



REPUBLIC OF KENYA



KENYA LAW
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**Wanjih v Gibb Africa Limited (Cause E1026 of 2023)
[2026] KEELRC 876 (KLR) (24 March 2026) (Judgment)**

Neutral citation: [2026] KEELRC 876 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E1026 OF 2023
SC RUTTO, J
MARCH 24, 2026**

BETWEEN

NURUDDIN EBRAHIM WANJIHI CLAIMANT

AND

GIBB AFRICA LIMITED RESPONDENT

JUDGMENT

1. The Claimant commenced these proceedings by way of a Statement of Claim dated 11th December 2023, in which he avers that on or about 3rd December 2021, he entered into a written agreement with the Respondent to provide sub-consultancy services for a period of two years in relation to consultancy engagements between the Respondent and various public and private entities.
2. The Claimant further avers that the said agreement was duly executed by both parties on 9th February 2022, thereby creating a contract of service. He states that he was assigned payroll number EK10-ENG-000397.
3. The Claimant asserts that, pursuant to the 4th Schedule of the Agreement, his remuneration was to be paid on a monthly basis, calculated based on the hours worked and as reflected in duly approved timesheets.
4. The Claimant contends that the Respondent breached the said agreement and is indebted to him in the sum of Kshs 1,571,462.15, being outstanding salary arrears as at April 2023.
5. On the basis of the foregoing, the Claimant seeks the following reliefs against the Respondent:
 - a. A declaration that the Claimant's fundamental rights under Article 41(2)a of *the Constitution* of Kenya 2010 to fair labour practices have been violated and/or infringed by the Respondent.
 - b. An Award of Ksh. 8,674,538.90/= made up as follows:



Unpaid Salary arrears.....Ksh. 1,571,462.15/=

12 Months' Salary as Compensation (4,500 x 30x4x12)....Ksh. 6,480,000/=

Service Pay (20,769.23 x 15 x 2).....Ksh. 623,076.90/=

- c. A mandatory directive to the Respondent to issue the Claimant with a Certificate of Service that is not prejudicial to the Claimant.
 - d. Costs for this suit.
 - e. Interest at Court's rates on (b) and (d) until payment in full.
 - f. Any other relief that this Honorable Court may deem fit and just to grant
6. The Respondent opposed the Claim by way of a Response dated 30th January 2024, in which it denies any liability for the salary arrears claimed by the Claimant, and accordingly, has urged the Court to dismiss the Claim with costs.
 7. The matter proceeded for hearing on 24th November 2025, during which both parties called oral evidence in support of their respective cases.

Claimant's Case

8. The Claimant testified in support of his case as CW1 and at the outset, he sought to adopt his witness statement to constitute his evidence in chief. He further produced the list and bundle of documents filed on his behalf as exhibits before the Court.
9. The Claimant averred that as per the agreement, he was to be remunerated at an hourly rate of Kshs 4,500/- and was required to submit monthly invoices based on approved timesheets reflecting the hours worked and the amounts due.
10. The Claimant further averred that he duly submitted all invoices, in the prescribed format, for services rendered to the Respondent, and that the same were approved.
11. He stated that despite submitting invoices covering the period from October 2021 to April 2023, the Respondent has failed to settle the same.
12. It was the Claimant's evidence that, to date, he has not received full payment of his salary arrears, which he states amount to Kshs 1,013,314.65. To this end, he asked the Court to allow his claim as prayed.

Respondent's Case

13. The Respondent called oral evidence through Ruth Odengo, who testified as RW1. Ms. Odengo identified herself as the Respondent's Human Resources Manager. Similarly, she adopted her witness statement and the list and bundle of documents filed on behalf of the Respondent as her evidence in chief.
14. In her testimony, RW1 acknowledged that on or about 3rd December 2021, the Claimant entered into a written agreement with the Respondent to provide sub-consultancy services for a period of two years in relation to the Respondent's consultancy engagements with various public and private entities.
15. She averred that the Claimant's remuneration was payable on a monthly basis, based on the hours worked as reflected in approved timesheets, and maintained that the Respondent fully settled all salary arrears and remitted all pension contributions.



