



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS

CAUSE NO. E001 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

LINIC ENTERPRISES LIMITED.....CLAIMANT

VERSUS

SAVANNAH CEMENT LIMITED.....RESPONDENT

RULING

1. Vide a memorandum of claim dated 30th September 2020 and filed on 1st October 2020 the Claimant seeks the following orders against the Respondent –

- i. Outstanding invoices amounting to Kshs.2,606,814.34.*
- ii. Immediate payment of Kshs.4,238,672.80 being the sum that would cover the remainder of the contract.*
- iii. 12 month's salary compensations equivalent to Kshs.5,086,407.36*
- iv. Costs of the suit and interest thereon at court rate.*
- v. Any other relief that the Honourable Court may deem fit to grant in the circumstances.*

2. In the memorandum of claim the Claimant describes itself as limited liability company registered and incorporated in Kenya.

3. The Respondent is described as a Limited Liability Company registered and incorporated in Kenya under the Companies Act carrying its business within the Republic of Kenya.

4. The particulars of claim are set out in paragraphs 3, 4, 6, and 7 as follows –

“3. On or about June, 2019 the Respondent reengaged the claimant as a contractor to specifically provide professional cleaning services at the Respondent's premises commencing on 1st June, 2019 to 31st May, 2021 pursuant to a renewal of contract for cleaning services between it and the Claimant Company.

4. The Claimant states that the terms of employment were such that the contract price was Kshs.423,867.28 per month plus VAT for a period of (2) two years and any review of the contract price was to be negotiated and agreed between the parties.

6. The claimant further states that it had engaged a big labour force of two hundred (200) stewards to work in the company and also purchased ultra-modern machines and equipment specific to the respondent's company cleaning requirements and most of which are still mortgaged to financial institutions or the claimant is servicing loans obtained to acquire the same.

7. On 17th June, 2020 the Respondent wrongfully and unlawfully terminated the services of the claimant vide a letter of termination of contract and the Respondent has also failed to pay accrued and terminal dues which are tabulated below;

a) Accrued invoices amounting to Kshs.2,706,814.34

b) Immediate payment of Kshs.4,238,672.80 being the sum that would cover the remainder of the contract.

c) Damages equivalent to Kshs.5,086,407.36 being 12 month's pay."

5. The Respondent filed a memorandum of response dated 24th June 2021 in which it denies that the Claimant was an employee of the Respondent. The Respondent avers that the Claimant at all material times entered into a commercial contract for provision of cleaning services vide a contract whose terms and conditions provided inter alia that;

(a) The Claimant would be hired as a contractor to provide comprehensive cleaning services at the Respondent.

(b) The contract was to run from the 1st of June 2019 for a period of 24 months.

(c) The contractor in that agreement was to perform the services as an independent contractor under the general guidance of the client.

(d) The contractor was to undertake to ensure all statutory deductions as stipulated by the law to its employees.

(e) the contractor was to undertake to insure against legal liabilities in respect of accidents to and claims from persons in their employment resulting from work while on the premises of the Respondent.

(f) The contract price was agreed and was to be subject to VAT.

(g) In the contract, the Claimant was described as a Contractor and the Respondent was expressed to be a Client.

6. The Respondent further raises preliminary objection seeking the striking out of the memorandum of claim for the following reasons –

(1) The substantive relationship between the Claimant and the Respondent did not fall within the province of the Employment Act, number 11 of 2007.

(2) The Claimant is not and cannot be an employee as contemplated by the provisions of section 2 of the Employment Act, 2007

(3) Parts 3 and 4 of the Employment Act, 2007 could not apply to the claimant in its relationship with the Respondent.

(4) Section 10 of the Employment Act, 2007 cannot apply to the Claimant.

(5) Part 5 of the Employment Act, 2007 in respect to rights and duties in employment cannot apply to the Claimant.

(6) The rights and obligations of an employer and an employee as stipulated in sections 41, 43, 44, 45, 46, 48 and 49 of the Employment Act cannot be construed in the relationship between the Claimant and the Respondent in this case.

