



**Assad & another (As Trustees of Global Pastrolist Organisation) v Mutile & 4 others
(Appeal E098 of 2024) [2024] KEELRC 2809 (KLR) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2809 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E098 OF 2024
M MBARÚ, J
NOVEMBER 14, 2024**

BETWEEN

**ARIF ASSAD 1ST APPELLANT
THAVIT ASSAD 2ND APPELLANT
AS TRUSTEES OF GLOBAL PASTROLIST ORGANISATION**

AND

**DAVID NYANJE MUTILE 1ST RESPONDENT
SULEIMAN MWANGOZI 2ND RESPONDENT
HASSAN OMARI MWACHIGUZO 3RD RESPONDENT
MOHAMED ALI KOMBO 4TH RESPONDENT
ALI OMARI BAKARI MAKOPO 5TH RESPONDENT**

*(Being an appeal from the judgment of Hon. M. Nabibya in
Mombasa CM ELRC No. E106 of 2022 delivered on 18 April 2024)*

JUDGMENT

1. The appeal arises from the judgment delivered on 18 April 2024 in Mombasa CM ELRC E106 of 2022. The appellants seek that the judgment entered in favour of the respondents be set aside and the same substituted with the decision in favour of the appellants with costs.
2. The background to the claim is a Memorandum of Claim filed by the respondent on the basis that they were contracted by the appellants between the years 2018 to 2021 to construct small mosques in Mombasa, Kwale and Kilifi as trustees of the Global Pastoralist Organization. The claim was that the appellant refused to settle the dues amounting to Ksh.1, 771,735.



1st respondent claimed the following dues;

- a. Labour charges Ksh.40,000;
- b. Transport plus cement Ksh.1,000;
- c. Cement and transport Ksh.6,200;
- d. Labour for 6 mosques Ksh.190,000;
- e. Labour balance Takango project Ksh.10,000;
- f. Support timber Ksh.2,000;
- g. Ngombeni post labourer Ksh.65,000;
- h. Danyenye post labour Ksh.5, 000.

The 2nd, and 3rd respondents;

- a. Kilifi Project No. 16388 Ksh.74,500;
- b. Kilifi Project No. 16928 and 16323 Ksh.147,500;
- c. Kilifi Project No. 16286 and 16215 Ksh.204,500;
- d. Kwale Project No. 18050 Ksh.79,500;
- e. Kwale Project No. 18694 Ksh.74,000;
- f. Kwale Project No. 18641 Ksh.74,000;
- g. Kwale Project No. 16605 Ksh.43,500;
- h. Kwale Project No. 16572 and 18694 Ksh.77,500;
- i. Kwale big mosque 16502 Ksh.40, 000.

4th respondent claimed the following;

- a. Project No. 17889 Vyambani 000
- b. Project No.17129 Majajani 000
- c. Project No, Bostol 000
- d. Project No. 16495 Mtondia 000
- e. Project No. 18573 Kitege ksh.102,125;
- f. Project No. 18797 Twi Ksh.107,340;
- g. Project No, 18287 Bububu Ksh.11,950;
- h. Project No. 18787 Ngamani Ksh.33,080;
- i. Project No.16485 Mayowe ksh.30,340;
- j. Salary 13 days Ksh.270,000;
- k. Labourer difference Ksh.139, 035.



The 5 respondent claimed the following;

- a. Mosque project No.18671/2019 Tiwi Ksh.30,000;
 - b. Mosque project 18698/2019 Tiwi Ksh.30,000;
 - c. Mosque madrasa/hospital No.9737 Matugu Ksh.70,000;
 - d. Big mosque project 15818 Miritini Ksh.20,000;
 - e. Labour charges Diani Ksh.27, 000.
3. The claim was to pay the contractual sums amounting to ksh.1, 771,735 with costs.
 4. In response, the appellant's case was that the 2nd respondent was never a trustee of Global Pastoralist Organization, as claimed, and he did not act in any official capacity to bind the organization in a contractual agreement as alleged. He was joined in the claim wrongly. The appellants denied the employment relationship between the parties as alleged and that they never contracted the respondents from the year 2018 to 2021 to construct small mosques in Mombasa, Kwale and Kilifi and hence not obliged to settle the claim for Ksh.1, 771,735. The claims particularized by each respondent were denied, and any contractual agreement written or otherwise bringing the respondents and the appellants, if any, were as casual labourers called subject to the availability of work and daily payments made. The claims should be dismissed with costs.
 5. The learned magistrate delivered judgment on 18 April 2024 and held that there was employment between the parties under the provisions of Section 37 of the Employment Act and the respondents, as claimants, are entitled to the claimed amount. I so allow the claim as presented.

