



Masila v Athi Water Works Development Agency & another (Cause E576 of 2020) [2023] KEELRC 3124 (KLR) (22 November 2023) (Ruling)

Neutral citation: [2023] KEELRC 3124 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E576 OF 2020
DKN MARETE, J
NOVEMBER 22, 2023**

BETWEEN

SAMSON NYAMAI MASILA CLAIMANT

AND

EMILY MUTHIO KYALO 1ST RESPONDENT

ATHI WATER WORKS DEVELOPMENT AGENCY 2ND RESPONDENT

RULING

1. This is an application dated 26th April, 2023 seeking a striking out of the claim on grounds of lack of jurisdiction.
2. It is the applicant's case that this court lacks jurisdiction to hear the suit in that the parties engaged in a consultancy agreement as opposed to an employment contract in terms of the Employment Act, 2007. Alternatively, the applicant prays that the 2nd Respondent be struck out of case proceedings for various reasons.
3. The Claimant/Respondent in a Replying Affidavit sworn on 6th June, 2023 opposes the application and prays that the same be dismissed with costs.
4. The claimant/Respondent laments his treatment by the 2nd Respondent at the workplace. This was also visited upon other hapless employees officers at their seat of duty with the 1st Respondent.
5. Again, the Claimant avers that jurisdiction is purely a matter of law that ought and can only be pleaded by way of a preliminary objection. This is in the nature of a demurer and raises a pure point of law which is argued on the assumption that all points pleaded by the other side are correct and therefore does not elicit any argumentations. It does not entertain any evidentiary pronouncements. On the contrary, a Notice of Motion is grounded on facts and assertions that its nature invites counter argumentations



and requires the production of evidence to sustain. This disables the present application as is brought out.

6. It is the Claimant/Respondent's further aversion that the above notwithstanding, it is now an established principle of law that in determining the existence of an employment relationship, the court is called upon to inquire into the entire spectrum of facts and circumstances, the behaviour of parties and their conduct without restriction to the terminology (ies) employed by the parties in their documents of offer. It is therefore imperative that the (this) court is enjoined to hear the parties, analyse the evidence on its merits, examine all the possible factors that are borne out of the relationship of the parties and came up with a conclusion on the same.
7. The Claimant/Respondent narrates that the initial minutes of their engagements incontestably refer to the 1st Respondent as an employer and himself as an employee and provide *inter alia* that;
 - a. I was subject to Monthly salary of Kshs.250,000/=
 - b. I was expected to sit and was indeed, allocated office space at the office of the 1st Respondent.
 - c. I was required to report to the Chief Executive Officer of the 1st Respondent and was at all times supervised by the 2nd Respondent.
 - d. The Respondents owned all tools of trade and work and were supposed to supply me with inter alia transport to site, project designs, survey maps and all other necessary tools for implementation of the contract.
 - e. The Respondents dictated the duties to be done and what assignments to undertake at particular periods of time et al.
 - f. I was placed solely under the control of the Respondents with no autonomy or independence in the conduct of my duties or in the implementation of the duties subject of the contract.
 - g. I was fully integrated into the business, processes, procedures and rules of the 1st Respondent and fully incorporated as a member of the legal department
8. That additionally, the contract met the test ownership of tools and facilities. The foregoing is inter alia demonstrable through the fact that:-
 - a. I was made to sign the ICT Policy.
 - b. I was handed a copy of the HR Manual to make reference and govern my conduct in the exercise of my duties.
 - c. I was required to report to office at the 1st Respondent's offices and at the official working hours.
 - d. I was required to report on all activities outside the office and also report on my whereabouts and any leave of absence from office.
 - e. I was given staff security clearances to access the 2nd Respondent's premises and was expected to clock into and sign in to office every day of the week.
 - f. That even on dates of site visits and field work, I was still required first to clock into office, make report of the activity before proceeding to the field.
 - g. I was invited to and participated in the Respondents schedule of activities including staff days et al.



