the Claimant for various assignments is a company incorporated and based in South Sudan where the cause of action arose. It follows therefore that the proper forum for the Claimant's claim was the courts in South Sudan and not Kenya.

6. In support of the ground that there was no employment relationship between the Claimant and the Respondent, Counsel cited the case of *Elijah Moranga v John Leinsly Irene Onderi [2014] eKLR* where **Radido J** held that in determining the jurisdiction of this Court to entertain a claim brought before it, the existence of a contract of service is an essential element.

7. The Respondent goes on to submit that it engaged the Claimant for a specific task, to set up a transport company in South Sudan for which the Claimant asked to be paid Kshs. 400,000 for that specific assignment. In the circumstances, the relationship between the Respondent, Simba Coach Limited and the Claimant was not one of employer/employee but one where the Claimant worked as an independent contractor.

8. The Respondent states that it neither directed nor supervised the work or hours of the Claimant but only expected the Claimant to perform a particular task that is; to register Simba Coach (K) Limited in South Sudan, a task which she did and completed. The Claimant did not draw a salary from the Respondent, Simba Coach Limited and her claim cannot therefore be sustained.

### **The Claimant's Reply**

9. In the submissions filed on behalf of the Claimant on 12th September 2014, it is submitted that after setting up Simba Coach (K) Limited in South Sudan, the Claimant on the instructions of the Respondent, managed the affairs of the new company until she was recalled to Nairobi by the Respondent's agent, Eddie Suleiman Mbaruk. The Claimant was however not given any assignment after 13th July 2013.

10. The Claimant further submits that since the Respondent entered an unconditional appearance in this matter, it cannot claim that the Court has no jurisdiction to hear and determine the matter.

11. Additionally, since the Respondent sought the services of the Claimant in Nairobi, Kenya this was the place of contract, supervision and reporting although the performance was to be in South Sudan. Consequently, for all intents and purposes, the Claimant and the Respondent contracted in Kenya and there was no evidence that the parties had any intention that any issue arising would be determined in another forum apart from Nairobi, Kenya.

12. In any event, all the evidence relating to this matter was available in Kenya and enforcement of a

judgment obtained in South Sudan would be difficult since the Respondent has no assets in South Sudan. Moreover, there is no reciprocity agreement between Kenya and South Sudan as contemplated by the Foreign Judgment (Reciprocal Enforcement) Act, Cap 43, Laws of Kenya. It is further submitted that the Respondent is incorporated in Kenya where the Claimant also resides.

### **Determination**

13. The issue for determination in this ruling is whether the Claimant's claim is properly before this Court. The Respondent's preliminary objection is premised on the assertion that the cause of action arose in South Sudan outside the jurisdiction of the Court and that there was no employment relationship between the Claimant and the Respondent.

14. A preliminary objection as defined in the famous case of *Mukisa Biscuits v West End Distributors Limited (1969 EALR)* is one which raises a pure point of law and is argued on the assumption that all the facts pleaded are uncontested. It cannot be raised if any fact has to be ascertained.

15. My reading of the pleadings and supporting documents filed by the parties in this case reveals the following issues that call for determination before the Court:

- a) The nature of engagement between the Claimant and the Respondent;
- b) The relationship between the Respondent and Simba Coach (K) Limited;
- c) The circumstances under which the Claimant proceeded to work in South Sudan;
- d) The circumstances under which the Claimant left South Sudan.

16. In my view, these issues must be determined before a ruling on whether the Claimant's claim is properly before the Court can be made. For this reason and without going into the merits of the case, I find the Respondent's preliminary objection not well taken and proceed to dismiss it with costs being in the cause.

17. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 22ND DAY OF MAY 2015**

**LINNET NDOLO**

**JUDGE**

### **Appearance:**

Ms. Mwau for the Claimant

Mr. Nyongesa for the Respondent