IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, GATEMBU & MURGOR, JJ,A)

CIVIL APPEAL NO. 58 OF 2018

BETWEEN

MAGNATE VENTURES LTD.....APPELLANT

AND

DAVID ODWORI NAMUHISA.....RESPONDENT

(Appeal from the Judgment of the Employment and Labour Relations Court of Kenya

at Nairobi of Wasilwa, J,) dated 31st *July 2017* **in Employment & Labour Relations**

Cause No. 1459 of 2014)

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JUDGMENT OF THE COURT

By a Memorandum of Claim dated 9th November 2009 filed by ***David Odwori Namuhisa, the respondent,*** against ***Magnate Ventures Ltd, the appellant*** the respondent stated that he entered into a consultancy agreement dated 9th November 2009 with the appellant for the provision of electrical works. He contended that under the agreement, he was to oversee, supervise and undertake electrical works for the appellant for a period of three years and would be paid a retainer and a consultancy fees of 4 percent of the revenue net of the expenses of all the electrical works conducted or undertaken. In return that the appellant was to have exclusive use of the respondent's licence Registration Number 1174 "A" over the duration of the contract, as the type of work the appellant usually undertook could only be awarded to holders of Class 'A' licences.

It was the respondent's contention that on 9th November, 2011, the appellant varied the contract terms to the respondent's dissatisfaction that led him to terminate the agreement. The respondent thereafter demanded to be paid the consultancy fees in terms of the agreement, which the appellant had refused to pay.

In particular, the respondent claimed special damages for;

a. Tender No. KAA/ES/JKIA/648/E: Rehabilitation of Airfield Ground Lighting system at Jomo Kenyatta International Airport. Contract amount Kshs. 302, 811,080.25. Notification of award dated 26th *May, 2020. 4% thereof = Kshs. 12,112,443.20;*

b. Tender No. DOD WKS/015.10.11: Proposed Securitization of Military Camps at Kahawa Garission, Embakasi Garission Moi Airbase and Kenya Navy Base Mtongwe. Contract amount Kshs. 83, 706, 882.00. Notification of award dated 7th *October, 2010. 4% thereof = Kshs. 3,348, 275.28;*

c. Tender No. KAA/ES/MLD/677/E: Relocation of Electrical power Station and Rehabilitation and Ducting for Airfield Ground Lighting System at Malindi Airport. Contract amount 54,152,129.00. Notification of award dated 22nd *December, 2010. 4% thereof = 2,166,085.16;*

d. Installation of a 30 metres promulgation Flag at Uhuru Park contracted by Department of Defence (DoD at Kshs. 4,500,000.00. contract date 27th *September, 2010. 4% thereof= Kshs. 180,000.00;*

e. Installation of 13 No. 30 meters Electric Powered High Mast in Witmere, Kahawa, Ruringu, Kamukunji stadium, Gatitu, Kamakwa and Mathari Nyeri town contracted by Ministry of Housing (KENSUP) Nyeri at Kshs. 41, 172, 969.00. Contract dated 17th *May, 2010. 4% thereof = Kshs. 1,646,918.76*

f. Installation of 30 metres Electric High Mast at Kaptembwa Nakuru town at Kshs 25,664,615.00. Contract date, May, 2011. 4% thereof = Kshs. 1,026, 584.60; and

g. Installation of 30 meters Electric Powered High mast in informal settlement in Homabay at Kshs. 12,255,308.00. Contract date May, 2011. 4% thereof = Kshs. 490,212.32.

General damages, interest and the costs of the suit.

In its defence the appellant, admitted entering into a consultancy agreement with the respondent, where it would pay the respondent a retention fee of Kshs. 15,000 per month, together with a consultancy fee equivalent to 4% of the net revenue of all electrical works he would supervise but denied being indebted to the respondent for Kshs. 20,970,519.30; that thereafter the initial agreement was varied and superseded by a second agreement dated 4th May, 2011, where the respondent would be paid a retention fee of Kshs. 50,000 per month. The agreement was for 5 years and could be terminated by either party giving the other 12 months' notice in writing; that on 31st September, 2013, the respondent terminated the agreement between them without giving the appellant any notice.

The issues for determination before the trial judge were whether there was an employment contract between the appellant and the respondent, and if so what were the terms of this contract and if not, what was the nature of the relationship between the appellant and the respondent; what were the circumstances that determined the relationship and what remedies if any to grant in the circumstances.

In determining the first issue, the trial court found that an employer employee contract existed between the parties as the respondent was to be paid Kshs 15,000 per month, and was "tied" to the appellant under the contract of employment, because he was not allowed to engage in any other similar work since his Licence Registration No. 1174 "A" was to be used exclusively by the appellant; that in addition, he was forbidden from engaging in any other business similar to that specified for in the consultancy agreement.

