

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT**  
**NAIROBI**

**ELRC CAUSE NO E325 OF 2025**

**BRIAN CHEGE**  
**NGUYAI.....CLAIMANT**

**VERSUS**

**BENTON MEDIA VENTURES LTD.....**  
**RESPONDENT**

**RULING**

**Background**

1. The Claimant has instituted the instant proceedings to challenge the Respondent's decision to terminate the contract for provision of labour services between them. He contends that the Respondent's action was unlawful. As such, he seeks various reliefs as set out in the Memorandum of Claim.
2. In response, the Respondent contends that the contract between them was legitimately terminated for, inter alia, misconduct and nonperformance on the part of the Claimant. It avers that the decision to relieve the Claimant of his duties was consensual after several meetings between the parties.
3. The Respondent further denies that it hired the Claimant as an employee. It avers that it only engaged him as a consultant.

**Preliminary Objection**

4. The Respondent has filed a preliminary objection to contest the court's jurisdiction to entertain the suit. The objection is two pronged.
5. First, the Respondent contends that the parties had a consultancy relationship. As such, it avers that this court is bereft of jurisdiction to entertain the dispute between them.
6. Second, the Respondent contends that the parties agreed that any dispute that may arise from the contract between them should be resolved amicably outside court. In the premises, it contends that the court is not entitled to entertain the suit.
7. The Claimant filed the affidavit dated 25<sup>th</sup> June 2025 to respond to the objection. He contends that although the labour contract between them was described as a consultancy contract, the relationship that they had was one of employment. He avers that the Respondent exercised substantial control over his work by, inter alia, requiring him to report to work between 8 AM and 5 PM every day for six days in a week.
8. The Claimant further contends that after the Respondent breached the impugned contract, he tried to have the dispute resolved amicably but to no avail. As such, he insinuates that he was left with little choice but to resort to court action.

### **Analysis**

9. The law on preliminary objections is now settled. A preliminary objection ought to raise a pure point of law which does not require detailed interrogation of facts.

10. The point of law should be self-evident or arise by implication from the pleadings. Further, a preliminary objection should only be raised where the facts that undergird it are not contested (see ***Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696***).
11. Whether a labour contract constitutes an employment or independent contract relationship cannot be determined by reference to the law alone. It also requires interrogation of the facts that surround the relationship to discern its true nature.
12. Speaking to this reality, the court in the case of ***Christine Adot Lopeyio v Wycliffe Mwathi Pere [2013] KEELRC 244 (KLR)*** stated as follows:-

*“The issue of whether there is a contract of service or a contract for service is one that can be established in law or in fact.....”*
13. Looked at from this viewpoint, the question whether parties to a labour supply contract had an employment or independent contractor relationship cannot be said to raise a pure point of law. As such, it is not suitable for determination through a preliminary objection.
14. In the instant case, it is apparent that the disputants are not in agreement whether they had an employment or independent contractor relationship. Whilst the Respondent contends that the arrangement was one of consultancy, the Claimant asserts that the two had an employment

relationship. As such, the basic facts that undergird the preliminary objection are contested.

15. By the Respondent asking the court to terminate the proceedings between the parties in their infancy on account of the fact that the two had an independent contractor relationship, it is inviting the court to interrogate the instrument through which they contracted and determine whether it (the instrument) created an independent contractor relationship without the benefit of a full trial. If the court were to do so, it will have made a conclusive assessment of contested facts at the preliminary stage of the case without the evidence on the matter being fully interrogated through the rigors of a trial, a course which is undesirable.
16. Whether the impugned labour relationship was one of an independent contractor or employment does not simply depend on how the parties described it in their contracting instrument but on their true intention whilst entering into the arrangement. The court will only be in a position to determine the true intention of the parties and therefore the nature of their engagement after it has evaluated the evidence which they will tender at the trial against the applicable law.
17. Speaking to this reality, the trial Judge in **Kenneth Kimani Mburu & another v Kibe Muigai Holdings Limited [2014] KEELRC 723 (KLR)** stated as follows:-

*“The Court in determining the first question (whether the Claimants were contracted as employees or*

