



Wanyoike v Transcentury PLC (Employment and Labour Relations Cause E961 of 2022) [2025] KEELRC 153 (KLR) (30 January 2025) (Judgment)

Neutral citation: [2025] KEELRC 153 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E961 OF 2022
BOM MANANI, J
JANUARY 30, 2025**

BETWEEN

STEPHEN NJUGUNA WANYOIKE CLAIMANT

AND

TRANSCENTURY PLC RESPONDENT

JUDGMENT

Introduction

1. The dispute between the parties revolves around the Claimant's attempts to recover his terminal dues from the Respondent following the alleged closure of his contract of service through effluxion of time. Whilst the Claimant contends that the Respondent was his employer and is obligated to settle the dues, the Respondent denies this assertion and denies that it is obligated to pay the dues in dispute.

Claimant's Case

2. The Claimant contends that he was an employee of the Respondent working on fixed term contracts. He contends that the Respondent engaged his services in March 2011. However, the employment relation allegedly came to a close in September 2022 when the last contract between them was terminated through effluxion of time.
3. The Claimant avers that during his term of service, he worked for the Respondent in different capacities at the latter's subsidiaries in Tanzania and South Africa. It is his case that the subsidiaries were under the direct control of the Respondent.
4. The Claimant contends that his last assignment with the Respondent was with its subsidiary, Kewberg Cables & Braids PTY Limited (Kewberg Cables) in the Republic of South Africa where he served as General Manager. He contends that the Respondent sent him to Kewberg Cables on secondment. It is his case that Kewberg Cables is wholly owned by the Respondent.



5. The Claimant contends that the parties agreed that his monthly remuneration at Kewberg Cables would be USD 7,138. He contends that the Respondent used to pay the aforesaid salary together with other benefits on behalf of Kewberg Cables. It is his case that the Respondent assumed this responsibility from March 2016.
6. The Claimant avers that the Respondent assumed the responsibility of settling his remuneration on behalf of Kewberg Cables because the latter had been undergoing financial distress. He contends that from the time the Respondent assumed this responsibility, he was never referred to Kewberg Cables regarding his remuneration.
7. The Claimant avers that the Respondent had all the while acknowledged him as its full time employee. He contends that it is the Respondent who in fact applied for his work permits from the South African authorities.
8. The Claimant avers that the Respondent issued him with the last contract which lapsed in May 2022. However, it (the Respondent) extended the contract by four (4) months to September 2022 to enable him to participate in the business recovery process he had initiated for Kewberg Cables.
9. The Claimant avers that after the Respondent extended his contract, he dutifully executed his duties until September 2022 when the contract lapsed through effluxion of time. He contends that despite all efforts to bring Kewberg Cables back on its feet, the subsidiary could not resuscitated. As such, it was placed under liquidation.
10. The Claimant contends that at the end of his contract, the parties agreed (verbally and through correspondence) that he was to be paid all the outstanding benefits due to him in USD and Rand. He avers that the parties further agreed to reduce this agreement into writing. He contends that they agreed on the following benefits:-
 - a. Accrued salary arrears for seven (7) months from March 2022 to September 2022 totaling USD 38,777.41.
 - b. Refund of medical cover insurance premiums for his spouse amounting to Ksh. 108,792.00.
 - c. Petty cash refund of R 56,750.26.
 - d. Severance pay for eleven (11) years amounting to USD 14,023.59.
11. The Claimant avers that the Respondent was to make good the aforesaid payments in November 2022. However, it allegedly failed to do so. Further, he contends that the Respondent avoided to give him the agreed written undertaking to settle the aforesaid amount opting instead to use another entity to do so.
12. The Claimant avers that all along, the Respondent acknowledged and treated him as its employee. As such, its (the Respondent's) attempts to evade responsibility to settle the aforesaid benefits was mischievous. As such, he prays for judgment against the Respondent for the aforesaid amounts together with interest and costs of the case.