The court went on to find that it had jurisdiction to determine the dispute between the appellant and the respondent for the reason that;

> **"Applying the test in R198, it is apparent that the Claimant though termed as a Consultant, was in fact an employee of the Respondent. It matters not what title he was given in the agreement because the nature of the work he did for Respondent show, that the work was solely performed for the benefit of the Respondent and he carried out this work which required his personal presence and supervision"**.

In so finding, the learned judge awarded the respondent Kshs.20,957,933.09 being the consultancy fee of 4% claimed together with interest and costs.

The appellant was dissatisfied with the trial court's decision and appealed to this court on grounds that, the learned judge erred by holding that an employer/employee relationship existed between the parties, and ignoring the parties' pleadings which unequivocally defined a consultancy relationship; in wrongly assuming jurisdiction over the dispute contrary to the provisions of ***section 12*** of the ***Employment and Labour Relations Court Act, 2011*** and ***Article 162 (2)*** of the ***Constitution***; in failing to take into account that the consultancy fees was payable at the rate of 4% net of expenses` as well as VAT and therefore the award of Kshs. 20,957,933.09 was erroneous and grossly exaggerated; in holding that the respondent had proved that contracts awarded amounting to Kshs. 528,448,327.09 yet no contract document was produced in evidence, and finding that the respondent had proved his case; in holding that the sum of Kshs.528,448,327.09, which sum was higher than what the claimant had pleaded in his case was the basis upon which the consultancy fees of 4% was to be calculated without any basis in fact or law; and failing to reevaluate the evidence and applying wrong legal principles to determine the dispute.

In the written submissions which ***Mr. Nyaanga,*** learned counsel for the appellant highlighted, counsel identified three issues for determination, firstly, whether there was an employer employee relationship between the parties, secondly, whether the Employment and Labour Relations Court had jurisdiction to hear the dispute and thirdly whether the respondent proved his case to the required standard.

Concerning whether an employer employee relationship existed, it was submitted that an agreement between the parties specified a consultancy arrangement existed between the parties, and that at no time was there any indication of an employment relationship; that further the respondent clearly stated that his dispute with the appellant arose out of the consultancy agreement made between them; that it was therefore wrong for the trial court to turn around and find that an employment relationship existed, and the judge's arrival at the existence of an employment relationship was wrong. Counsel went on to argue that since it was a consultancy and not an employment relationship that existed between the parties, then the Employment and Labour Relations Court did not have jurisdiction to hear and determine the dispute.

Finally on the question of whether the respondent was entitled to the award of Kshs. 20,957,933.09, counsel submitted that, the consultancy agreement provided that the respondent would be paid a consultancy fee net of all expenses, and that the respondent should have produced the requisite documentation to support the claim. As it were, counsel argued, the sum claimed was not net of expenses, and therefore the respondent was not entitled to the award of Kshs 20,957,933.09; that the trial court was wrong to award an amount that had no basis, and which was not computed in terms of the parties' agreement.

In response ***Mr. S. Ojienda***, learned counsel for the respondent who also filed written submission, contended that an employer employee relationship existed between the parties, as the contract restricted the respondent from engaging in any other business, and that therefore the Employment and Labour Relations Court had jurisdiction to hear and determine the dispute. The case of ***Whitehead vs Woolworths (Pty) (1999) 20 ILJ 2133 (LC)*** was cited to define an employee as a person who worked for another and whose services were not considered to be that of an independent contractor; that the court was right in finding that an employment relationship existed particularly as the respondent was paid a monthly fee, he was not allowed to engage in any other business; his licence was exclusively for the appellant's use; it was a term contract; and the respondent was basically tied to the appellant.

Concerning the award of Kshs. 20,957,933.09, counsel asserted that the amount was due to the respondent as, though the respondent did not produce the related documents in support of the sum claimed, the onus was upon the appellant to produce the documents and provide evidence of the expenses incurred; that since they chose not to do so, the court was entitled to base the award on the documentation the respondent provided.

In a brief reply, Mr. Nyaanga submitted that the contract was clear; that the burden of proof lay with the respondent to show how the sum of Kshs 20,957,933.09 was arrived at, and that by failing to do so, he had not discharged the burden of proof, so as to entitle him to the sums awarded.

We have considered the appeal, the proceedings and the submissions of the parties. As this is a first appeal, it is our duty to reevaluate the evidence and come to our own conclusion on the facts, but we must remain cognisant of the fact that we have not seen or heard the witnesses that were before the trial court. See ***Mwanasokoni vs Kenya Bus Limited [1985] KLR 931.***

With the aforegoing in mind, the issues for consideration are whether the trial court had jurisdiction to hear and determine this dispute, and if so whether the respondent was entitled to the amount claimed.

