



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1102 OF 2017

IN TOUCH SPORTS LIMITED CLAIMANT

v

KENYA RUGBY UNION RESPONDENT

RULING

1. Sometime in 2013, In Touch Sports Ltd (the Claimant) a sports management and sponsorship company entered into negotiations with Kenya Rugby Union (the Respondent) to procure/recruit coaches for the Kenya National rugby team.

2. The Claimant was acting as agent/representative of the 3 named coaches.

3. The negotiations were successful and as a result, the Respondent entered into *service contracts* with the 3 coaches on or around October 2013. There is no dispute that as between the coaches and the Respondent, the *service contracts* constituted employment contracts.

4. On its part, the Claimant and the Respondent signed a contract under which the Respondent would pay to the Claimant yearly *management fees* based on the salaries payable to the 3 coaches.

5. The Claimant raised several invoices for the payment of the *management fees*. The Respondent failed to pay (One of the coaches also assigned to the Claimant certain monies due to him from the Respondent).

6. The Claimant, therefore, moved the Court on 15 June 2017 and it stated the Issue in Dispute as **Refusal to pay the Claimant's management fees for the completion and signing in October 2013 of employment contracts between three (3) coaches from South Africa namely, Paul Treu, Vuyo Zangqa and Graham Bentz and the Respondent and the said coaches.**

7. After filing the suit, the parties entered into a consent to refer the dispute to arbitration. The Court adopted the consent.

8. The Arbitrator found in favour of the Claimant.

9. The Claimant then moved the Court through a Chamber Summons dated 29 January 2020 to have the arbitral award adopted

10. The specific orders sought in the Summons were

1. **THAT** the Arbitration award dated 30th July 2019 made by Mr. Arthur K. Igeria and reviewed on the 30th October 2019 be and is hereby adopted as the Judgment of this Court.

2. **THAT** a decree do issue for the sum of USD 37125/= plus interest from the date of the Award until payment in full.

3. **THAT** the costs of this suit and as well as such costs and expenses as are incidental to Arbitration enforcement and execution of this application be provided for.

11. When served with the Summons, the Respondent filed a Notice of Preliminary Objection dated 2 March 2020 contending that

1. This Court lacks jurisdiction to hear and determine the application dated 29.1.20 as it lacks jurisdiction to determine disputes of a commercial nature.

12. At the same time, the Respondent filed a Notice of Motion seeking orders

1. **THAT** there be a stay of proceedings herein pending the hearing and determination of this application.
2. **THAT** this Honourable Court be pleased to set aside the Final Award delivered on 30th July 2019 by the Arbitrator Mr. Arthur K. Igeria.
3. **THAT** costs be in the cause.

13. When the parties appeared for directions on 7 August 2020, the Court directed that all the applications on file be taken together. The parties were ordered to file and exchange submissions.

14. The Claimant filed its submissions on 21 August 2020 while the Respondent filed its submissions on 29 September 2020.

15. In its submissions, the Claimant identified 3 Issues for determination, to wit:

- (i) Whether the Honourable Court has jurisdiction to hear and determine this suit?
- (ii) Whether the Arbitration Award dated 30th July 2019 made by Mr. Arthur K. Igeria and reviewed on the 30th October 2019 ought to be set aside?
- (iii) Whether the Arbitration Award dated 30th July 2019 made by Mr. Arthur K. Igeria and reviewed on the 30th October 2019 ought to be adopted as a Judgment of this Court and a decree accordingly.

16. The Respondent, on the other hand, identified only 1 Issue being

- (i) Whether the Employment and Labour Relations Court had jurisdiction to hear/direct this matter to an Arbitrator.

17. The Court has considered the applications, affidavits, Objections and the rival submissions and will at the outset examine the jurisdiction question as it is foundational.

Jurisdiction

18. The general jurisdiction of this Court is provided for under Article 162(2) of the Constitution. However, the proviso left it to Parliament to delineate the contours, extent, nature and scope of the jurisdiction.

19. The contours, extent, nature and scope of the jurisdiction of this Court is primarily anchored in the Employment and Labour Relations Court Act, the Employment Act, 2007 and the Labour Relations Act, 2007 (there are myriad other statutes which confer jurisdiction on the Court such as the Work Injury Benefits Act, amongst others).

20. Under its Constitutive Act, section 12 (of the Employment and Labour Relations Act) has set out the jurisdiction of this Court thus

12. Jurisdiction of the Court

(1) 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 employers' organisation and a trade union's organisation;
- (d) disputes between trade unions;
- (e) disputes between employer organisations;
- (f) disputes between an employers' organisation and a trade union;
- (g) disputes between a trade union and a member thereof;
- (h) disputes between an employer's organisation 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 agreements.