Respondent's Case

13. In response and contrary to the assertion by the Claimant, the Respondent denies that the Claimant was its employee. It contends that the Claimant was an employee of Kewberg Cables, a separate and distinct legal entity. The Respondent contends that the Claimant and Kewberg Cables had various fixed term contracts on which their employment relation was anchored.



14. The Respondent contends that it has a distant relation with Kewberg Cables. It avers that it has an interest in Trans Century (Pty) Holdings Co. SA which is the Holding company for Kewberg Cables.
15. The Respondent contends that the Claimant requested Kewberg Cables to pay his salary in Kenya through Kenyan currency in order for him to avoid the cost of transferring money to his family which was living in Kenya at the time. It contends that in view of this request, Kewberg Cables asked it (the Respondent) to facilitate the payments since it has presence in Kenya. The Respondent avers that it is in this context that it began paying the Claimant's salary.
16. In the premises, the Respondent denies that the fact that it was paying the Claimant's salary converted him into its employee. It contends that it was doing so on behalf of the Claimant's employer following the employer's request in that regard. It further avers that all such payments were charged to the account of Kewberg Cables, the Claimant's employer.
17. Regarding the letter requesting for a work permit for the Claimant, the Respondent insists that it made the request at the instance of Kewberg Cables, the Claimant's employer. As such, the letter should not be relied on to impose an employment relation between it and the Claimant.
18. The Respondent denies that it assumed responsibility for settling the Claimant's exit dues as asserted by the Claimant. It contends that it only facilitated negotiations between the Claimant and Kewberg Cables regarding the Claimant's exit package. It further contends that when the Claimant insisted that the exit agreement be drawn in its name, it declined the request as there was no privity of contract between them.
19. The Respondent contests the court's jurisdiction to hear the case. It contends that the cause of action arose in South Africa where the contract between the Claimant and Kewberg Cables was concluded.
20. The Respondent further contends that the contract between the Claimant and Kewberg Cables was performed in South Africa where the Claimant was ordinarily resident at the time. As such, this suit ought to have been filed in the Republic of South Africa.
21. The Respondent further asserts that there is no employment relation between it and the Claimant. As such and in terms of section 12 of the [Employment and Labour Relations Court Act](#), the court is not seized of the requisite jurisdiction to hear the case.

Issues for Determination

22. After evaluating the pleadings, evidence and submissions by the parties, it is apparent that the following are the issues that require determination:-
 - a. Whether the court has jurisdiction to entertain the action.
 - b. Whether the Claimant was an employee of the Respondent at the time of the closure of his last contract of service.
 - c. Whether the Claimant is entitled to the reliefs that he seeks through these proceedings.

Analysis

23. The first issue for determination relates to whether the court has jurisdiction to determine the dispute between the parties. The Respondent has contested the court's jurisdiction on two fronts.



