



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO. 689 OF 2012**

JOAO SOARES .....CLAIMANT

**VERSUS**

TUEGEST GUERMA .....1<sup>st</sup> RESPONDENT

THE AFRICAN MEDICAL AND RESEARCH FOUNDATION ...2<sup>nd</sup> RESPONDENT

**RULING**

The Claim herein was filed by the Claimant Joao Soares against the Respondents Tuegest Guerma and the African Medical and Research Foundation, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents respectively, through a statement of Claim dated 17<sup>th</sup> April 2012 and filed in court on 25<sup>th</sup> April 2012. The Claimant seeks orders as prayed in the Statement of Claim.

The Respondents appear to have filed a Statement of Defence on 16<sup>th</sup> July 2012 although there is no copy in the file. In the defence the Respondent denied that this court has jurisdiction to hear the Claimant's case.

On 2<sup>nd</sup> March 2014 the Respondents filed a Notice of Preliminary Objection on the grounds that: -

- a. Pursuant to Clause 4 of the Claimant's Contract of Employment, the place of the contract was Ethiopia;
- b. Pursuant to Clause 22 of the contract, it was to be construed according to, and governed by the Laws of Ethiopia;
- c. This honourable court has no jurisdiction to hear the matter.
- d. That the dispute be referred to arbitration according to Clause 23 of the Claimant's contract of employment.

When the parties appeared before me to argue the application on 6<sup>th</sup> May 2014, they agreed to dispose of the same by way of written submissions.

The Respondents filed their submissions on 15<sup>th</sup> May 2014 and the Claimant filed submissions on 28<sup>th</sup> May 2014. The Respondents thereafter filed a Reply to the Claimant's submissions on 30<sup>th</sup> May 2014.

The thrust of the arguments by the Respondents is that the Claimant was employed as a country

Director for Ethiopia thus the contract was to be performed in Ethiopia. Clause 22 of the Claimant's contract provided that it would be governed by the law of Ethiopia. Clause 9 provided for deductions from his salary to be made **“under any statutes, rules or regulations for the time being having force of Laws of Ethiopia”**.

The Respondents referred me to paragraph 354 Hulsbury's Law of England, 4<sup>th</sup> Edition Re-issue Vol. 8 (3) and the following authorities:-

- i. **Savings and Loan Kenya Limited V Mayfair Holdings Limite C.A. 152 of 2006;**
- ii. **National Bank of Kenya Ltd V Pipe Plastic Samkolit (K) & Another (2001) KLR 112;**
- iii. **Credit Corporation & Another V Air Al-Faraj Ltd C.A 29 OF 1999;**
- iv. **United India Insurance Co. Ltd V East African Underwriters (Kenya) Ltd [1985] KLR 898**
- v. **Areva T D India Limited V Priority Electrical Engineers and another CA 103 of 2011;**

The Respondents further submitted that the Claimant has pleaded that he is a USA citizen, but a resident of Nairobi but the Nairobi address is that of his advocate. His C.V gives his permanent address as 115 Webster St; East Boston, MA 021281 USA (617) 569 - 9572. That for these reasons the Claimant has no connection with the Kenyan jurisdiction as he was a resident of USA at the time of entering into the contract, and thereafter, a resident of Ethiopia. He did not acquire Kenyan residency at any time.

The Respondents urge the court to find that the cause of action arose in Ethiopia and that the courts best placed to hear the Claim are the Ethiopian courts. They pray that the court allows the preliminary objection and dismisses the claim with costs.

The Claimant opposed the preliminary objection. The Claimant submitted that the contract referred to was governed by the laws of Ethiopia until 17<sup>th</sup> April 2012 when it's life span ended, that the 1<sup>st</sup> Respondent who was not a party to the employment contract works and resides in Nairobi, Kenya, that the 2<sup>nd</sup> Respondent is registered in Kenya. Further, the contract was negotiated and signed in Kenya at the 2<sup>nd</sup> Respondents headquarters in Nairobi and the persons who executed the contract on behalf of the 2<sup>nd</sup> Respondent are Kenyans.

The Claimant argues that he was an employee of the 2<sup>nd</sup> Respondent in Kenya but worked in Ethiopia, that when the contract expired he returned to Nairobi where he was employed. The Claimant argued that by virtue of Section 14 and 15 of the Civil Procedure Act a claim may be filed where the course of action arose or where the Respondent resides.

