



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 132 OF 2019

IN THE MATTER OF ARTICLES 22, 23, 162 AND 165 OF THE CONSTITUTION

AND

IN THE MATTER OF THE CONTRAVENTION AND VIOLATION OF ARTICLES 27 AND 28 OF THE CONSTITUTION

BETWEEN

MIRIAM NZILANI MWEU.....PETITIONER

VERSUS

KIPTINESS & ODHIAMBO ASSOCIATES.....RESPONDENT

JUDGMENT

1. Miriam Nzilani Mweu (Petitioner) is an advocate of the High Court of Kenya. On or around 6 April 2015, she was engaged by Kiptiness & Odhiambo Associates (Respondent) as an Associate.
2. On or around 30 November 2017, the Respondent offered to the Petitioner the position of Fixed Remuneration Partner commencing 1 January 2018.
3. The Petitioner did not serve as a Partner for long, on 28 September 2017 she gave 6 months' notice of resignation from the partnership. The Respondent accepted the notice of resignation on 21 December 2017 and waived 3 months of the notice. The next day, the Petitioner sought clarification on when her terminal dues would be paid.
4. On 19 July 2019, the Petitioner instituted legal proceedings against the Respondent alleging violation of her rights to equality and freedom from discrimination, and inherent dignity. There were also allegations of breach of contract.
5. Filed together with the Petition was a motion under a certificate of urgency.
6. When the application and Petition were served upon the Respondent, it filed a Summons seeking that the dispute be referred to arbitration. The Court directed that the summons be deemed as part of the opposition to the Petitioner's motion and be argued together.
7. The Petitioner filed submissions on the motion on 26 September 2019 while the Respondent filed its submissions on 2 October 2019.
8. In a Ruling delivered on 23 October 2019, the Court in lieu of allowing the Petitioner's motion ordered that the Petition be heard on an expedited basis and further directed the parties to file and exchange responses and submissions ahead of highlighting on 11 December 2019.
9. The rationale of the orders was to save on judicial time but intervening events and more so the declaration of a public health pandemic in March 2020 did not make that possible.
10. Before the directives, the Petitioner had on 29 August 2019 caused to be filed other affidavits in support of the Petition.
11. Pursuant to the Court orders/directives of 23 October 2019, the Respondent filed a replying affidavit to the Petition, 2 Affidavits in support of Reply to Petition, Grounds of Opposition in Reply to the Petition on 7 November 2019.
12. The Petitioner filed her submissions on 22 November 2019 and her proposed List of Issues for determination on 26 November 2019

13. The Respondent filed written submissions, a List and Bundle of Authorities and Proposed List of Issues on 6 December 2019.
14. The submissions were highlighted as scheduled and the Court reserved judgment to 13 March 2020.
15. However, on 21 January 2020, the Petitioner wrote a letter to the Respondent suggesting an out of court settlement on some of the Issues in dispute. The letter was copied to the Court.
16. Consequently, on 13 March 2020 when Judgment was scheduled to be delivered, the Court directed the parties to address it on 2 April 2020 on the question Value Added Tax. Due to the declaration of public health pandemic, the Court did not sit on 2 April 2020.
17. On 5 May 2020, the Petitioner sought leave to file further submissions, a request the Court acceded to.
18. The Petitioner filed Supplementary submissions on 23 April 2020. The Respondent filed Supplementary Submissions on 6 May 2020.
19. The Petitioner identified 7 Issues as arising for determination while the Respondent identified 8 Issues.
20. The Court will adopt the Issues as identified by the parties.
21. The Court will start with the question of the employment relationship as a finding on it is jurisdictional.

Whether Petitioner was an employee or Partner of the Respondent

22. The Petitioner identified the question of the contractual relationship with the Respondent as Issue No. 6. The Respondent, however, was not so precise but alluded to the Issue as No. 2 and 7 in its List of Issues.
23. In the view of the Court, a determination of this Issue one way or the other may dispose of the Petition as underneath is the jurisdictional question which may lead to the downing of its pen or dismissal of the Petition.
24. On 6 April 2015, the Petitioner and the Respondent entered into a contract of service. The Petitioner was to serve as an Associate.
25. The tenor of the contract of service leaves no doubt in the mind of the Court that the Petitioner started as an employee within the context of Article 162(2) of the Constitution as read with section 2 of the Employment Act, 2007 as well as section 2 of the Employment and Labour Relations Court Act.
26. However, on 30 November 2017, the Petitioner was engaged as a partner in the Technology, Media and Telecommunications (TMT) practice department of the Respondent. The effective date of admission into the partnership was stated as 1 January 2018.
27. Under the terms agreed by the parties, the Petitioner was entitled to a fixed remuneration as well as bonuses and participation in profits of the firm.
28. The preamble/introductory part of the letter of admission was in the following terms

We are pleased to confirm that you have been promoted to a Fixed Remuneration Partner of the firm in the TMT Practice. The terms of your engagement are as follows:

29. Of note is clause 6 which provided

Participation in the profits of the firm

The firm shall distribute seven point five per cent (7.5%) of total revenues net of tax collected in any given calendar (sic) to you under your practice group provided that the distribution shall be restricted to a single practice group. For business introduced into the firm by you whether, in your or any other practice group, the firm shall pay a commission of seven point five per cent (7.5%) of total revenues net of taxes collected from that business or client in the first twelve-month- period since the date of the first fee note or invoice. Distributions under this paragraph shall be subject to income taxes and shall be subject to review after two years of commencement.

