



**Githui v Focus Management Solutions & another (Cause E011 of 2021)
[2024] KEELRC 2780 (KLR) (8 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2780 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E011 OF 2021
AK NZEI, J
NOVEMBER 8, 2024**

BETWEEN

RICHARD GITHUI CLAIMANT

AND

FOCUS MANAGEMENT SOLUTIONS 1ST RESPONDENT

AMISH KAMLESH JULKA 2ND RESPONDENT

JUDGMENT

1. Vide a Memorandum of Claim dated 10th February, 2024, the Claimant sued the Respondents herein and sought the following reliefs:-
 - a. One month notice pay Kshs.200,000/=
 - b. Salary arrearsKshs.1,950,000/=
 - c. Accommodation and other expenses... Kshs.39,990/=
 - d. Compensation for unfair termination (Kshs.200,000 x 12) ... Kshs.2,400,000/=.
 - e. Certificate of service.
 - f. Costs of the suit and interest.
2. The Claimant pleaded that he was employed by the Respondents as a Lead SAP Sales and Distribution Consultant to implement SAP Sales and Distribution Module for companies engaged by the Respondents, and worked for the Respondent, working for companies which had SAP implementation contractual agreement with 1st Respondent.
3. The Claimant further pleaded:-



- a. that it was a term of the agreement that the Claimant would earn a monthly salary of Kshs.200,000/= starting from November 2019; but would first report to work before the employment (contract).
 - b. that the Claimant performed his part of the bargain and took up the job expecting the Respondents to immediately give him an employment contract to sign as had been agreed.
 - c. that the Respondents did not give the Claimant an employment contract/agreement, and started delaying his salary such that salary arrears accumulated to Kshs.1,989,990/=, made up of outstanding salary and reimbursement of costs incurred while working for the 1st Respondent.
 - d. that when the Claimant enquired about his salary, the Respondents became arrogant and sacked him vide an email of 8th October, 2020 and refused to pay him the pending salary and other pending payments (dues).
 - e. that termination of the Claimant's employment was unlawful as it was done without proper notice and there was underpayment of salary.
 - f. that the Claimant demands damages/compensation for unlawful termination.
4. Documents filed alongside the Claimant's statement of claim were the Claimant's affidavit sworn on 10th February, 2021 in verification of the claim, the Claimant's written witness statement (dated 10th February, 2021) and an evenly dated list of documents, listing 7 documents. The listed documents included a demand letter by the Claimant dated 13th October, 2020, response to the demand (dated 13th October, 2020) and copies of cheques issued by the Respondents.
 5. The Respondents entered appearance (under protest) on 4th March, 2021 and subsequently filed response to the Claimant's claim and Counter-claim on 20th April, 2021. In the reply to claim, the Respondents denied the allegation that the Claimant was their employee, and denied the existence of an employer-employee relationship between them and the Claimant.
 6. The Respondents further pleaded that the Claimant had no cause of action as his engagement was with the 1st Respondent which is a Juristic legal person with separate identity and existence from the 2nd Respondent, and that the Claimant's suit violated the principle of separate legal identity of companies. That the suit against the 2nd Respondent was defective.
 7. The Respondents further pleaded:-
 - a. That the Respondent was engaged as a Lead SAP Sales and Distribution Consultant; and that the nature of his engagement was that of an independent contractor for services and not as an employee.
 - b. That the Claimant was issued with a contract dated 1st November, 2019 which was send to him via WhatsApp, whose contents the Claimant noted, acknowledged and acquiesced to.
 - c. That the contract was for 3 months, and contained a clause that either party could terminate it by issuing a one (1) month notice.
 - d. That even though the contract dated 1st November, 2019 was not signed by the parties, it formed the basis of the engagement between the parties; and that subsequent correspondence between the Claimant and the 2nd Respondent on WhatsApp bore out the following facts:-
 - i. That the Claimant had received and noted the contract dated 1st November, 2019.



