



**Maliti v Ajua Inc t/a Msurvey Limited (Cause E768 of 2022)  
[2023] KEELRC 2421 (KLR) (3 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2421 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E768 OF 2022  
DKN MARETE, J  
OCTOBER 3, 2023**

**BETWEEN**

**STACY NDANU MALITI ..... CLAIMANT**

**AND**

**AJUA INC T/A MSURVEY LIMITED ..... RESPONDENT**

**RULING**

1. This is an application dated November 29, 2022 and seek the following orders of court;
  1. That this honourable court do strike out this suit for want of jurisdiction; and
  2. That the costs of this application be borne by the claimant/respondent.
2. It is grounded on the fact that the relationship *inter partes* was forged on a consultancy agreement for a duration of one year effective March 8, 2021 to March 7, 2022. There was never any employment and therefore the futility of the claim as presented.
3. In support of application in the her supporting affidavit sworn on November 29, 2022, respondent avers as follows;
  12. That I am further advised by the respondent's/applicant's that jurisdiction is everything and without jurisdiction, this honourable court has not authority to take any further steps. If this honourable court therefore proceeds to hear this dispute without jurisdiction, then the result will be a nullity *ab initio* and any determination made by this honourable court will be amenable to being set aside *ex debito justitiae*.
  13. That in view of the foregoing, the respondent/applicant avers that this action by the claimant/respondent is mischievous, a fishing expedition and is a vexatious stratagem intended as a means to unjustly enrich the claimant/respondent at the expense of the respondent/applicant, through the reliefs that only ELRC may grant.



5. The claimant/respondent in her replying affidavit sworn on January 18, 2023 rubbishes the application on the following grounds;
  2. ...
    - a. That the notice of motion application dated November 29, 2022 is essentially seeking to determine the main suit in its entirety at a preliminary state.
    - b. That the grounds raised in the notice of motion application dated November 29, 2022 should be populated in the respondent's statement of defence and should be ventilated during the hearing of the main suit.
    - c. That rather than filing a notice of motion application, the respondent should have properly filed a preliminary objection if at all it wanted to substantially object to the jurisdiction of this case.
    - d. That the respondent's decision of file a notice of motion application rather than a preliminary objection proves that it lacks sufficient evidence to support its grounds.
6. Her further case comes out thus;
  3. That in specific response to paragraph 3 and 4 of the respondent's supporting affidavit dated November 29, 2022 and upon advice from my advocates on record, which advice I verify believe to be true and upon which I rely, I unequivocally state that the respondent employed me under the guise of a consultant but carried on our engagement as an employer-employee relationship for the purpose of avoiding payment of my statutory deductions and requisite tax obligations.
7. The respondent/applicant's case overwhelmed that of the claimant. This is because she ably demonstrates a case against an employment term and contract for the claimant. What is presented amounts to a consultancy agreement and not an employment contract. With this, the matter closes at that.
8. If the claimant/respondents really felt that she was engaged in an employment contract as opposed to a consultancy, she should have declined executing the document on terms of reference or alternatively raised issues on realization of the fraud of the contract as now alleged. It is rite law that courts have no mandate or duty to interfere or vary contractual terms entered into freely and on the volition of the parties.
9. I am therefore inclined to allow the application with orders that each party bears their cost of the same.

**DELIVERED, DATED AND SIGNED THIS 3<sup>RD</sup> DAY OF OCTOBER 2023.**

**D. K. NJAGI MARETE**

**JUDGE**

**Appearances**

**1. Mr. Atika instructed by O&M Law LLP Advocates for the Respondent/Applicant.**

**2. Mr. Omollo instructed by Bahati Mwamuye & Associates Advocates for the Claimant/Respondent.**