(2) An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer's organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.

(3) ...

21. The Act has defined an employee

means a person employed for wages or a salary and includes an apprentice and indentured learner' while 'employer' has been defined as, 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.

22. The same definitions are replicated in section 2 of the Employment Act and section 2 of the Labour Relations Act.

23. The Claimant and the Respondent did not have an employer/employee relationship. The relationship did not also qualify as one between a trade union and an employer.

24. Consequently, the Court finds that the jurisdiction of the Court in respect of the Claimant's cause of action cannot be founded upon the Employment and Labour Relations Court Act.

25. Under the Employment Act, 2007, section 87 clothes the Court with jurisdiction in the following language

87. Complaint and jurisdiction in cases of dispute between employers and employees

(1) Subject to the provisions of this Act whenever –

(a) an employer or employee neglects or refuses to fulfil a contract of service; or

(b) any question, difference or dispute arises as to the rights or liabilities of either party; or

(c) touching any misconduct, neglect or ill treatment of either party or any injury to the person or property of either party, under a contract of service, the aggrieved party may complain to the labour officer or lodge a complaint or suit in the Employment and Labour Relations Court.

2. No court other than the Employment and Labour Relations Court shall determine any complaint or suit referred to in subsection (1).

3. This section shall not apply in a suit where the dispute over a contract of service or any other matter referred to in subsection (1) is similar or secondary to the main issue in dispute.

26. The relationship between the Claimant and the Respondent was not founded upon a *contract of service* nor was it anchored on a dispute arising under a *contract of service*.

27. The mere fact that reference was made to the payment of a management and/or signing fee, did not in the view of the Court, convert the relationship between the Claimant and Respondent into a *contract of service* as contemplated in the statutes adverted to above.

28. In any case, the Claimant did not suggest that it acted as a sports manager of the coaches, or played any role in their daily coaching responsibilities. It only acted as an agent for purposes of negotiating their recruitment.

29. The Claimant also made an argument that the International Labour Organisation had recognised non-standard forms of employment and argued that the relationship between the Claimant, the Respondent and the coaches constituted a *multi-party employment relationship*.

30. This Court agrees that there exist non-standard forms of employment but is unable to agree that the *service contracts* between the Respondent and coaches amounted to a *multi-party employment relationship*. The *service contracts* did not make any reference to any rights or obligations placed upon the Claimant.

31. All that the Claimant and Respondent agreed to was for payment of *management fees*, as a percentage of the salaries of the coaches.

32. The Claimant's cause of action was founded upon the contract for payment of management fees between it and the Respondent and not the *service contracts* between the Respondent and the coaches.

33. In line with the decision of the Court of Appeal in *National Bank of Kenya Ltd v Leonard Gethoi Kamweti* (2019) eKLR, the Court finds that it has no jurisdiction over the dispute herein.

34. From the foregoing and following a long chain of authorities, the Court has only one option, down its pen.

ORDERS

35. The Court of Appeal has in the recent past reached inconsistent positions on the appropriate order a Court finding itself without jurisdiction should make.

36. In *Phoenix E.A. Assurance Company Ltd v S.M. Thiga t/a Newspaper Service* (2019) eKLR the Court of Appeal was of the view that

It is clear from the foregoing that the Claim by the Respondent was filed before a Court devoid of jurisdiction. The suit was a nullity ab initio and was not transferable to another Court; jurisdiction cannot be conferred by consent and ultimately, all orders emanating from that suit are null and void...

37. However, in *Daniel N Mugendi v Kenyatta University & 3 Ors* (2013) eKLR, the Court of Appeal stated that

..... in endeavouring to meet the ends of justice untrammelled by procedural technicalities, we set aside the order striking out the appellant's petition and direct that the High Court do transfer it to the Industrial Court which also has jurisdiction and authority to consider the claims of breach of fundamental rights as pertain to industrial and labour relations matters. It is only meet and proper that the Industrial Court do exclusively entertain those matters in that context and with regard to **Article 165(5)(b)**. And in order to do justice, in the event where the High Court, the Industrial Court or the Environment & Land Court comes across a matter that ought to be litigated in any of the other courts, it should be prudent to have the matter transferred to that court for hearing and determination.

38. The order that commends itself to this Court is to order that the Cause herein be transferred to the High Court for further proceedings.

39. Costs in the cause.

Delivered through Microsoft teams, dated and signed in Nairobi on this 29th day of October 2020.

Radido Stephen

Judge

Appearances

For Claimant Menezes & Partners Advocates

For Respondent Orare & Co. Advocates

Court Assistant Lindsey/Judy Maina