- ii. That based on the understanding and unqualified acceptance of the terms therein, the Claimant would commence offering services to the 1st Respondent.
 - e. That the 1st Respondent intended to be bound by the terms of the said contract, and that on 9th October, 2020, the Claimant had insisted on the fact that his engagement with the 1st Respondent was by the aforesaid contract and not an oral engagement/understanding.
 - f. That the Respondents would rely on the doctrine of estoppel by conduct to prevent the Respondent from refuting the existence, nature and purport of the contract dated 1st November, 2019. That the contract was one for service but not an employment contract in that:-
 - i. The Claimant was not subject to statutory deductions, but was subjected to Withholding Tax as an independent contractor.
 - ii. The Claimant was not onboarded to the 1st Respondent's system as an employee; and was not working directly for the 1st Respondent.
 - iii. That the Claimant admitted in his pleadings that he was working for the 1st Respondent's clients, had control over how he worked and was not under direct supervision of the Respondents.
 - iv. That the Claimant could work from any place, including remotely.
 - g. That this court is divested of Jurisdiction to entertain the claim herein as presented since the relationship between the Claimant and the 1st Respondent was a contract for service not within the definition of an employee as per Section 2 and 2(1) of the *Employment Act* and *Employment and Labour Relations Court Act* respectively.
 - h. That it was the Claimant who breached the terms of engagement through misrepresentation as to his capacity as a consultant by claiming to have expertise in SAP Distribution and Sales while he had no competence to handle such projects, and abandoning projects with the 1st Respondent's clients mid-way, or doing them poorly such that the 1st Respondent had to engage other contractors for the same projects. That on 8th October, 2020 and 10th October, 2020, the 2nd Respondent wrote emails to the Claimant expressing dissatisfaction with his work, and subsequently vide a demand letter dated 13th October, 2020 called on him to refund monies advanced to him in respect of the projects that he had been unable to deliver on.
 - i. That in sheer act of bad faith, the Claimant took off with the 1st Respondent's laptop worth Kshs.135,000/=, and refused to return it to date.
8. The 1st Respondent raised a Counter-claim against the Claimant and sought the following reliefs against him:-
- a. Return of the laptop and in the alternative, payment of Kshs.135,000/=.
 - b. General damages for injury to the Respondent's credibility as to expertise as a result of the Claimant's incompetence.
 - c. Costs of the counter-claim and interest.
9. Documents filed alongside the Respondents' response to the claim and the 1st Respondent's Counter-claim included an affidavit in verification of the Counter-claim, a written witness statement of the 2nd Respondent dated 19th April, 2021 and an evenly dated list of documents listing 4 documents.



The listed documents included a certificate of production of electronic evidence, contract dated 1st November, 2019, WhatsApp communication between the Claimant and the 2nd Respondent and a demand letter dated 13th October, 2020.

10. At the trial, the Claimant adopted his filed witness statement, which replicated the averments made in the statement of claim, as his testimony and produced in evidence the documents referred to in paragraph 4 of this Judgment. The Claimant further testified:-
- a. That he was employed by the Respondents on 1st November, 2019 as a Lead Consultant for Sales and Distribution, at an agreed salary of Kshs.200,000/=.
 - b. That a contract was sent to the Claimant by WhatsApp, but the same was never signed as the signing kept on being deferred.
 - c. That the first salary was paid in January 2020 by two cheques of Kshs.100,000/= each. That there was another payment cheque for Kshs.200,000/= and another one for Kshs.230,000/=.
 - d. That at the time of termination, the outstanding salary arrears stood at Kshs.1,950,000/=; for the period between November 2019 and October 2020. That the arrears were for various months during that period.
 - e. That the employment was terminated vide a WhatsApp message on 3rd October, 2020, followed by an email which the Claimant received on 8th October, 2020 send in response to the Claimant's demand for salary arrears; and vide which the Claimant was accused of incompetence and having left with company property.
 - f. That the Claimant had never received any summons or notice of incompetence; that he had been accused of leaving work and going to Mombasa without permission and of not finishing work in time.
 - g. That the foregoing accusations were never made during the Claimant's period of employment, but were made upon termination.
 - h. That the company laptop that the Claimant left with on being terminated had been given to him, and was allowed to go home with it and to work from home. That he was terminated while enroute to Mombasa, and he left with it.
 - i. That on being terminated, the Claimant was told by the 2nd Respondent that arrangements would be made on how the laptop would be picked, but that this never happened.
 - j. That for the period that the Claimant worked, he was only paid Kshs.630,000/=, leaving an outstanding sum of Kshs.1,950,000/=.
 - k. That there was a salary increment of Kshs.30,000/=, which was supposed to cater for the Claimant's meals.
11. The Claimant further testified that the sum of over Kshs.5,000,000/= being demanded from him by the Respondents was refund of all the money paid to him and expenses used on him while he was working, which was strange. He, the Claimant, denied the allegations of incompetence and stated that the 2nd Respondent knew of his competence as they had previously worked on projects together at Bamburi Cement for ten (10) years. That this is why the 2nd Respondent had called the Claimant to do the Respondents' projects.



