Rambukwella v DL Koisagat Tea Estate Limited (Cause E025 of 2024) [2025] KEELRC 2086 (KLR) (10 July 2025) (Ruling)

Neutral citation: [2025] KEELRC 2086 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET

CAUSE E025 OF 2024

MA ONYANGO, J

JULY 10, 2025

BETWEEN

USSANGA WIJERATNE RAMBUKWELLA ..... CLAIMANT

AND

DL KOISAGAT TEA ESTATE LIMITED ..... RESPONDENT

RULING

1. Vide an application dated 17th February, 2025 the Respondent seeks the following orders:

    a. The Application raises a fundamental issue of jurisdiction, which ought to be determined as a threshold question before any further proceedings.

    b. The Applicant seeks the striking out of the instant claim on the basis that this Honourable Court lacks jurisdiction, there being no employer-employee relationship between the Applicant and the Respondent.

    c. Given that jurisdiction is the cornerstone of judicial authority, and where it is lacking, a court must decline to entertain a matter, unless this Application is certified urgent and determined at the earliest opportunity, there is a real risk of this Honourable Court proceeding without jurisdiction, thereby contravening a long-standing and sacrosanct legal principle to the Applicant's detriment.

2. The application is anchored on the grounds on the face thereof as follows:

    a. The legal instrument governing the relationship between the Claimant and the Respondent is the Consulting Contract signed on13th June 2022, together with the Addendum executed on 15th December 2022.

    b. Under the contract, the Claimant was engaged as the General Manager of Technical Operations, responsible for assessments, evaluations, design, and development of all factory

operations to ensure the overall success of the business. The contract was for a fixed term of two years, running from 13th June 2022 to 13th June 2024.

c. The relationship between the parties was consultancy arrangement, not an employer-employee relationship. Article 5(j) of the consulting contract explicitly designates the Claimant as an independent contractor and states that nothing in the agreement would render the Claimant an employee, worker, agent, or partner of the Company.

d. The Claimant was entitled to a monthly consultancy fee, subject to a 15% withholding tax. He was not entitled to standard employee benefits and was not subject to statutory deductions such as the Housing Levy, PAYE, NHIF, or NSSF.

e. As a Consultant, the Claimant was required to pay only the 15% withholding tax to the Kenyan Government. He received 85% of the agreed monthly fee upon submission of an invoice prepared and signed by him.

f. The agreement was a contract for services, not a contract of service, distinguishing it from typical employment contracts in Kenya.

g. Consequently, the dispute between the parties does not fall within the jurisdiction of this Court, as there is no employer-employee relationship.

h. It is therefore fair and in the interest of justice that the suit be struck out for want of jurisdiction.

3. The application is further supported by the affidavit of Daniel Kariuki, the Group Human Resource Manager of DL Group of Companies to which the Respondent is a subsidiary sworn on 17th February, 2025. He deposes that the legal instrument governing the relationship between the Claimant and the Respondent is the consulting contract signed on 13th June, 2022, together with the Addendum executed on 1th December, 2022. He reiterates the grounds on the face of the application.

4. Mr. Kariuki states that Clause 5 (L) of the Consulting Contract provides that any dispute, claim, controversy or disagreement between the parties as to matters arising "under or pursuant to the contract" which cannot be settled amicably within fifteen (15) days shall be referred to arbitration by consent of the parties. That the Claimant has therefore instituted this suit in contravention of the said Clause 5(L).

5. The application is opposed. The Claimant filed a replying affidavit sworn on 26th March, 2025 in which he deposes that the Respondent's assertions that he was engaged as an independent contractor and not an employee are factually and legally incorrect.

6. That while the Respondent relies on the Consulting Contract and Addendum to assert that he was an independent contractor, the actual nature of his engagement, the control exercised over him and the work he performed clearly indicate an employer-employee relationship.

7. That in particular, as part of supervision & Control, he was required to report directly to the Respondent's senior management and was bound by its internal policies, including its disciplinary and operational guidelines; had fixed working hours and exclusively worked for the Respondent. that he was required to work full-time, adhering to set working hours dictated by the Respondent. that unlike an independent consultant who typically has flexibility, his role mirrored that of a full-time employee.

