



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO.559 OF 2017

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

SHUAIB ADAM.....CLAIMANT

VERSUS

JAPAN INTERNATIONAL COOPERATION AGENCY.....RESPONDENT

JUDGEMENT

PREMIABLE

1. The Claimant filed a claim against the Respondent dated 10th March, 2017. The Respondent put his response dated 28th April, 2017.

FACTS

CLAIMANT'S EVIDENCE

2. The Claimant avers he was offered employment by the Respondent as a consultant from 4th November, 1997 to 2016. He says he worked diligently until 31st March, 2016 when he resigned.

3. He says he was entitled to his salary on monthly basis, house allowance, leave as provided in the Kenya Law.

4. There were working conditions and entitlements provided in his agreement. There was also an arbitration clause as provided in the said agreement. He says he invited the Respondent for arbitration on 17th November, 2016 but the Respondent failed to comply.

He says as a result of the Respondent refusing to participate in arbitration proceedings the Claimant suffered great loss.

5. Particulars of loss;-

(a) Pay in lieu of 24 leave days \$4110

(b) Pay in respect of gratuity for 18 years worked at the rate of 33% per annum based on the last salary \$24,413

TOTAL \$28,523.00

(c) The Claimant prays for;

(1) Order for the Respondent to submit to arbitration

(2) An order to compel Respondent to pay gratuity for the 18 years

(d) Order to compel Respondent to pay the amount of US28,523

(e) Order for damages for breach of contract.

(f) Costs of the suit and interest at court rates.

(g) Any other relief the Honourable Court may deem fit to grant.

RESPONDENT'S CASE

6. The Respondent denies that the Claimant was their employee and he quotes Claimant's email dated 22nd December, 2011 where Claimant apparently states he was not an employee of JIKA.

7. In his contract the Claimant declares taxes paid as a consultant but never paid employee taxes.

8. The Respondent therefore avers Claimant was not his employee but was a contractor providing services to other clients as well.

9. In 2009 he was in Somali offering services to the Government of Seychelles. He says that since the Claimant was an independent contractor he is not entitled to leave.

10. He denies he owes Claimant a sum of US\$99,393.

Clause 7(e) of his initial contract in 1997 expressly provided leave not taken would be forfeited.

So if he was entitled to leave in the past years, it was up to him (the Claimant) to make arrangements for leave. Claimant never applied for leave and was denied. He was allowed out of office to see his other clients.

11. The Respondent says he accepted to subject the matter to a single arbitrator but thereafter the Claimant rushed to court.

12. The Respondent denies the jurisdiction of this court since the contract is not of employment. He prays the claim be dismissed with costs against the Claimant.

DETERMINATION

13. In all the security services agreement signed between the Claimant and the Respondent from 1997 to 2016 when the Claimant resigned had a provision for arbitration. It is therefore clear that both parties voluntarily and clearly intended to submit themselves for arbitration if there is a dispute.

14. It is unfortunate the parties have wasted a lot of time in these proceedings when they should have submitted themselves to arbitration.

In Section 6 of the Arbitration Act Kenya it provides that a court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought stay the proceedings and refer the parties to arbitration.

15. Section 10 of the same Arbitration Act provides that no court shall intervene in matters governed by this Act.

16. The court therefore will stay these proceedings because it had no jurisdiction to even entertain the case since it was under Arbitration Act and proceedings should have been before an arbitrator.

17. The parties are ordered to submit to arbitration within 45 days from the date of this judgment and meanwhile these proceedings are stayed.

Costs in the cause.

Orders accordingly.

Delivered, dated and signed in Nairobi this 11th day of February 2022.

ANNA NGIBUINI MWAURE

JUDGE

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 has 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 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.

A signed copy will be availed to each party upon payment of court fees.

ANNA NGIBUINI MWAURE

JUDGE