12. Cross-examined, the Claimant testified that he was engaged orally by the 2nd Respondent, a director of the 1st Respondent. That he was being paid by the 1st Respondent. That he was not given an employment contract, but was send the first page of a contract by WhatsApp before 1st November, 2019. That he was terminated in Mid-October (2020) via a WhatsApp message; which he had not filed as part of his documents in the suit herein.
13. The Claimant denied having been a consultant, and insisted that he was an employee; and that he undertook various projects with different companies on behalf of the 1st Respondent. It was the Claimant's further evidence that the salary paid to him was net of tax, and that he was not issued with any payslip.
14. Both the Respondents and their Counsel did not attend court on 3rd November, 2023 when the suit came up for further hearing, despite the said date having been taken in court in the presence of counsel for both parties. On application by counsel for the Claimant, the Respondent's Counter-claim was dismissed, and the defence case was closed. An application by the Respondents seeking to re-open the Respondents' case and to set aside the dismissal order was dismissed by this court vide its Ruling delivered on 16th May, 2024.
15. The legal import of failure by the Respondents to call evidence is that their pleadings (response to the claim) and filed witness statements remained mere unsubstantiated statements of fact that cannot be considered by the court in determining the dispute herein. The evidence presented by the Claimant stands unrebutted and unchallenged.
16. Issues that present for determination, in my view, are as follows:-
 - a. Whether the Claimant was an employee of the Respondents or was a consultant.
 - b. Whether this court is vested with Jurisdiction to determine the dispute/suit herein.
 - c. Whether the Claimant is entitled to the reliefs sought.
17. The Claimant pleaded in his statement of claim that he was employed as a Lead SAP Sales and Distribution Consultant to implement SAP Sales and Distribution Module for Companies engaged by the Respondents. That he worked for the companies which had SAP implementation contractual agreement with the Respondents. This pleading places the Claimant in the aforesaid companies where his consultancy expertise was required, but not within the enterprise and/or business of the Respondents. It is trite that parties are always bound by their pleadings. In this regard, counsel for the Respondents referred the Court to the case of Independent Electoral and Boundaries Commission & Another – vs – Stephen Mutinda Mule & 3 Others (2014) eKLR where the Court of Appeal Stated as follows:-

“ . . . It is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings, goes to no issue and must be disregarded . . .

In fact that parties are not allowed to depart from their pleadings is on the authorities basic as this enables the parties to prepare their evidence on the issues as joined and avoid surprises by which no opportunity is given to the other party to meet the new situation.”
18. The *Employment Act* defines an employee as a person employed for wages or a salary and includes an apprentice and indentured learner. An employer on the other hand is defined by the Act as a



person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager. It is worthy noting that the *Employment Act* does not define a consultant.

19. The test as to whether one is an employee or a consultant (independent contractor) has long been established. An employer controls the work to be done by an employee, and gives an employee's job description pursuant to Section 10 of the *Employment Act*, and even controls the manner in which the work is done. An employer will define the working hours, pay a salary and effect statutory deductions therefrom, and give annual leave and rest days to an employee. An employee is an integral part of his employer's enterprise and his working hours on any single working day are part of the terms and conditions of his employment.
20. On the other hand, a consultant is deemed to be an expert in his field whose manner of working is not defined or dictated by any one. An expert's task or scope of work is outlined, and he is left to determine how best to do his work/to undertake his projects.
21. Best put, 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*.
22. The evidence adduced by the Claimant, which sought to present and to portray the Claimant as an employee of the Respondents, was at variance with his pleadings herein, and therefore went to no issue. It is worthy noting that no signed contract was produced in evidence by either party, and that the Court was basically guided by the pleadings filed and the evidence adduced.
23. I make the unavoidable finding that this Court, being a specialised court, lacks jurisdiction to determine the dispute herein, and must therefore down its tools.
24. The Court of Appeal stated as follows in the case of National Social Security Board of Trustees – vs – Kenya Tea Growers Association & 14 Others (Civil Appeal No. 656 of 2022 (2023) KECA 80 (KLR) (3 February, 2023) (Judgment):-

“We start our determination by stressing that jurisdiction is a threshold matter which goes to the competence of the court to hear and determine a suit. Jurisdiction can be raised at any stage of the proceedings in the High Court, on appeal and even in the Supreme Court for the first time. It can be raised by any of the parties or by the Court, and once raised the court would do well to examine it and render a considered ruling on it.”
25. Still on the issue of Jurisdiction, the Court of Appeal stated as follows in Kenya Ports Authority – vs – Modern Holdings (E.A) Limited (2017) eKLR:-

“We have stressed that Jurisdiction is such a fundamental matter that it can be raised at any stage and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised at any time, in any manner, even for the first time on appeal, or even viva-voce, and indeed by the Court itself . . .”
26. The Respondents participated in the trial upto the point of cross-examining the Claimant. They properly raised the issue of Jurisdiction, both in their pleadings and in their final submissions. Having made a finding that this Court is without jurisdiction to determine the claim herein, the court will not determine the other issue framed. The Claimant's suit is hereby dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF NOVEMBER 2024



AGNES KITIKU NZEI

JUDGE

Order

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....Claimant

.....Respondent