The Claimant distinguished the authorities relied upon by the Respondents on the basis that the 1<sup>st</sup> Respondent was not a party to the contract. The Claimant relied on paragraph 354 **Halsbury's Laws of England 4<sup>th</sup> Edition Re-issue Vol. 8(3)** which the Respondents also relied on which provides that

***“In a contract of employment, notwithstanding the rules regarding the express choice of applicable law, the choice of applicable law does not deprive the employee of the protection afforded to him by the mandatory rules of the law which would have been applicable to the contract in the absence of choice.”***

The Claimant relied on Rome Convention (OJ C282; 31.10.80) pl P.25 to the effect that mandatory rules override the corresponding provisions of the chosen law. The Claimant submitted that the Civil Procedure Act overrides the choice of law.

The Claimant further relied on the case of **United India Insurance Co. Ltd V E.A Underwriters K Ltd (1985) KLR 998** which the Respondents also relied on, to the effect that ***“the onus of establishing a strong reason for avoiding the jurisdiction of the Kenyan Courts is upon the parties who seek to avoid that jurisdiction.”*** The Court further held that the court must take into account the following:-

***“In what country the evidence on the facts in issue is situate or more readily available and the effect of that on convenience and expense of trial as between the courts of the two countries, whether and how differently the law of the foreign court applies, with what country either party is connected and how closely, whether the Defendants genuinely desire trial in the foreign country or are only seeking procedural advantage and finally, whether the Plaintiff would be prejudiced by having to sue in a foreign court.”***

The Claimant prayed that the preliminary objection be dismissed with costs.

I have considered the application and grounds in support thereof. I have also considered the submissions and the authorities relied upon by the parties.

Paragraph 9 of the statement of claim states that the 2<sup>nd</sup> Respondent is sued for the unlawful acts of the 1<sup>st</sup> Respondent who was at the time material to the suit the Director General of the 2<sup>nd</sup> Respondent.

I have perused the agreement signed by the parties. As the Claimant submits, it was executed in Kenya by the Claimant who is a citizen of USA and the 2<sup>nd</sup> Respondent which is registered in Kenya. The contract was to perform services in Ethiopia. Under the Employment Act of Kenya, this would be referred to as a foreign contract of service which by definition is a contract made in Kenya to be performed outside Kenya. Such contract is governed by the provisions of Part X1 of the Act. Such contracts are required to comply with the provisions of the Act. I have also noted that Clause 23 of the contract provides that disputes shall be referred to arbitration under the Arbitration Act of Kenya.

Although the contract refers to the same being governed by the Laws of Ethiopia, it does not make reference to any specific law of Ethiopia.

According to the Civil Procedure Act Section 14 and 15 a suit may be instituted either where the defendant resides or carries on business or where the Plaintiff resides or carries on business or where the wrong was done, at the option of the plaintiff.

There being no specific provision relating to jurisdiction in the Industrial Court Act or in the Rules, the provisions of the Civil Procedure Act would apply to disputes in the Industrial court provided they do not conflict with the Industrial Court Act or any specific legislation on employment relations.

Both **Hulsbury’s Laws of England** and the case of **United India Insurance Co. Ltd. V E.A Underwriters (K) Ltd (1985) KLR** confirm the position that an employee cannot by choice be deprived of the protection afforded by the applicable law.

I agree with the principles set out in the United India Insurance case . Both the Claimant and the Respondents reside in Kenya. The evidence for the case is in Nairobi. The Claimant is not a resident of Ethiopia and would be greatly prejudiced should this court decline to hear his case and refer him to the courts of Ethiopia.

In any event, the contract provides for arbitration under Arbitration Act of Kenya. The Respondents cannot on the one hand be saying that laws of Ethiopia apply to the contract and on the other hand ask the court to refer the parties to arbitration under the Arbitration Act of Kenya. The fact that the 2<sup>nd</sup> Respondent was willing to apply the Arbitration Act of Kenya to this dispute means that they were willing to apply the laws of Kenya if convenient to them. I am tempted to agree with the Claimant’s submissions to the effect that the Respondents do not have a genuine desire to transfer the trial of the Claimant’s claim to Ethiopia, but rather, they are seeking procedural advantage.

On reference of the case to arbitration, I wish to restate the reasons I gave in my decision in the case of **Dr. Kennedy Amuhaya Manyoni V African Medical and Research Foundation [2014] eKLR** where I stated that the Industrial Court Act and the Labour Relations Act deliberately omit reference to arbitration in employment cases and that employment contracts are not commercial contracts for which

the Arbitration Act was intended.

For the foregoing reasons I find the objection without merit and dismiss it with costs to the Claimant.

Orders accordingly.

Dated and delivered at Nairobi this 4<sup>th</sup> day of July 2014

**HON. LADY JUSTICE MAUREEN ONYANGO**

**JUDGE**

In the presence of:

Gitaka holding brief for Mrs. Wetende for Respondent/Applicant

No appearance for Claimant