



Cherogony v African Rural Agricultural Credit Association & another (Cause 1888 of 2017) [2022] KEELRC 14645 (KLR) (27 October 2022) (Judgment)

Neutral citation: [2022] KEELRC 14645 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1888 OF 2017
NZIOKI WA MAKAU, J
OCTOBER 27, 2022**

BETWEEN

MARIAM CHEROGONY CLAIMANT

AND

**AFRICAN RURAL AGRICULTURAL CREDIT ASSOCIATION 1ST
RESPONDENT**

**INTERNATIONAL FUND FOR AGRICULTURAL DEVELOPMENT 2ND
RESPONDENT**

JUDGMENT

1. The Claimant instituted this claim against the Respondents vide a Memorandum of Claim dated 19th September 2017 for failure to pay her consultancy fees. She avers that at all material times, International Fund For Agricultural Development (IFAD), the 2nd Respondent, engaged in activities of financing programs focused on rural poverty reduction, working with poor rural populations in developing countries to eliminate poverty, hunger and malnutrition, raise their productivity and incomes, and improve the quality of their lives. That in enforcing the said activities and projects in Kenya, the 2nd Respondent partnered with various local based organisations such as the 1st Respondent Association. The Claimant avers that it is a result of the various grants issued by the 2nd Respondent to the 1st Respondent that she was severally contracted by the 1st Respondent to give her services as a Consultant; for instance, in 2012 and 2013 she was contracted as a Rural Finance Specialist and Knowledge Management Consultant.
2. It is the Claimant's averment that sometime in the year 2012, the 2nd Respondent issued a Grant No I-R-1331 to a local based organisation named PICO Knowledge Net Ltd (PICO KN) for the IFAD Africa Regional Knowledge Network-Phase II Project. The Claimant avers that the said grant was to last for three years effectively from November 28, 2012 with the project completion date being December 31, 2015 and the grant closing date being June 30, 2016. Furthermore, simultaneous



with the signing of the grant agreement was a condition precedent for PICO KN to enter into a Memorandum of Understanding (MOU) with the 1st Respondent, on the management and implementation of the grant for the release of the project funds. That according to the MOU, the 1st Respondent was to provide fiduciary management of the funds issued to PICO KN for a period of one year and thereafter undertake a financial review of the said organisation to ascertain its readiness to receive and roll out grant funds on its own.

3. The Claimant avers that it is pursuant to the issuance of Grant No 1331 that she got into a consultancy agreement with the 1st Respondent as a Knowledge Management Coordinator for the period between January 1, 2013 and December 31, 2013. That the consultancy fee for the period of the consultancy was fixed at USD 60,000 translating to USD 5,000 per month and that notably, the said contract was prepared and signed in September 2013. She further avers that a salient feature of the contract was that she would be responsible for the management of the 2nd Respondent's approved Regional Knowledge Network-Phase II Project grant to the 1st Respondent and PICO KN. Furthermore, that she was to mentor the Project Manager recruited by the 1st Respondent and PICO KN to take over the day to day running of the grant, for a period of eighteen months before the said Project Manager would fully take up the role of grant management. It is the Claimant's averment that the 2nd Respondent provided a no objection to the above agreement and the same was included in the grant budget. That she consequently rolled out the grant and implemented the same as per provisions of the Large Grant Agreement and the MOU.
4. She further avers that upon management of the grant for one year and as per the MOU, the 2nd Respondent was to review the financial and operational capability of PICO KN to receive, absorb and utilise the grant funds objectively and effectively. That it is pursuant to this that the 1st Respondent and PICO KN wrote several emails to the 2nd Respondent in November 2013 and several reminders thereafter to undertake the financial review of PICO KN but the review process was still delayed up until August 2014. That the consequence of the delay led to the Project Manager who had been recruited to manage the grant resigning and the Claimant was left to single-handedly manage the same until August 2014 when the review was conducted. The Claimant avers that the financial review of PICO KN led to the decision that Grant No. 1331 be closed ahead of schedule and that she was consequently requested to proceed with the closure while ensuring adherence to procedures and timelines, including a financial audit of PICO KN. That during the said audit, an issue arose as to the existence of a formal consultancy contract for her since the existing contract had since expired. That the Auditor consequently suggested that a new contract or an addendum to the former contract be prepared to cover for the administration of the contract and to justify the accrued sum of USD 70,000 due to her. Other owing accrued expenses by PICO KN included premises rent due and costs for conducting the financial audits on the 1st Respondent and PICO KN. Nevertheless, after preparation of an Audit Report and a Completion Report, the said grant was finally closed on March 6, 2015.
5. It is the Claimant's averment that together with the 1st and 2nd Respondents, they agreed to extend the terms of the existing contract and a new contract was therefore prepared, approved and signed by the parties in September 2015. That due to the special circumstances surrounding Grant No 1331, the issue of extending her contract were inadvertently overlooked because she assumed the parties were operating in mutual agreement and in good faith. That after she severally sent communications to the Respondents with regard to settling the said liabilities the 2nd Respondent responded through a letter dated 14th October 2015 accepting and settling the same in terms of the rent due and the costs of the financial audits but refusing to settle the consultancy fees due to her. That the 2nd Respondent alleged that firstly, payment of the consultancy fee was ineligible since it could not allegedly accept a retroactive contract, secondly, the 1st Respondent had no capacity to enter into any contract on behalf