8. It was the averment of the Claimant that he handled non-consultancy functions as the Respondent assigned him additional administrative and managerial duties beyond the scope of a consultancy arrangement. These included oversight of employees, attending executive meetings, and participating in decision-making processes typically reserved for employees.

9. The Claimant further deposed that he depended entirely on the Respondent for income and was not engaged in any other external consultancy assignments, which contradicts the hallmarks of an independent contractor.

10. The Claimant further deposed that the Respondent's assertion that he was not entitled to statutory benefits was a circumvention of labour laws intended to deny him rightful benefits including NHIF, NSSF. That the mere fact that deductions were not made does not negate an employer-employee relationship.

11. The Claimant deposed that the characterization of his role as a consultancy was a deliberate misrepresentation by the Respondent to evade its statutory obligations as an employer. That courts have consistently held that the substance of an employment relationship prevails over the labels assigned by parties.

12. It was the Claimant's assertion that the Employment and Labour Relations Court (ELRC) is vested with the jurisdiction to determine disputes concerning the existence and nature of employment relationships including those disguised as consultancy agreements and the instant application is part of the Respondent's deliberate delaying tactics with the sole intention of frustrating his claim. That despite having been served with the pleadings last year the Respondent has continuously sought to buy time through various applications and objections including the present one.

13. It was the averment of the Claimant that it is evident the Respondent's application is not made in good faith but is a deliberate attempt to delay the hearing of this matter on its merits. That this Court should not permit the Respondent to misuse judicial resources to evade its legal responsibilities.

14. That the Respondent's actions continue to prejudice the Claimant as he has been denied his rightful dues for an extended period while the Respondent attempt to frustrate his claim through procedural technicalities.

15. That it is in the interest of justice that the Respondent's Application be dismissed with costs and his claim be heard on its merits without further delay.

16. The application was disposed of by way of written submissions. Both parties filed and exchanged submissions. I have considered the submissions and the only issue arising for determination is whether the Claimant was an employee of the Respondent or an independent contractor.

17. It is the submission of the Respondent that the *Employment Act* defines an employee and employment contract respectively as:

> " employee" means a person employed for wages or a salary and includes an apprentice and indentured learner;
>
> "contract of service" means an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of this Act applies;

18. Relying on the decision in Commissioner of Domestic Taxes v Ocean Freight (East Africa) Limited [2018] KECA 281 (KLR) the Respondent submits that the modern test for determining whether a person is an employee or independent contractor entails a holistic assessment of several factors. That the degree of integration in the enterprise, while an important factor, is not conclusive.

19. The Respondent submitted that the nature of the relationship between an employer and employee must be determined by an objective analysis relying on the decision in Market Investigations Ltd v Minister of Social Security (1968) 3 ALL ER 732 cited with approval in Safaricom PLC v Commissioner of Domestic Taxes [2024] KETAT 1772 (KLR)

20. The Respondent invited the court to consider the following:

    a. The degree of control exercised by the Respondent;

    b. The level of integration of the Claimant into the business;

    c. The method of payment;

    d. Whether there is an obligation to work exclusively for the Respondent;

    e. The presence of stipulations on working hours, overtime, holidays and similar terms; and

    f. The arrangement for payment of income tax and statutory contributions, between the parties.

21. The Respondent submitted that the Claimant was headhunted to undertake a defined project focused on turning around the factory's operations. That he worked independently in a senior advisory capacity, with no direct supervision, save for submitting periodic reports to the Company's Executive Chairman.

22. He was not subject to the Respondent's internal HR policies and did not receive any employee benefits, including leave entitlements, PAYE, NSSF or NHIF deductions, or pension contributions. He was not paid a salary or wage but paid a consultancy fee, was not integrated into the company's daily structure but operated as an external consultant. That he remained external to the company's operational structure, functioning purely as a consultant.

23. The Respondent further invited the court to be guided by the decisions in Everret Aviation Ltd v Kenya Revenue Authority [2013] eKLR; George Kamau Ndiritu & another v Intercontinental Hotel [2015] eKLR; Kenneth Kimani Mburu & another v Kibe Mungai Holdings Limited [2014] KEELRC 723 (KLR); Omusamia v Upperhill Springs Restaurant [2021] KEELRC 3 (KLR); and Wamuyu v Humphrey & Company LLP & another [2023] KEELRC 2201 (KLR).