- h. I was offered an office space in the legal department and sat in an open plan office where the entire legal department was housed.
- i. I was given an email address under the Respondent's domain and incorporated in the communication networks, teams and channels of the 1st Respondent.
- j. All facilities and tools were availed by the Respondents including, office files, stationery, sitting space, funds for carrying on the assignment, printing and photocopy, transport, catering services available to other staff et al.
- k. I was summoned and made to attend departmental meetings, in which the agenda, constituted other departmental issues unrelated to my contractual duties.
- l. I was at all times subject to the directions of the Respondents, and their instructions and directions overrode any of my plans of work.
- m. I was assigned duties on priority and need basis and I dared not protest.
- n. I was summoned to meetings on matters unrelated to the contract and such would take precedence over any scheduled activities.
- o. I was assigned various office equipment including laptop, printer, photocopier, writing material, desks and all equipment necessary for the conduct of my duties was availed by the 1st Respondent.

The formal contract did not doctrinally change the state of things. The claimant examined remained a formal employee of the Respondent.

- 9. The claimant's further Affidavit came on 15th May 2023 further buttresses his case and rubbishes the application.
- 10. The 1st respondent in a written submission does a case for the application. It is her submission that the suit goes against the grain of section 12 of the *Employment Act, 2007* in that no employer/employee relationship existed *inter partes*. She also cites on Section 2 of the Court Act and definition of employee and employer.
- 11. The 1st Respondent further invokes the authorities of *Owners of the Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Ltd*, [1989] KLR 1 and the superior court decision of *Samuel Kamau Macharia –vs- Kenya Commercial Bank Limited & 2 others* (2012) eKLR where the critical place of jurisdiction in court proceedings was emphasized.
- 12. The 2nd Respondent in a written submission dated reiterates the 1st Respondent's case and posits that the suit is unsustainable and in any event, her name should be struck out of the proceedings as she never dealt directly with the claimant's affairs with the 1st Respondent.
- 13. The Claimant/Respondent in opposition to the application reiterates his case.
- 14. It is his case that the court has not been properly moved in that the application is a disguise from a preliminary objection. He cites various authorities including the case of *Deepak Lalchand Nichani -v- Kenya Revenue Authority & another* HC Con. Pet No. E042 of 2021 and *Mukbisa Biscuit Manufacturers Ltd vs- Westend Distributors Ltd*, (1969) E.A. 696 at page 700 where the place of a preliminary objection in court proceeding was set out. The application as set out is therefore premature and misplaced and has no standing in law. He further argues and submits that on a contest of facts,



issues of a contract of service vis.a.vis employment cannot be resolved preliminarily and therefore this application becomes a cropper.

15. The Claimant/Respondent buttresses the above position by relying on authority of Ibrahim Ulalo Case (supra) where the court went on to cite another decision thus;-

“Further, as it was stated in the case of Maurice Oduor Okech –vs- Chequered Flag Limited [2013] eKLR, the traditional tests of control of word by the employer and its integration into the employer’s core business are no longer conclusive. The court has to determine which of the two parties has properly interpreted the terms of their relationship and make a determination whether or not there was indeed an employment relationship. The contract between two parties where the nature of the relationship is contested is for the court interprets. In the interpretation the court requires evidence of the nature of the relationship between the parties. An employment relationship can be a matter of presumption based on the fact of the case. From the foregoing it is the opinion of the court that this is not a matter for determination as a preliminary issue and is for determination by the court after consideration of evidence adduced by the parties at the hearing. For these reasons the preliminary objection fails and is accordingly dismissed with no orders as to cost.

16. Overall, the claimant/respondent case in opposition to the application comes out wealthier than the reverse case. Firstly, there are legal issues relating to the nature and form of the application. I agree with the Claimant/Respondent that the application should have come out as a preliminary objection ab initio. This would have readied the application for thrashing out the explicit issues of law without reference to matters of fact. In our circumstances, this is not the case and therefore the fallacy of the application.
17. The application therefore fails for want of merit. This is because the claimant/respondent case overwhelms that of the applicants.
18. I am therefore inclined to dismiss the application with cost to the Respondent.

DELIVERED, DATED AND SIGNED THIS 22ND DAY OF NOVEMBER 2023.

D. K. NJAGI MARETE

JUDGE

Appearances:

No appearance for the 1st Respondent/Applicant

Ms Mwova instructed by Keli Mwinzi & Company Advocate for the 2nd Respondent

Mr. Masila instructed by Masila & Mworja Advocates LLP for the Claimant/Respondent.