30. The above clause leaves no doubt in the mind of the Court that the Petitioner was a *Partner* as she was entitled to share in the income profits of the Respondent.
31. The question that arises, then, is whether a partner in a law firm is an employee or is under a contract of service to fall within the jurisdiction of this Court.
32. An answer to the question is not straightforward as it has always been a probing legal issue in different jurisdictions.
33. To support the contention that she was an employee for purposes of the Employment Act, 2007, the Petitioner cited *Williamson & Soden Solicitors v Briars* UKEAT/0611/10/DM where the Employment Appeal Tribunal concluded that a salaried partner in receipt of a profit was an employee.

34. The Petitioner also asserted that she was not involved in decision making on matters which did not fall under her job description and was also not a party to the *Partnership Deed* between Crispine Odhiambo and Stephen Kiptiness and that she had not contributed any equity.
35. In the *Williamson & Sodden* authority relied on by the Petitioner, the Claimant was a salaried partner in the firm with a guaranteed salary and share of profits. The Claimant moved the Employment Tribunal and the Respondent raised an objection that he was not an employee.
36. The Tribunal found that the Claimant was not an equity partner, his title/status had not changed, his benefits under the previous contract were to continue, had no capital stake in the firm or risk of exposure to losses, had targets to meet, was not consulted on significant events in the life of the firm and had not been invited to sign the partnership agreement and therefore he was an employee for the purposes of the Employment Rights Act, 1996 which defined an employee as an individual who has entered into or works under [...] a contract of employment and, a contract of employment as means, "a contract of service [...], whether expressed or implied, and (if it is expressed) whether oral or in writing.
37. The Employment Appeal Tribunal upheld the conclusions by the Employment Tribunal.
38. In *Clackamas Gastroenterology Associates v Wells*, 123 S.Ct. 1673 (2003), the United States Supreme Court settled on a six-factor test and concluded that common-law element of control was the principal guide in answering the question of whether a director or shareholder was an employee.
39. In *Clyde & Co LLP & Ar v Bates van Winklehof* (2014) UKSC 32, the Supreme Court, United Kingdom had to determine the question whether a member of a limited liability partnership is a "worker" within the meaning of s 230(3) of the Employment Equity Act 1996, and so protected by the Public Interest Disclosure Act 1998, when bringing a whistleblowing claim.
40. The Supreme Court held that a partner was a *worker* for purposes of the particular statute and entitled to whistle-blower protections.
41. The above decisions turned on particular statutes and the Court does not find them particularly determinative. The Court will now look at our domestic legal framework.
42. Partnerships in this country are governed by two primary statutes, the Partnerships Act, 2012 and the Limited Liability Partnerships Act, 2011.
43. Section 8(2) of the Partnership Act provides
- A partnership shall not employ a partner as an employee of the firm
44. However, by dint of section 3 of the Act, limited liability partnerships are excluded from the scope of the Partnerships Act. For inexplicable reasons, section 8 of the Limited Liability Partnerships Act provides that the Partnerships Act applies to the Limited Liability Partnerships Act unless expressly provided otherwise (regrettably, the parties did not disclose under which of the two statutory regimes the Respondent is registered or operates).
45. The Court has not seen any contrary intention to the provision that a partnership shall not employ a partner as an employee of the firm.
46. The conclusion notwithstanding, can a partner in a law firm qualify as an employee (worker not defined in our statutes) under the Employment Act, 2007?
47. Under section 2 of the Employment Act, 2007, an *employee* is defined as means a person employed for wages or a salary and includes an apprentice and indentured learner.
48. Can it be said that after admission as a Fixed Remuneration Partner, the Petitioner remained as an employee under a contract of service?
49. The Petitioner answered the question in the positive on account that she was entitled to a monthly salary, was not a signatory to the partnership agreement, had not contributed any equity and had set targets.
50. Practitioners in the employment law field in this country generally know that our employment law arena is inadequate. It is not only narrow but still takes the traditional view of the employment contract. It only recognises *contracts of service* as opposed *contracts of employment* or *contracts for service*. The framework makes no distinction between the *worker* contemplated in Article 41(2) of the Constitution and the *employee* as defined in the Employment Act, 2007 and the Employment and Labour Relations Court Act.
51. Apart from allegations of violation of the rights to equality and freedom from discrimination, the other substantive gravamen of the Petitioner's case is her share of revenues and commissions from the partnership.
52. This Court is not convinced that it has jurisdiction over a dispute on the distribution of partnership revenue/commissions as statutory law currently stands.
53. Even if the Court were to hold that the Petitioner was an *employee*, it would not be possible to sever the actions for constitutional violations from the claims over partnership revenue distribution.
54. All in all, the Court is not satisfied that the Petitioner was an *employee* of the Respondent for purposes of the Employment Act, 2007 and

the Employment and Labour Relations Court Act. As a partner under the Partnerships Act and the Limited Partnerships Act, she was an employer.

55. The Court consequently finds that it has no jurisdiction to determine whether the Petitioner was discriminated against as a partner or that she is entitled to commissions or share of revenues as such partner.

56. Before concluding, the Court is still of the mind that the parties may reach an out of court settlement if they negotiated in good faith.

57. In lieu of dismissing the Petition, which the Court has not determined on the merits, the Court will strike it out.

58. No order on costs.

Delivered through video/email, dated and signed in Nairobi on this 29th day of May 2020.

Radido Stephen

Judge

Appearances

For Petitioner Muchemi & Co. Advocates

For Respondent Kiptiness & Odhiambo Associates, Advocates

Court Assistant Judy Maina