



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 145 OF 2014

GODFREY KITOTO OCHIENG & 6 OTHERS.....CLAIMANTS

VERSUS

HYDROBUILD CONSTRUCTION COMPANY LIMITED.....1ST RESPONDENT

JOHN OTIENO OOKO2ND RESPONDENT

RULING

1. On 28th March 2014, the Respondents, HYDROBUILD CONSTRUCTION COMPANY LIMITED and JOHN OTIENO OOKO filed their notice of Preliminary Objection noting the following;

1. *That the Court lacks jurisdiction to hear and determine the matter*
2. *That the claim has been brought to this Court in clear disregard of law and procedure and amount to abuse of the Court process.*

2. On this basis the Respondents were heard through their oral submissions in Court and the Claimants advocates made a reply in objection to the preliminary issues raised. This ruling therefore relate to the preliminary objections by the Respondents.

3. The Respondents advocate submitted that the Court has no jurisdiction in this matter on the grounds that the contract between the parties was executed outside Kenya in South Sudan. At paragraph 4 and 6 of the claim the Claimants s confirm that they were hired and employed in South Sudan.

4. Industrial Court act section 4 establishes the Industrial Court to settle disputes within Kenya and therefore on matters with regard to contracts made outside Kenya, the Court has no jurisdiction over them. Section 27 Industrial Court Act explain to what extent the Court can extend jurisdiction to other countries and by Practice Directive, the Chief justice vide gazette Notice 1756 of 2009 provide that the place of suing is per the law and not the preference of the plaintiff.

5. In this case the Court has no jurisdiction over a dispute that arose in a different country and the entire suit should be struck out. There is a Certificate of Respondents' registration showing it is a limited and company incorporated in South Sudan on 13th January 2010.

6. In response the Claimants s' advocate opposed the objections raised and submitted that despite the Respondents company being registered in South Sudan as noted in their submissions, they are also incorporated in Kenya as confirmed by the Registrar of Companies. In the Claimants contracts, there is a

provision that they cannot travel from Kenya to South Sudan without the Respondents approval. Payments of dues are in South Sudan Pounds and advances are paid in Kenya Shillings. There are several other Claimants who are in the process of giving instructions to confirm that these are Kenyans who hold valid contracts between them and the Respondents indicating the place of contracting was in Kenya.

7. The contracts issued to the Claimants s have a provision that they will be relocated to South Sudan for work and thus the Court has the jurisdiction to hear the claims.

8. At the close of these submissions, the Respondents objected to the production of the contracts from the Claimants s on the basis that parties are bound by their pleadings noting that in the claim the Claimants state that they were hired in South Sudan and evidence to the contrary should be expunged.

9. In this regard the Court gave directions;

1. The Claimants to supply the Court with certified copy from the Registrar of Companies with regard to the document submitted on the registration of the Respondents company in Kenya;
2. The Respondents to submit the original employment contracts between them and the Claimants s;
3. The directions above (1) and (2) to be complied with within 14 days and parties to file these records in Court before the 17th September 2014 when the Court will mention the matter and give directions and ruling on the preliminary objections.

10. Both parties appeared in Court on 17th September 2014 and note the following; the 1st direction was complied with while the 2nd direction is not complied with. The parties have had 14 days since 23rd July 2014 to 17th September 2014, a period of over 45 days to comply.

11. Both issues with regard to the question of jurisdiction and that the claim is brought without regard to procedure and the law will be considered jointly as they are intertwined.

12. Section 74 of the Employment Act makes it mandatory for an employer to keep all employment records of each employee. Where there is a suit filed contesting matters that the employer is as of law supposed to keep, such records are to be made available to Court. Where such an employer fails, refuses and or neglects to make such records accessible, this must be construed to the benefit of the employee. This is the law.

13. The above provisions of section 74 of the Employment Act must be read together here with Rule 14(7) and (8) of the Industrial Court procedure rules make provision as;

(7) Where the Court, on its own motion or application by a party, is satisfied that a pleading does not adequately set the particulars required by the Court, or for any other reason the Court requires clarification of any pleading or submission by a party, the Court may request the party to provide further details as it may consider necessary within such period as it may determine or specify.