24. First, it contends that there is no employment relation between it and the Claimant. As such and in terms of section 12 of the Employment and *Labour Relations Act*, this court cannot preside over this dispute.
25. Second, it contends that the disputed employment relationship was entered into and performed in the Republic of South Africa where both the Claimant and his employer, Kewberg Cables, were ordinarily resident at the time. As such, the suit ought to have been filed in the Republic of South Africa.
26. Regarding the first limb of the objection, the court notes that whether an employment relation exists is a matter of fact and law. It turns on an analysis of the evidence tendered by the parties to the dispute vis a vis the applicable law.
27. The Employment and Labour Relations Court is constitutionally mandated to evaluate any set of facts to determine whether they disclose the presence of an employment relationship. It (the court) can only discharge this function by analyzing the evidence which is presented to it by the parties to an alleged employment dispute against the applicable law. It is only then that it will return a finding whether there exists an employment relation.
28. This is what this court is called upon to do in the instant dispute. It is tasked to examine the facts presented by the parties before it in order to determine whether they had an employment relationship. The fact that the court is mandated to discharge this task means that it is clothed with jurisdiction to do so. Consequently, the first limb of the objection is without merit and fails.
29. Regarding the second limb of the objection, the court notes that the Claimant has sued Trans-century Plc, the Respondent herein alleging that there was an employment relation between him and the said company. He has not instituted the proceedings against Kewberg Cables, the company which the Respondent contends was his employer. As such, the question whether the court has jurisdiction to determine the dispute has to be addressed in the context of the alleged employment relationship between the Claimant and the Respondent; not Kewberg Cables. Indeed, it is this question which the court is called upon to address.
30. Since the Claimant has not framed any claim against Kewberg Cables, the alleged contract between these two is irrelevant in addressing the question of jurisdiction. However, it will be relevant in determining whether there was an employment relation between the Claimant and the Respondent.
31. The Respondent does not deny that it is a Kenyan company operating within the territory of Kenya. As a matter of fact, it tendered in evidence an official search from the Registrar of Companies and a Certificate of Incorporation both of which show that it is registered in Kenya with majority of its shareholders being Kenyan nationals. Thus, the court finds that it (the Respondent) is ordinarily resident and operates in Kenya.
32. The Claimant alleges that the Respondent hired his services and seconded him to work for Kewberg Cables, a South African company. In effect, he claims that there was an employment relation between him and the Respondent.
33. The Claimant contends that he was employed by the Respondent, a Kenyan national and that the contract between the two was concluded in Kenya. I do not understand him as contending that he was employed by Kewberg Cables, a South African national and that the contract between them was concluded in the Republic of South Africa. This being the case, the dispute between the parties (Claimant and Respondent) squarely falls within the purview of this court and not the South African court. As such, the court finds that it has jurisdiction to entertain the dispute.



34. The next question for determination is whether the Claimant was an employee of the Respondent. The evidence on record shows that there was an employment relation between the Claimant and the Respondent. This fact is confirmed by the Respondent's letter to the Department of Home Affairs, Republic of South Africa dated 20th July 2018. The letter expressed the Respondent's agreement to an intra-company transfer of the Claimant with the consequence that the latter was to leave the service of the Respondent and join Kewberg Cables exclusively as a General Manager for two years.
35. Section 8 of the *Employment Act* acknowledges that a contract of employment may be either oral or written. Under section 9 (2) of the Act, a contract of service whose tenure is three or more months is required to be evidenced in writing. The responsibility to reduce the contract into writing rests on the employer.
36. However, the fact that the employer has not reduced the contract into writing does not render it (the contract) nonexistent and without force of law. The contract can still be discerned from other evidence such as the Respondent's aforesaid letter and is, all factors remaining constant, enforceable.
37. The only legal ramification for the failure to reduce into writing a contract of service which is required to be in writing relates to the burden of proof of the terms of the contract. Under section 10 (7) of the *Employment Act*, if the employer fails to put in writing a contract which the law requires to be in writing, the burden of proof in respect of disputed terms of the contract rests on him.
38. On 20th July 2018, the Respondent appears to have agreed to an arrangement whereby the Claimant was to be transferred to Kewberg Cables for a period of two years. The Claimant was to serve Kewberg Cables in the position of General Manager.
39. The evidence on record shows that the Respondent wrote a motivation letter to support the Claimant's application for a work permit under the aforesaid arrangement. It appears to me that the Respondent was tasked to write the letter because it was deemed to have knowledge of the Claimant's work attributes and ethics having previously worked with him.
40. The record shows that the Claimant secured an intra-company transfer work permit number A7724264 on 6th November 2018. The permit granted him temporary residence status in the Republic of South Africa.
41. The *Employment Act* of Kenya does not deal with the concept of intra-company transfers. Therefore, we have to look elsewhere to delineate the concept.
42. The Public Service Commission Regulations, 2020 define the term "transfer" to mean the movement of an officer from one ministry to another or from one duty station to another with change of pay point. But this definition is conceptualized in the context of the public service sector.
43. In the private sector realm, it appears that intra-company transfers occur when an employee is transferred by a multinational company from one country to another to work for either the same multinational or its subsidiaries. The foregoing can be discerned from the application of the phrase in the Immigration Act of South Africa, *Act No. 13 of 2002*. Section 19 (5) and (6) of the Act provides as follows:-
 - a. An intra-company transfer work permit may be issued by the Department to a foreigner who is employed abroad by a business operating in the Republic in a branch, subsidiary or affiliate relationship and who by reason of his or her employment is required to conduct work in the Republic for a period not exceeding two years....."



