



**Bah v Living Goods Kenya (Cause E168 of 2022)
[2024] KEELRC 1497 (KLR) (12 June 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1497 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E168 OF 2022
NZIOKI WA MAKAU, J
JUNE 12, 2024**

BETWEEN

ALHASSAN BAH CLAIMANT

AND

LIVING GOODS KENYA RESPONDENT

RULING

1. The Respondent/Applicant vide its notice of Preliminary Objection asserts as follows:-
 - a. The relationship between it and the Claimant is guided by a contract for service, to wit, a consultancy contract and not a contract of service, to wit, an employment contract.
 - b. Section 12 of the *Employment and Labour Relations Court Act* as read together with Article 162(2) of the *Constitution* of Kenya 2010 totally ousts jurisdiction in this matter from this court.
 - c. The contract for service was entered into with a separate entity registered in the United states of America, Living Goods Usa to be performed in Sierra Leone. Once again, this court lacks the requisite jurisdiction to hear this suit.
2. The Claimant submitted that in decisions distinguishing contracts of service and contracts for service, reliance was placed on the case of *Anthony Njuguna v Afri-China International Co. Ltd & another* [2022] eKLR. It was submitted that the contract forming the basis of this suit was a contract for services as the Claimant was a consultant. The Respondent submitted that this did not and has never been transformed into an employment contract and that there have never been any further documents signed by the two parties modifying the contract. The Respondent submits that this suit is a non-starter and amounts to an abuse of court process. It submits that section 12 of the *Employment and Labour Relations Court Act* as read together with Article 162(2) of the *Constitution* of Kenya totally



ousts jurisdiction in this matter from this court. The Respondent thus urges the preliminary objection be upheld and the suit herein dismissed with costs.

3. The Claimant on his part submits that the issue for determination by the Court is whether the court has jurisdiction to hear and determine this claim, and secondly, whether the relationship between the Claimant and the Respondent was a contract for service or a contract of service. The Claimant submits that the jurisdiction of any Court is derived from the Constitution or statute or both. He relied on the case of *United India Insurance Co. Ltd v E.A Underwriters K Ltd* [1985] KLR 998, where the Court held thus:-

“ the onus of establishing a strong reason for avoiding the jurisdiction of the Kenyan Courts is upon the parties who seek to avoid that jurisdiction.”

4. That the Court further held that the court must take into account the following:-

“ In what country the evidence on the facts in issue is situate or more readily available and the effect of that on convenience and expense of trial as between the courts of the two countries, whether and how differently the law of the foreign court applies, with what country either party is connected and how closely, whether the Defendants genuinely desire trial in the foreign country or are only seeking procedural advantage and finally, whether the Plaintiff would be prejudiced by having to sue in a foreign court.”

5. The Claimant submits that the Agreement between him and the Respondent was prepared and executed in Nairobi, Kenya and that the Claimant was a Kenyan resident at the time, by virtue of his previous employment. The Claimant submits he was then provided an office space and furniture in the Kenya Global Office; was fully embedded and worked from the Kenyan global office from the date of employment to the closure of the office for the 2019 Christmas holidays in before travelling to Sierra Leone to set up the Sierra Leone Country Office. He submits he was required and held weekly catch-up meetings with the CEO in person, in the Kenyan Global office from August 2019 to December 2019. The Claimant submits that he had a direct reporting line to the CEO based in Nairobi Kenya to whom he would complete and submit monthly technical and financial reports for review and approval. The Claimant submits that he does not know and never visited the Respondent's office in USA and no aspect of the Claimant's work was required to be conducted in the USA. He submits that other than the period spent in Sierra Leone, his physical place of work was Nairobi, Kenya. He submitted that additionally, according to paragraph 354 Halsbury's Laws of England 4th Edition Reissue Vol. 8(3) it provides that "In a contract of employment, notwithstanding the rules regarding the express choice of applicable law, the choice of applicable law does not deprive the employee of the protection afforded to him by the mandatory rules of the law which would have been applicable to the contract in the absence of choice."
6. He submitted that on the strength of the foregoing passage in Halsbury's Laws of England as well as the cited case, the contract was executed and subsisted within the jurisdiction of this court. The Claimant further relied on the holding by Odunga J. (as he then was) in *SN v Cabinet Secretary for Interior and Coordination of National Management Services, Director General, Kenya Citizens & Foreign Nationals Management Services & Attorney General* [2016] eKLR wherein the petitioner, who was not a citizen of Kenya was nevertheless entitled to the protection of their rights as rights were recognized by all modern and democratic societies.
7. As to whether the relationship between the Claimant and the Respondent was a contract for service or a contract of service, the Claimant submitted that the distinction between a contract for service or



a contract of service was set out in the case of *Kenya Hotels & Allied Workers Union v Alfajiri Villas (Magufa Ltd)* [2014] eKLR, where the Court expressed itself as follows: -

“ A distinction between an employee and an independent contractor depends on statute, and tests which have been set out case law. These tests include organization/integration test conceived in context of the professional worker? See *Cassidy v Min. of Health* [1951] 2 KB 343 and multiple or mixed factor test which was initially formulated in *Ready Mixed Concrete v Min. of Pensions* (1968) 2 QB 497.”

