Chrismer Express Limited & another v Killmall International Limited (Cause 385A of 2017) [2023] KEELRC 227 (KLR) (27 January 2023) (Judgment)

Neutral citation: [2023] KEELRC 227 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 385A OF 2017

SC RUTTO, J

JANUARY 27, 2023

BETWEEN

CHRISMER EXPRESS LIMITED ..... 1ST CLAIMANT

JETFLY COURIER SERVICES ..... 2ND CLAIMANT

AND

KILLMALL INTERNATIONAL LIMITED ..... RESPONDENT

JUDGMENT

1. The claimants instituted two sets of claims against the respondent. However, both claims are in the joint names of the claimants and relate to the same cause action. Accordingly, the matters were heard together.

2. The 1st claimant describes itself as a limited liability company duly incorporated under Cap 486, Laws of Kenya. It avers that it carries on business of transport, parcel delivery, courier services and logistics solutions. That it was engaged by the respondent on September 15, 2016, as a Drop Shipping Associate to provide competent riders on a contractual basis for a period of six months. That this done vide a contract executed and signed on the same day.

3. The 2nd claimant describes itself as a business enterprise duly incorporated under the provisions of the *Registration of Business Names Act*, cap 499 Laws of Kenya. It avers that it carries on business of transport, parcel delivery, courier services and logistics solutions. That it was engaged by the respondent as a Drop Shipping Associate on September 3, 2016 vide a contract executed and signed on the same day, to provide competent riders on a contractual basis for a period of six months.

4. It is the claimants' case that they were engaged by the respondent at all material times until it constructively and unlawfully terminated their contracts of employment in a calculated move on January 24, 2017 vide a letter executed the same day. They aver that there was no unsatisfactory performance to warrant immediate termination. As a result, the claimants have termed the actions

of the respondent as amounting to breach of contract, unfair termination, discrimination and constructive termination. Consequently, they jointly claim against the respondent terminal dues and benefits being salary in lieu of notice, compensatory damages for unlawful termination and certificates of service for 32 riders (13 being for the 1st claimant and 19 being for the 2nd claimant).

5. The respondent opposed the claim and filed a Response under protest. It admitted entering into separate Drop Shipping Service Contract Agreements with the claimants. It avers that it was an express term of the Drop Shipping Service Contracts that nothing contained therein would constitute either claimant as an employee or agent of the respondent and more particularly, that the relationship of the claimants and the respondent would be one of an independent contractor.

6. The respondent further contends that the claimants have without any cause or justification not exhausted the dispute resolution mechanism provided for in the respective Drop Shipping Service Contracts hence the present claim is premature and out of place. For this reason, the respondent avers that the Court lacks jurisdiction to entertain the claim and prays that the same be struck out with costs.

7. The respondent further filed a Notice of Preliminary Objection dated March 21, 2017 which was premised on the ground that the claim does not fall under the purview of the *Employment Act*, *Labour Institutions Act* and *Employment and Labour Relations Court Act* and is therefore an abuse of the Court process. That further, this Court lacks jurisdiction to entertain the claim and it must be struck out with costs.

8. In a Ruling dated November 22, 2019, the Preliminary Objection was overruled with the Court directing that the matter proceeds to full trial. In overruling the Preliminary Objection, the Court determined that an employer employee relationship sometimes may not be clear but can be deduced from the circumstances of the parties and their relationship. That this may require calling of evidence to establish or refute the existence of the relationship. That in this case, the relationship of the parties does not come out clearly to enable the Court uphold the Preliminary Objection. It is for this reason that the Court held that the issue will be determined after a full trial.

9. The matter proceeded for part hearing on May 9, 2022 and further on July 19, 2022 when the trial closed. Both parties called oral evidence during the hearing.

1st Claimant's Case

10. The 1st claimant called oral evidence through Mr. Christopher Mwangi who testified as CW1. He identified himself as the 1st claimant's Managing Director and at the outset, adopted his witness testament and the documents filed together with the claim, to constitute his evidence in chief.

11. CW1 testified that the respondent approached him with a view of signing a contract where he would provide competent riders for delivery of its goods. That on the September 15, 2016, he signed a contract with the respondent as a Delivery Company where he was to second the services of courier delivery riders by providing competent riders on a contractual basis for one year. As such, he contracted delivery riders to provide courier services to the respondent.

12. That on December 23, 2016, the respondent sent an email informing him that his riders had been sent on a compulsory Christmas Vacation starting on the same day until the January 3, 2017 when they would resume normal services.

13. That on January 3, 2017 when the riders were to resume work, the respondent sent an email informing him that the Management had reviewed the same and that it would continue with their contract if he furnished the respondent with a bank guarantee, training, reporting and recording system. He stated that previously, he had demonstrated the training, reporting and recording system to the respondent in

their offices and they were satisfied with the same. That his Company had also taken a Bank Guarantee with Family Bank as was required by the contract signed.

14. That on January 23, 2017, the respondent sent an email informing his Company of a meeting at 5.00 p.m. That the respondent came late to the meeting and told him to sign the minutes. That he signed the minutes and was informed that the money being payment for December, 2016 will be remitted to his bank account on January 24, 2017. That later, he read the minutes and found that the partnership had been terminated. That all that time, the riders would report to work at the respondent's warehouse but were never issued with any orders.

15. He stated in further evidence that the respondent introduced amendments contrary to the Contract without prior agreement of both parties as was required. That further, the respondent imposed unconscionable terms and conditions in a calculated move to find fault in his Company.

16. That the respondent did not issue a termination notice or offer any payment in lieu of the notice as was provided for in the Contract. That there was neither unsatisfactory performance on his Company's part nor disciplinary misconduct to warrant the immediate termination of the contract.

17. That further, the respondent's actions of immediate termination of contract exposed his Company to civil suits by the riders contracted to provide the services. That he incurred heavy losses as he had hired motorbikes and engaged 14 riders. That he even resigned from employment so as to manage the riders.

18. That as a result, his Company engaged their Advocate who communicated to the respondent its intention to sue through a letter dated February 3, 2017. That the respondent did not reply to the Demand notice sent thereby necessitating the instant suit.

2nd Claimant's Case

19. The 2nd claimant called oral evidence through Mr. Geoffrey Martin Lumbasi who testified as CW2. He identified himself as its Operations Manager and similarly, he adopted his witness statement and the documents filed together with the claim to constitute his evidence in chief.

20. CW2 stated in his evidence that the respondent approached him with a view of signing a contract where he would provide competent riders to deliver its goods.

21. That on September 15, 2016, he signed a contract with the respondent as a Delivery Company where he was to second the services of courier delivery riders by providing competent riders on a contractual basis for one year. That as such, he contracted delivery riders to provide courier services to the respondent.

22. That on December 23, 2016, the respondent sent an email informing him that his riders had been sent on a compulsory Christmas Vacation starting on the same day until January 3, 2017 when they would resume normal services.

23. That on January 3, 2017 when the riders were to resume work, the respondent sent another email informing him that the Management had reviewed the same and that it would continue with their contract if they furnished the respondent with a bank guarantee, training system and reporting & recording system. That the riders were not issued with any orders despite them reporting to work.

24. That previously, they had demonstrated the training, reporting and recording system their business enterprise uses in performance of the services to the respondent in their offices which they were satisfied with. That his Company had also taken an Insurance Cover with First Assurance covering fire and perils, burglary and carriers' liability as was required by the contract signed.

25. That he strived to get a Bank Guarantee to meet the conditions imposed but the respondent frustrated his efforts due to lack of its cooperation as can be seen from their email communication.

26. That on the January 23, 2017, the respondent sent an email informing his Company of a meeting at 5.00 p.m. That the respondent came late to the meeting and told him to sign the minutes. That he signed the minutes and was informed that payment for December, 2016 will be remitted to his bank account on January 24, 2017. That he later read the minutes and found that the partnership had been terminated. That all that long, the riders would report to work at the respondent's warehouse but were never issued with any orders.

27. CW2 stated that the respondent introduced amendments contrary to the Contract without prior agreement of both parties as was required. That further, the respondent imposed unconscionable terms and conditions and refused to cooperate with his business enterprise in a calculated move to find fault.

28. He contended that the respondent did not issue a termination notice or offer any payment in lieu of the notice as was provided for in the Contract of Services signed. That there was neither unsatisfactory performance on his part nor any misconduct to warrant the immediate termination of the contract. That further, the respondent's actions of immediate termination of contract exposed his Company to civil suits by the riders contracted to provide the services. That he incurred losses after termination of the contract as the respondent had told them to get a van and rent a bigger office. That after termination of the contract, he had to pay the riders their dues.

29. He stated in further evidence that his business as a result, engaged their Advocate who communicated to the respondent its intention to sue through a letter dated February 3, 2017. That the respondent did not reply to the demand notice sent, thereby necessitating the instant suit.

Respondent's case

30. The respondent called oral evidence through Ms. Grace Mwende Masya who testified as RW2. She identified herself as its Human Resource Manager and to start with, she proceeded to rely on her witness statement and the documents filed on behalf of the respondent to constitute her evidence in chief.

31. She stated that all along, there has never been any employment relationship created between the respondent and the claimants. That instead, there has been a purely contractual relationship between the claimants and the respondent in which the claimants were identified as independent contractors.

32. That the respondent and the 1st claimant entered into a Drop Shipping Service Contract Agreement on the September 15, 2016. That a similar agreement was entered into with the 2nd claimant on September 3, 2016. That the Drop Shipping Service Contract Agreement between the claimants and the respondent further provided under Clause 9 that any dispute arising out of the Agreement shall be first settled amicably by the parties within 30 days and in the event, they could not settle the dispute within 30 days, they would refer the dispute to a mediator. That in the event mediation did not succeed, parties were to try and solve the dispute by way of arbitration.

33. That the claimants did not make any attempt to resolve the dispute amicably, appoint a mediator and/or try to resolve the dispute by way of arbitration. That the claimants prematurely instituted the suit against the respondent before attempting to resolve the dispute amicably as was agreed by the parties under Clause 9 of the Drop Shipping Service Contract Agreement.

34. That further, on the September 15, 2016, the respondent entered into separate Secondment Agreements with the claimants. That the said Agreements were in form of contracts for service and as such an employment relationship could not exist between the claimants and the respondent.

35. That the Secondment Agreement defined Kilimall International Limited as Kilimall, the claimants as Employers and the claimants' delivery riders as the Secondees. That pursuant to paragraph 2 of the General Clause of the Agreement, it was apparent that there wasn't any employment relationship between the respondent and the claimants.

36. That the Secondment Agreements entered into by the claimants and the respondent never contained any clause that created the existence of an employment relationship between the claimants and the respondent.

Submissions

37. The claimants filed joint written submissions through which they urged that the secondment contracts do not indicate that there shall be no employer employee relations between the respondent and the claimants or its employees. That the claimants were under the direct command of the respondent and would issue instructions to them. That further, the respondent controlled them as to the manner in which deliveries were to be made. The claimants' further submitted that they were an integral part of the respondent's organisation. To buttress their arguments, the claimants relied on the case of *Christine Adot Lopeyo vs Wycliffe Mwathi Pere* (2013) eKLR.

38. It was the claimants' further submission that the respondent commenced the process of their constructive dismissal by imposing unconscionable working terms and introducing extraneous matters to their contracts of employment.

39. With regards to whether the respondent had exhausted the grievance procedure, the claimants submitted that they used their best efforts to initiate internal dispute resolution mechanisms provided in the contracts before filing the suit. That they communicated their claim against the respondent through a letter dated February 23, 2017 from their Advocates but the respondent never acknowledged or replied the said letter. On this issue, the claimants relied on the case of *William Odhiambo Ramogi & 3 others vs Attorney General & 4 others* (2020) eKLR.

40. On its part, the respondent submitted that this Court has no jurisdiction to hear and determine the matter as the nature of the agreement entered between the claimants and the respondent was a contract for service and not a contract of service. In distinguishing a contract of service and a contract for service, the respondent invited the Court to consider the determination in the case of *Benjamin Joseph Omusamia vs Upperhill Springs Restaurant* (2021) eKLR. The respondent stated in further submission that the claimants were independent contractors. That the secondment agreements provided in express terms that nothing in the agreements shall constitute an employer employee relationship. That further, the conditions in the secondment agreement have no provisions that have statutory requirements under the *Employment Act*. To this end, the respondent placed reliance on the case of *George Onyango Ochieng vs Chemelil Sugar Company Limited* (2014) eKLR.

41. Citing the case of *William Odhiambo Ramogi & 3 others vs Attorney General & 4 others* (2020) eKLR, the respondent further argued that the claimant had failed to exhaust the remedial measures stipulated in the agreements.

Analysis and Determination

42. Having considered the pleadings on record, the evidentiary material placed before me as well as the parties' submissions, the issues falling for the Court's determination can be distilled as follows:

    i. Whether the Claimants were engaged on a contract of service or on a contract for service

    ii. If engaged on a contract of service, were the claimants unlawfully and unfairly terminated from employment?

    iii. Are the claimants entitled to the reliefs sought?

Contract of service or contract for Service?

43. The claimants confirmed that they were separately engaged by the respondent as Drop Shipping Associates hence executed contracts to that effect. It is worth pointing out at this juncture that the contracts executed between the respondent and both claimants, are similarly worded.

44. The question is whether the said contracts constituted contracts of Service Or Contracts for service. Put another way, were the claimants engaged as employees of the respondent? To answer this question, it is imperative to revisit the said contracts in order to ascertain their full effect.

45. For starters, clause 5 of the Drop Shipping Service Contract Agreement is couched as follows:

> " Nothing contained herein shall constitute the first party an employee or agent of the second and the relationship of the first party to the second party shall be one of an independent contractor."

46. In this regard, the Contract identifies the first party as the claimants while the respondent is identified as the second party.

47. It is also notable that on the face of it, the said contracts do not bear any semblance to an employment contract, rather appears to be more of a normal service level agreement. Why do I say so? The contract does not have the clauses ordinarily contained in an employment contract for instance, remuneration, place of work, hours of work, leave, disciplinary issues, performance appraisal etc. Indeed, the clauses contained in the said agreement do not resonate in any way with the normal and ordinary terms of a contract of service.

48. The *Employment Act* defines a "contract of service" to mean:

> " 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 learnership but does not include a foreign contract of service to which Part XI of this Act applies."

49. In light of the above definition, it is clear that an employee is normally engaged under a contract of service. Section 2 of the *Employment Act* defines an employee to refer to a person employed for wages or a salary and includes an apprentice and indentured learner.

50. In my considered view, the definition of the term "employee" under the *Employment Act* does not contemplate a situation where an employee is an artificial person, as the claimants herein. Indeed, it would be absurd to deem an artificial person as an employee under the *Employment Act*, 2007. This is further compounded by the wording in the preamble of the Act which provides its purpose as being;

"to declare and define the fundamental rights of employees, to provide basic conditions of employment of employees, to regulate employment of children, and to provide for matters connected with the foregoing". In light of this, I find it hard to comprehend how the terms of the *Employment Act*, 2007 would be applicable on artificial persons as employees.

51. Coupled with the foregoing, clause 5 of the Drop Shipping Service Agreement was express that the claimants were engaged as independent contractors. The *Black's Law Dictionary*, (9th Edition) defines an independent contractor, to mean, "One who is entrusted to undertake a specific project but who is left free to do the assigned work and to choose the method for accomplishing it."

52. In the case of *Kenya Hotels & Allied Workers Union vs Alfajiri Villas (Magufa) Ltd* [2014] eKLR the Court had this to say on the issue:

> " 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."

53. Applying the above determination to the instant case, the element of control is not apparent from the contract executed by the parties. The claimants were engaged to provide a specific Service in exchange of a consideration. In this regard, the claimants were to be paid a consolidated contract fee of Kshs 40,000 per month net of all taxes which were to be paid in arrears per motorbike. There was no mention of salary.

54. Generally, and going by the definition of the term "employee" in the *Employment Act*, the term salary is normally invoked in an employment relationship.

55. In the instant case, the claimants exhibited invoices addressed to the respondent. The said invoices were raised in respect of the services rendered to the respondent. It is essential to note that an invoice is a document that is typically used in a contract for service to claim payment for services rendered. This is not ordinary in an employment contract where an employee is paid salary or wages periodically.

56. Further, in an ordinary employment relationship, the employer will provide the employee with the tools of work. In this case, the claimants availed the working tools and resources for which they were to perform the services under the contract. These included the motorbikes and the riders. In this regard, the claimants hired working tools being motorcycle owned by the riders. This is further evidenced by the minutes of August 15, 2016 between the claimants and the riders.

57. From the totality of the foregoing, it is evident that the relationship that existed between the claimants and the respondent was that of a contract for service and not a contract of service. In this case, the claimants were engaged on contracts for service to provide a specific service and, were to perform the said service as independent contractors for a consideration. This takes the relationship out of the realm of employer employee and it can very well be said that the parties were not in an employment relationship.

58. It is trite law that parties are bound by the terms of their contract and it is not the role of the Court to rewrite the parties' contract. The Court in *Pius Kimaiyo Langat vs Co-operative Bank of Kenya Ltd* [2017] eKLR, reiterated this position as follows:

> "We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, Fraud or undue influence are pleaded and proved."

59. Therefore, the claimants are bound by the terms of the contract they executed. As pointed out, they entered into the contracts as independent contractors and not as employees of the respondent. It is not open for the Court to infer otherwise as the intention of the parties is very clear and can be discerned from the express terms of the contract.

60. With regards to the secondment agreement, the same refer to the claimants as employers. Therefore, it is probable that there may have existed an employment relationship between the respondent and the riders (secondees) but not between the claimants and the respondent.

61. Having found that the parties were not in an employment relationship, the dispute falls outside this Court's jurisdiction and logically, the other issues cannot be determined.

Orders

62. In the end, both claims, that is, ELRC Cause Nos 385A of 2017 and 385B of 2017 are dismissed in their entirety with no orders as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 27th day of January, 2023.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimants Ms. Mugo

For the Respondent Mr. Kahama

Court Assistant Abdimalik Hussein

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

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