24. The Respondent submitted that in Wamuyu v Humphrey & Company LLP & another the court cited with approval the decision in Stevenson, Jordan and Harrison Ltd v Macdonald and Evans [1952] 1 TLR 101.

25. The Claimant on the other hand submitted that he was wholly dependent on the Respondent for income and was not engaged in any parallel consultancy arrangements, demonstrating a clear lack of independence associated with true consulting roles, relying on the decision in Kenya Port Authority v Edward Otieno Saka [2019] eKLR and Everret Aviation Ltd v Kenya Revenue Authority (supra).

26. The Claimant submitted that the Respondent's attempt to rely on the arbitration clause is in this instance, a clear ploy to delay payment. The Claimant referred to the email correspondence he attached in Exhibit A as evidence wherein the Respondent acknowledges the outstanding debt but has failed to make any payments. The Respondent's sudden interest in arbitration only after the Claimant filed this suit shows bad faith and an intention to frustrate the Claimant by prolonging the matter.

27. The Claimant submitted that as was held in Nairobi Botters Limited v Andrew Onyango Odongo [2021] eKLR, courts should not allow a party to abuse the arbitration process to gain an unfair

advantage, such as delaying payment. Arbitration should not be used as a means to avoid obligations under a contract, especially where one party has already admitted liability.

28. The terms "employee" and "contract of service" are defined in the *Employment Act* thus-

> " employee" means a person employed for wages or a salary and includes an apprentice and indentured learner;
>
> "contract of service" means an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of this Act applies;

29. In the contract between the Claimant and the Respondent the Claimant is referred to as "the consultant" while the Respondent is referred to as "the employer/company". Article 2 of the contract provides:

a. Consultants function:

General Manager-Technical Operations.

b. Description of Consultants' tasks:

Carry out all assessment, evaluation, design, and development of all the factory operations to drive the overall business success of the factory and any other duties assigned by the Director.

On reporting and supervision the contract provides that the Consultant will report to the Executive Chairman: Dr. David Lagat on the progress of the assignment by sending regular reports, enabling DL Group Koisagat Tea Factory to meet its commitments.

30. The contract states that "it is expressly agreed that the Consultant's services shall include possible participation in the preparation of any additional proposal for services requested by the director of DL, Group Koisagat Tea Factory.

> Furthermore, the Consultant shall be responsible, to DL Group Koisagat Tea Factory, for meeting the requirements of the DL Group Koisagat Tea Factory quality management system and for attaining the objectives assigned to the Consultant for the assignment."

31. Paragraphs 3 and 4 of the contract further provide:

> Article 3 - Location And Duration Of The Assignment
>
> The Consultant's assignment on General Management of Technical Operations will be carried out at the DL. Group Koisagat Tea Factory in Nandi, Kenya.
>
> The Consultant's assignment shall last for a cumulative period of 24 months starting from 13/06/2022 to 13/06/2024.
>
> The Consultant's services may be extended or reduced at the Executive Chairman's request. The Consultant agrees to guarantee to be available for a possible extension of this agreement, on condition that she is notified at least one(1) month before the end of the provision of services.
>
> Article 4-fees
>
> DL Group Koisagat Tea Factory shall remunerate the Consultant for the services provided by paying a set Monthly fee of USD 4,004 less 15% withholding tax payable to the

Kenya Government, for every completed month of service.(The fee is also taken to include superannuation, leave pay, and the like), Any overtime is deemed to have been paid in the lamp Sum Remuneration stated above and no overtime claim will be accepted whatsoever.

DL Group Koisagat Tea Factory shall pay Monthly for the Consultant's services and the duration of his services.

Fees shall be paid Monthly at 85% of the sot ice on submission of an invoice, prepared and signed off by the Consultant

Fees shall be paid at the end of each month loss any advance on salary taken by this Consultant.

