



**Eliud & 484 others v Mombasa Cement (Cause E097 of 2023)  
[2024] KEELRC 1479 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1479 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE E097 OF 2023  
M MBARŪ, J  
MARCH 14, 2024**

**BETWEEN**

**MORRIS MWATATA ELIUD ..... 1<sup>ST</sup> CLAIMANT  
ANDERSON NYALE KALU ..... 2<sup>ND</sup> CLAIMANT  
MUNGA BALU KEZULE ..... 3<sup>RD</sup> CLAIMANT  
MWANAHAMISI SAIDI MOHAMED & 481 OTHERS ..... 4<sup>TH</sup> CLAIMANT  
AND  
MOMBASA CEMENT ..... RESPONDENT**

**JUDGMENT**

1. The claimants are male and female adults. The respondent is a limited liability company.
2. The claimants' case is that they were all employed by the respondent from 1<sup>st</sup> December 2013 as general labourers earning a daily wage of ksh.300. their duties were to clear bushes around one of the respondent's properties in Kilifi County among other duties. The work hours were 6 am to 6 pm for 6 days each week.
3. The claim is that the claimants worked until 30 September 2020 when the respondent terminated their employment without notice or giving any reasons leading to unfair termination of employment. The respondent through its officers told the claimants not to report to work. The respondent promised to pay terminal dues but has since failed to honour such a promise.
4. The respondent violated the provisions of Sections 35, 40, and 41 of the [Employment Act](#), 2007. The claimants are seeking the following dues;
  - a) Notice pay at Kshs. 14,400 for 485 claimants Kshs. 6,984,000;
  - b) Unpaid leave for 7 years Kshs. 21,388,500;



- c) House allowance for 84 months Kshs. 87,998,400;
  - d) Public holidays for 84 months Kshs. 12,222,000;
  - e) Service pay for 7 years Kshs. 15,277,500;
  - f) Severance pay for 7 years Kshs. 15,277,500;
  - g) 12 months' compensation for 485 claimants Kshs. 83,808,000;
  - h) Costs.
5. The claimants called four (4) witnesses.
  6. Morris Mwatata Eliud testified that he was among the claimants employed by the respondent on 1<sup>st</sup> December 2013 as a general labourer at a daily wage of Ksh.300. He worked for 6 days each week but on 30 September 2020, the respondent informed them not to report to work the next day.
  7. Morris testified that he was not employed by Omar Ali Ngala trading as Takaungu Enterprises but the principal employer was the respondent. The response that Takaungu Enterprises was to the employer is unknown to him. Omar Ali Ngala was the Chief assisting the claimants in the community. As the chief of Takaungu, he would assist the claimants.
  8. In cross-examination, the claimant testified that he was in court representing all the 485 claimants. The responses that some claimants are repeated are not correct. He noted that;

Charo Katana at No.498 and 460 have different identity card numbers.

Jane Nyevu at numbers 367 and 439 are different claimants;

Kwekwe Charo at numbers 476 and 345 is a repetition of names.

Several other names are repeated on the list including the following;

1. Amina Charo;
2. Anita Ngala;
3. Bahati Kitsao;
4. Charo Kitsao;
5. Eunice Kadzo;
6. Jane Nyevu;
7. Kabibi Kalume;
8. Kadzo Kazungu;
9. Karisa Changa;
10. Hamisi Kirima;
11. Kwekewe Charo;
12. Murichwa Umanzi.

A total of 18 names are repeated on the list of 485 claimants.



9. Morris also testified that the Letter of Authority to sue is signed with different signatures. There are no identity cards to verify the persons listed, the details, and their signatures. Some have different signatures from the lists filed. Other claimants have not signed giving authority to sue all being 35.
10. Morris testified that the claimants wrote a demand letter to the respondent to pay their terminal dues through the Citizen Forum. The letter of demand is not signed.
11. The contract between the chief through Takaungu Enterprises was to source employees for the respondent including the claimants. The claimant admitted that he interrogated the contract between Takaungu Enterprises and the respondent but the matter was already filed in court.
12. Anderson Nyale Kalu gave similar evidence and relied on his witness statement.
13. Mwanahamisi Saidi Mohamed testified that she was employed by the respondent as a supervisor. She would supervise other claimants in their duties. She had her boss who would make payments through Juma Kitsao. These payments would be done within the premises of the respondent at Vipingo in Kilifi. Omar Ali Ngala was the chief and was not involved in their employment. The agreement between the respondent and the chief is an independent contractor agreement and he was required to pay the claimants as the employer.
14. Munga Balu Kezule gave similar evidence and relied on his witness statement. He also testified that the respondent was the employer and not Omar Ali Ngala who was the chief for Takaungu. The respondent would pay the daily wages within its premises in Vipingo, Kilifi County.
15. Munga also testified that in a letter dated 1<sup>st</sup> September 2022 filed by the claimants, they acknowledged that the chief, Omar Ali Ngala was the supervisor. He got money from the respondent and paid the claimants. The agreement between the chief and the respondent, he was the employer. He paid all wages. The respondent has filed petty cash vouchers making payments to the Chief and not the claimants. Omar allocated the claimant's work and paid them.

