



**Aseda v Mesh Plus Plus Limited (Cause E736 of 2021)
[2022] KEELRC 1650 (KLR) (10 May 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1650 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E736 OF 2021**

JK GAKERI, J

MAY 10, 2022

BETWEEN

GEOFFREY ASEDA CLAIMANT

AND

MESH PLUS PLUS LIMITED RESPONDENT

RULING

1. The claimant initiated this claim by a memorandum of claim dated September 6, 2021 alleging unfair and wrongful termination of services.
2. The respondent filed a reply to the memorandum of claim dated October 6, 2021 together with a notice of preliminary objection of even date.
3. Before the court for determination is a preliminary objection dated October 6, 2021. The respondent opposes the claim on the grounds that:
 - i) That this court lacks jurisdiction to hear and determine the issues raised in this claim as there was no employment relationship that existed between the claimant and the respondent.
 - ii) That accordingly the claim filed herein is incompetent, misconceived and bad in law.
4. The objection is grounded on the pleadings herein. The factual background of the suit is as follows:
5. The claimant was employed by the respondent as a Consultant Network Engineer, on March 22, 2021 for 6 months at a monthly remuneration of USD 1600, about Kshs 172,480/=. The contract entitled “contract for provision of consultancy services” between the respondent and the claimant is dated March 22, 2021.
6. It is averred that after about 2 months of service, the respondent purported to relieve the claimant from his consultancy without proper procedure. It is alleged that the termination was not conducted



in cognisance with a fair procedure, respondent had no valid reason to terminate the contract and did not prove the same.

7. The claimant relies on the provisions of the *Employment Act*, 2007 for compensation among other remedies including pay *in lieu* of notice and damages for discrimination, unfair labour practices and emotional distress, a total of Kshs 1,334,880/=. It is also alleged that the respondent breached the rules of natural justice.
8. The respondent filed a reply to the memorandum of claim contending that the agreement dated March 22, 2021 was exclusively a consultancy contract as exemplified by its clauses.
9. In its submissions, the respondent identifies a similar issue for determination whether the court has jurisdiction to hear and determine the suit. Reliance is made on section 2 of the *Employment Act* for the definition of the term employee as is the decision in *Kenya Hotels and Allied Workers Union v Alfajiri Villas* [2014] eKLR to exemplify the difference between an employee and an independent consultant. It is urged that the parties to the agreement were deliberate and intentional on the nature of their relationship. That the contract provided for a consultancy fee of USD 1600 per month for the 6 months duration of the contract, 8 hour shift (40 hours per week) 5% withholding tax and no other benefits.
10. The claimant had liberty to work for other employers (clause 8.2) and was respondent for statutory payments other than the 5% withholding tax.
11. The decisions in *Elizabeth Awuor Otieno v Core Construction Ltd* [2021] eKLR and *Vitalis Oliewo K'omudho v AAR Health Services Ltd* [2016] eKLR. are relied upon to urge that there was no employment relationship between the parties since the claimant was a consultant as asserted by clause 8.1.
12. It is submitted that the duty of a court of law is to give effect to the contract entered into by the parties and not to rewrite the contract. The decision in *National Water Conservation & Pipeline Corporation v Jayne Kanini Mwanza* [2014] eKLR is relied upon to reinforce the submission as is the decision in *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR to urge that the claimant has not alleged that it was coerced or there was fraud or undue influence when the contract was entered into.
13. Finally, the respondent submits that it has raised a valid point of law on the court's jurisdiction in the matter and prays that the objection be upheld.
14. By the date of retiring to write this ruling on April 22, 2022, the claimant had neither filed its response nor submissions to the preliminary objection having been accorded seven days effective February 15, 2022. The preliminary objection is unopposed.

Analysis and determination

15. The issues for determination are whether:
 - i. The preliminary objection meets the threshold;
 - ii. The court has jurisdiction to hear and determine the claim.



