



REPUBLIC OF KENYA



KENYA LAW
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Waweru v Healthlink Matcare Limited t/a Nairobi Women's Hospital (Cause E942 of 2022) [2025] KEELRC 570 (KLR) (27 February 2025) (Ruling)

Neutral citation: [2025] KEELRC 570 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E942 OF 2022
BOM MANANI, J
FEBRUARY 27, 2025

BETWEEN

REUBEN WAWERU CLAIMANT

AND

**HEALTHLINK MATCARE LIMITED T/A NAIROBI WOMEN'S
HOSPITAL RESPONDENT**

RULING

Background

1. The Claimant has filed this suit alleging that the Respondent duped him into acceding to a mutual separation agreement under which his contract of employment was terminated by, inter alia, misrepresenting to him that it will enter into consultancy agreements with him for collection of an outstanding debt from the National Health Insurance Fund (the NHIF) and managing its pending court cases. It is his case that after the two signed the mutual separation agreement, the Respondent reneged on the agreement by failing to issue him with formal consultancy and case management contracts. As such, he claims for, inter alia, the following:-
 - a. Ksh. 5,833,333.00 representing 2.5% proportionate share of damages arising from breach of the consultancy contract.
 - b. Refund of Ksh. 95,455.20 being 30% tax deducted from his medical cover.
 - c. Ksh. 14,850,000.00 as damages for the loss of earnings arising from breach of the case management contract.
 - d. Interest on the above claims.
 - e. General damages for breach of the consultancy agreement.



- f. In the alternative, general damages for fraud.
 - g. In the alternative, twelve (12) months' pay as compensation for unfair termination of his contract of service.
 - h. Costs of the case.
2. The record shows that the case was referred to mediation whereat the parties entered into a partial settlement. Thereafter, they referred the rest of the unresolved matters back to court.
 3. Accordingly and based on the aforesaid partial settlement, the court recorded the following consent:-
 - a. Judgment is entered for the Claimant against the Respondent for Ksh. 95,455.20 being 30% tax deduction on the Claimant's medical insurance cover. The Respondent to pay to the Claimant the aforesaid sum of Ksh. 95,455.20 on or before 26th February 2024 (now past).
 - b. The balance of the claim to wit the following to go to trial:-
 - i. The claim for Ksh. 5,833,333.00 being the Claimant's alleged 2.5% proportionate share of damages arising from the alleged breach by the Respondent of the consultancy contract under which the Claimant was to recover Ksh. 700,000,000.00 from the NHIF.
 - ii. The claim by the Claimant for Ksh. 14,850,000.00 in damages for loss of earnings on account of the alleged breach of contract.
 - iii. The claim for interest on items b (i) and (ii) above.
 - iv. The alternative claim for compensation equivalent to the Claimant's salary for 12 months.
 - v. The claim for costs.
 4. The Respondent has now filed the application dated 30th September 2024 objecting to the court's jurisdiction to entertain the claims for alleged breach of the consultancy agreements between the parties. It contends that the court is not entitled to adjudicate the dispute between the parties relating to prayers (a), (c), (d), (e) and (f) in the Statement of Claim on account of want of jurisdiction. For the avoidance of doubt, apart from prayer (f), the impugned prayers are the ones listed in paragraph 2(B) of this ruling.
 5. The Respondent's position is that these prayers, in so far as they are premised on the alleged breach of the consultancy agreements between the parties, constitute a commercial dispute between them which lies outside the jurisdiction of the Employment and Labour Relations Court (the ELRC). As such, this court is not entitled to entertain them.
 6. The Respondent contends that the jurisdiction of the ELRC is anchored on article 162(2) of *the Constitution* of Kenya 2010 as read with section 4 of the *Employment and Labour Relations Court Act*. According to it (the Respondent), the court's jurisdiction is limited to adjudicating disputes relating to employment and labour relations. It (the jurisdiction) does not extend to commercial disputes. As such, the court has no power to preside over the purported commercial dispute between the parties.
 7. The Respondent asserts that once the parties executed the voluntary separation agreement, the employment relation between them came to a close. It contends that thereafter, the parties transited into a consultancy arrangement which does not yield an employment relation. Consequently, the court cannot determine disputes arising from this latter arrangement.



