



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL NO. 68 OF 2013

BETWEEN

CHARLES OJWANGAPPELLANT

AND

NYANDO COUNTY COUNCILRESPONDENT

(Being an appeal from the Ruling and Order of Hon. D.O. Chepkwony, Ag. SPM in the Principal Magistrates Court at Nyando in Civil Case No. 348 of 2012 dated 24th July 2013)

JUDGMENT

1. The facts leading to this appeal are straightforward. At the time material to this suit, the appellant was the chairman of the respondent. On 8th May 2012 the appellant filed suit against the respondent claiming among others Kshs. 259,000/- being money due and owing to him on account of services provided to the respondent during his tenure as chairman of the respondent. The respondent filed a defence on 13th February 2013 denying the appellant's claim.
2. By an application dated 23rd April 2013, the respondent applied to have the plaint struck out and the suit dismissed. It contended that the dispute between them arose out of employer/employee relationship and as such, the Magistrate's court lacked jurisdiction to determine the matter by dint of **section 12** of the ***Labour Institutions Act (repealed)*** which granted exclusive jurisdiction in such case to the Industrial Court as it was known.
3. The appellant opposed the application on the ground that there was no employer/employee relationship between himself and the respondent and that he was only claiming payment for services rendered as the chairman of the respondent and not as an employee.
4. The learned magistrate struck out the appellant's plaint and dismissed the suit as a whole on grounds that the court lacked jurisdiction to entertain the suit on the following terms;

In considering all the facts presented in the plaint, I am inclined to agree with the applicant/Defendant's Counsel that the relationship between the plaintiff and the defendant has been brought out as that of employee-employer even if the plaintiff was elected by councillors. In my opinion I believe, the plaintiff was elected chairman by councillors by virtue of his being a councillor – running the affairs of the council. It is therefore for this reason that as chairman, the plaintiff was entitled to draw allowances and expenses for the council for services rendered(sic).

Upon finding so, I find that the relationship is not one that arises out of an employment contract. And allowances and expenses that accrue when one is employee are as a result of that relationship.

I therefore, having found out that the relationship between the plaintiff and defendant is that of employee-employer

5. Aggrieved by the decision of the trial magistrate, the appellant has filed this appeal based on the following grounds:

1. *The learned magistrate erred in law in holding that the court had no jurisdiction to entertain the suit;*
2. *That the learned magistrate erred in law and in fact and wholly misdirected herself in holding that the Appellant was an employee of the respondent without any evidence to point to the same;*
3. *That the ruling ought to be set aside ex debito justitiae on the basis that the magistrate considered and gave undue weight to irrelevant issues and totally failed to consider the relevant issues.*

6. Counsel for the appellant submitted that the appellant was chairman of the respondent and not an employee and the claim was for allowances for services rendered to the Council hence the Magistrates Court had jurisdiction to entertain the matter. Counsel for the respondent, opposed the appeal on the ground that the Industrial Court was in place when the claim was lodged and it had the exclusive jurisdiction to deal with a claim for allowances for work done.

7. The main issue in this appeal is whether the relationship between the parties was one of an employer/employee contemplated by the labour law and more specifically the **Employment Act, 2007** and the **Employment and Labour Relations Court Act, 2011** thereby ousting the jurisdiction of the Magistrates Court.

8. The collective definition of an employee/employer relationship is to be found **section 2** of the **Employment Act, 2007** as follows;

“employee” means a person employed for wages or a salary and includes an apprentice and indentured learner.

“employer” means a person, public body, firm, corporation or company who or which has entered into a contract of service to employ an individual and includes the agent, foreman, manager or factor of such a person, public body, firm corporation or company. [Emphasis mine]

“contract of service” means an agreement, whether oral or in writing, and whether expressed or implied to employ or to serve as an employee for a period of time

9. The same definitions are to be found in the **Employment and Labour Relations Act, 2007** which provides for the jurisdiction of the Employment and Labour Relations Court which under **section 12** of the **Act** is a court with exclusive jurisdiction to hear and determine, “disputes relating to or arising out of employment between and employer and an employee.”