- b. The holder of an intra-company transfer work permit may conduct work only for the employer referred to in subsection (5) and in accordance with the job description and other elements contemplated in the certification referred to in subsection (5) or set out in his or her permit.
44. A reading of the above provision suggests that an intra-company transfer happens when an employee is moved by a parent company to either its branch office or to its subsidiaries or affiliates operating in another country. Depending on whether the transfer is to a parent company's branch or its subsidiaries or affiliates, the legal ramifications of the process will be different.
45. If the intra-company transfer is to the company's branch, the employee remains an employee of the company during the period of such transfer. This is because the branch to which the employee is transferred has no corporate status of its own. It remains part of the company.
46. However, the position will be different if the transfer is to a subsidiary or affiliate of the parent company. This is because the subsidiary or affiliate company has its own corporate personality which is separate and distinct from that of the parent company (see *Hannah Maina t/a Taa Flower v Rift Valley Bottlers Limited* [2016] eKLR, *Mosi v National Bank of Kenya Limited* [2001] eKLR and *Fredrick Otieno Oluoch v Oryx Energies (K) Limited & another* [2020] eKLR). In effect, the transfer will sever the employment relation the employee had with the parent company and establish a new employment relation with the subsidiary or affiliate company.
47. This fact is made apparent by George Ogembo in his publication, *Employment Law Guide for Employers*, Second Edition when he states at page 57 thus:-
- In situations where an employee has been transferred, the original employer who transfers the employee is, in law, no longer regarded as his employer. Instead, the company which the employee has been transferred to is now regarded as his employer.”
48. The parties to the instant dispute agree that Kewberg Cables and the Respondent have an affiliation either directly or through Trans Century (Pty) Holdings Co. SA. It is also apparent that Kewberg Cables is registered as a distinct legal entity. Evidence of this was tendered by the Respondent in the form of Certificate of Incorporation No. 2007/017366/07. Therefore, notwithstanding that it may be an affiliate of the Respondent and Trans Century (Pty) Holdings Co. SA, Kewberg Cables is a distinct legal entity with a separate corporate personality.
49. The evidence on record shows that after the Respondent entered into an intra-company transfer with Kewberg Cables in respect of the Claimant's services, Kewberg Cables entered into a fixed term contract with the Claimant which was drawn on 28th May 2021 and which is the subject of this litigation. The contract was to run from 1st June 2019 to 31st May 2022.
50. It is noteworthy that prior to this engagement, the two companies had entered into previous intra-company transfers under which the Claimant was transferred to work for Kewberg Cables on short term contracts. For instance, there is evidence that the Claimant was issued with intra-company transfer work permit No. A04216910 dated 26th July 2011 which allowed him to work for Kewberg Cables from the date of the permit and on the basis of which, he concluded a couple of short term contracts of service with Kewberg Cables.
51. It appears to me that every time the Claimant's short-term contract with Kewberg Cables lapsed, he would, albeit momentarily and technically, resume his employment with the Respondent where-after the latter would sanction a fresh intra-company transfer for him back to Kewberg Cables on another short-term contract. This process was undertaken successively over a period of time. And hence the series of contracts between the Claimant and Kewberg Cables.