Submissions

16. Following the close of the hearing, both parties filed written submissions, which the Court has considered. On his part, the Claimant submitted that the nature of the parties' engagement was that of an employer–employee relationship, contending that he was an integral part of the Respondent's operations and worked under its control and supervision. He argued that these factors point to the existence of employment. In support of this position, the Claimant placed reliance on the case of *Maurice Oduor Okech v Chequered Flag* [2013] KEELRC 891 (KLR) and *Krijnen v NAS Airport Services Ltd* [2023] KEELRC 2390 (KLR).
17. The Claimant further submitted that the Respondent failed to adduce any evidence demonstrating that he had been paid, including payment records or itemized statements showing if, when, and how payments were made. He argued that the absence of such evidence leads to the inference that it either does not exist or does not support the Respondent's case. In this regard, he relied on the case of *Jackson Muiruri Wathigo t/a Murtown Supermarket v Lilian Mutune* [2021] KECA 388 (KLR).
18. Placing reliance on the case of *Kiboko v Osteria Group (Kenya) Limited* [2023] KEELRC 2700 (KLR), the Claimant submitted that the Respondent's failure to pay for work done constitutes a fundamental breach of contract and amounts to an unfair labour practice.
19. On the other hand, the Respondent submitted that no employer–employee relationship existed, maintaining that the Claimant was engaged strictly as a sub-consultant under a Sub-Consultancy Agreement.
20. Referencing the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1, the Respondent argued that this Court's jurisdiction is derived from Article 162(2)(a) of *the Constitution* of Kenya, 2010 and Section 12 of the *Employment and Labour Relations Court Act*, 2011, which confine its mandate to employment and labour relations disputes.
21. On this score, the Respondent contended that in the absence of an employer–employee relationship, the Court lacks jurisdiction and the dispute ought to be determined as a commercial matter before the ordinary civil courts.
22. The Respondent further submitted that its agreement with the Claimant was purely for the provision of consultancy services to its transportation and related departments, and that the terms did not amount to an appointment into employment but rather a professional engagement.
23. Relying on the case of *Ready Mixed Concrete (South East) Ltd v Minister of Pensions* [1968] 2 QB 497, the Respondent argued that the requirement for the Claimant to render services for 30 hours per week did not, of itself, establish control indicative of an employment relationship. It maintained that the Claimant operated independently, invoiced for services rendered, and provided consultancy services in his own capacity, thereby demonstrating that he was in business on his own account.
24. The Respondent further submitted that the deduction of P.A.Y.E does not, in itself, establish the existence of an employment relationship. In support of this contention, the Respondent relied on the case of *Lydia Limber v Akili Dada* [2022] KEELRC 951 (KLR), maintaining that tax treatment alone is not determinative of employment status.
25. Further, the Respondent argued that, having established the absence of an employer-employee relationship, the Claimant's claim for salary arrears is fundamentally misconceived.



26. It was further submitted by the Respondent that any entitlement due to the Claimant, if at all, would arise strictly under the consultancy agreement and only in respect of services actually rendered and invoiced, as opposed to salary arrears.
27. The Respondent further contended that, having failed to demonstrate that he was an employee within the meaning of Section 2 of the *Employment Act*, the Claimant cannot invoke statutory protections relating to unfair termination or unfair labour practices.

Analysis and Determination

28. Flowing from the record, the Court has identified the following issues for determination:
 - i. Whether the Claimant was engaged under a contract of service or a contract for service, and consequently, whether this Court has jurisdiction to hear and determine the matter; and
 - ii. Subject to the determination in (i) above, whether the Claimant is entitled to the reliefs sought.

Contract of service or contract for service?

29. Whereas the Claimant asserts that he was engaged by the Respondent under a contract of service, the Respondent maintains that the Claimant was retained as a consultant and that no employer-employee relationship existed between them.
30. It is not in dispute that the parties entered into a Sub-Consultancy Agreement on 3rd December 2021. The issue in contention, however, is whether that agreement amounted to a contract of service or a contract for service.
31. In the Sub-Consultancy Agreement, the Claimant is described as a sub-consultant, while the Respondent is described as the consultant. These descriptions are consistently applied throughout the Agreement. The question that arises, therefore, is whether, notwithstanding its characterization as a Sub-Consultancy Agreement, the arrangement can properly be construed as an employment contract. In other words, was this a disguised employment? To determine this issue, it is necessary to examine the Sub-Consultancy Agreement.
32. It is notable that the Sub-Consultancy Agreement required the Claimant as the sub-consultant to work up to a maximum of 30 hours per week, subject to prior agreement with the consultant on the time allocation for each assignment. Additionally, the Respondent was to grant the Claimant access to project staff, office, and equipment.
33. It is further evident from the record that the Claimant was assigned payroll number EK10-ENG-000397, and that the Respondent remitted his income tax (PAYE), as reflected in the P9 form exhibited by the Claimant. Indeed, it is apparent that under the terms of the Agreement, payments were subject to PAYE.
34. In addition to the foregoing, it is noteworthy that in the P9 form exhibited by the Claimant, he is identified as the employee, while the Respondent is identified as the employer. Additionally, the Claimant's defined contributions to the retirement scheme are reflected in the said P9 form. Notably, RW1 confirmed in her testimony before the Court that the Respondent remitted all of the Claimant's pension contributions.
35. It is also apparent that, as part of the terms of the Agreement, the Claimant was required to submit monthly invoices based on approved timesheets. Indeed, the Claimant produced copies of invoices submitted to the Respondent, indicating the hours worked.



