

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1660 OF 2014

CHARLES GATHECA.....CLAIMANT/RESPONDENT

VERSUS

ATLAS COPCO EASTERN

AFRICA LIMITED.....RESPONDENT/APPLICANT

RULING

1. The Respondent's notice of motion dated 17th November 2014 is due for determination. The motion seeks the stay of the suit and a reference of the matter to arbitration and that further, the Respondent herein be removed and/or expunged from the record and substituted with Atlas Copco CMT & CT Management Limited. The grounds for this are on the face of the motion and are mainly that the Claimant had sued the wrong party. The application was supported by the Affidavit of Lina Jorheden. In the affidavit in support she deposed that she was the country director of the Respondent and that it was clear from the Claimant's exhibits that the contract of employment was with Atlas Copco CMT & CT Management Limited and that the contract provided that disputes regarding the interpretation and implementation of the contract shall be settled by arbitration where the company is located unless otherwise agreed. She stated that the company is based in Nigeria.

2. The Claimant in his Replying Affidavit filed on 4th December 2014 was to the effect that he was employed by the Respondent for 19 years and served both in Kenya and as an expatriate under home country employment in Chingola, Zambia and Abuja, Nigeria. The Claimant deponed that the contract of employment he had with the Respondent is what incorporated the employment in Nigeria. He thus stated that the correct party and forum for the case were the Respondent and this Court. He deponed that the contract had not identified the seat of arbitration and it was unclear if it was Nigeria, Sweden or Kenya. He deponed that the clause on arbitration did not provide how the arbitrators would be selected and how a disagreement on the selection of an arbitrator be settled. This was stated to be contrary to Section 6 of the Arbitration Act.

3. The Respondent/Applicant filed a Further Affidavit sworn by Lina Jordheden on 13th January 2015. In the affidavit the deponent deposed that the Respondent is a separate and distinct legal entity from Atlas Copco CMTC and CT Management Limited which is a legal entity incorporated in Nigeria and Atlas Copco AB incorporated in Stockholm Sweden. She deponed the Claimant resigned from the Respondent to take up employment in Zambia and later resigned to take up engagement in Nigeria. The Respondent deponed that the seat of arbitration could be Nigeria or Sweden or any other place to be agreed and that variety was not equal to ambiguity.

4. The parties opted to canvass the application by way of written submission. At the time of penning the Ruling, only the Claimant's submissions are on record.

5. The dispute between the parties seems one which can be settled by arbitration. Article 159 (2)(c) encourages alternative dispute resolution mechanisms. The Respondent has elucidated that there are

options in this area. The Respondent seeks the substitution of the Respondent with Atlas Copco CMT & CT Management Limited. I accede to the request and add the name of the proposed Respondent as the 1st Respondent and maintain the Respondent herein as the 2nd Respondent in relation to the portion of the claim relating to the subsequent 6 months service in the current Respondent. The Court *suo motu* settles the seat of Arbitration as Kenya as the 2nd Respondent has a presence in Kenya and the representation of the 1st Respondent can be assured and secured in conjunction with the 2nd Respondent. I will make no order as to costs on the suit. Matter is thus stayed and referred to arbitration as a means of alternative resolution.

Orders accordingly.

Dated and delivered at Nairobi this 20th day of July 2015

Nzioki wa Makau

JUDGE