## Response

16. In response, the respondent denied being the employer or having an employment relationship with the claimants.
17. On 1<sup>st</sup> November 2014, the respondent entered into an independent contract agreement with Omar Ali Ngala t/a Takaungu Enterprises for the express purposes as stated in the contract and to hire his employees to provide services such as clearing bushes on the lands owned by the respondent. It was an express provision of the independent contract that the independent contractor would be responsible for paying all his employees. The respondent was not privy to the contract between the independent contractor and any of its employees. The independent contractor was not its employee or agent.
18. The response is also that the court's jurisdiction in a claim of employment is dependent on the existence of an employment relationship between the parties as stipulated under Section 12 of the [Employment and Labour Relations Act](#), hence without such a relationship being established between the parties, the court lacks jurisdiction and the claims sought cannot be awarded.
19. There was no employment relationship to justify the remedies sought. notice pay, leave pay, house allowance, public holidays, service pay, and severance pay compensations are only due within the employment relationship. Without jurisdiction, the court should dismiss the claim.



20. The response is also that, the claimants have been repeated twice in the list, hence their appearance should be struck out. Examples were outlined including Amina kaingu Charo as claimant 131 and 438; and Anita Ningoma Ngala as claimant 126 and 409.
21. Several other claimants are repeated twice in the letter of Authority to sue and should be struck out. Examples include;
  - Amina Kaingu Charo is listed as claimant 127 and 438 and
  - Anita Ningoma Ngala as claimant 126 and 409.Several other claimants have not signed in the authority to file suit including. Examples include;
  - Morris Chilango appears as claimant number 73;
  - Jane Karisa Yaa claimant 84; and
  - Kadzo Sanga Mwavita claimant 94.
22. The reliefs sought cannot be issued outside the employment relationship or the respondent be found to be in breach of an employment contract that does not exist. The claims made are an abuse of the court process and should be dismissed with costs.
23. In evidence, the respondent called Evans Mungai the human resources and administration officer who testified that there is no employment relationship between the parties, and the claimants have no evidence in this regard. The respondent entered into an independent contract agreement with Omar Ali Ngala t/a Takaungu Enterprises on 1<sup>st</sup> November 2014 for the express purpose of hiring his employees to provide service as agreed under the agreement. This was to clear bushes on the lands owned by the respondent. The independent contractor was responsible for paying its employees and the respondent was not privy to such employment. The independent contractor was not an employee of the respondent.
24. Mr Mungai testified that, without an employment relationship, the court is without jurisdiction.
25. He testified that the claimants' particulars of terminal benefits, prayers, and conclusion do not arise since the respondent was not the employer and the claims should be dismissed with costs.
26. Mungai testified that the independent contractor had full control over the claimants. Through an agreement dated 1<sup>st</sup> November 2019 to 31<sup>st</sup> October 2024, the independent contractor has an ongoing agreement with the respondent for the provision of labour. Omar Ali Ngala is still responsible for the provision of labour to the respondent. He is responsible for the control, regulation, and discipline of his employees. The respondent has no role other than to pay under the contract. There are petty cash vouchers to confirm payments to the contractor.
27. The claimants wrote a letter dated 1<sup>st</sup> September 2022 to the contractor. It is not signed. The demand was not made to the respondent. They admit that they were under the Chief's supervision and not the respondent. The claimants alleged that they were supervised by the staff of the respondent but this is without proof or evidence. They could not recall who these supervisors were. The respondent only engaged as a client and did not attend to the day-to-day running of the independent contractor's agreement. Any terminal dues owing should not be claimed by the respondent.
28. At the close of the hearing, both parties agreed to file written submissions. These are analyzed and put into perspective in the analysis herein.