Determining the question of whether the Employment and Labour Relations Court had jurisdiction to hear the dispute, requires that we begin by considering, whether an employer employee relationship existed between the parties.

In this case, there were 2 contracts, one dated 9th November 2009 (*the initial contract)* and another dated 4th May 2011 *(the second contract)* that was referred to as a consultancy agreement between the parties that set out the terms of an arrangement that existed between them. It is not in dispute that in the initial agreement, the appellant agreed to pay the respondent as consultant a retention fee of Kshs. 15,000 per month and a consultancy fee of four percent (4%) of the revenue net of the expenses on all electrical works he was required to oversee. In return, the appellant was entitled to the exclusive use of the Consultant's Licence Registration Number 1174 "A" during the term of the agreement. It is also not in dispute that the parties entered into a second agreement in the same terms, save that the retention amount the respondent received was increased to Kshs. 50.000, but the consultancy fee of 4% of revenue net of expenses was excluded from the agreement.

It is not also disputed that the second agreement was terminated by the respondent, with the result that, it becomes apparent that the claim herein turns on, the respondent's demand for payment of the *"*… consultancy fee of *four per centum (4%) of the revenue net of expenses"* of all the electrical works undertaken that was expressed in the initial agreement.

Whether the parties' relationship was based on the consultancy agreement or an employment relationship requires that we consider the contractual terms of the parties' agreement to construe the purport and intent, or the 'true meaning' of the contract, this being a basic tenet of contract law, in order to give effect to the parties' intentions.

In the case of ***Charter Reinsurance Co Limited vs Fagan [1997] AC 313*** the UK Court of Appeal had this to say;

> **"… the court should remind itself that the task is to discover what the parties meant from what they have said, and that to force upon the words a meaning which they cannot fairly bear is to substitute for the bargain actually made one which the court believes could better have been made. This is an illegitimate role for the court."**

By the same token in the case of ***Pius Kimaiyo Langat vs Co-operative Bank of Kenya Ltd [2017] eKLR***, it was also stated thus;

> **"We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, Fraud or undue influence are pleaded and proved."**

Consequently, whether the terms of the agreement resulted in a consultancy or employment relationship essentially boils down to what was the parties' intention when they entered into the agreement. Instead of interpreting the contractual terms expressed in the agreement, the learned judge imported ***ILO R198 – Employment Relationship Recommendation 2006 (R198)*** into the circumstances of this case and concluded that an employment contract existed between the parties. The recommendation stipulates that;

> **"Members should consider the possibility of defining in their law and regulations or by other means, specific indicators of the existence of an employment relationship. These indicators might include: -**
>
> > **a. 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 parties requesting the work is of a particular duration has a certain continuity, requires the workers availability or involves the provision of tools, materials or machinery by the party requesting the work.**

b. Periodic payment of remuneration to the worker, the fact that such remuneration constitutes the worker sole or principal source of income, provision of payment in kind, such as food, lodging or transport, recognition of entitlements such as weekly rent and annual holiday, payment by the party requesting the work for travel undertaken by the worker in order to carry out the work, or absence of financial risk for the worker".

We think that this was not the correct approach for the trial court to adopt, for reasons, that firstly, the provision clearly provides that member states should "…*consider the possibility of defining in their law and regulations*, *or by other means, specific indicators of the existence of an employment relationship…".* Since the recommendation has yet to be enacted into law in this jurisdiction, it remains a recommendation until such enactment. Secondly, the recommendation does not specify the circumstances within which it is to be applied, such as, whether or not it should be implied into the terms of contracts legitimately entered into between parties, in particular where, the nature of the contract and its terms are expressly specified.

By applying the recommendation and reaching a finding that an employment relationship existed between the parties, without construing the terms of the extant consultancy contract that governed their relationship, we find that the learned judge misdirected herself, and in so doing, attempted to rewrite the parties' agreement.

It therefore, becomes incumbent upon us to discern the parties' intention from the terms of their contract.

In the case of ***Savings And Loan Kenya Limited vs Mayfair Holdings Limited [*2012] eKLR** it was held that**;**

"….Therefore, the intention of the parties should be construed with reference to the object and the terms of the agreement.

If the words used in the agreement are clear they should be construed in their ordinary meaning so as to establish the intention of the parties."

