



Acturial & Benefits Consultant Limited v Orbit Chemical Industrial Limited & another (Cause E783 of 2021) [2022] KEELRC 1286 (KLR) (13 July 2022) (Ruling)

Neutral citation: [2022] KEELRC 1286 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E783 OF 2021
NZIOKI WA MAKAU, J
JULY 13, 2022**

**BETWEEN
ACTURIAL & BENEFITS CONSULTANT LIMITED CLAIMANT
AND
ORBIT CHEMICAL INDUSTRIAL LIMITED & ANOTHER RESPONDENT**

RULING

1. The Respondents/Applicants filed a Notice of Preliminary Objection to the Claim dated 26th May 2022 praying that the Statement of Claim dated 6th September 2021 against them be struck out with costs. The preliminary objection is made on the following grounds:
 - i. The claim and suit herein discloses no Employer/Employee or Master/Servant Relationship between parties herein or employee entitlements hence the Court lacks jurisdiction to entertain, adjudicate or determine the claim under Article 162(2) (a) of the Constitution of Kenya, section 3 of the Employment Act, section 12 of the Employment and Labour Relations Court Act or any other relevant laws of Kenya.
 - ii. The claim and or suit herein against the Respondents is incompetent. Statute barred by Section 90 of the Employment & Labour Relations Act or Limitation of Actions Act having been filed on 6th September 2021 after over 15 years since the cause of action arose.
 - iii. The suit and claim is fatally and incurable defective, incompetent and contra statute particularly section 3(1) of the Law of Contract Act.
 - iv. The suit and or claim against the 2nd Respondent is incompetent and discloses no reasonable cause of action in law against him in so far as the Statement of



Claim alleges, and claims against the 2nd Respondent for actions or allegations admittedly undertaken in his capacity as an Agent, Director or officer of a disclosed Principal who is the 1st Respondent.

2. The matter was disposed of by way of

Respondents/ Applicants' Submissions

3. The Applicants submit that their Preliminary Objection has merit and should be allowed. That in the case of *Boniface Wachira Kariuki v Nyeri County Government* [2018] eKLR, the Court at para 4 of the Ruling, cited the celebrated case of the East African Court of Appeal in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd.* [1969] EA 696, which expressed that a preliminary objection consists of a pure 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. They submit that the totality of Article 162(2)(a) of the *Constitution* of Kenya as read with Section 12 of the *Employment and Labour Relations Court Act* is that the Employment and Labour Relations Court is bestowed with the powers and or the jurisdiction to deal with matters between parties that have an employer-employee relationship. That in the case of *Tabitha K Rutere v Kenyatta University* [2018] eKLR, the Court relied in the decision of the court in *Owners of Motor Vessel "Lilian S" v Caltex Oil (Kenya) Limited* [1989] KLR 1 in propounding that jurisdiction means the authority which a court has to decide the matters litigated before or to take cognisance of matters presented in a formal way for its decision. That the Court in *Kollengode Venkatachala Lakshminarayan v Intex Construction Limited* [2020] eKLR considered the issue of whether a consultancy arrangement raised an employer-employee relationship between the parties and relied upon the decision in *Everret Aviation Limited v Kenya Revenue Authority (Through the Commissioner of Domestic Taxes)* [2013] eKLR where it was held that various tests to be used in finding out whether a person is an employee include: whether the person's duties are an integral part of the employer's business; whether the employer directly controls the employee; the method of payment; any obligation to work only for that employer; stipulations as to hours, overtime, holidays etc; arrangements for payment of income tax and national insurance contribution; how the contract may be terminated; whether the individual may delegate work; who provides tools and equipment; and who, ultimately, bears the risk of loss and the chance of profit.
4. It is the Applicants' submission that going by the observation in the aforementioned case, the Claimant herein does not meet the threshold set therein. Firstly, the Claimant's duties in the consultancy agreement are not an integral part of the 1st Respondent's business, evidenced by the fact that the Claimant's business is providing various actuarial services a vocation that is completely distinct from that of the 1st Respondent, which is mainly manufacturing. That this is further buttressed by the fact that the Claimant was allegedly approached and asked to provide expert opinion only to enable the 1st Respondent prove losses suffered as averred in the Statement of Claim. Secondly, the Claimant severally admits in its Statement of Claim that the Respondent was allegedly supposed to pay a one-off consultancy fee for services rendered and that the claim is for past consultancy services rendered. That these admissions alone qualify the relationship between the Claimant and the 1st Respondent to fall under the definition of 'Contract for Service' distinguished from a 'Contract of Service' as elaborated in the decision in *Geoffrey Makana Asanyo v Nakuru Water and Sanitation Services Company & 6 Others* [2014] eKLR. The Applicants submit that the Claimant never raised the issue of employer/employee and or master/servant at any point and that it is trite law that parties are bound by their pleadings. That this Honourable Court lacks jurisdiction to hear and determine this matter and should therefore down its tools.