(7) Ipso facto, the provisions of the Employment and Labour Relations Court Act, 2011 cannot apply in respect to the dispute between the Claimant and the Respondent herein.

(8) The Honourable Court courts cannot exercise its mandate and jurisdiction as stipulated under section 12 of the Employment and Labour Relations Court Act of 2011.

(9) The Employment and Labour Relations Court of Kenya as currently constituted cannot hear and determine the claim as filed.

(10) The Employment and Labour Relations Court as contemplated, stipulated and constituted under Article 162(2) of the Constitution of Kenya, 2010 has no jurisdiction to hear and determine this claim as presented.

(11) There was no contract of service nor contract for service capable of being subjected to the provisions of the Employment Act, 2007 and Labour Relations Act, 2007 so as to fall within the jurisdiction of this Honourable Court.

(12) The Respondent prays that based on the above, the Honourable Court makes a finding that it lacks the requisite jurisdiction to hear and determine the case and have the same struck out with costs to the Respondent.

7. The Respondent denies owing the Claimant the sum claimed in the memorandum of claim on grounds that her is no employment relationship between the Claimant and the Respondent.

8. The preliminary objection was disposed of by way of written submissions. In its submissions the Respondent substantially reiterates the grounds of preliminary objection. It submits that the agreement between it and the Claimant is a commercial contract that does not fall within the province of the Employment and Labour Relations Court Act or the Employment act.

9. The Respondent submits that the Claimant at all material times entered into a commercial contract for provision of cleaning services vide a contract whose terms and conditions provided inter alia that;

(a) The Claimant would be hired as a contractor to provide comprehensive cleaning services at the Respondent.

(b) *The contract was to run from the 1st of June 2019 for a period of 24 months.*

(c) *The contractor in that agreement was to perform the services as an independent contractor under the general guidance of the client.*

(d) *The contractor was to undertake to ensure all statutory deductions as stipulated by the law to its employees.*

(e) *The contractor was to undertake to insure against legal liabilities in respect of accidents to and claims from persons in their employment resulting from work while on the premises of the Respondent.*

10. For the Claimant it is submitted that the preliminary objection as filed does not meet the threshold in the case of **Mukhisa Biscuit Manufacturers Ltd. v West End Distributors Ltd. [1969] E.A. 696** where a preliminary objection was defined as –

“A preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleading and which if argued as Preliminary Objection may dispose of the suit.”

11. The Claimant submits that the issues in dispute raise facts which can only be ascertained at a full trial. It insists that the cleaning contract between the Claimant and Respondent gives rise to an employment relationship. The Claimant relies on the decision in **Ibrahim Ulalo v Nation Media Group [2019] eKLR** where the Court stated –

“...In the present application there is a contract between the parties which the claimant alleges is an employment contract while the respondent avers the contract engaged the claimant as an independent contractor and there is no employer-employee relationship, that this court therefore has no jurisdiction under Section 12 of the Employment and Labour Relations Court Act.

As was stated in the case of Mukisa Biscuits, a preliminary objection is suitable in a matter raising a pure point of law where the facts are not contested. It cannot be raised where any facts are to be ascertained.

Further, was stated in the case of Maurice Oduor Okech -V-Chequered Flag Limited, the traditional tests of control of work 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 to interpret. 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 facts 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 costs...”

12. The Claimant further submits that it is settled law that jurisdiction in this case is not confined to merely employer/employee relationships based on the interpretation of the Constitution and the Employment and Labour Relations Court Act, 2014. Further, the claimant herein is seeking remedies under Section 12(3)(v) and (vi) of the Employment and Labour Relations Court Act thus making it an Employment and Labour Relations dispute.

13. For emphasis the Claimant relies on the decision in **Daniel Kipkoech Kenduiyo v County Government of Uasin Gishu [2017] eKLR** where the Court dismissed a preliminary objection on grounds that the Court has jurisdiction to deal with all issues relating to employment and labour relations and is not confined to employer/employee matters.

Determination

14. I have considered the submissions by both parties. The issues for determination are whether there is an employment relationship between the Claimant and the Respondent and whether the claim should be struck out.