## Determination

29. The twin question herein is whether there is an employment relationship between the parties;  
Whether the remedies sought should be issued; and who should pay the costs.
30. It is trite that a court is only vested with jurisdiction as conferred under the Constitution or statute or both. The court can only exercise jurisdiction as conferred by the Constitution or written law. It cannot arrogate to itself jurisdiction exceeding that which was conferred upon it by law as held in *Macharia, Samuel Kamau & another v Kenya Commercial Bank Limited & 2 others* (Application 2 of 2011; [2012] eKLR). This is the guiding principle in the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited* ([1989] KLR 1). Without jurisdiction, a court must stop.
31. The claimants filed this claim on 31<sup>st</sup> August 2023. The basis was that the respondent terminated their employment on 30 September 2020 unfairly and failed to pay terminal dues.
32. The respondent filed a response on 26 October 2023 and denied the employment relationship. The respondent attached records to the effect that it had a service agreement with an independent contractor to provide labour for clearing bushes around its properties in Kilifi. Evans Mungai testified for the respondent that the independent contract, Omar Ali Ngala t/a Takaungu Enterprises has an ongoing service agreement with the respondent running from 1<sup>st</sup> November 2019 to 31<sup>st</sup> October 2024 and a previous contract for the period of 1<sup>st</sup> November 2014 to 31<sup>st</sup> October 2019. These contracts are attached to the response.
33. There was no response by the claimants upon the respondent filing its response.
34. In the Memorandum of Claim, the claimants filed a letter dated 1<sup>st</sup> September 2022. It is not signed but the 4 witnesses called by the claimants admitted that they authored this letter to The Chief, Mavueni/Takaungu Location. The claimants were seeking an audience with the Chief on the reasons that they worked at Mombasa Cement under his supervision and that of the assistant Chief Takaungu sub-location some years back.
35. The 4 claimants who testified had the same script. That they were employed by the respondent. that they would receive their wages within the respondent's compound. That their wages would be paid by persons of Indian origin, but could not account for his name. Mwanahamisi Saidi Mohamed emphasized that she was a supervisor. However, all the claimants had no written contracts or any evidence of their employment by the respondent.
36. Of all the claimants who testified, Munga Balu Kezule was the most honest. He testified that Omar Ali Ngala was their overseer. He would check if they had problems as the Takaungu Chief.
37. With further probing by the court, Munga Balu Kezule testified that Omar (the Chief) got money from the respondent and paid them;  
  
... Omar got money from the Indians and paid us. In the agreement between Omar and the respondent, Omar was the employer. Omar paid us. The respondent filed petty cash vouchers for bush clearing and general cleaning. Omar brought cash and paid us. ...
38. As noted above, upon the respondent filing its response, the claimants did not respond particularly as regards the challenge that there was no employment relationship. The service agreements between the respondent and Omar Ali Ngala t/a Takaungu Enterprises were brought to the attention of the claimants.



39. The evidence that the claimants were sourced by an independent contractor and deployed to work within the respondent's premises under the service agreement is not contested. An employer is allowed to outsource its non-core business. The persons under the outsourced arrangements are the employees of the contractor and not the outsourcing entity.
40. Any claims arising out of the service agreement should be lodged against the independent contractor. The outsourcing entity is not privy to any employment relationship thereof or emanating between the outsourced contractor and its third parties.
41. Outsourcing, though not regulated under any Kenya law is an acceptable workplace practice acknowledged in various decisions of the court. In the case of *Elizabeth Wasbeke and 62 Others v Airtel Networks (k) Ltd & another* [2013] eKLR, the court held that an employer is allowed to outsource its non-core functions. This is affirmed in the case of *Wrigley Company (East Africa) Limited v Attorney General & 2 others & another* [2013] eKLR that defined the parameters for a credible outsourcing;
- a) Ordinarily employers are not expected to outsource their core functions;
  - b) An employer will not be permitted to use outsourcing as a means to escape from meeting accrued contractual obligations to its employees;
  - c) An employer will not be permitted to transfer the services of its employees to an outsourcing agency without the express acceptance of each affected employee and in all such cases, the employer must settle all outstanding obligations to its employees before any outsourcing arrangement takes effect; and
  - d) Outsourcing is unlawful if its effect is to introduce discrimination between employees doing equal work in an enterprise.
42. The respondent had a service agreement for non-core functions relating to cleaning and clearing of bushes around its properties in Kilifi. The independent contractor was allowed to source their employees. The claimants remained under the control, directions, and wages paid by the independent contractor.
43. The service agreements between the respondent and the independent contractor have not been challenged as being unlawful or contrary to known practice to provide non-core function to the respondent.
44. As far back as 1<sup>st</sup> September 2022, the claimants were clear to the extent that Omar Ali Ngala, chief Takaungu, Kilifi was their supervisor. As a claimant, Munga Balu Kezule admitted to this relationship of control, payment, and problem-solving by Omar Ali Ngala. Such directly relates to a relationship with such a person and not the respondent.
45. The evidence of the service contracts presented in court hence removes the respondent from the employment relationship with the claimants. The claims herein relate to employment benefits which can only accrue within the employer and employee relationship. The claimants have the benefit of legal representation and had the advantage of seeing the service agreement way in advance and before the matter was scheduled for hearing. There was no effort to amend or seek to enjoin Omar Ali Ngala t/ a Takaungu Enterprises.
46. Without any employment relationship, directly or indirectly, on the evidence before the court, there is no jurisdiction to address the employment benefits claimed. The suit is hereby dismissed. The claimants shall pay costs due to the respondent all assessed at Kshs. 48,400.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 14 DAY OF MARCH 2024.**



**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet

..... and .....

