



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT

AT BUNGOMA

CLAIM NO. 54 OF 2018

DR. APOLLO MULIANGA EKESACLAIMANT

VERSUS

LIFE CARE HOSPITALS LIMITED..... RESPONDENT

RULING

1. The Claimant by way of Memorandum of Claim dated 12th July, 2018 sought the following reliefs:-
 - a) Professional fees for medical services offered to the Respondent's Institution amounting to Kshs. 7,884,624/-
 - b) Damages
 - c) Costs
 - d) Interest
 - e) Further or other relief.
2. The Claimant verified the Claim by affidavit dated 12th July, 2018. In addition the Claimant filed list of witnesses dated 12th July, 2018, Claimant's Statement dated 12th July, 2018, Claimant's list of documents dated 12th July, 2018, together with bundle of documents.
3. The Respondent entered appearance and appointed Mongeri, Kinyanjui & Co. Advocates to represent it and filed Memorandum of response dated 17th August 2018.
4. The Claimant filed reply to defence dated 27th August 2018 .
5. The Respondent further filled its list of witnesses dated 23rd May 2019, witness statement dated 23rd May 2017, Respondent's undated list of documents filed in court on the 24th May 2019 and annexed bundle of the documents.
6. The Claimant on 2nd July, 2019 filed further statement by the Claimant and reply to witness statement dated 23rd May 2019.
7. The Claimant's case was heard by my brother Justice Nderi Nduma on the 27th January 2020
8. The court will rely on the written proceedings this being a court of record. This court heard the defence case on the 12th October, 2021 and on 30th November 2021 gave judgment date the parties having confirmed the filing of written submissions.
9. The Claimant's written submissions by M/S Omundi Bw' Onchiri Advocates are dated 21st October 2018. The Respondent's filled written submissions drawn by Mongeri Kinyanjui Advocates and dated 4th February 2022.
10. The Claimant's case in brief is for unpaid invoices amounting to Kshs. 7,884,624/- which he claims to have billed as a visiting Consultant

to the hospital (Respondent).

11. The Respondent's case in brief is that the Claimant is only entitled to Kshs. 1,317,750/- for unpaid services rendered and relies on audit report produced by "DWI".

DETERMINATION

12. The Court having heard the defence case only and having read the proceedings of the Claimant's evidence in court questions its jurisdiction to determine the case. The Court holds a strong view that without jurisdiction it has no authority to determine the dispute. The court will thus render a ruling on issue of jurisdiction instead of the scheduled Judgement.

13. The court's opinion is guided by the law as set out in the Landmark decision in owners of *Motor Vessel "Lilian S" -vs- Caltex Oil (Kenya) Ltd (1989) eKLR decision of Nyarangi JA* who held that jurisdiction is everything and without it the court must down its tools.

14. The Jurisdiction of the Employment and Labour Relations Court flows from the Constitution Article 162 and is defined under Section 12 (i) of the Employment and Labour Relations Court Act as follows"-

“(i) 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 and any other law written Law which extends jurisdiction to the court relating to Employment and Labour Relations including disputes relating to and rising out of employment between employee and employer.

15. The court must establish existence of employee employer relations in this case which is also defined as contract of service. The Employment Act defines Contract of service to mean agreement whether oral or in writing and whether expressed or implied to employee to serve as an employee for a period of time ...

16. The Employment Act defines an employee to mean a person employed for wages or salary..... The term employer and the Employment Act is defined to mean “ 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.....

17. The Employment Act does not define a consultant. The concise Oxford English dictionary defines the term Consultant to mean a person who provides expert advice professionary e.g. hospital doctor of a senior rank.

18. The Claimant in the instant case is a doctor. In his testimony in examination in chief he told the court that he was not an appointed employee of the Respondent. That he was a visiting doctor. That he ran his own clinic. In cross – examination the Claimant told the court that he had no written contract with the Respondent . That they have a dispute on the billing.

19. In paragraph 3 of the Memorandum of Response the Respondent stated that the Claimant has never been its employee but was engaged as a consultant on a case to case basis.

20. The Claimant admitted in his evidence in chief that he had not been appointment as employee but was a consultant for services. In his further statement dated 26th June, 2019 the Claimant states that the only tax that shall be taken from his fees is 5% withholding tax which shall be accounted by the hospital to Kenya tax authority.

21. The court finds that the Claimant and Respondent's relationship was that of Consultancy. The Claimant admitted in evidence in chief that he was a visiting consultant. The court finds that without the existence of employee employer relationship this instant dispute is a pure commercial transaction falling outside the jurisdiction of this court. Employment contracts enjoy protection under the Employment Act exclusive of all other types of contracts. Parliament in its own wisdom separated employment contracts from other types of contracts. Section 87 of the Employment Act narrows down the jurisdiction to contracts of services. The differences created by the Employment Act law are numerous including limiting employment claims to 3 years under Section 90 of the Employment Act (other contracts time limit is 6 years) , Section 47 (5) shifting burden of prove to employer to justify grounds of termination . Section 74 creating obligations of employer to keep records of employment among others.

22. The Claimant never enjoyed any benefits of employees like statutory leave and other types of leaves, was not obliged to report regularly to work and no evidence of supervision by Respondent in his own admission he was a visiting consultant. The Claimant can not thus enjoy or benefit from the protection accorded to employees in employment claims under the Employment Act. Section 49 of the Employment Act creates the remedies available to employees. The Claimant does not seek those remedies which guide the court in making its decision.

This instant case thus having not established employee employer relationships falls under the high court jurisdiction.

23. Consequently, the court must down its tools. The instant suit is a commercial dispute. The High court is the proper place for Commercial disputes. This court is minded to temper justice with mercy and to ensure substantial justice. The court is guided by Court of Appeal decision in the case of *Daniel N. Mugendi -vs- Kenyatta University & 3 others (2013) eKLR as cited in Ali Jarso Waku & Another -vs- Ministry of Interior & Coordination of National Government & 5 others, Public Service Commission & 5 others (interested parties) 2020 eKLR* where Court of Appeal held as follows:-

“ Believing as we do the approach taken by *Majanja J* is the correct one , and in endeavoring to meet the ends of justice untrammled by procedural technicalities, we set aside the order striking out the appellant's petition and direct the High court to

transfer it to the industrial court which also has jurisdiction and authority to consider the claims of breach of fundamental rights as pertains to industrial and labour relations matters. It is only meet and proper that the industrial court do exclusively entertain those matter in that context and with regard to Article 165 (5) (b) and in order to do justice, in the event where the High court or the industrial court or the Environment and land court comes across a matter that ought to be litigated in any other court, it should be prudent to have the matter transferred to that court for hearing and determination”

24. The Constitution has demarcated jurisdiction of this court and the High court. Any decision by this court in the instant suit would amount to nothing as there is no employee employer relationship. Having found this court lacks jurisdiction to determine the dispute, the suit is hereby transferred to the High Court for determination.

Costs shall follow the outcome of the main course.

It is so ordered.

DATED, SIGNED AND DELIVRED AT BUNGOMA THIS 21ST DAY OF APRIL, 2022

J. W KELI,

JUDGE.

IN THE PRESENCE OF:-

Court Assistant : Brenda Wesonga

Claimant:- Masakhe holding brief for Bw’Onchiri Advocate.

Respondent:- Mong’eri Advocate