of PICO KN and finally, the 2nd Respondent was not party to the MOU between PICO KN and the 1st Respondent. The Claimant avers that she protested the move through several email communications to the 2nd Respondent which it never responded to and has since refused to settle her consultancy fee for the 14 months and 6 days that she worked with no pay. She avers that despite exhibiting exemplary performance at all times during the period of her employment, the 1st and 2nd Respondents wrongfully, unlawfully and unfairly failed and/ or refused to pay for her consultancy services after closure of the grant. The Claimant thus prays for judgment in her favour with the specific Orders for payment of consultancy fees for 14 months and 6 days amounting to USD 70,999.99; interest at commercial rates on the USD 70,999.99 from March 6, 2015 until payment in full; costs of this suit and interest thereon; and any other relief the court deems fit to grant.

6. In response, the 1st Respondent filed a Statement of Response dated December 8, 2017 averring that the Claimant has no reasonable cause of action as against it as the contract in dispute is between her and PICO KN. Furthermore, that upon its signing the MOU with PICO KN, it subsequently prepared a consultancy agreement with the Claimant on behalf of PICO KN as the Claimant alleged she could not sign an agreement directly with PICO KN because she was a Director at PICO KN and there would be conflict of interest. It is the 1st Respondent averment that even if the Claimant has an actionable cause against it, clause 9 of the contract dated July 16, 2015 provides for a dispute resolution mechanism and this Court therefore lacks jurisdiction to entertain any claim arising therefrom.
7. The 1st Respondent further avers that though the consultancy fee was agreed upon, its payment was subject to the 2nd Respondent funding the project and the grant agreement not being changed. Additionally, the 2nd Respondent disbursed funds in batches in regard to specific assignments and the 1st Respondent could only pay the disbursements upon approval by the 2nd Respondent. It further avers that it is the Claimant who instigated the termination of the project after informing the 2nd Respondent that PICO KN was unwilling to continue with the same due to irreconcilable internal differences between PICO KN's directors which made implementation of the grant impossible. It contends that the Claimant agreed to continue working on the closure of the grant on goodwill basis and is therefore estopped from claiming anything to the contrary. The 1st Respondent avers that clause 3 of the MOU signed between it and PICO KN was clear that any payroll calculations, payment of salaries and withholding tax in respect of the project's personnel would only be paid upon relevant information being provided to the 1st Respondent by PICO KN. Additionally, the mandate of the 1st Respondent under the MOU was limited to administration of funds for one year from the signing of the MOU and the said funds were only received during that first year of the grant.
8. The 1st Respondent also filed a witness statement made on November 15, 2019 by its Accountant, Moses Jumah Obolah. He asserts that the 1st Respondent diligently carried out its obligations under the MOU and that after the grant was terminated, no complaint was made against it on misuse of funds by either the 2nd Respondent or PICO KN. That while the auditors were preparing the audit report, the Claimant approached the 1st Respondent and requested it to prepare a contract between her and PICO KN on behalf of PICO KN, in which she would be paid USD 70,000. That based on the MOU, the 1st Respondent in goodwill prepared the said agreement which was later signed on July 16, 2015 and also to avoid conflict of interest as claimed by the Claimant. He states that the 1st Respondent does not owe the Claimant USD 70,000 as claimed since the contract subject of this suit is solely between the Claimant and PICO KN and the 1st Respondent is not party to it, having only prepared her contract on instructions and behalf of PICO KN. That in any event, PICO KN remains the Claimant's employer and from whom she should make a complaint for compensation.