In the case of ***Lord Napier and Ettrick vs R F Kershaw Limited [1999] 1 WLR 756***, Lord Steyn discussed the contextual interpretation of a contract stated thus;

"Loyalty to the text of a commercial contract, instrument, or document read in its contextual setting is the paramount principle of interpretation. But in the process of interpreting the meaning of the language of a commercial document the court ought generally to favour a commercially sensible construction. The reason for this approach is that a commercially favourable construction is likely to give effect to the intention of the parties. Words ought therefore to be interpreted in the way in which a reasonable commercial person would construe them. And the reasonable commercial person can safely be assumed to be unimpressed with technical interpretations and undue emphasis on niceties of language". (emphasis ours)

In other words, discerning the parties' intention in entering into the agreement requires an interrogation of the context, meaning and language of the document, including the commonly given terms and expressions, as well as the usage of such terms. For instance, the term *'consultancy'*, is defined by the ***Oxford English Dictionary*** as, *"a professional practice giving expert advice in a given field"*, and a *'consultant'* as, *"a person who provides expert advice professionally"*.

Defining attributes of a consultant are that they provide expertise in a specific area and would be paid a consultancy fee or retainer. The consultant would be independent of the client, and would have qualifications that the client would not have within its organization.

With reference to payment, ***Investopedia*** defines a *"retainer fee"* as,

"… an amount of money paid upfront to secure the services of a consultant, freelancer, lawyer, or other professional. A retainer fee is most commonly paid to individual third parties that have been engaged by the payer to perform a specific action on their behalf. These fees, almost always paid upfront,.... In addition, retainer fees usually do not represent the total final cost of the services provided."

In the instant case, the terminology adopted makes it clear that at all times, the intended purpose of the contract was the provision of consultancy services, where the respondent, referred to as a consultant, and not an 'electrician' or 'employee' was contracted to oversee, supervise and undertake electric works for the appellant. In return he was to be paid a monthly retainer, and not a 'monthly salary'.

Furthermore, the contractual provisions such as,*"…the Company shall be entitled to the exclusive use of the Consultant's Licence Reg No. 1174 "A" during the term of the Agreement…"* and that *"…the Consultant shall not engage in any other business similar, to compete with the Company in its electrical engineering works or take any other electrical engineering consultancy during the term of this agreement,"* when considered in the context of the parties' arrangement are with reference to non-compete provisions that were not strangers to the agreement in question.

It is also significant that in addition to the retainer fee of Kshs. 15,000, the contract also specified that the consultant would have a share of the appellant's revenue at the rate of 4% net of the expenses, which provision forms the basis of the respondent's claim against the appellant. This payment obligation soundly placed the parties' relationship on a commercial footing, thereby negating any reference to an employment relationship. As such, when all the provisions of the agreement are construed together the only conclusion that can be reached is that the parties' contract was strictly for the provision of commercial consultancy services, and was never intended to create an employment contract. We would add that; the record does not also disclose that the respondent construed the agreement to be otherwise.

Given our finding that this was not an employment contract, did the Employment and Labour Relations Court have jurisdiction to hear and

determine the dispute?

Matters pertaining to jurisdiction have numerously been restated by this Court, and we will not refrain from restating this Court's position in **The Owners of Motor Vessel 'Lillian S' vs Caltex Oil Kenya Ltd** ***[1989] KLR 1*** that;

> **"Jurisdiction is everything. Without it a court has no power to make one step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction."**

The Supreme Court in **Samuel Kamau Macharia & Another vs Kenya** ***Commercial Bank & 2 others Application No. 2 of 2011 [2012] eKLR*** stated,

> **"A court's jurisdiction flows from the Constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred by law."**

Article 162 (2) of the ***Constitution*** as read together with ***section 12*** of the ***Employment and Labour Relations Act***, provides that the court shall have exclusive 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, employment disputes; employer and trade union disputes; employers' organization and a trade union organization disputes; disputes between trade unions; employer organizations disputes; disputes between an employers' organization and a trade union; trade union and a member disputes; employer's organization or a federal and a member disputes; registration and election of trade union officials disputes; and registration and enforcement of collective agreements disputes.

Bearing the remit of the Employment and Labour Relations Court in mind, it is evident that the trial court had no jurisdiction to determine a dispute that was based on a consultancy agreement and had all the hallmarks of a commercial document. What the respondent desired was for his claim at the rate of 4% net of the expenses of the appellant's revenue that was specified in the consultancy agreement to be determined, and had the court construed the true meaning and intent of the parties' agreement, it would have found that it was not an employment contract, and in so finding, it would have declined to take over and adjudge the parties' dispute.

It would also follow that, because the court had no jurisdiction to determine the dispute, the award of Kshs. 20,957,933.09 was not also within its remit to determine, and as a consequence, we too have no basis upon which to go into its merits.

In sum, the appeal is allowed, the judgment of the Employment and Labour Relations Court delivered on 31st July 2017 is hereby set aside and substituted with an order dismissing the suit with costs to the appellant.

It is so ordered.

Dated and delivered at Nairobi this 7*th* day of August,?2020.

R. N. NAMBUYE

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR