



REPUBLIC OF KENYA



**Byakika v Cas Consultants Limited & another (Cause 1373 of 2018)
[2023] KEELRC 239 (KLR) (2 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 239 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1373 OF 2018
L NDOLO, J
FEBRUARY 2, 2023**

BETWEEN

FREDRICK BYAKIKA CLAIMANT

AND

CAS CONSULTANTS LIMITED 1ST RESPONDENT

EDON CONSULTANTS INTERNATIONAL LIMITED 2ND RESPONDENT

RULING

1. This ruling relates to the preliminary objection raised by the 2nd respondent by notice dated October 26, 2022. The objection is premised on the grounds that:
 - a) There was no employment relationship between the claimant and the 2nd respondent;
 - b) The 2nd respondent ought to be struck out from this suit as it is not a necessary party;
 - c) Pursuant to article 162(1)(a) of the constitution and section 12(1) of the Employment and Labour Relations Court Act, this court does not have the jurisdiction to adjudicate the alleged dispute between the claimant and the 2nd respondent;
 - d) The claimant has not demonstrated a cause of action against the 2nd respondent.
2. The preliminary objection was urged by way of written submissions. In its submissions dated November 2, 2022, the 2nd respondent states that the claimant was employed by the 1st respondent as a consultant resident engineer at the Bara Bara Plaza Building Project where the 2nd respondent was the project manager.
3. The 2nd respondent asserts that the claimant was not its employee. The 1st respondent points out that even if it were true, as averred by the claimant that he was informed that the termination of his employment was due to a letter by the 2nd respondent, it would still be the duty of the 1st respondent



- to justify the decision it made and it therefore serves no purpose to call the 2nd respondent do defend the suit.
4. The 2nd respondent concludes that no legal claim can stand against it in the absence of an employment relationship.
 5. Regarding the payment made by the 2nd respondent to the claimant, the 2nd respondent submits that the said payment was on account of a works contract between the 2nd respondent and a third party. The 2nd respondent adds that any dispute arising from this payment is a commercial dispute over which this court has no jurisdiction.
 6. Both the claimant and the 1st respondent are opposed to the 2nd respondent's preliminary objection. In his submissions dated November 9, 2022, the claimant submits that the objection does not meet the threshold for a preliminary objection.
 7. The claimant states that there are two reasons why the 2nd respondent was enjoined in these proceedings being that:
 - a) The 2nd respondent wrote to the 1st respondent on July 5, 2017, requiring the 1st respondent to dismiss the claimant with immediate effect;
 - b) The 2nd respondent paid to the claimant money for accommodation which was covered in the claimant's employment contract.
 8. The claimant asserts that by virtue of the 2nd respondent's letter, his employment was terminated without notice and adds that had it not been for this letter, his employment would not have been terminated.
 9. The claimant further submits that after his dismissal from the 1st respondent's employment, the 2nd respondent issued him with a cheque for Kshs 504,000 being his accommodation charges for the months of May, June and July 2017 in terms of his employment contract.
 10. A preliminary objection was defined in *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 as follows:

“...a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit...It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”
 11. There is sharp divergence among the parties regarding the role of the 2nd respondent in the employment contract giving rise to this dispute. This is a matter that can only be resolved after a full hearing. The inescapable conclusion therefore is that the 2nd respondent's preliminary objection is not well taken and is overruled with costs in the cause.

DELIVERED VIRTUALLY AT NAIROBI THIS 2ND DAY OF FEBRUARY 2023

LINNET NDOLO

JUDGE

Appearance:

Mr. Mwiti for the Claimant



Mr. Makori for the 1st respondent

Mr. Weru for the 2nd respondent

