



**Victor v Ernie Campbell & Company Limited (Cause E570 of 2024)
[2024] KEELRC 13371 (KLR) (6 December 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13371 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E570 OF 2024
SC RUTTO, J
DECEMBER 6, 2024**

BETWEEN

MBELESIA JUNIOR VICTOR CLAIMANT

AND

ERNIE CAMPBELL & COMPANY LIMITED RESPONDENT

RULING

1. Before this court for determination is the Respondent's/Applicant's Notice of Motion Application dated 3rd October 2024 seeking an order to strike out the Claimant's Memorandum of Claim.
2. The Application which is expressed to be brought under Article 162(2) of the Constitution of Kenya (2010), Section 12(1) of the Employment and Labour Relations Court Act, Section 1A, 1B and 3B of the Civil Procedure Act, Order 2 Rule 15 (b) and Order 51 Rule of the Civil Procedure Rules, is premised on the grounds on its face and the Affidavit of Gopal Vaghian sworn on 3rd October 2024.
3. Grounds in support of the Motion are that the Claimant and the Respondent entered into a Consultancy Agreement dated 18th September 2018 where the Claimant would work as an independent contractor to provide consultancy services as a quantity surveyor. The contract was for a contract for service and not a contract of service. That therefore, this Court's jurisdiction has been invoked improperly as there is no employer-employee relationship.
4. The Application was opposed through the Claimant's Replying Affidavit sworn on 22nd October 2024. The Claimant deposes that his engagement was a contract of service and not a contract for service. That even though the Respondent titled his contract as a "Consultancy Agreement", the terms therein do not speak to a consultancy but to formal employment. The Claimant avers that he was to carry out all duties assigned to him.



5. The Claimant further avers that there is no express clause referring to him as an independent contractor. Further, his working hours were specified from 8:00 am to 4:30 pm on weekdays and 8:00 am to 1:00 pm on Saturdays.
6. It is the Claimant's further deposition that he was given an office by the Respondent and that he used to report to work every day. That had to seek permission from the Respondent if he wanted to miss work to attend to his personal issues.
7. That he was also involved in the management of the Respondent company and was a member of the Respondent's employees' WhatsApp groups including the management group and quantities department group. He avers that he was immediately removed from the said WhatsApp group after his termination.
8. It is the Claimant's assertion that even though his salary was calculated hourly, it was paid monthly and was subject to statutory deductions.
9. The Claimant further avers that he had been in continuous and uninterrupted employment with the Respondent for a period of six years.
10. In rejoinder, the Applicant filed a Further Affidavit sworn by Gopal Vagjian on 11th November 2024. He deposes that the Consultancy Agreement signed by the Claimant, invoices raised monthly by the Claimant and the withholding tax certificates generated by the Kenya Revenue Authority demonstrate that the Claimant was an independent contractor.
11. That the working hours specified in the Consultancy Agreement only provide guidance on the engagement between the parties and cannot be used to imply an employer-employee relationship.
12. According to him, the Claimant was included in the WhatsApp groups for the purposes of coordinating work within the company and did not establish an employer-employee relationship.
13. It is further averred by Mr. Gopal that there are no rigid timelines upon which an individual can be an independent contractor.

Submissions

14. The Application was canvassed by way of written submissions. On the Applicant's part, it was submitted that the relationship between the parties aligns with the hallmarks of an independent contractor. In support of this argument, the Applicant placed reliance on the case of *Kenya Hotel and Allied Workers Union vs Alfajiri Villa Mafuga Ltd* (2014) eKLR.
15. Placing reliance on the case of *Gilbert Sule Otieno vs Seventh Day Adventist Church (East Africa) Ltd (sued on behalf of S.D.A. Church, Kiamunyi East)* [2014] KEELRC 39 (KLR), the court was urged to arrive at a finding that the Claimant was an independent contractor and that any other finding would be tantamount to rewriting the contract between the parties.
16. It was further submitted by the Applicant that where parties have reduced the terms and conditions regulating their relationship into writing like the present case, such is to be given importance because they form the basis and intention of the parties. To buttress this position, the Applicant reference was made to the case of *Five Forty Aviation Limited vs Erwan Lanoe* (2019) eKLR.
17. According to the Applicant, this court has no jurisdiction to determine the claim.



