



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 166 OF 2013

SAMSON KIPROP MALUEI.....CLAIMANT

VS

KENYA COMMERCIAL BANK LIMITED.....RESPONDENT

RULING

1. On 8th February 2013, the Claimant filed a claim against the Respondent seeking reinstatement as well as general damages for unfair and wrongful dismissal. The Respondent then filed a Notice of Motion under Section 12 of the Industrial Court Act, 2011 and Rule 16(1) of the Industrial Court (Procedure) Rules, 2010 seeking orders towards striking out of the Claimant's claim as against the Respondent.
2. The Respondent's application is based on the following grounds:
 - a) That this Court lacks the jurisdiction to hear and/or determine the Claimant's claim.
 - b) That the Claimant's claim fails to disclose a reasonable cause of action as against the Respondent.
 - c) That the Respondent is neither a necessary nor a proper party to this claim.
 - d) That the Memorandum of Claim herein and the entire claim amounts to an abuse of the court process.
3. In the supporting affidavit of Debra Ajwang' sworn on 30th January 2014, it is deponed that the Claimant was initially employed by the Respondent on 9th March 1992 and that this employment terminated on 1st November 2009 when the Claimant took up employment with KCB Sudan Limited as Operations Manager, Rumbek Branch.
4. Ajwang' further depones that KCB Sudan Limited is a separate and distinct legal entity from the Respondent and that since it is KCB Sudan Limited that terminated the Claimant's employment contract no action arising from the termination can lie against the Respondent.
5. Ajwang' goes on to depone that the Claimant's contract with KCB Sudan Limited was to be performed in the Republic of South Sudan. The applicable law would therefore be the Labour Act, 1997 of the Republic of South Sudan (now repealed). As a consequence, this Court lacks

jurisdiction to entertain the Claimant's claim.

6. In a replying affidavit sworn on 20th March 2014, the Claimant depones that he was employed by the Respondent as a clerk on 18th February 1992. Following an internal job advertisement made by the Respondent, the Claimant applied and was interviewed for the position of Section Head KCB Sudan Limited, Juba Head Office effective 26th April 2008. While working in Juba, the Claimant was appointed as Operations Manager and transferred to Rumbek Branch with effect from 1st November 2009.

7. The issue for determination before this Court is whether the Claimant, whose employment was terminated by letter dated 10th June 2010 signed by Sammy Itemere, the Managing Director for KCB Sudan Limited has a legitimate claim against the Respondent, Kenya Commercial Bank Limited.

8. In the submissions filed on behalf of the Respondent, the Court was referred to a number of authorities on the legal autonomy of incorporated companies as against their holding companies or subsidiaries. This is a well grounded legal principle over which this Court has no struggles. In my view however, this is not the issue before the Court. Rather, the issue is the effect of the Claimant's move to KCB South Sudan Limited, initially as a Section Head in Juba and later as Operations Manager in Rumbek.

9. It is not in contest that the Claimant was initially employed by the Respondent and worked in Kenya for many years before moving to South Sudan. It is also not in dispute that though the Respondent and KCB South Sudan Limited are separate legal entities in their own right, the two are closely related.

10. By letter dated 21st April 2008 under reference '*Letter of Appointment and Assignment*' signed by Asiko Owiro for the Respondent's Divisional Director, Human Resources, the Claimant was appointed as Section Head KCB Sudan Ltd, Juba Head Office for a period of one year with effect from 26th April 2008.

11. A subsequent letter dated 21st October 2009 under reference '*Appointment*' signed by Simon C. Kisegei, Head of Human Resources, KCB Sudan states *inter alia*:

“I am pleased to advise that, following the interview you attended you have been appointed to the position of Operations Manager, at Management Level B and transferred to Rumbek Branch with effect from 1st November 2009.

It must be emphasized that this promotion now brings you into the sphere of Management.

If at any time during the period of six months' probation the Bank considers that your work and progress are not satisfactory, you will be required to revert to your present grade and terms of service.

On confirmation, other terms and conditions for this Grade as stipulated in the Managers' Terms of Service Handbook, will apply and also the provisions of the original letter of appointment which you signed on entering the Bank's service will apply except as may be amended above.”

12. From this letter, the Court makes the following observations:

a) The Claimant's appointment to the position of Operations Manager, Rumbek Branch was a promotion from his previous position;

b) The appointment was subject to a six months' probation with the possibility of the Claimant being required by the Respondent to revert back to his previous position;

c) That upon confirmation, the Claimant's terms and conditions of employment would be governed by the Managers' Terms of Service Handbook as well as his original letter of appointment issued to him by the Respondent.

13. From the foregoing, this Court has arrived at the conclusion that the Claimant never left the Respondent's employment at any time between his initial employment on 9th March 1992 and his termination on 10th June 2010. Indeed, his certificate of service signed by Fredrick Kioko, the Respondent's Head, Compensation and Benefits attest to this. It seems to me therefore that in bringing this application, the Respondent is making an attempt to use its own internal operational structures to circumvent its obligations to the Claimant as an employee.

14. On the question of the applicable law, since the Claimant was an employee of the Respondent up to the time of his dismissal, his employment contract and his claim cannot be governed by any other law apart from Kenyan labour and employment law. That said, the issue of jurisdiction is a non issue.

15. The Respondent's application for striking out of the Claimant's claim therefore fails and is dismissed with costs to the Claimant.

Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 8TH
DAY OF MAY 2014**

LINNET NDOLO

JUDGE

In the Presence of:

.....*Claimant*

.....*Respondent*