15. The jurisdiction of this Court is set out in Article 162(2)(a) of the Constitution which provides as follows –

Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to, land.

16. Section 12(1) of the Employment and Labour Relations Court Act further expound on the jurisdiction as follows

(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—

- (a) disputes relating to or arising out of employment between an employer and an employee;
- (b) disputes between an employer and a trade union;
- (c) disputes between an employers' organisation and a trade union's organisation;
- (d) disputes between trade unions;
- (e) disputes between employer organisations;
- (f) disputes between an employers' organisation and a trade union;
- (g) disputes between a trade union and a member thereof;
- (h) disputes between an employer's organisation
or a federation and a member thereof;
- (i) disputes concerning the registration and election of trade union officials; and
- (j) disputes relating to the registration and enforcement of collective agreements.

17. In the instant case, the facts as set out in the memorandum of claim are not contested. The contract between the Claimant and Respondent is attached to the claim. It is a contract for cleaning services. Savanna Cement Limited is referred to as "Client" and Linic Enterprises Limited is the "contractor".

18. Article 3 of the contract provides as follows –

"ARTICLE 3 - Provision of Services.

3.1 *The contractor undertakes to perform the services hereunder to the highest standards of Professional and ethical competence and integrity, having due regard to the nature of the Clients premises and to ensure that employees assigned any services under this contract will conduct themselves in a manner consistent therewith.*

3.2 *The Contractor shall perform the services as an independent contractor under the general guidance of the Client and the Contractor nor its employees*

shall not act as an agent of the said Client.

3.3 *All employees of the Contractor working under this contract will be subject to security checks by the Client as may become necessary.*

3.4 *The contractor and/or its employees undertake not to commit any act on the premises, which may render the Client liable as occupier under Common law or virtue of any provisions of any statute.*

3.5 *The Contractor undertakes to take out an insurance policy against all form of personal accidents for their staff that may occur during the period of the Contract to cover their legal liabilities under Clause 3.4 hereof as indemnity for any accidents that arise out of the Contactor's negligence.*

3.6 *The Contractor also undertakes to insure against their legal liabilities in respect to accidents to and claims from persons in their employment resulting from work whilst on the premises of the Client and generally to deal with all the claims including legal fees for the employees that may arise under the Work Injury Benefits Act {WIBA} or any other statute or law.*

3.7 *The Contractor also undertakes to ensure all statutory deductions (PAYE, NSSF and NHIF) are paid as stipulated by the Kenya Law and regulations and hereby indemnifies the client of any disputes that may arise from failures to comply with the said regulations.*

3.8 *The Contract shall provide all the required tools, equipment and detergents necessary for the delivery of cleaning services.*

3.9 *The Contractor shall provide Fourteen [14] stewards, and One (1) Supervisor on full-time basis as stipulated on the work schedule for the provision of the said services.*

19. It is expressly stated in the contract that the Claimant herein is an independent contractor.

20. The relationship between the Claimant and Respondent herein do not fit within the definition of "employer" and "employee" under the Employment Act or the Employment and Labour Relations Act, both of which define employer as any person, public body, firm, corporation

or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company; and employee as a person employed for wages or a salary and includes an apprentice and indentured learner.

21. The pleadings in the memorandum of claim further dispel any notion that there is an employer/employee relationship between the Claimant and Respondent herein. At paragraph 6 of the memorandum of claim the Claimant pleads –

6. The claimant further states that it had engaged a big labour force of two hundred (200) stewards to work in the company and also purchased ultra-modern machines and equipment specific to the respondent's company cleaning requirements and most of which are still mortgaged to financial institutions or the claimant is servicing loans obtained to acquire the same.

22. From the foregoing it is clear that there is no employer/employee relationship between the Claimant and Respondent herein and that the contract between them is a commercial contract. This Court therefore has no jurisdiction to hear and determine the suit herein.

23. **For these reasons the preliminary objection by the Respondent succeeds with the result that the suit herein is struck out with costs.**

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 18TH DAY OF MARCH 2022

MAUREEN ONYANGO

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 Civil 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.

MAUREEN ONYANGO

JUDGE