5. They further submit that since this Honourable Court will be lacking in jurisdiction, the issue of transfer of this suit to another competent court is not one that this Court can determine. That the Supreme Court of Kenya addressed itself on the issue of transfer of suits filed incompetently, in a Court lacking pecuniary or other terms of jurisdiction at paragraphs 153 & 154 in *Albert Chaurembo Mumba & 7 Others v Maurice Munyao & 148 Others* [2019] eKLR. That similarly, the Court of Appeal in *Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel* [2016] eKLR stated that it would be illegal for the High Court in exercise of its powers, to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction because no competent suit exists that is capable of being transferred.
6. The Applicants further submit that Section 90 of the *Employment Act* is couched in mandatory terms and therefore each and every claim that is brought therein should adhere to the stated terms or be dismissed for being incompetent and a clear abuse of the court process. That the Court in *G4S Security Services (K) Limited v Joseph Kamau & 468 Others* [2018] eKLR cited with authority the decision in *Rift Valley Railways (Kenya) Ltd v Hawkins Wagunza Musonye & Another* [2016] eKLR where the Court held time does not stop running merely because parties are engaged in an out of court negotiations and that it was incumbent upon the respondents to bear in mind the provisions of Section 90 of the *Employment Act* even as they engaged in the negotiations. The Applicants submit that the provisions of Section 3(1) of the *Law of Contract Act* provides that no suit shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person unless the agreement upon which such suit is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized. That in instant case the Respondents/Applicants have never executed any agreement in terms of a contract between themselves and the Claimant herein in relation to the matters in issue. That it is therefore clear that as filed, the suit is contra statute because it cannot be enforced and that this Court should strike it out on this ground. On this submission they rely on the case of *Patrick Tarzan Matu & Another v Nassim Shariff Nassir Abdulla & 2 Others* [2009] eKLR where the court struck out a suit for being contra provisions of the *Law of Contract Act*.
7. They submit that it is trite that once registration of a company has been successfully completed a legal person separate from its members is created and acquires a veil of incorporation that completely separates the members' from being held responsible for the liabilities of the company which they have subscribed to. That in the case of *Warubiu, K'OWade & Ng'ang'a Advocates v Mutune Investment Limited* [2016] eKLR, the Court held that a company is a separate and distinct entity from its shareholders. It is the Applicants' submission that the consequence is that there is a fictional veil between the company and its members, protecting them from being personally liable for the companies' debts and obligations.

Claimant/Respondent's Submissions

8. The Claimant/ Respondent submits that when they were served with the Notice of Preliminary Objection, they understood the essence of Ground 1 therein and reached out to the Respondent to have this suit transferred to the Court with jurisdiction, owing to mistake by Counsel who had erroneously interpreted "Labour Relations" reference to cover contract for services (consultants). That Counsel admits the error of judgment and seeks indulgence and concession only to the first ground of the Preliminary Objection in order to save judicial time and salvage the client's case. That the Claimant herein genuinely has a cause of action that it can prove in law before a competent court with jurisdiction. They rely on Article 159 of the *Constitution* of Kenya and the holding of Onyango J. in *Manpower Networks Limited v Wrigley Company (East Africa) Limited & 2 Others; Richard Mutisya*



Maithya & 28 Others (Interested Parties) [2020] eKLR where in regard to the Preliminary Objection, the Court transferred the suit to the High Court for hearing and held that the fact that the matter is filed in the wrong court should not be a reason for dismissal of the suit since the court has inherent power to refer the suit to the correct court. The Claimant/Respondent herein similarly prays that this Court exercises its discretion and do substantive justice to both parties herein by referring this suit to the High Court Civil Division for hearing and determination, so the parties can have the matter determined on its merits after full hearing. They further rely on the case of *Spedag Interfreight Kenya Limited v The Cabinet Secretary for Labour & Social Relations & 2 Others* [2019] eKLR where the Court transferred the matter to the ELRC after finding that it lacked jurisdiction.

9. The Claimant/ Respondent submits that it is already hereinbefore shown that the dispute between the parties herein is not one of employment but rather a contractual dispute, then the provisions of Section 90 of the *Employment Act* is not the applicable law for consideration of limitation period. That the limitation period prescribed in Section 4(1) of the *Limitations of Actions* Act, Cap 22 is a period of six (6) years and that the computation of time from September 2019 to when the suit was filed in September 2021 is just a period of two (2) years and still within the six (6) years period. It is their submission that this ground of the Preliminary Objection that the matter is statute barred is thus without merit and legal justification and this Court should find so.
10. As regards whether the suit is contra statute, the Claimant/Respondent submits that a contract can arise from oral negotiations and or written correspondence exchanged during negotiations and that it is also a common principle of law in Kenya that contracts can be written or oral. The Claimant/ Respondent submits that the Court cannot make a determination on this ground without taking evidence from the parties and reviewing the documents submitted and that it is not a proper ground to be raised through a Preliminary Objection as interpreted in the renowned case of *Mukisa Biscuit Manufacturing Co. Limited v West End Distributors Limited* [1969] EA 696.
11. An objection is taken as to the provenance of the claim before the court. Whilst the Court is in agreement with the Claimant that certain aspects of the claim would require *viva voce* evidence, the claim as framed herein is not one between employer and employee but one for unpaid fees. In that regard the correct court is the High Court. This Court is not persuaded that an order of transfer is merited as the suit will have to be amended appropriately, I will do the best the Court can and strike out the claim with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF JULY 2022

Nzioki wa Makau

JUDGE