10. Although both statutes do not define a contract for services, there is a distinction between a contract of service and a contract for services. In the case of **Christine Adot Lopeyio v Wycliffe Mwathi Pere NRB ELRC Cause No. 1688 of 2012 [2013]eKLR**, Mbaru J., contrasted the nature of a contract of service contemplated under **section 2** of the **Employment Act, 2007** and a contract for services which is outside the ambit of the statute by setting out various tests to determine the character of the relationship as follows;

In most cited authorities in this regard from various jurisdictions, several tests have been applied to distinguish between what comprise ‘employment’ as against what constitutes

'service' in case of contracts of service as contrasted with contracts for service. They include the following:

- a. The control test whereby a servant is a person who is subject to the command of the master as to the manner in which he or she shall do the work.
- b. The integration test in which the worker is subjected to the rules and procedures of the employer rather than personal command. The employee is part of the business and his or her work is primarily part of the business.
- c. The test of economic or business reality which takes into account whether the worker is in business on his or her own account, as an entrepreneur, or works for another person, the employer, who takes the ultimate risk of loss or chance of profit.
- d. Mutuality of obligation in which the parties make commitments to maintain the employment relationship over a period of time. That a contract of service entails service in return for wages, and, secondly, mutual promises for future performance. The arrangement creates a sense of stability between the parties. The challenge is that where there is absence of mutual promises for stable future performance, the worker thereby ceases to be classified as an employee as may be the case for casual workers.

These tests are however not to be seen exclusively by themselves as they only serve as a guide based on the facts of each case. They are however a good guide to the issues as in this case.

11. When viewed through the lens of these tests at first glance, the position of the Chairman of a County Council does not appear to fall under the employer/employee relationship. Indeed, the learned magistrate appeared to oscillate between finding that the Chairman was elected and that he did not enter into a contract of employment but went on to find that allowances and expenses accrue out of an employer/employee relationship.

12. The Chairman of a County Council under the **Local Government Act (repealed)** was elected by the councillors of the local authority to guide the affairs of the Council. His position was akin to that of the Speaker. His work was to Chair and control meetings and he is only paid for particular allowances and expenses. He did not enjoy a periodical salary or annual leave and was not subjected to the level of control and discipline as ordinary employee. Within this matrix, I would have considered the fact of his election a decisive factor in determining the nature of the relationship but the Court of Appeal settled this issue in the case of **County Assembly of Kisumu and Others v Kisumu County Assembly Board and 6 Others KSM CA Civil Appeal Nos. 17 & 18 of 2015 [2015]eKLR** where it observed as follows;

[51] As is clear from these submissions, both sides of the divide in this appeal agree that pursuant to the provisions of Article 162(2)(a) of the Constitution as read with Section 12(1) of the Industrial Court Act, the jurisdiction of the ELRC stems from the existence of employment and labour relations. The main issue in this appeal therefore is whether or not such relationship exists between a Speaker and a County Assembly. The appellants contended that employer/employee relationship arises on appointment and not on election and since the position of a Speaker is elective, such relationship does not exist. The respondents contended otherwise arguing that the determinant factor is remuneration.

[52] The position of the Speakers of the National and County Assemblies should be distinguished from those of the Members of the National and County Assemblies In a sense therefore, the Speakers' roles are akin to those of managing directors of body corporates answerable to their Boards of Directors on the day-to-day operations of the companies. The Speakers' elections are therefore akin to appointments which create employer/employee relationships.

[53] As Nduma J correctly observed in Nick Githinji Ndichu v. Clerk Kiambu County Assembly & Another, a decision followed by Sitati J. in Peter Kingoina v. County Assembly of Nyamira employer/employee relationship exists when there is a "contract of service" as defined by Section 2 of the Employment Act, 2007. We concur with the learned Judge that the

law is not concerned with the manner of engagement or assumption of the position of employee. What is important is the existence of a contract of service “whether oral or in writing, and whether expressed or implied to employ or to serve as an employee for a period of time...for wages or a salary.” On this additional criterion, we once again concur with the learned Judge that there exists a contract of service between a Speaker of a County Assembly and the County Assembly concerned.

13. Flowing from the decision I have cited, I must hold that the appellant’s relationship with the respondent is that of an employer/employee. **Section 12(1)** of the ***Employment and Labour Relations Act, 2011*** gives the Employment and Labour Relations Court the exclusive original and appellate jurisdiction to deal with such disputes. This Act commenced on 30th August 2011, prior to filing of the suit before the Magistrates court hence it was applicable to the case.

14. The upshot of my findings is that the learned magistrate came to the correct conclusion in declining jurisdiction and striking out the suit.

15. The appeal is dismissed with costs to the respondent.

DATED and DELIVERED at KISUMU this 30th day of September 2016.

D. S. MAJANJA

JUDGE

Mr Orieyo instructed by Otieno, Yogo, Ojuro and Company Advocates for the appellant.

Mr Olel instructed by Olel, Onyango, Ingutiah and Company Advocates for the respondent.