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. ”

8. The Claimant submitted that an employee is defined under section 2 of the *Employment Act*, 2007 to mean a person employed for wages or a salary and includes an apprentice and indentured learner. Similarly, that *Black's Law Dictionary* 8th Ed at page 564 defines an employee as a person who comes in the service of another (the employer) under an express or implied contract of hire, under which the employer has a right to control the details of work performance. The Claimant submits that the *Employment Act*, 2007, in Section 2 goes ahead to define a contract of service as 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 learner. The Claimant submits that the Court in the case of *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* (*supra*) 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.
9. The Claimant submitted the contract of service complies with the terms of an employment agreement and that this entails complying with the statutory requirements in the *Employment Act* including minimum wage, provision for leave and payment of income tax. On integration and control, the Claimant submitted that the contract he had was one imbued with all the elements of a contract of service. He submits he was integrated in the operations of the Respondent. The Claimant submitted that he was a member of the Global Executive Team (G.E.T) which is the highest decision making body of the Respondent and he was presented to the world for the entire duration of his employment, on the company's website alongside the CEO and the other directors that makes up the Global Executive Team GET. He submits that Schedule A of the Agreement dated 21st May 2019 that the Claimant entered into with the Respondent expressly states that the Claimant is a County Director Sierra Leone which is not a consultant title. Further; it clearly stipulates that the Claimant is a member of the senior leadership teams responsible for managing operations, promoting Living Goods, securing funds and leading with integrity. The Claimant that he had an official email address, and access to all company documents accessible to all Global Executive Team members during his active working hours with the Respondent. Further, the Claimant submits he was given the Human Resource manual of the Respondent which guided him during his tenure of work and reiterates that he was being paid a wage by the Respondent and he was entitled to annual leave benefits and also allowed to observe Sierra Leone



public holidays. The Claimant submits the annual paid leave granted to the Claimant was approved by the Chief Executive Officer of the Respondent which avenue is not available for independent contractors. The Claimant submits he was required to participate and complete set targets by the Respondent where all other Global Executive Team members were evaluated in the same manner. The Claimant avers that he had authority to hire and terminate contracts of staff members on behalf of the Respondent being the County Director Sierra Leone. On the issue of payment the Claimant asserts that he was on a fixed salary at the end of every month which is not in tandem with a contract for service and that he received bonuses computed and paid at the same time as other employees of the Respondent. The Claimant submitted that he had medical insurance paid for by the Respondent just like other employees of the Respondent. He cited the case of *Christine Adot Lopeyio v Wycliffee Mwathi Pere* [2013] eKLR, where 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...”

10. The Claimant submitted that in light of the foregoing and the highlighted facts and case laws, it is correct to say that the Claimant was employed by the Respondent on a contract of service which created rights and responsibilities between the claimant and respondent therefore bringing about an employment relationship. The Claimant submits that this court has the jurisdiction to hear and determine the instant matter and therefore the Respondent’s Preliminary Objection, should be dismissed with costs.
11. The objection taken by the Respondent was that the Court lacks jurisdiction to hear and determine the case. The case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 is instructive in matters relating to what constitutes a preliminary objection. In the case, Sir Charles Newbold P. stated thus:

“A preliminary objection cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and on occasion, confuse the issues. This improper practice should stop.” [Emphasis supplied]

12. Clearly the warning by Newbold P. has not been heeded. The Claimant's contract was exhibited – the same has facts which are as follows – in it are elements that one does not find in a consultant's contract; in the agreement, the Claimant is entitled to leave, bonuses and monthly remuneration as a wage. The Respondent seems to conflate its persona with jurisdiction of the Court. Whether the Respondent is based in the United States of America or Kenya is neither here nor there. What the Court will need to determine is the relationship between the parties and the manner of its severance. Under



the *Employment Act* and in particular section 12 thereof as well as Article 162(2)(b) of the *Constitution*, this court has the jurisdiction to deal with employment and labour matters. The dispute before me is one. The preliminary objection is not well taken and must face the only consequence befitting it – dismissal with costs on the higher scale as the purported preliminary objection was a needless exercise in futility initiated by the Respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF JUNE 2024

NZIOKI WA MAKAU

JUDGE