9. Under protest, the 2nd Respondent filed a Memorandum of Reply dated November 18, 2021 averring that as a specialized agency of the UN, it enjoys immunity from legal processes in Kenya. It avers that it did not at any one time engage in the implementation of the projects it merely provided funding to via a grant nor did it engage in the hiring of any employees for the project implementation. That by the Claimant's own admission, she was contracted by the 1st Respondent as a Consultant and the 2nd Respondent was not privy to the said contract. That there was never any contractual agreement between the Claimant and the 2nd Respondent related to the grant implemented by the 1st Respondent and PICO KN and neither was there an employer-employee relationship between it and the Claimant. That it consequently was never under a duty pay her any monies and that if there were any more funds to be paid or deployed beyond the grant funds, it was the sole responsibility of PICO KN to settle them. That even if it had a payment obligation towards the Claimant, which it denies, such monies could not be paid retroactively especially since the consultancy contract was signed a month after the Grant was terminated. That in any event, it was not party to the MOU between PICO KN and the 1st Respondent. The 2nd Respondent subsequently denies the jurisdiction of this Court to hear the claim as against it and avers that the Claimant is not entitled to any of the prayers sought in the Memorandum of Claim.

10. Claimant's Submissions

On the issue of jurisdiction, the Claimant submits that the 2nd Respondent's Preliminary Objection dated February 5, 2020 claiming immunity from legal proceedings was canvassed and the Honourable Court through its ruling dated 25th September 2020 dismissed the same stating that the 2nd Respondent does not enjoy absolute immunity since employment matters are in the purview of private law. She submits that the 2nd Respondent still challenges the jurisdiction of this Court on the basis that there was no employment relationship between her and the Respondents. She cites the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank & 2 others* - Supreme Court Civil Appeal (Application) No 2 of 2011 in which the Supreme Court restated that a court's jurisdiction flows from either the *Constitution* or legislation or both. Further, that article 162(2)(a) of the *Constitution* provides for the establishment of the Employment and Labour Relations Court (ELRC) which was subsequently established by the *Employment and Labour Relations Court Act* No 20 of 2011. That section 12(1)(a) of the ELRC Act provides that this 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*, including disputes relating to or arising out of employment between an employer and an employee. The Claimant submits that *Black's Law Dictionary Abridged* 6th Edition describes employment, employ and employee as follows:

Employment - Act of employing or state of being employed; that which engages or occupies; that which consumes time or attention; also an occupation, profession, trade, post or business. Includes the doing of work and a reasonable margin of time and space required in passing to and from the place where the work is to be done.

Employ - To engage in one's service; to hire; to use as an agent or substitute in transacting business; to commission and entrust with the performance of certain acts or functions or with the management of one's affairs.

Employee - A person in the service of another under any contract of hire, express or implied, oral or written, where the employer has the power or right to control or direct the employee in the material details of how the work is to be perform.