8. In response, whilst the Claimant admits that the employment contract between them was terminated through mutual separation on 9th November 2021, he avers that the two agreed to enter into the impugned consultancy agreements as part of his exit package. As such, the impugned agreements are inextricably intertwined with the terminated contract of employment.
9. The Claimant contends that in breach of the consultancy agreements, the Respondent refused to issue him with formal contracts to evidence the new arrangement. As such, it is his view that the Respondent duped him into signing the mutual separation agreement.
10. The Claimant contends that the Respondent's actions amount to unfair labour practice which is actionable at law. And hence this suit.
11. The Claimant contends that because the consultancy agreements were negotiated between the parties during the currency of their employment relation, this court has jurisdiction to adjudicate the dispute between them arising from the said agreements. He contends that the Respondent used the consultancy agreements to induce him into agreeing to terminate his employment contract.

Analysis

12. Jurisdiction, it has been said, is everything. Without it, the court cannot purport to adjudicate on a matter. In the time honoured decision of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR, the Court of Appeal had the following to say about a court's jurisdiction to handle a matter:-

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down[s] tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

13. Jurisdiction is conferred by either *the Constitution* or statute. The court cannot confer jurisdiction on itself through judicial craft or innovation (see *Aluochier v Independent Electoral and Boundaries Commission & 17 others* (Petition 20 (E023) of 2022) [2022] KESC 77 (KLR) (Civ) (20 December 2022) (Judgment)).
14. The ELRC is a creature of statute having been established under section 4 of the Employment and *Labour Relations Act* as read with article 162(2) of *the Constitution* of Kenya 2010. The boundaries of the court's jurisdiction are demarcated by section 12 of the Employment and *Labour Relations Act* which, inter alia, provides as follows:-

"The Court shall have exclusive original 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:-

- a. disputes relating to or arising out of employment between an employer and an employee;
- b. disputes between an employer and a trade union;
- c. disputes between an employers' organization and a trade union's organization;
- d. disputes between trade unions;
- e. disputes between employer organizations;



- f. disputes between an employers' organization and a trade union;
 - g. disputes between a trade union and a member thereof;
 - h. disputes between an employer's organization or a federation and a member thereof;
 - i. disputes concerning the registration and election of trade union officials; and
 - j. disputes relating to the registration and enforcement of collective agreements.”
15. Clearly, the disputes which the ELRC is entitled to entertain under the aforesaid provision of law ought to have arisen from and relate to an “employment and labour relation.” Any other matter is outside the court’s jurisdiction.
 16. It is true, as the Claimant contends, that the impugned consultancy agreements sprung from the mutual separation agreement through which the parties closed their employment relationship. However, they (the consultancy agreements) comprised of standalone contracts capable of being independently enforced between the parties. As such, they (the consultancy agreements) created a new and distinct legal relation between the parties which was separate from the previous employment relation between them.
 17. The Respondent has produced and annexed to the affidavit in support of its application the mutual separation agreement between them dated 9th November 2021. A cursory look at the document shows that it was executed by the parties on 19th November 2021 effectively closing the employment relation between them.
 18. The employment relation having been closed on 19th November 2021, what remained between the parties are the consultancy agreements in respect of collection of the debt from the NHIF and management of the Respondent’s court cases. These two are purely commercial contracts between the parties. Although they sprung from their previous employment relation, they were nevertheless separate and distinct contracts.
 19. The fact that consultancy agreements do not yield an employment relationship and are purely commercial in nature has recently been underscored in the case of *Githui v Focus Management Solutions & another* (Cause E011 of 2021) [2024] KEELRC 2780 (KLR) (8 November 2024) (Judgment). Pronouncing itself on the matter, the court observed as follows:-