The appeal is based on five (5) grounds;

- a. That the learned magistrate erred in law and fact in failing to appreciate the facts surrounding the relationship between the appellants and the respondent.
 - b. The learned magistrate erred in law and fact in proceeding to deliver judgment on a suit based on a fatally defective and incompetent suit the pleadings of which failed to comply with the provisions of Order 1 rule 13(2) as read together with Order 4 rule 1(3) of the Civil Procedure Rules.
 - c. The learned magistrate erred in law and fact in upholding that the appellant/claim was entitled to the reliefs sought in the memorandum of the claim as they appeared to disregard payments made in full to the respondents and further disregarded evidence where the claimants acknowledged they have no claims against the appellant.
 - d. The learned magistrate erred in law and fact in failing to appreciate the evidence of the appellants.
 - e. The learned magistrate erred in law and fact in failing to consider the evidence and submissions of the appellants and as a result reaching a wrong conclusion.
6. Parties attended and agreed to address the appeal by way of written submissions.
 7. The appellant submitted that the suit before the trial court was fatally defective and incompetent and filed contrary to Order 1 Rule 13(2) of the Civil Procedure Rules read together with Order 4 Rule 1(3). The claim was filed on behalf of 5 claimants, but only the 1st claimant swore a Verifying Affidavit. There was no written authority attached to the claim. The 2nd respondent did not attend court, and the 1st respondent could not explain why he was absent. In the case of Savala Ɖ another v Ndanyi



ELC Civil Case 248 of 2021, the court held that where a claim relates to 2 claimants, each should file a Verifying Affidavit and letter of authority to act.

8. The appellants submitted that there was no employer and employee relationship between the parties. Hence, this was not a proper claim for the court to address. In the case of *Nanyuki Water & Sewerage Company Limited v Benson Mwiti Ntiritu & others* [2018] eKLR, the court held that section 37 of the *Employment Act* applies where there is continuous employment without stop and work is available. In this case, the respondents were not in the continuous service of the appellants to claim employment status under the *Employment Act*.
9. In the case of *Josphat Njuguna v High Rise Self Help Group* [2014] eKLR, the court held that the proper interpretation of Section 37 of the *Employment Act* is to appreciate that where the employee is paid at the end of each day, such constitutes causal employment. Conversion to employment status only accrues after continuous service of 3 months.
10. In this case, the respondents were contracted as independent contractors and not as employees of the appellants. The claims made by the respondents do not relate to employment but to independent contractors.
11. The trial court should have dismissed the claims with costs without any employment status. The appeal should be allowed to this extent.
12. The respondents submitted that the appellants contracted them to build mosques. Under Section 10(7) of the *Employment Act*, the appellants had a duty to issue the respondents with contracts and file them in court upon service of summons. In the case of *Abigail Yator v China Hannan International Cause No.136 of 2028 (Eldoret)*, the court held that piece-rate work is allowed as proper employment. In the case *Krystalline Salt Limited v Kwekwe Mwakele & 67 others* [2017] eKLR, the court held that the *Employment Act* recognizes a contract for an unspecified period, a specific period and causal employment. In this case, the respondents were employed on piece-rate work, and the claims made were adequately assessed and allowed.
13. The respondents submitted that they were before the proper court and filed their Memorandum of Claim using Rule 4 of the Employment and Labour Relations Court (Procedure) Rules.
14. In the supplementary submissions, the appellant asserts that there was no employment relationship as defined under Section 2 of the *Employment Act* to justify the filing of the suit in this court as held in the case of *Ready-mix Concrete (South East) Ltd v Minister of Pensions and National Insurance, 1968 2 OB*. The court distinguished between an independent contract and an employee relationship, which applies in this case. The respondents were contracted as independent workers for services unlike employment as held in *Kenya Hotels and Allied Workers Union v Alfajiri Villas (Magufa) Ltd* [2014] eKLR and *Fredrick Byakika v Mutiso Menezes International Limited* [2016] eKLR.