11. The claimant submits further, that section 10 of the *Employment Act* defines some of the characteristics of an employment contract such as pay; basic job description; personal details of the employer and the employee; date of commencement; terms and duration of the contract; place of work; hours of work; remuneration interval; rate of remuneration. She submits that the Court should interrogate her contract in question dated July 16, 2017 together with the documents that gave rise to the signing of the said contract. That a closer scrutiny of the said contract shows the Respondents did not have any intention of letting her be an Independent Contractor but wanted to rather have control over her services, including remuneration. That Clauses 4, 5, 6 and 7 of the contract provide who she was to report to, her place of work or work location, her monthly wage payment, and the parameters of per diem. She therefore questions whether an Independent Contractor would be subject to all the forgoing restrictions and/or controls she was subject to, and which controls conform to the internal regulations and/or practices of especially the 2nd Respondent. She further questions why she would be paid per diem according to the Knowledge Management Coordination Partnership Policy which follows the UN system, which the 2nd Respondent considers itself part of, if indeed the Respondents intended her to be an Independent Contractor. That per diem as per the *Black's Law Dictionary Abridged* 6th Edition is defined as: "By the day; an allowance or amount of so much per day...generally, used in connection with compensation, wages or salary, means pay for a day's service". Further, she submits that according to the Large Grant Agreement which the contract of services was based on, at Schedule 6 thereof, paragraph 6.1 (xxi), any work plan and budget for the project had to be approved by the 2nd Respondent. Secondly, as per the MOU signed between PICO KN and the 1st Respondent, the 1st Respondent was responsible for payroll calculations, payment of salaries and withholding tax in respect of project personnel. She submits that the services she offered were an integral part of the 2nd Respondent's core functions, within its area of practice and/or influence as shown from the activities to be performed under Schedule 1 paragraph 1.5 of the Large Grant Agreement. It is the Claimant's submission that for all intents and purposes, the Respondents herein intended to create an employment relationship between themselves and the Project Personnel during the subsistence of the Large Grant Agreement. The Claimant submits that the Respondent's Witness confirmed that the Claimant was part and parcel of the project personnel and indeed worked. The Claimant relies on the case of *Umbertoh Daniel Nungari v Wildebeest Camp & Travels Limited* [2019] eKLR in which the Court held that the employment relationship is determined by whether the employee serves and is under control of the employer in performing his services. She also cites the holding in the case of *Kenneth Kimani Mburu & another v Kibe Muigai Holdings Limited* [2014] eKLR, where Rika, J in deciding whether the contract before him was one of consultancy or employment, rendered himself as follows:

(39) In answering the first question, the court must attempt to evaluate these two agreements, and make a finding whether they are employment contracts, or consultancy contracts. The respondent testified that the agreements were drawn by the parties, without the involvement of their Lawyers. This is apparent from the wording of the two documents, which adopts the language common to employment contracts as well as language that is characteristic of consultancy/independent contracts. They for instance adopt the word 'salary' which is a feature of the employment contract, while the Respondent is referred to as 'the Client' which is a terminology relating to consultancy/independent contracts.

40. A closer look into both agreements leads the court to find these were not intended to be consultancy/ independent contracts, but employment contracts. A Consultant performs work for another person, according to his own processes and methods. A Consultant is not subject to another's control, except to the extent admitted under the contract. The court in determining



the first question is not bound by the Parties' respective declarations on the character of these contracts, but should not disregard the Parties' intention.

41. Even with the hybrid wording in the contracts, the intention of the Parties, and the wording in large portions of the two agreements persuade the court these were employer-employee relationships.”
12. It is the Claimant's submission that from the above, the Respondents intended to have an employment relationship with her hence this Court is clearly vested with the jurisdiction to determine this matter. On whether there was privity of contract between parties herein, the Claimant describes privity and privity of contract respectively under *Black's Law Dictionary Abridged* 6th Edition as follows:
- Privity signifies that relationship between two or more persons is such that a judgment involving one of them may justly be conclusive upon the other, although the other was not a party to lawsuit.
- Privity of Contract - That connection or relationship which exists between two or more contracting parties.
13. The Claimant relies on the decision of the Court of Appeal in the case of *Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & another* [2015] eKLR where it was held:

“Over time some exceptions to the doctrine of privity of contract have been recognized and accepted. Among these exceptions is where a contract between two parties is accompanied by a collateral contract between one of them and a third party relating to the same subject matter. Thus in *Shanklin Pier v Detel Products Ltd* [1951] 2 KB 854, for example, the plaintiff owned a pier, which it wished to be repainted. After the defendant represented to the plaintiff that some particular paint was fit for purpose, the plaintiff directed its contractor to use that paint. The contractor purchased the paint from the defendant, which proved unfit for purpose. Upon a suit by the plaintiff against the defendant, the court found for the plaintiff notwithstanding the fact that there was no privity of contract between the plaintiff and the defendant, as far as the contract for the sale of the paint was concerned.