52. As mentioned earlier, it is not a legal requirement that a contract of service must be in writing for it to be deemed to exist. It may arise from an oral arrangement or could be implied from the conduct of the parties.
53. In my view, the short interludes during which the Claimant momentarily and technically resumed employment with the Respondent to enable a fresh intra-company transfer back to Kewberg Cables were most likely based on oral agreements between them. Absent such oral agreements, the Claimant's resumption of employment can be inferred from the conduct of the parties.
54. Otherwise, it would be impossible to account for the capacity in which the Respondent assumed the task of sanctioning fresh intra-company transfers of the Claimant to Kewberg Cables every time the fixed term contracts between Kewberg Cables and the Claimant lapsed. The Respondent could only have performed this task because it acknowledged resumption of the employment relation (albeit momentarily) between it and the Claimant immediately the latter's short-term contracts with Kewberg closed. This in turn gave it (the Respondent) the locus standi to sanction fresh intra-company transfers for the Claimant.
55. The impugned contract of 28th May 2021 describes Kewberg Cables as the Claimant's employer. It does not suggest that the Respondent was to be the Claimant's employer during its currency.
56. Clause 4.1 of the contract on salary clearly stipulates that the obligation to pay the Claimant's salary rested on the company (Kewberg Cables). There is no suggestion that this was to be the Respondent's obligation.
57. Clause 17 of the contract provides that the agreement between the parties constituted the entire contract between them (Claimant and Kewberg Cables) and that no variations, alterations and or additions were to be introduced in it except through an instrument in writing signed by both parties (Claimant and Kewberg Cables).
58. The court has not been shown any written memorandum signed by the Claimant and Kewberg Cables transferring Kewberg Cables' obligation to pay the Claimant's salary under the contract of 28th May 2021 (or indeed the previous contracts) to the Respondent. As such, the obligation to remunerate the Claimant during the currency of the contract(s) between him and Kewberg Cables remained with Kewberg Cables.
59. The record shows that the Respondent made some payments towards the Claimant's salary whilst the Claimant was in the service of Kewberg Cables. The Claimant contends that this proves that he was an employee of the Respondent. However, the Respondent contends that this arrangement was pursuant to a request by Kewberg Cables that it facilitates payment of the Claimant's salary in Kenya to avoid the inconveniences which the Claimant was facing in transferring money to Kenya where his family was living at the time.
60. In the face of the explicit contract between the Claimant and Kewberg Cables dated 28th May 2021 creating an employment relation between the two, it cannot be argued that the mere fact that the Respondent paid the Claimant's salary during the currency of that contract established an employment relation between it (the Respondent) and the Claimant. There must have been some other explanation for this arrangement.
61. And the Respondent has given the reason for this state of affairs. It contends that the arrangement was intended to ease the difficulty which the Claimant was facing in transferring money to Kenya for the benefit of his family. Because the Respondent (which is resident in Kenya) has a relation with Kewberg



Cables (which is resident in South Africa), it does not appear absurd that Kewberg Cables considered it easier for the Respondent to assist it in disbursing the Claimant's salary from Kenya.

62. The fact that the Respondent did not assume responsibility for paying the Claimant's salary except in the capacity of Kewberg Cables' agent is evident from the documents that were tendered in evidence. For instance, the ledger at page 36 of the Respondent's trial bundle demonstrates that the funds released by the Respondent to the Claimant for this purpose were charged to the account of Kewberg Cables.
63. The Claimant has contested the Respondent's narrative that the money it paid to him on behalf of Kewberg Cables was charged to the account of Kewberg Cables. First he contends that the Respondent did not produce an agreement between it and Kewberg Cables sanctioning such an arrangement. Second, he alleges that the Respondent did not plead this narration in its defense. As such, it cannot advance it (the narration) to defeat his claim.
64. I do not think that the Respondent and Kewberg Cables were under obligation to reduce the arrangement under which the Respondent acted as Kewberg Cable's agent in paying the Claimant's salary into writing. The two were at liberty to enter into the arrangement orally. The fact of the matter is that the ledger at page 36 of the Respondent's bundle demonstrates that the cash transfers by the Respondent to the Claimant on account of the latter's salary were charged to Kewberg Cables.
65. As a matter of fact, it is the Claimant who proposed the aforesaid arrangement as a way of easing the challenges he was facing whilst processing his salary in South Africa. This is evident from his email dated 21st September 2017 appearing at page 35 of the Respondent's trial bundle. In the email, the Claimant proposed that the Respondent pays his salary in Kenya and charges the amount paid to the account of Kewberg Cables. The email states in part as follows:-

My proposal was payment of monthly net pay in Kenya which is recharged to Kewberg and meet the other legal obligations (filing of returns) here as per contract of employment. To overcome the bank challenge on regular deposits, transfers made to my account from TCL can cover these as I had convinced the Bank that TCL will be paying my salary from Kenya.”