Determination

15. This is a first appeal and the court is under a duty to review the record and make its conclusions. However, take into account that the trial court had the opportunity to take evidence.
16. The appellants have challenged the findings by the trial court about the application of Order 1 Rule 13(2) of the Civil Procedure Rules. Order 1 Rule 13(1), (2) of the Civil Procedure Rules is concerned with several claimants filing suit and one being granted authority to represent others in court.



The order requires that;

Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

17. However, the operative rules in employment and labour relations claims are the Employment and Labour Relations Court (Procedure) Rules. Under the rules applicable when the claim was filed on 17 March 2022, under Rule 9 of the Employment and Labour Relations Court (Procedure) Rules, 2016, a claim with an outline of what each claimant was seeking and represented by a single claimant was allowed.
18. On the application of Order 4 rule 1(3) of the Civil Procedure Rules, the appellants assert that the 2nd appellant is not a trustee or an official of the Global Pastoralist Organization and hence not capable of entering into any contractual relationship with the respondents. On this basis, the standing of the 2nd appellant became a crucial issue for determination. The respondents should have addressed such matter instantly and either amended their claim or removed the 2nd appellant from these proceedings.

Admissions of not being a trustee or in any manner an official of the entity sued, Global Pastoralist Organization was a material fact that the trial court should have addressed first, with finality.

Regarding the employment status and relationship between the parties, the respondents claimed that they were contracted to build mosques by the appellant. Their claims relate to various projects, materials costs and labourer payments. They produced various records of their expenses for cement, timber and building materials.

In evidence before the trial court, the 1st respondent admitted that;

I was a contractor.

I wasn't paid monthly, but after a project is completed Ksh.261, 200 is what I am demanding. ... The company catered for materials acquisition.

Whereas an employee is defined under Section 2 of the *Employment Act*, an independent contractor is not defined because such a person is not protected under the *Employment Act*.

19. The respondents submitted that they were contracted employees for piece-rate work. This is defined under Section 2 of the *Employment Act* to mean;

“Piece work” means any work the pay for which is ascertained by the amount of work performed irrespective of the time occupied in its performance;
20. Under Section 18 (1) of the *Employment Act*, piece-rate employment is allowed, provided the parties are bound by an agreement to be paid monthly or upon completion of a given task. The parameters for such work must be defined, and payment must be agreed upon.
21. However, the court acknowledges that independent contractors are part of daily securing services as agreed upon by the parties. Under such an agreement, the terms are purely commercial. Once the task is accomplished, there is payment. Where there is disagreement, this becomes a commercial claim and not an employment dispute.



22. In this case, the respondent's claims, as outlined above, range from labour charges, transport costs, and materials costs to nothing related to claims that would ordinarily arise from an employment relationship. As submitted by the appellants, there is a clear distinction between an employee and an independent contractor. In the case of *Ekisa v Highland Primary School; Wachira & 2 others (Interested Parties)* [2022] KEELRC 3831 (KLR), the court held that;

... an independent contractor is a person hired to perform work for another person (client) without control from the client. The contractor does not get the benefits of an employee, and his pay is not in the form of wages or salary. In this case, the contract was for services, and the pay was a commission based on the rent collected. The amount differed from month to month.
23. In the case of *Uap Life Assurance Company Limited v Commissioner of Domestic Taxes* [2019] KEHC 412 (KLR) the court held that an independent contractor does not enjoy employment benefits unlike an employee.
24. In this case, the outline of claims made does not relate to an employment relationship but to independent contractors invited to construct mosques in different areas. The 1st appellant represented the Global Pastoralists Organization and not the second appellant, who was not a trustee or under any capacity to contract the respondents.
25. Without establishing the employment relationship, an essential element for a claim before this court was lost. The trial court should have downed its tools at that point. In a commercial claim for work done by an independent contractor, the primary forum for litigation is not this court.
26. The appellants too should have addressed these legal questions instantly and not wait for the appeal. Hence, each party should pay its costs.
27. Accordingly, the appeal is found with merit as outlined above. The judgment in *Mombasa CM ELRC Noi.E106 of 2022* is hereby set aside in its entirety. Each party is to bear its costs.

DELIVERED VIA TEAMS VIRTUAL PLATFORM THIS 14TH DAY OF NOVEMBER 2024.

M. MBARŪ

JUDGE