32. In Cassidy v Min. of Health [1951] 2 KB 343 the court discussed the multiple or mixed factor test which was initially formulated in Ready Mixed Concrete v Min. of Pensions (1968) 2 QB 497 as follows:

> " An independent contractor's contract, in my view is a contract of work (contract for service) and not a contract of service, or to use the ordinary language a contract of employment. The hallmarks of a true independent contractor are that the contractor will be a registered taxpayer, will work his own hours, runs his own business, will be free to carry out work for more than one employer at the same time, will invoice the employer each month for his/her services and be paid accordingly and will not be subject to usual "employment" matters such as the deduction of PAYE (tax on income), will not get annual leave, sick leave, 13th Cheque and so on. "

33. In the case of Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance it was held that the servant agrees to provide his own work and skill by providing services for their master, in consideration of a wage or other remunerations. The servant agrees that in the performance of that service they will be subject to the master's control. Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time, and the place where it shall be done.

34. In the case of Christine Adot Lopeyio v Wycliffee Mwathi Pere [2013] eKLR, Mbaru J. stated as follows: -

> " The issue of whether there is a contract of service or a contract for service is one that can be established in law or in fact but also noting that most contracts for service are not written, the facts of each case are paramount and worth consideration as to the intentions of the parties to such a contract. This is more so due to the fact that in law a contract of service is well outlined with fundamental protections as this is clearly defined under the *Employment Act*, 2007 unlike the other contract for service. This is more so in view of the definitions of employee, employer and contract of service under the *Employment Act*, 2007 and the Industrial Court Act, 2011.This differentiation relates to very fundamental issues noting that under a contract of service it customarily relates to an employee who is subordinate or under the guidance and dependent on another for their employment whereas under a contract for service an employee can be said to be independent or free on his or her own terms for purposes of undertaking a task in an autonomous manner..."

35. In Kenneth Kimani Mburu & another v Kibe Muigai Holdings Limited [2014] eKLR the court held thus:

> " There was no evidence that the Claimants paid with-holding tax. Instead, the Respondent paid Mburu a 'net salary.'

36. In Kenya Pipeline Company Ltd v Ndegwa & Another [2023] KECA 226 (KLR), the Court of Appeal distinguished between an independent contractor and an employee, citing the South African case of Stein vs Rising Title Productions (2002) 23 ILJ 2017, wherein it was stated as follows:

> " The main distinction between an employee (servant) and an independent contractor appears to lie in the fact that the former undertakes to render personal services to the employer, while the latter undertakes to perform a certain specified piece of work or to produce a certain specified result for the employer. Unlike an employee, an independent contractor is generally not subject to the control or the instructions of the employer as to the manner in which he or she performs the work or produces the result. ... Although the control test is an important factor in the enquiry, the crucial test, particularly in marginal cases, is whether or not the 'dominant impression' of the relationship is that of a contract of employment... The application of the dominant impression test thus requires a topological approach, according to which the right of control is not an indispensable requirement of the contract of service, but one of a number of indicia, the combination of which may be decisive. Other indicia which have been identified in the South African case law are: the nature of the work; the existence or non-existence of a right of supervision on the part of the employer; the manner of payment (eg, whether the employee is paid a fixed rate or commission); the relative dependence or freedom of action of the employee in the performance of his or her duties; the employers power of dismissal; whether the employee is precluded from working for another, whether the employee is required to devote a particular amount of time to his or her work; whether the employee is obliged to perform his or her duties personally; the ownership of the working facilities and whether the employee provides his or her own tools and equipment; the place of work; the length of time of the employment; the intention of the parties, etc."

37. The Court of Appeal also cited the case of Christine Adot Lopeyio v Wycliffee Mwathi Pere (supra) where Mbaru J stated as follows:

> " In most cited authorities in this regard from various jurisdictions, several tests have been applied to distinguish between what comprise 'employment' as against what constitutes 'service' in case of contracts of service as contrasted with contracts for service. They include the following:

a. The control test whereby a servant is a person who is subject to the command of the master as to the manner in which he or she shall do the work.

b. The integration test in which the worker is subjected to the rules and procedures of the employer rather than personal command. The employee is part of the business and his or her work is primarily part of the business.

c. The test of economic or business reality which takes into account whether the worker is in business on his or her own account, as an entrepreneur, or works for another person, the employer, who takes the ultimate risk of loss or chance of profit.

d. Mutuality of obligation in which the parties make commitments to maintain the employment relationship over a period of time.