66. On whether the Respondent's narration was impleaded by it (the Respondent), I can do no better than refer to paragraph 4(c) of the Statement of Defense where the Respondent pleaded as follows:-

Contrary to his assertions, sometimes in 2016 the Claimant being a Kenyan and having his family in Kenya requested that he be paid using Kenyan currency as he was incurring costs transferring monies to Kenya for his family and his other Kenyan operations. His employer (Kewberg Cables) approached the Respondent for assistance in having the Claimant's salary paid in Kenyan currency but this salary payment was always charged to his employer.”
67. The Claimant relies on various email correspondence between him and some employees of the Respondent to contend that the Respondent accepted to settle his terminal dues. I have looked at the emails and it is apparent that no such agreement was arrived at between the parties.
68. The email trail of 23rd September 2022 and 26th September 2022 which the Claimant relies on to contend that there was a settlement of the agreed dues between him and the Respondent shows that negotiations on the matter had not closed at the time. There were outstanding issues between them regarding: the payment plan; the exchange rate; and petty cash refunds.
69. Importantly, there was no agreement that the Respondent would be the one to pay the dues. This explains why the Respondent's staff sent the Claimant a draft agreement on the Letterhead of Kewberg



Cables, a matter which elicited immediate protestation from the Claimant as can be seen from his email dated 17th October 2022.

70. The Respondent denies that the discussions evidenced by the emails were meant to impose the responsibility of settling Kewberg Cables' liabilities on it (the Respondent). It contends that it was only involved in the negotiations in a bid to assist the parties to agree on the Claimant's exit package. However, when it became apparent that the Claimant wanted to saddle it (the Respondent) with the responsibility of paying the dues, it (the Respondent) abandoned the exercise.
71. The court notes that the Claimant's contention that the Respondent assumed responsibility to settle his dues on behalf of Kewberg Cables is premised on the aforesaid email correspondence between him and some of the Respondent's employees. However, there is no Board Resolution by the Respondent's Board of Directors to confirm that the Respondent assumed this responsibility. As such, the Claimant's contention that the email exchanges bind the Respondent to settle the claim is misplaced.
72. Indeed, some of the emails by the Claimant to the Respondent's employees demonstrate that he appreciated the fact that Kewberg Cables bore the responsibility of paying his terminal dues. However, because of the liquidity challenges it (Kewberg Cables) was facing, he considered that the Respondent should shoulder this liability. This reality is for instance self-evident in the Claimant's email of 17th October 2022.
73. In their final submissions, the Claimant's advocates urge the court to see through the Respondent's corporate subterfuge and issue the orders sought. However and as demonstrated earlier, despite the affiliation of the Respondent and Kewberg Cables, the two remain distinct legal persons. As such, if the Claimant had reason to believe that the Respondent was perhaps abusing the corporate personality of Kewberg Cables by seeking to hide behind the corporate veil of Kewberg Cables to evade making payments that are due from it (the Respondent), he ought to have sought to lift the corporate personality of Kewberg Cables (as a subsidiary of the Respondent) in order to go for the Respondent directly (see Peter O. Ngoge T/A O P Ngoge & Associates v Ammu Investment Company Limited [2012] eKLR). However, he did not do so. As such and absent the process of lifting the corporate veil of Kewberg Cables, the court is not entitled to circumvent the corporate veil of the two companies and transfer liabilities of Kewberg Cables to the Respondent as there was no privity of contract between the two companies and the Claimant in respect of the Claimant's contract(s) with Kewberg Cables (Hannah Maina t/a Taa Flower v Rift Valley Bottlers Limited [2016] eKLR).
74. The Claimant contends that he was seconded by the Respondent to Kewberg Cables. However, the evidence on record does not support this contention. The work permits which the Claimant was issued with following his movement from the Respondent to Kewberg Cables show that he joined Kewberg Cables on an intra-company transfer and not on secondment by the Respondent.
75. The two processes have entirely different legal outcomes. As such, they must not be confused or conflated.
76. The fact that the two concepts have distinct legal outcomes is well articulated by George Ogembo in the publication referred to earlier in this judgment when he says at pages 57-58 thereof thus:-