While the proposition that a contract cannot impose liabilities on a non-party has been widely embraced and accepted as rational and well founded, the proposition that a contract cannot confer a benefit other than to a party to it has not been readily accepted and has in fact been the subject of much criticism. In *Darlington Bourough Council v Witshire Northern Ltd* [1995] 1 WLR 68 Lord Steyn eloquently demonstrated the flaw in the proposition in the following terms:

“The case for recognizing a contract for the benefit of a third party is simple and straightforward. The autonomy of the will of the parties should be respected. The law of contract should give effect to the reasonable expectations of contracting parties. Principle certainly requires that a burden should not be imposed on a third party without his consent. But there is no doctrinal, logical or policy reason why the law should deny effectiveness to a contract for the benefit of a third party where that is the expressed intention of the parties. Moreover, often the parties, and particularly third parties, organize their affairs on the faith of the contract. They rely on the contract. It is therefore unjust to deny effectiveness to such a contract.”

14. She submits that the contract in issue herein dated July 16, 2015 was prepared by the 1st Respondent and signed by its Secretary General which can only mean that the 1st Respondent had every intention



to be bound by the said agreement. Secondly, when it came to payment of the Claimant's wages, the 1st Respondent sought to bind the 2nd Respondent at paragraph 6 of the contract because the funds were to come from the 2nd Respondent as the Grant Funder. Furthermore, the 1st Respondent had the power to bind the 2nd Respondent to the above-mentioned contract by virtue of the Large Grant Agreement and the MOU signed between the 2nd Respondent and PICO KN and PICO KN and the 1st Respondent respectively. That as part of the audit findings, the 2nd Respondent was aware that an addendum to the earlier contract of January to December 2013 would be prepared to ensure that the Claimant's dues were to be paid and it hence approved the preparation of the subsequent contract signed on July 16, 2015. It is the Claimant's submission that it is evident that there was privity of contract between her and the Respondents herein. The Claimant further submits that she did perform her contractual obligations as evidenced in the Project Audit Report which listed her consultancy fees as accrued expenses. Furthermore, the audit findings are that the Claimant was the project coordinator and her contract had not been renewed and that the same need to be actioned on a high priority basis. She submits that the Respondent's witness also confirmed in his testimony that the Claimant was the project coordinator and had at some point taken up the duties of the project manager until closure of the grant. Finally, that the email exchanges between her and the representatives of the Respondent demonstrate that she performed her duties as project coordinator until final closure of the grant.

15. It is submitted by the Claimant that since she has evidenced she worked from January 1, 2014 to March 6, 2015, translating to 14 months and 6 days and totalling USD 70,999.99, she is entitled to compensation thereto which the Respondents withheld from her when it was due. That she is subsequent to that then entitled to interest on the said amount from the date due until payment in full. She submits that the 2nd Respondent's argument that it cannot pay a retroactive contract is not justification for failing to pay her for work done and is an escapist reason to unjustifiably withhold her hard earned dues. Further, the 1st Respondent never led any evidence to show that her working on a good faith basis meant working for free. On who should pay the costs of this claim, the Claimant submits that the liability to pay costs is discretionary but it always follows the event.

16. Respondents' Submissions

The 1st respondent submits that section 2 of the [Employment Act](#) defines an employee as

“a person employed for wages or a salary and includes an apprentice and indentured learner” while a contract of service is defined thus:

“...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 learnership but does not include a foreign contract of service to which Part XI of this Act applies”.

That the definition of an employee under Section 2 was expounded in the case of [Fredrick Byakika v Mutiso Menezes International Unlimited](#) [2016] eKLR in which the court held that such definition sets clarity with regard to the payment of salary or wage and that any employee is thus paid a wage or salary. On the other hand, that a contract of service was well defined in [Benjamin Joseph Omusamia v Upperhill Springs Restaurant](#) [2021] eKLR that its characteristic is such that the contractor was free to choose the means of performing the contract and no relationship of subordination existed between the contractor or the service provider and the client in respect of such performance. It is the submission of the 1st Respondent that the rationale of what goes into an employment relationship as against into an independent consultant relationship was summarized in the case of [Charles Juma Oleng v M/S Auto Garage Ltd & another](#) [2014] eKLR as follows:



- a. The control test whereby a servant is a person who is subject to the command of the master as to the manner in which he or she shall do the work.
 - b. The integration test in which the worker is subjected to the rules and procedures of the employer rather than personal command. The employee is part of the business and his or her work is primarily part of the business.
 - c. The test of economic or business reality which takes into account whether the worker is in business on his or her own account, as an entrepreneur, or works for another person, the employer, who takes the ultimate risk of loss or chance of profit.
 - d. Mutuality of obligation in which the parties make commitments to maintain the employment relationship over a period of time. That a contract of service entails service in return for wages, and, secondly, mutual promises for future performance. The arrangement creates a sense of stability between the parties. The challenge is that where there is absence of mutual promises for stable future performance, the worker thereby ceases to be classified as an employee as may be the case for casual workers.”
17. The 1st Respondent submits that where parties have reduced the terms and conditions regulating the relationship into writing like the present case, such is to be given importance with reference because they form the basis and intentions of such parties. This position was reiterated in the case of *Fredrick Byakika v Mutiso Menezes International Unlimited* (*supra*) quoted with authority in *Lorna Adbiambo Aling v Safi International AS* [2017] eKLR. It is the 1st Respondent’s submission that taking into account the above cases and the stipulated considerations thereof, this Court has no jurisdiction to determine this claim based off of the terms and conditions of engagement spelt out in the Consultancy Contract dated July 16, 2015 as the relationship between the Claimant and the Third Party Company is stated as that of an Independent Contractor. It invites the Court to be guided by the wording of the said consultancy contract which expresses the intentions of the parties involved and to arrive at a finding that the nature of engagement was that of an independent contractor. That as such, the duty of employment relationship cannot be enforced against the 1st Respondent in this case and that it was similarly held by the Court in the *Lorna Adbiambo Aling* case (*supra*) that where no such employment relationship exists and only a consultancy engagement is apparent, such duty cannot be enforced against the respondent in this case.
18. The 1st Respondent submits that the Claimant does not meet the threshold established in the *Charles Juma Oleng* case (*supra*) as can be demonstrated clauses 4, 5 and 6 of the Consultancy Contract. Furthermore, the said consultancy contract does not provide for employee’s benefits such as health cover, annual leave, sick leaves and overtime provision and the lack of such provisions speaks to the nature of the engagement being that of an independent contractor. It submits that without an employment relationship between the parties, this Court is denied jurisdiction and without jurisdiction, this court cannot move a step further and must stop here. It invites the Court to determine that the claim is commercial in nature and ought to be addressed by the High Court and not this Court as was the case in *Lorna Adbiambo Aling* (*supra*).
19. The 1st Respondent submits that should this Court however determine that it is clothed with jurisdiction in the matter, it should find that the Claimant cannot selectively claim that the consultancy contract was between her and the 1st Respondent and leave out the Third Party Company; as in fact the 1st Respondent only prepared the agreement but the same is executed by PICO KN and the Claimant. That the terms of the agreement speak to the privity of contract between the Claimant and the Third Party Company and that to intentionally allege liability on the 1st Respondent is unjust and malicious.



It submits that there is thus no privity of contract between itself and the Claimant and it is therefore not liable to pay the Claimant. That should this Court however find that the 1st Respondent is liable to pay the Claimant, its submission is that it cannot effect such payment as it has not as of the date of writing this submission, received any money from the 2nd Respondent as settlement of the Claimant's accrued consultancy arrears.