“...a consultancy agreement is a commercial contract which, in my view, falls outside the purview of Article 162(2)(a) of *the Constitution* of Kenya 2010 and Section 12 of the *Employment and Labour Relations Court Act*.”
 20. The Claimant’s case is not that the consultancy contracts did not come into existence. Rather, it is that the said agreements were frustrated after the Respondent failed to formalize them through execution of formal contracts.
 21. The foregoing is self-evident from paragraph 17 (b) of the Claimant’s replying affidavit where he says that although the Respondent did not formalize the contracts, he (the Claimant) continued to attend to its pending court cases under instructions from the Respondent. I therefore understand the Claimant’s case to be that the Respondent breached the consultancy agreements.
 22. The foregoing is further fortified by paragraph 18 in the Statement of Claim. In the paragraph, the Claimant accuses the Respondent of having breached the consultancy agreements by failing to formalize them.



23. Finally, in the prayer section in the Statement of Claim, the Claimant prays for various reliefs on account of breach of the consultancy agreements. In effect, the Claimant acknowledges that the said contracts indeed came into existence only that they were not reduced into writing.
24. The question which arises is whether this court has power under article 162(2) of *the Constitution* 2010 as read with section 12 of the *Employment and Labour Relations Court Act* to adjudicate on the two consultancy agreements. Can the court determine whether the Respondent is in breach of the said contracts and award damages for their breach as prayed by the Claimant?
25. The answer to the aforesaid question is in the negative. This is for the simple reason that the agreements did not yield an employment relation between the Claimant and the Respondent over which this court may exercise jurisdiction. The fact that the two agreements sprung from an agreement under which the parties exited their employment relation does not convert them into employment contracts.
26. In effect, the court has no jurisdiction to inquire into whether the Respondent breached the consultancy agreements between the parties and whether the Claimant is entitled to recover damages as a result of such breach. The court will not attempt to expand its jurisdiction through judicial craft and innovation to adjudicate of the above matter.
27. For the avoidance of doubt, the court affirms that it has jurisdiction to examine whether the Respondent breached the separation agreement between the parties by failing to give life to the consultancy agreements. However, this cannot be with the intention of granting damages for breach of the impugned consultancy agreements. It can only be with the intention of determining whether termination of the Claimant's contract of employment was fair in the circumstances and whether he is entitled to the consequential reliefs under section 49 of the *Employment Act*.
28. Put differently, the court has no jurisdiction to wade into the realm of remedying breach of the consultancy agreements as that is a commercial dispute. However, it has jurisdiction to remedy breach of the separation agreement by declaring that such breach amounted to unfair termination of the employment contract between the parties and granting either one or several of the reliefs sanctioned by section 49 of the *Employment Act*.
29. I have considered the two decisions which the Claimant has cited in support of his case (Republic v Chief of Staff & Head of the Public Service & 2 others Ex-parte George A. O. Magoha [2018] eKLR and Paul Njaga Kihara v Chase Bank (Kenya) Limited in Receivership & another [2018] eKLR). In the two cases, the Claimants sought to enforce benefits under exit agreements from their employment. However, the benefits were not anchored on new contracts.
30. Conversely in the instant case, the exit benefits which the Claimant seeks to enforce are premised on new and distinct consultancy agreements between the parties which yielded a new relationship between them. As such, the cases are distinguishable.

Determination

31. The upshot is that the court arrives at the conclusion that it has no jurisdiction to entertain prayers a), c), d), e) and f) in the Statement of Claim. As a result, the aforesaid prayers are struck out from the Statement of Claim.
32. Since prayer b) was settled through mediation, the court will adjudicate on prayers g) and h) in the Statement of Claim.
33. Costs of the application will abide the outcome of the suit.



DATED, SIGNED AND DELIVERED ON THE 27TH DAY OF FEBRUARY, 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