16. As to whether the preliminary objection passes the muster the home port is the decision in *Mukisa Biscuits Manufacturing Co Ltd v West End Distribution Ltd* [1969] EA 696 where the court laid it authoritatively that:

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation ... in the nature of what used to be a demurrer. It raises a pure point of law...”

17. As the foregoing sentiments exemplify, jurisdiction is a point of law and thus meets the test of a preliminary objection formulated in the Mukisa Biscuits Case. The respondent did not submit on this issue.

18. As to whether the court has jurisdiction to hear and determine the suit herein it is critical to ascertain whether there was an employer/employee relationship between the parties. The provisions of the [Employment Act](#) and propositions of law enunciated in numerous decisions are the first point of call.

19. Before delving into the instant case, it is essential to underscore the place of jurisdiction in judicial proceedings.

20. As explained by Nyarangi, JA in his *locus classisus* articulation in [Owners of the Motor Vessel “Lillian S.” v Caltex Oil Kenya Ltd](#) [1989] eKLR.

“...I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it.”

21. Needless to emphasize, jurisdiction is the threshold issue and determinative of the life of a suit. A court of law must have jurisdiction before proceeding with the matter before it.

22. As eloquently put by Nyarangi, JA:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

23. The court is guided by those sentiments.

24. Section 2 of the [Employment Act](#) provides that employee “means a person employed for wages or a salary and includes an apprenticeship and indentured learner” on the other hand “employer” means 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.”

25. Section 2 of the act defines a contract of service as:

“an agreement whether oral or in writing and whether expressed or implied to employ or to serve as an employee for a period of time and includes a contract of apprenticeship and



indentured partnership but does not include a foreign contract of service to which part xi of this act applies.”

26. In the instant case, the contract between the parties is entitled “contract for provision of consultancy services” and uses the term consultant exclusively to describe the claimant. But more significantly, the memorandum of claim is explicit that the claimant was employed on March 22, 2021 as a consultant and the claimant makes no allegation of having been an employee of the respondent.
27. The court in agreement with the sentiments expressed in *National Water Conservation & Pipeline Corporation v Jayne Kanini Mwanza* (supra) where the court stated as follows:

“... A court cannot rewrite the terms of a contract freely entered into between the parties. Once there is a written contract the court will seek to give meaning to such contract giving ordinary meaning to its terms in determining of any issue that may arise.”
28. Similar sentiments were expressed in *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* (supra) where the court held that:

“A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion fraud, undue inference are pleaded and proved.”
29. In *Maurice Oduor Okech v Chequered Flag Limited* [2013] eKLR, the court held that in order to determine the intention of the parties, the court must go beyond the terminologies used by the parties in the pleading and evidence. A perusal of the “contract for provision of consultancy services” reveals that the parties intended to enter into and entered into a consultancy agreement as opposed to an employment contract for the following reasons:
30. First the cover page of the contract is explicit that it is a contract for the provision of consultancy services. The parties agreed that there was a contract for consultancy services.
31. Second, the claimant herein is expressly described as “consultant” and his role was to provide support in the distribution and implementation of wireless networking in Kenya, 8 hours a day for a fixed duration of six months effective March 22, 2021.
32. Under the contract, the claimant was neither required to report to the office and had no reporting and exit times. He was however required to regularly report to the company as agreed and avail all reports and data.
33. Third, clause 6 of the contract enumerates the deliverables of the claimant to be evaluated monthly.
34. Fourth, a consultancy fee of USD 1600 was payable monthly subject to 5% withholding tax and the claimant was liable to meet other tax and statutory obligations.
35. Fifth, the consultant had the liberty to render services to other clients subject to several conditions including restriction on disclosure of the respondents trade secrets, business methods on information or approach any employees of the company to entice him/her to quit such employment.
36. Sixth, clause 8.1. is explicit that “The contract does not in any way create an employer/employee relationship between the parties thereto...” in other words, the parties are clear that they did not desire to create an employment contract.
37. The claimant was to act as an independent contractor and was responsible for settling tax obligations other than the withholding tax deducted by the respondent, and if employed by another organization



or company, the claimant was required to notify such employer that he was working for the respondent on a consultancy basis.