38. In Maurice Oduor Okech v Chegquered Flag Limited [2013] eKLR the court held thus;

> "In determining the existence of an employment relationship, the court is expected to go beyond mere terminologies employed by the parties either in their pleadings or in their testimony. The court is called upon to inquire into the entire spectrum of facts and circumstances to establish whether an employer/employee relationship as defined in the *Employment Act* 2007 actually exists."

39. In the instant case, the Claimant was engaged as a General Manager-Technical Operations. His job description was "to carry out all assessment, evaluation, design, and development of all the factory operations to drive the overall business success of the factory and any other duties assigned by the Director...

40. The location of the consultant's office was DL Group Koisagat Tea Factory in Nandi, Kenya.

41. The duration of the assignment was 24 months from 13th June, 2022 to 13th June, 2024.

42. The Claimant was to be paid a monthly "fee" USD 4094 less withholding tax of 15%. He was to receive 85% of the set fee on submission of an invoice, prepared by the consultant. The payment would be less "any advance on salary taken by the consultant" [emphasis added]

43. In addition, the Claimant was housed, given a fully maintained company car with 150 liters of fuel monthly, reimbursed the expenses incurred in the course of engagement subject to prior approval by the company, reimbursed any costs of travel when required to do so by the company.

44. Further, the Claimant was entitled to 24 days annual leave for every completed year of service or 2 days for every month of service, to be taken at such time or times as may suit the convenience of the company and consultant to be applied for and approved by the Executive Chairman at least four weeks prior to the leave date, and the leave travel expenses paid by the Company for Claimant and his family at least once a year.

45. Under the addendum the company was to reimburse the Claimant any medical expenses.

46. As was stated in the case of Maurice Oduor Okech v Chegquered Flag Limited in determining the existence of an employment relationship the court is expected to go beyond mere terminologies employed by the parties. Applying the control test to this case, it is evident that the Respondent controlled the Claimant as he was reporting to the Respondent's Executive Chairman to whom he had to send regular reports, and who was free to assign him any other duties.

47. Further, the Claimant was assigned an office at the Respondent's offices in the factory, and was to apply for annual leave which he could only take upon approval. The expenses for leave which was paid for by the Respondent included his family's travel expenses.

48. Applying the integration test, the Claimant was a general manager with the role of carrying out all assessment, evaluation, design, and development of all the factory operations to drive the overall business success of the factory and any other duties assigned by the Director. There was no separation between his role and the rest of the operations of the Respondent as he was in charge of overall operations of the company.

49. Applying the test of economic or business reality, the Claimant was not in a business of his own as an entrepreneur but worked for the Respondent as his employer, who took the ultimate risk of loss and profit.

50. Applying the mutuality of obligation test, again the Claimant made a commitment to the Respondent to maintain the employment relationship over a period of time and to abide by the conditions set by the Respondent.

51. The Claimant undertook to render personal services to the Respondent as an employee and did not undertakes to perform a certain specified piece of work or to produce a certain specified result for the employer unlike an independent contractor who is generally not subject to the control or the instructions of the employer as to the manner in which he or she performs the work or produces the result.

52. From the ownership of working tools and equipment, the place of work, the length of time of the employment, the intention of the parties was clear that this was an employer-employee relationship even though the terminology used was that of consultant and employer. The Claimant worked in the Respondent's office, was supplied with all tools of work including a car and laptop, had a fixed term contract, reported to and worked under the Respondent's executive director. He further did not pay his tax but was paid a net salary after the Respondent deducted the tax. The remittance of the tax was not his responsibility as he was paid a net monthly salary.

53. For these reasons I find that the relationship between the Claimant and Respondent was that of employer and employee even though the terminology used was that of consultant. I thus find no merit in the Respondent's application dated 17th February, 2024 and dismiss the same. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 10TH DAY OF JULY, 2025

MAUREEN ONYANGO

JUDGE