18. On the other hand, the Claimant submitted that the Applicant had absolute control and or command over his performance of duties. In support of the Claimant's position, reference was made to the case of *Charles Juma Oleng vs Ms Auto Garage Ltd* (2014) KEELRC 1170 (KLR).
19. According to the Claimant, he had proved the control test, the integration test, the test of economic or business continuity and the mutuality of obligations test.
20. The Claimant maintained that he was not an independent contractor as alleged but an employee of the Applicant whose engagement was a contract of service.

Analysis and determination

21. Having considered the Application, the Replying Affidavit and the rival submissions, it is this court's view that the issue for determination is whether the Claimant was engaged on a contract for service or contract of service hence whether this court has jurisdiction to hear and determine the matter.
22. The gravamen of the Application is that the jurisdiction of this court has been invoked improperly as there was no employer-employee relationship between the parties. In this regard, the Applicant is categorical that the Claimant worked as an independent contractor, where he was engaged to provide consultancy services.
23. According to the Claimant, his contract although titled "Consultancy Agreement" does not contain terms that speak to a consultancy but to formal employment. In support of this agreement, the Claimant cited the hours of work, the element of control, his integration into the Applicant's business and the manner in which he was remunerated.
24. In this case, the parties executed a Consultancy Agreement dated 18th September 2018. In the said Agreement, the Claimant is identified as a Consultant and is described as much throughout the contract. The question thus, is whether the said agreement despite being titled "consultancy" can be construed to be an employment contract. Differently expressed, was this a disguised employment?
25. In distinguishing a contract for service and a contract of service, the Court had this to say in the case of *Kenneth Kimani Mburu & another vs Kibe Muigai Holdings Limited* [2014] eKLR: -

"A Consultant performs work for another person, according to his own processes and methods. A Consultant is not subject to another's control, except to the extent admitted under the contract. The Court in determining the first question is not bound by the Parties' respective declarations on the character of these contracts, but should not disregard the Parties' intention.

41. Even with the hybrid wording in the contracts, the intention of the Parties, and the wording in large portions of the two agreements persuade the Court these were employer-employee relationships. A Consultant is paid a fee as confirmed by the Respondent's Witness Mr. Karabilo, not a salary. A Consultant is not eligible for Company benefits such as health insurance, which was extended by the Respondent to Mburu and three other members of his family. A Consultant would not normally be provided with the tools of work. The Respondent provided Mburu with the laptop, office facilities, and a phone. The Respondent provided the tools of work, and directed the Claimants in the performance of work. There were frequent meetings between the Parties during which Kibe Muigai kept demanding for specific outputs. He was emphatic the Claimants remained accountable to him. A



Consultant would have the latitude to discharge his obligation according to his own processes and methods, which would include the ability to subcontract or hire own assistants. The evidence on record suggests all the persons working at the Hotel were engaged by the Respondent, and were paid by the Respondent largely through Debora. He remained in control of the undertaking. There was no evidence that the Claimants paid with-holding tax. Instead, the Respondent paid Mburu a ‘net salary.’ Instead, the Respondent paid Mburu a ‘net salary.’ It is the obligation of an employer to enforce statutory deductions such as P.A.Y.E, N.S.S.F and N.H.I.F contributions. By paying ‘net salary’ the presumption would be that the Respondent had factored in this obligation. The fact that no evidence was presented showing payment of these employee deductions is not an indication that there was no employer-employee relationship.” Underlined for emphasis