In situations where an employee has been transferred, the original employer who transfers the employee is, in law, no longer regarded as his employer. Instead, the company which the employee has been transferred to is now regarded as his employer. The opposite is however the case where an employee has been seconded. In such a situation, the company which



seconds the employee remains the employer at all material times and not the company to which the employee is seconded....”

77. In their submissions, counsel for the Claimant contend that the Respondent’s decision to allegedly vary the Claimant’s contract regarding payment of his remuneration with the consequence that he (the Claimant) was to seek payment from Kewberg Cables is illegal as it violates section 10 of the [Employment Act](#) and article 41 of [the Constitution](#). However, I do not find merit in this contention. As pointed out earlier, save for the short interludes when the Claimant momentarily and technically resumed his employment with the Respondent between the lapse and re-issue of the short-term contracts with Kewberg Cables, he was in the exclusive employment of Kewberg Cables. As such, the Respondent cannot be accused of having unlawfully varied the fixed term contracts between him and Kewberg Cables as it (the Respondent) was not party to those contracts. As indicated earlier, the fact that the Respondent sometimes paid the Claimant’s salary on behalf of Kewberg Cables under the contract(s) did not convert him into the Respondent’s employee (*Fredrick Otieno Oluoch v Oryx Energies (K) Limited & another* [2020] eKLR).
78. Counsel for the Claimant has also impugned the legality of the contracts that were drawn between the Claimant and Kewberg Cables. He contends that the contracts are illegal and incapable of enforcement as they contravene sections 83 and 85 of the [Employment Act](#) on foreign contracts of service. He further contends that the contracts were a sham and only drawn to aid the parties to sidestep South African laws on employment of foreign nationals.
79. I have looked through the Claimant’s pleadings and note that the fact of the impugned contracts having been illegitimate was not pleaded by him. As such, he cannot build his case around this unpleaded issue. In the premises, the court declines to pronounce itself on the unpleaded matter (*Ndishu & another v Muriungi* (Civil Appeal 3 of 2020) [2022] KEHC 2 (KLR) (21 January 2022) (Judgment)).

Determination

80. The foregoing being the position, I arrive at the conclusion that:-
- a. This court is seized of the requisite jurisdiction to determine this dispute.
 - b. Although the Claimant was intermittently an employee of the Respondent, he was transferred to Kewberg Cables through an intra-company transfer between the Respondent and Kewberg Cables whereupon he entered into the contract of service dated 28th May 2021 with Kewberg Cables which terminated on 31st May 2022. The court notes that prior to the aforesaid contract, the parties had previously entered into similar arrangements.
 - c. Although Kewberg Cables is an affiliate of the Respondent, the two are distinct corporate entities.
 - d. As such, when the Claimant was transferred by the Respondent to Kewberg Cables, he ceased to be an employee of the Respondent during the term of the intra-company transfer(s) and became an employee of Kewberg Cables.
 - e. Consequently, Kewberg Cables and not the Respondent bear the responsibility to settle the Claimant’s exit dues arising from the contract(s) between it (Kewberg Cables) and the Claimant.
 - f. As such, the instant suit, in so far as it seeks to compel the Respondent to pay the dues in question, is misconceived and bad in law.



g. Consequently, it is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED ON THE 30TH DAY OF JANUARY, 2025.

B. O. M. MANANI

JUDGE

In the presence of:**

..... for the Claimant

..... for the Respondent

Order

In light of the directions issued on 12th 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