38. The foregoing provisions are consistent with the sentiments of Radido J in [*Kenya Hotels & Allied Workers Union v Alfajiri Villas \(Magufa Ltd\)*](#) [2014] eKLR where he stated as follows:

“An independent contractor’s contract, in my view is a contract of work (contract for service) and not a contract of service, or to use the ordinary language a contract of employment. The hall marks of a true independent contractor are that the contractor will be a registered tax payer, will work his own hours, runs his own business, will be free to carry out work for more than one employer at the same time will invoice the employer each month for his/her services and be paid accordingly and will not be subject to usual “employment” matters such as the deduction of payee (tax on income) will not get annual leave, sick leave, 13th cheque and so on”.

39. Seventh, under clause 10 of the contract, the consultancy would terminate if the consultant:

- i. Committed a breach of his obligations and does not remedy the same within 7 days after a written notice requiring him to do so.
- ii. Fails to deliver the consultancy report within the stipulated time.
- iii. Delivers incompetent, low quality or sub-standard results after the exercise and refuses, ignores or is incapable of rectifying the same within the duration prescribed by the company.

40. The contract has no provision for termination by either party by notice.

41. Although some of the remedies prayed for by the claimant are prescribed by the [*Employment Act*](#) and alleges that the termination of the consultancy contract was wrongful and unfair and relies on the provisions of the Act germane to termination, he does not allege that he was an employee of the respondent or that there was an employment relationship between them.

42. Paragraph 3 is categorical that the claimant was employed as a consultant and under paragraph 5, the respondent purported to relieve him from his consultancy.

43. The court is also guided by the sentiments of mbaru j. in [*Fredrick Byakika v Mutiso Menezes International Unlimited*](#) [2016] eKLR. The learned judge stated as follows:

“... an employee is thus paid a wage or salary. However even where a salary or wage is paid, where parties have reduced the terms and conditions regulating the relationship into writing, such is to be given importance with reference as such form the basis and intentions of the parties. In this case the letter of appointment was issued for the claimant, he accepted it on July 26, 2014. Such letter spelt out the terms and conditions of engagement between the parties ... he was appointed as a consultant...”

44. The court is in agreement with these sentiments as well as those of rika J in [*Kenneth Kimani Mburu & another v Kibe Muigai Holdings Limited*](#) [2014] eKLR.

45. For the foregoing reasons, it is the finding of the court that the claimant and the respondent had no employer/employee relationship.

46. As regards jurisdiction, article 162(3) of the [*Constitution*](#) of Kenya, 2010 provides that “Parliament shall determine the jurisdiction and functions of the court’s contemplated in clause (2)”. While section



4 of the *Employment and Labour Relations Court Act*, 2011 establishes the Employment and Labour Relations Court, section 12(1) defines the jurisdiction of the court. The section provides that:

“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 employer’s organization and a trade union’s organization.
- d. disputes between trade unions
- e. disputes between employers’ organizations.
- f. disputes between an employers’ organization and a trade union.
- g. disputes between a trade union and a member thereof
- h. disputes between an employers’ organization 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 agreement.”

47. The foregoing catalogue of disputes is in exhaustive and encompasses all types of disputes that fall under the rubric of employment and labour relations.

48. Accordingly, having found that there was no employment relationship between the claimant and the respondent and their dispute does not fall within the ambit of section 12(1) of the *Employment and Labour Relations Court Act*, the court has no jurisdiction and must down its tools.

49. The preliminary objection is merited and the suit herein is struck out. Parties to bear own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 10TH DAY OF MAY 2022

DR. JACOB GAKERI

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.



DR. JACOB GAKERI
JUDGE