26. Under the *International Labour Organization (ILO) Recommendation 198 (R198 - Employment Relationship Recommendation, 2006 (No. 198)* it was appreciated that there are difficulties in establishing whether or not an employment relationship exists in situations where the respective rights and obligations of the parties concerned are not clear, where there has been an attempt to disguise the employment relationship, or where inadequacies or limitations exist in the legal framework, or in its interpretation or application.
27. In this regard, *ILO Recommendation No. 198* endorsed specific indicators for facilitating the determination of the existence of an employment relationship. Some of these indicators are;
 - (a) the fact that the work is carried out according to the instructions and under the control of another party; involves the integration of the worker in the organization of the enterprise; is performed solely or mainly for the benefit of another person; must be carried out personally by the worker; is carried out within specific working hours or at a workplace specified or agreed by the party requesting the work; is of a particular duration and has a certain continuity; requires the worker's availability; or involves the provision of tools, materials and machinery by the party requesting the work;
 - (b) periodic payment of remuneration to the worker; the fact that such remuneration constitutes the worker's sole or principal source of income; provision of payment in kind, such as food, lodging or transport; recognition of entitlements such as weekly rest and annual holidays; payment by the party requesting the work for travel undertaken by the worker in order to carry out the work; or absence of financial risk for the worker.
28. Applying the indicators established under *ILO Recommendation No. 198* and the dicta in *Kenneth Kimani Mburu & another vs Kibe Muigai Holdings Limited* [*supra*], I am persuaded that the Claimant was engaged under a contract of service as opposed to a contract for service.
29. I say so because first, clause 2 of the Consultancy Agreement provides that from Monday to Friday, the Claimant was to work from 8:00 am to 4:30 pm with half hour lunch break and from Saturdays, the Claimant was to work from 8:00 am to 1:00 pm.
30. Disputing the Claimant's assertions, the Applicant has averred that the working hours only provided guidance on the engagement between the parties.
31. In a consultancy arrangement, a consultant is not subject to another person's control. In this case, the Applicant controlled the Claimant's working hours, including the specific days of the week he was to



work and rest. Indeed, it is notable that Sundays are excluded from the days the Claimant was to work. Therefore, the Applicant was in essence recognizing that the Claimant needed to take a weekly rest.

32. Indeed, the aforementioned clause in the Consultancy Agreement is consistent with Section 27 of the [Employment Act](#) which provides as follows;

(27)

- (1) An employer shall regulate the working hours of each employee in accordance with the provisions of this Act and any other written law.
- (2) Notwithstanding subsection (1), an employee shall be entitled to at least one rest day in every period of seven days.

33. Further to the foregoing, the Consultancy Agreement recognized that the Claimant needed to take lunch hour breaks.

34. It is uncommon to incorporate the working hours in an arrangement involving an independent contractor. Therefore, this leaves no doubt that the Claimant herein was working under the control of the Applicant.

35. The Consultancy Agreement further provided in clause 3 that the company was to provide the Claimant with work related equipments including work gear, office stationery, a phone and other related items which he was to take good care of and return upon termination.

36. As rightly stated in the case of *Kenneth Kimani Mburu & another vs Kibe Muigai Holdings Limited* [supra], a Consultant would not normally be provided with the tools of work. They are expected to bring their own. As such, I cannot help but question why the Applicant would provide the Claimant with tools and equipment including stationery if at all he was not an employee.

37. Needless to say, the fact that the Agreement was titled a “Consultancy Agreement” does not automatically mean that the parties were not in an employment relationship. The terms of the Agreement implied that they were in an employer-employee relationship. As was rightly held by the Court in the case of *Kenneth Kimani Mburu & another vs Kibe Muigai Holdings Limited* [supra]: -

“The Court in determining the first question is not bound by the Parties’ respective declarations on the character of these contracts...”

38. Still on that issue, [ILO Recommendation No. 198](#) states that “for the purposes of the national policy of protection for workers in an employment relationship, the determination of the existence of such a relationship should be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties.”

39. If I may say, it is apparent that in this case, the relationship was that of an employer-employee disguised as a consultancy.

40. For the foregoing reasons, I am led to conclude that the Claimant was engaged in a contract of service as opposed to a contract for service. Therefore, their relationship fell within the ambit of the [Employment Act](#), 2007. To this end, this Court has jurisdiction to hear and determine the dispute.

41. Accordingly, the Application dated 3rd October 2024 is disallowed with an order that costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF DECEMBER, 2024.



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STELLA RUTTO

JUDGE

In the presence of:

For the Claimant Mr. Shisanya

For the Respondent/Applicant Ms. Gicheru instructed by Ms. Mbaabu

Court Assistant Millicent

Order

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court had been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