(8) A party requested to provide further details shall provide to the Court and the other party the details required

14. The documents sought vide Court directions on 23rd July 2014 were with regard to contested issues raised by the Respondents in their preliminary objections with regard to the Court's jurisdiction noting that the contracts for the Claimants s were executed in South Sudan and the Respondents Company is incorporated in south Sudan. This was contested noting that the Claimants s' contracts are said to be executed in Kenya. Thus the productions of the original records of the contracts between the parties which by law are to be in the custody of the Respondents were of particular importance here. The Respondents fails to produce these records and it can only be surmised that these are not in their favour therefore the reluctance or refusal to have them produced.

15. However, when the question of jurisdiction is raised, the Court must be seized of it and address it first before delving into other issues as outlined in *Owners of the Motor Vessel “Lillian S” v. Caltex Oil, (Kenya) Ltd [1989] KLR 1* and in *Samuel Kamau Macharia & Another v. Kenya Commercial Bank Limited & 2 Others, S.C. Application No. 2 of 2012; [2012] eKLR* (Macharia Case), held that the assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, statute law, and judicial precedent. It was stated:

A Court’s jurisdiction flows from either the Constitution or legislation or both. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity.

16. **Article 162(2)**, under the section Industrial Court Act or any other written law that extends jurisdiction to the Court. That jurisdiction is outlined under the Constitution as;

162. (1) the superior Courts are the Supreme Court, the Court of Appeal, the High Court and the Court’s mentioned in clause (2).

(2) Parliament shall establish Court’s with the status of the High Court to hear and determine disputes relating to—

(a) Employment and labour relations; and

(b) The environment and the use and occupation of, and title to, land.

(3) Parliament shall determine the jurisdiction and functions of the Court’s contemplated in clause (2).

[Emphasis added].

17. Parliament enacted the Industrial Court Act and at section 4 sets the purpose for it, that of;

4. (1) In pursuance of Article 162(2)(a) of the Constitution, there is established the Industrial Court for the purpose of settling employment and Industrial relations disputes and the furtherance, securing and maintenance of good employment and labour relations in Kenya.

18. The Act further elaborately outlines the jurisdiction of the Court at section 12 as;

12. (1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—

(a) disputes relating to or arising out of employment between an employer and an employee;

(b) disputes between an employer and a trade union;

(c) disputes between an employers’ organization and a trade unions organization;

(d) disputes between trade unions;

(e) disputes between employer organizations;

(f) disputes between an employers’ organisation and a trade union;

(g) disputes between a trade union and a member thereof;

(h) disputes between an employer's organisation or a federation and a member thereof;

(i) disputes concerning the registration and election of trade union officials; and

(j) disputes relating to the registration and enforcement of collective agreements.

19. With the above outlined provisions of the constitution and the Industrial Court act, it is apparent that the Industrial Court has original jurisdiction over employment and labour relations matters. The Industrial Court Act also make provisions that such jurisdiction include what is set out under the Constitution at Article 162(2), the Industrial Court Act or *any other written law which extends jurisdiction to the Court relating to employment and labour relations* on matters as outlined under section 12 of the Industrial Court Act and *including* matters as outlined for adjudication by the Court under *any other written law*.

20. Therefore part XI of the Employment Act is imperative to refer and most precisely sections 83, 85 and 89. Section 89 provides;

89. (1) Nothing in this Act shall prevent an employer or employee from enforcing their respective rights and remedies for any breach or non-performance of a lawful contract of service made outside Kenya, but the respective rights of the parties under that contract as well against each other as against third parties invading those rights may be enforced in the same manner as other contracts.

(2) Where a contract has been executed in conformity with this Part, it shall be enforced in the same manner as a contract entered into under this Act, but no written contract, tenor and execution of which are not in conformity with this Act shall be enforced as attains an employee who is unable to read and understand the contract and any such contract shall be deemed to be executed in conformity with this Act if it is signed by the names or marks of the contracting parties and bears, as concerns any illiterate parties, an attestation to the like effect as if prescribed by this Act.

(3) Where a contract is made in a foreign country, the contract shall be attested by a judge or magistrate, and shall be authenticated by the official seal of the Court to which the judge of magistrate is attached.

[Emphasis added].

21. In the absence of original records relating to the Claimants contracts as under section 74 of the Employment Act, the confirmation from the records certified by the Registrar of Companies that the Respondent's company is incorporated in Kenya and with outlined provisions as under part XI of the Employment Act, I find no basis to the preliminary objections raised by the Respondents. This Court has jurisdiction over the matter before it.

The preliminary objection is hereby dismissed. Costs in the cause.

Delivered in open court at Nairobi this 17th Day of September 2014

M. Mbaru

Judge

In the presence of:

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