*consultants) is not bound by the parties' respective declarations on the character of these contracts, but should not disregard the parties' intention."*

18. The mere fact that the parties christened the engagement as a "consultancy contract" did not, *ipso facto*, make it an independent contractor labour arrangement. The court is required to decipher the nature of the relationship by interrogating the true intention of the parties to the contract through evaluation of the evidence which they will tender on the matter.
19. Indeed, it is noteworthy that in the case of ***Fredrick Byakika v Mutiso Menezes International Unlimited [2016] KEELRC 1225 (KLR)*** which the Respondent relies on to support its objection, the court arrived at its determination regarding the nature of the labour relations between the parties after the benefit of a full trial. The matter was not determined summarily through a preliminary objection at the preliminary stage of the case.
20. The Respondent further contends that the parties agreed that in the event a dispute arose from the relationship, they would settle it amicably outside court. As such, it contends that by this agreement, they ousted the court's jurisdiction to entertain the instant dispute.
21. The general position in law is that clauses which purport to oust the jurisdiction of the court to entertain a dispute between parties ought to be given restrictive interpretation (***Apollo Mboya v Attorney General, National Assembly & Senate [2018] KEHC 6933 (KLR)***). Much as parties to a

contract have the freedom to elect how to resolve disputes that may arise from the contract, this does not oust the court's jurisdiction to intervene in such disputes.

22. It is true as contended by the Respondent that the court should not re-write a contract between parties. As a general rule, the contract should be implemented as it is (***Ogotu v Anjichi [2025] KEHC 3875 (KLR)***). However, it is not lost to the court that courts have inherent and equitable powers to intervene in and refuse to enforce contracts that are found to be unconscionable (***Polyphase Systems Limited v Sterling & Wilson Solar Limited; Malindi Solar Group Limited (Interested Party) [2021] KEHC 13345 (KLR)***).
23. The court observes that under clause 12 of the agreement between the parties, they covenanted to seek amicable settlement of any dispute that may arise from their contract without resorting to court action. However, the clause does not state what should happen in the event that the attempts to resolve the dispute amicably come a cropper.
24. It cannot be that the intention of the parties was to bar themselves from approaching the court in circumstances where attempts to settle a grievance arising from the contract fail. That would not only be absurd but also an affront to the right to access justice. As such, the court is not convinced that the impugned clause was intended to oust its jurisdiction over the contract.
25. The Claimant has averred under oath that after the Respondent allegedly breached the contract between them, he tried to have the matter settled amicably but to no avail.

The court notes that the Respondent has not controverted this contention.

26. The foregoing being the case and acknowledging the right of the parties to seek alternative means of resolving their dispute before the court can intervene fully, I direct parties to submit to court annexed mediation in a bid to amicably settle the matter. Should the efforts to resolve the dispute through court annexed mediation fail, the court will assume jurisdiction over the matter to determine, inter alia, whether the parties had an employment relationship.

**Determination**

27. The upshot is that the court is not satisfied that the preliminary objection is merited.
28. The question whether the parties had an employment or independent contractor relationship is one that the court has jurisdiction to determine after evaluating the evidence that will be tendered at the trial of the case.
29. Further, the court is not convinced that the fact that the parties agreed to seek amicable settlement of any disputes that may arise from their contract ousted the jurisdiction of the court to entertain the instant dispute.
30. Consequently, the preliminary objection fails and is dismissed.
31. Nevertheless and in acknowledgement of the Respondent's contention that the matter ought to have been subjected to an out of court settlement, the court orders that the parties submit to court annexed mediation to attempt an amicable resolution of the dispute.

32. Should the dispute not be resolved through court annexed mediation, the court will adjudicate the matter in order to determine, inter alia, whether the relationship between the parties amounted to an employment relationship.
33. Costs of the objection are granted to the Claimant.

**Dated, signed and delivered on the 15<sup>th</sup> day of December, 2025**

**B. O. M. MANANI**  
**JUDGE**

In the presence of:

..... for the Claimant

.....for the Respondent

**ORDER**

**In light of the directions issued on 12<sup>th</sup> July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**B. O. M MANANI**