20. The 2nd Respondent submits that this Honourable Court does not have jurisdiction to determine disputes where an employer-employee relationship does not exist. That as evidenced by the Claimant's own pleadings and the consultancy agreement she seeks to enforce, her claim is not based on any alleged employer-employee relationship. That the entire claim is instead based upon a consultancy agreement, which constitutes a purely commercial arrangement. It submits that a party is bound by their pleadings and the Claimant's belated attempts in her submissions to allege that there existed an employer-employee relationship cannot stand. That this position was reiterated by the Court of Appeal in the case of *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR. It further relies on the decision of the Court of Appeal in the case of *Magnate Ventures Ltd v David Odwori Namuhisa* [2020] eKLR that the terminology adopted made it clear that at all times, the intended purpose of the contract was the provision of consultancy services and further, the payment obligation placed the parties' relationship on a commercial footing, thereby negating any reference to an employment relationship. Upon the Court of Appeal finding that the agreement in the case was for provision of consultancy services and not an employer-employee relationship, it held that bearing in mind the remit of the ELRC, the trial court had no jurisdiction to determine a dispute that was based on a consultancy agreement and with all the hallmarks of a commercial document.
21. The 2nd Respondent submits that it has not waived the immunity it enjoys by virtue of the provisions of the UN Convention on Privileges and Immunities of the Specialized Agencies as read together with the Agreement establishing the IFAD and the Agreement between the UN and the IFAD. Furthermore, the subject matter of the Claim herein relate to official and not private matters. On this position it relies on the decision of the Court of Appeal in the case of *Karen Njeri Kandie v Alssane Ba & another* [2015] eKLR holding that employment related claims are covered by Diplomatic Immunity and that the ELRC does not have jurisdiction to determine a dispute involving a diplomatic entity such as the 2nd Respondent herein. That this holding was upheld by the Supreme Court in the case of *Njeri Kandie v Alssanne Ba & another* [2017] eKLR and a similar finding arrived at by the Employment Court in the case of *Christopher Bernard Wasike v International Centre of Insect Physiology and Ecology* [2018] eKLR. Without prejudice to the foregoing, the 2nd Respondent submits that even if the Court found that it had jurisdiction to determine the dispute herein, the 2nd Respondent would not be liable to pay any purported Consultancy Fees to the Claimant, by the doctrine of the Privity of Contract. That merely providing funding to PICO KN does not confer any responsibility on it to pay consultants engaged by the said PICO KN. Furthermore, Clause 6.18 of the General Provisions Applicable to IFAD Large Grant Agreement was categorical that PICO KN would not be considered an Agent of the 2nd Respondent and therefore the 2nd Respondent cannot be held liable for any expenses incurred by PICO KN, including expenses related to payment of Consultants. That the Claimant being a director of the said PICO KN, was privy to the Large Grant Agreement and is therefore estopped from making any claims against the 2nd Respondent. The 2nd Respondent further submits that the Claimant has failed to explain why she did not sue the said PICO KN, despite the Consultancy Agreement having been with the said entity and notably, the fact that the Consultancy Agreement was backdated is ready evidence that the demanded payment was not in the project budget.



22. The issue of jurisdiction has been raised yet again by the 1st and 2nd Respondents. Having made a Ruling in respect of the same, this Court is functus officio as far as that issue is concerned. As such, the Court will not make any determination on the basis of the submissions made by the 2nd Respondent asserting immunities and privileges it allegedly enjoys.

The Claimant sued the 1st Respondent with whom it had a contract. The 2nd Respondent on the other hand was not privy to the contract with the Claimant and thus was improperly joined to the proceedings. To my mind, the 2nd Respondent funded activities of the 1st Respondent and as such being a donor cannot be liable for the actions of its donee the 1st Respondent. Consequently, I strike out the name of the 2nd Respondent albeit with no order as to costs. The decision herein will relate solely to the 1st Respondent who had a contract with the Claimant. A close reading of the contract reveals the following salient points:- the Claimant was to be paid a fee aptly named ‘consultancy fee’ for services rendered, there was withholding tax and there was no provision for payment of NHIF, NSSF or medical cover. Applying the tests in the case of *Charles Juma Oleng v M/S Auto Garage Ltd & another supra* the Court finds that the elements of control and integration are absent as the Claimant was not subject to the command of the 1st Respondent as to the manner in which she would do the work. Secondly the Claimant was not subject to personal command by the employer and was not an integral part of the enterprise as her services were finite and fixed in time. In my understanding, the Claimant even knew this as she executed various tasks with her own entity which interfaced with the 1st Respondent as a supplier. In the final result, there is no merit in the claim by the Claimant, though she could have pressed a commercial claim for non-payment of consultancy fees. In light of this her suit is dismissed with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF OCTOBER, 2022

Nzioki wa Makau

JUDGE