36. What can be drawn from the foregoing that the engagement between the parties embodied a blend of characteristics associated with both an employment relationship and a consultancy arrangement.
37. In distinguishing between an employment relationship and a consultancy arrangement, the Court in the case of *Kenneth Kimani Mburu & another v Kibe Muigai Holdings Limited* [2014] eKLR stated as follows: -

“A Consultant performs work for another person, according to his own processes and methods. A Consultant is not subject to another’s control, except to the extent admitted under the contract. The Court in determining the first question is not bound by the Parties’ respective declarations on the character of these contracts, but should not disregard the Parties’ intention.....A Consultant would not normally be provided with the tools of work. The Respondent provided Mburu with the laptop, office facilities, and a phone. The Respondent provided the tools of work, and directed the Claimants in the performance of work....A Consultant would have the latitude to discharge his obligation according to his own processes and methods, which would include the ability to subcontract or hire own assistants. The evidence on record suggests all the persons working at the Hotel were engaged by the Respondent, and were paid by the Respondent largely through Debora. He remained in control of the undertaking. There was no evidence that the Claimants paid with-holding tax. Instead, the Respondent paid Mburu a ‘net salary.’ Instead, the Respondent paid Mburu a ‘net salary.’ It is the obligation of an employer to enforce statutory deductions such as P.A.Y.E, N.S.S.F and N.H.I.F contributions. By paying ‘net salary’ the presumption would be that the Respondent had factored in this obligation. The fact that no evidence was presented showing payment of these employee deductions is not an indication that there was no employer-employee relationship.” Underlined for emphasis

38. The Court is further guided by the International Labour Organization (ILO) Recommendation No. 198 (Employment Relationship Recommendation, 2006), which recognizes that challenges may arise in determining the existence of an employment relationship, particularly where the respective rights and obligations of the parties are unclear, where there is an attempt to conceal the true nature of the relationship, or where gaps or limitations exist in the legal framework or in its interpretation and application.
39. In this regard, ILO Recommendation No. 198 identifies specific indicators to assist in determining the existence of an employment relationship. Among these indicators are; the fact that the work is carried out according to the instructions and under the control of another party; involves the integration of the worker in the organization of the enterprise; is performed solely or mainly for the benefit of another person; must be carried out personally by the worker; is carried out within specific working hours or at a workplace specified or agreed by the party requesting the work; is of a particular duration and has a certain continuity; requires the worker’s availability; or involves the provision of tools, materials and machinery by the party requesting the work.
40. Back to the case herein, it has been established that the Claimant was granted access to project staff, office, and equipment; that his weekly working hours were prescribed in consultation with the Respondent; that he was assigned a payroll number; and that the Respondent remitted his pension contributions and statutory deductions, specifically income tax.
41. Accordingly, notwithstanding the hybrid wording in the Sub-Consultancy Agreement and certain features suggestive of a consultancy arrangement, the Court is persuaded that the parties’ intention,



as well as the tenor of substantial portions of the agreement, point to the existence of an employer-employee relationship.

42. Indeed, I cannot help but question why the Respondent would grant the Claimant access to project staff, office, and equipment, prescribe his weekly working hours, assign him a payroll number, remit his pension contributions and income tax, and issue a P9 form describing him as an employee while describing itself as the employer.
43. As was rightly held by the Court in the case of *Kenneth Kimani Mburu & another v Kibe Muigai Holdings Limited* [supra], the Court is not bound by the Parties' respective declarations on the character of these contracts.
44. And further, ILO Recommendation No. 198 states that; "for the purposes of the national policy of protection for workers in an employment relationship, the determination of the existence of such a relationship should be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties."
45. All things considered, the Court finds that the relationship that existed between the parties herein was that of an employer-employee, disguised as a consultancy arrangement. Consequently, the relationship falls within the scope of the *Employment Act*, 2007, and this Court therefore has jurisdiction to hear and determine the dispute.

Reliefs?

Salary arrears

46. The Claimant seeks, under this head, the sum of Kshs 1,571,462.15. In support of his claim, he produced copies of invoices reflecting a total of Kshs 1,264,500.00 as amounts owed by the Respondent.
47. The Respondent, despite denying any liability, has failed to adduce evidence proving that it had paid the amounts claimed by the Claimant. Accordingly, the Court finds no reason to doubt that the Respondent has not remunerated the Claimant for the services rendered.
48. It is further noted that, although the Claimant's Statement of Claim sought Kshs 1,571,462.15, he testified in chief that the outstanding amount as at the date of the hearing is Kshs 1,013,314.00.
49. In light of the foregoing, the Court finds that the Claimant is entitled to Kshs 1,013,314.00.

Service pay

50. The Claimant has sought to be paid Kshs 623,076.90 as service pay. However, it is evident from his P9 form that he was contributing to a retirement scheme. As such, pursuant to Section 35(6) of the *Employment Act*, he is not eligible to receive service pay.

Orders

51. In sum, judgment is entered in favour of the Claimant against the Respondent as follows: -
 - a. The Claimant is hereby awarded Kshs 1,013,314.00 in respect of unpaid salary arrears.
 - b. Interest shall accrue on this amount at court rates from the date of this judgment until full payment is made.



- c. The Respondent shall bear the costs of the suit.
- d. The Respondent shall also issue the Claimant with a certificate of service within 14 days from the date of this judgment.

DATED, SIGNED AND DELIVERED AT NYERI THIS 24TH DAY OF MARCH 2026.

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STELLA RUTTO

JUDGE

In the presence of:

For the Claimant Ms. Washalla instructed by Mr. Orina

For the Respondent Mr. Kimanzi

Court Assistant Ndati

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

