



**Obongo v Blockchain Cybertech Limited (Cause E974 of 2021)
[2023] KEELRC 1385 (KLR) (31 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1385 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E974 OF 2021**

**J RIKA, J
MAY 31, 2023**

BETWEEN

CHRIS ORWA OBONGO CLAIMANT

AND

BLOCKCHAIN CYBTERTECH LIMITED RESPONDENT

RULING

1. At paragraph 3 of the Statement of Claim, the Claimant states that he entered into a consultancy agreement with the Respondent, on October 19, 2020.
2. He was to provide the Respondent with data scientist services. He states that sometime in May 2021, the Respondent failed to settle his dues, after he had offered his services.
3. He presented the Statement of Claim dated November 23, 2021, before the Court asking for the following orders against the Respondent: -
 - a. A declaration that withholding of the Claimant's remuneration amounted to constructive dismissal.
 - b. Issuance of letter of service.
 - c. Damages for breach of contract.
 - d. Unpaid monthly dues.
 - e. Unremitted NSSF contributions.
 - f. Costs.
 - g. Interest.
 - h. Any other suitable relief.



4. The Respondent has filed a Notice of Preliminary Objection, dated February 15, 2023, on jurisdiction. According to the Respondent, the dispute between the Parties is a consultancy dispute. It is not an employment dispute. The Court has no jurisdiction to hear the dispute, and grant the remedies sought.
5. Parties agreed to have Preliminary Objection considered and determined on the strength of their Pleadings, Documents and Submissions. The matter was last mentioned in Court on March 9, 2023, when the Claimant confirmed to have filed and served his Submissions, while the Respondent undertook to file and serve its Submissions by end of that day.

The Court Finds: -

6. The Parties executed a consultancy agreement on October 19, 2020. This is acknowledged by the Claimant, at paragraph 3 of his Statement of Claim.
7. The agreement states at clause 4, that the Claimant would receive a consultancy fee of Kshs 100,000, subject to withholding tax.
8. The Claimant does not plead that he was employed by the Respondent. He is clear in his Pleadings that he was a consultant.
9. The decision he cites, *Kenneth Kimani Mburu & Another v Kibe Muigai Holdings Limited* [2014] e-KLR, seems to solidify the position taken by the Respondent, that he was a consultant rather than an Employee.
10. The Court held in that decision, that a consultant is paid a fee, not a salary. The Claimant states, and the consultancy agreement shows, that he was to be paid a fee of Kshs 100,000. A consultant is not eligible for company benefits such as health insurance, which in the decision above, had been extended by the Respondent to the Claimants. The consultancy agreement executed by the Claimant and the Respondent herein did not extend any employment benefits. The Court found also, in the decision cited above, that a consultant has the latitude, to discharge his obligation, according to his own processes and methods, which would include the ability to subcontract or hire own assistants. Clause 3.7 of the agreement between the Parties herein, allowed the Claimant to use 3rd parties to perform any administrative, clerical or secretarial functions, which are reasonably incidental to the provision of the consultancy service. Consultants are subject to withholding tax, rather than PAYE tax, applicable to Employees. The agreement under clause 4.1. made provision for withholding tax.
11. The Pleadings and the Documents available to the Court, particularly the foundational document - consultancy agreement, persuades the Court that the Claimant was a consultant. He was not in a contract of employment. The consultancy features identified in the decision of the Court above, permeate the relationship between the Claimant and the Respondent.
12. This Court does not have jurisdiction under Section 12 of the *Employment and Labour Relations Court Act*. The *Employment Act* is not applicable to the dispute. The Claimant was not an Employee of the Respondent, and the Respondent was not an Employer of the Claimant, within the meaning of Section 2 of the *Employment Act*. The remedies sought, such as certificate of service, are not awardable to consultants. The concept of constructive dismissal, is alien to consultancies. No damages in constructive dismissal is payable. There is no legal or contractual obligation attached to the Respondent, on deduction and payment of NSSF contributions, on account of the Claimant.
13. The Court does not have jurisdiction in this dispute.



It Is Ordered: -

- a. The Claim is struck out.
- b. No order on the costs.

DATED, SIGNED AND RELEASED TO THE PARTIES VIA E-MAIL, AT NAIROBI, UNDER PRACTICE DIRECTION NO. 6 [2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 31ST DAY OF MAY 2023.

JAMES RIKA

JUDGE

