



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. E446 OF 2020**

*(Before Hon. Lady Justice Maureen Onyango)*

**MANPOWER NETWORKS LIMITED .....CLAIMANT**

*VERSUS*

**WRIGLEY COMPANY (EAST AFRICA) LIMITED .....1<sup>ST</sup> RESPONDENT**

**THE WRIGLEY COMPANY (EAST AFRICA) LIMITED .....2<sup>ND</sup> RESPONDENT**

**MARS WRIGLEY CONFECTIONERY KENYA LIMITED ....3<sup>RD</sup> RESPONDENT**

**AND**

**RICHARD MUTISYA MAITHYA .....1<sup>ST</sup> INTERESTED PARTY**

**KURINE MILIMO..... 2<sup>ND</sup> INTERESTED PARTY**

**DANIEL LUMUMBA .....3<sup>RD</sup> INTERESTED PARTY**

**SYLVIA AURAH .....4<sup>TH</sup> INTERESTED PARTY**

**PAUL OKOTH .....5<sup>TH</sup> INTERESTED PARTY**

**WANJIRU MARIGI .....6<sup>TH</sup> INTERESTED PARTY**

**ABEL BERA .....7<sup>TH</sup> INTERESTED PARTY**

**SUSAN MUTUNGA .....8<sup>TH</sup> INTERESTED PARTY**

**HARON CHARLES..... 9<sup>TH</sup> INTERESTED PARTY**

**DAVID OMBATI .....10<sup>TH</sup> INTERESTED PARTY**

**JELIDAH AMUNABI .....11<sup>TH</sup> INTERESTED PARTY**

**NICODEMUS KABWERE .....12<sup>TH</sup> INTERESTED PARTY**

**ERIC MUTISYA .....13<sup>TH</sup> INTERESTED PARTY**

**BERNARD MUTUKU .....14<sup>TH</sup> INTERESTED PARTY**

**RICHARD NDUBA .....15<sup>TH</sup> INTERESTED PARTY**

EDWIN ONSANGO .....	16 <sup>TH</sup> INTERESTED PARTY
WILFRED MARI GA.....	17 <sup>TH</sup> INTERESTED PARTY
DANIEL MUHATI .....	18 <sup>TH</sup> INTERESTED PARTY
JOHN SITIENEI .....	19 <sup>TH</sup> INTERESTED PARTY
DANIEL MIDEGA .....	20 <sup>TH</sup> INTERESTED PARTY
SOLOMON LAV ASA .....	21 <sup>ST</sup> INTERESTED PARTY
DANIEL MAKHOKHA .....	22 <sup>ND</sup> INTERESTED PARTY
MICHAEL MUINDE .....	23 <sup>RD</sup> INTERESTED PARTY
PETER KIMANI .....	24 <sup>TH</sup> INTERESTED PARTY
BERNARD INDUSWE .....	25 <sup>TH</sup> INTERESTED PARTY
CAROLINE NJOKI.....	26 <sup>TH</sup> INTERESTED PARTY
SAMWEL MWANGI .....	27 <sup>TH</sup> INTERESTED PARTY
EUGENE OMONDI .....	28 <sup>TH</sup> INTERESTED PARTY
MELODY AN DESO .....	29 <sup>TH</sup> INTERESTED PARTY

#### **RULING**

The claimant is a limited liability company registered and carrying on business in Kenya. The Respondents are also limited liability companies registered in Kenya. The claimant and Respondents entered into a contract under which the claimant was to supply labour to the Respondent under a labour outsourcing contract.

The Interested Parties are employees of the claimant who were outsourced to the Respondent.

In the Memorandum of Claim filed herein dated 25<sup>th</sup> August and filed on 28<sup>th</sup> August 2020, the claimant avers that it entered into a contract with the respondent for provision of services at its Industrial Area Factory for a period of one year commencing 1<sup>st</sup> January 2015. That the contract was thereafter extended severally with the last addendum being dated 19<sup>th</sup> July 2020.

The claimant avers that there exists another agreement where the Claimant provides services to the Respondents at its Mavoko factory in Athi River and which contract has never been reduced to writing. That the Claimant's personnel engaged by the Respondent have always reported for work at the Respondent's factory in Mavoko since January 2018 to date.

The claimant avers that the Respondents exited from its Industrial Area factory without giving any notice to the Claimant. That on or about 12<sup>th</sup> August 2020 the respondent made known to the Claimant its intention to terminate the contract on 31<sup>st</sup> August 2020.

It avers that the contract between the parties provides for three months' notice of termination.

The claimant seeks the following reliefs in the claim –

- (a) *An injunction restraining the Claimant from terminating the contract.*
- (b) *Damages for breach of contract.*
- (c) *A declaration that the purported termination of contract amounts to unlawful termination of the personnel engaged at the Respondent's factories.*
- (d) *Damages for unlawful and illegal termination of employment.*
- (e) *Payment of terminal dues of all the personnel engaged at the Respondent's factories.*

(f) In the alternative to prayer a) an order of attachment of the monies held in the Respondent's account with Citi Bank to the extent of Kshs.7,010,860.63/= and costs of these proceedings estimated at Kenya Shillings Five Hundred and Fifty Thousand (Kshs.550,000/=) Totaling to Kenya Shillings Seven Million Five Hundred and Sixty Thousand Eight Hundred and Sixty and Sixty Three Cents (Kshs.7,560.860.63/=).

(g) Kshs.7,010,860.63/= being the amount outstanding and due to the Claimant from the Respondent.

(h) Cost of this suit.

(i) Interest on (f) and (g) above.

(j) Any other relief the Court may deem just to grant.

By a notice of preliminary objection dated 31<sup>st</sup> August 2020, the Respondent raises the following grounds of objection –

1. The Court has no jurisdiction to entertain the alleged dispute as the same is not one of the nature of disputes listed at Section 12(1) of the Employment and Labour Relations Court Act No. 20 of 2011.
2. The dispute is of a commercial nature.
3. A court of law cannot rewrite a contract for the parties or order the parties to maintain a contract beyond the period the parties had agreed to.
4. The prayers sought in the Notice of Motion are at variance with what is prayed for in the Memorandum of Claim.

The preliminary objection was disposed of by way of written submissions.

#### **Respondent's Submissions**

The Respondent submits that this court has no jurisdiction to entertain the suit filed by the claimant as it is not one in the nature of disputes listed in Section 12(1) of the Employment and Labour Relations Court Act. It submits that in the case of **Mukisa Biscuits Co. v West End Distributors (1969) EA. 696** Law J.A. defined a " Preliminary Objection" in the following terms:

*"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, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration"*

The Respondent submitted that having questioned the jurisdiction of the Court such an objection needs to be determined first before the court engages in any further deliberations on other matters raised in the Memorandum of Claim.

The Respondent submits that the Court derives its jurisdiction from Section 12 of the Employment and Labour Relations Act with specific reference for the purposes of the present preliminary objection, to subsections (1) and (2) thereof which state as follows:

#### **"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' organization and a trade union's organization;**

**(d) disputes between trade unions;**

**(e) disputes between employer 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 employer's 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 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 organization, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose."**

It is the Respondent's submission that the Contract is not of the nature of "**contract of service**" within the definition assigned to that term under the Employment Act 2007 which is:

***"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..."***

That indeed according to the Contract the Claimant agreed to provide the Respondent with "*services*" as specified in Schedule 1 of the contract document as opposed to serving as an employee of the Respondent. That the Claimant cannot qualify to be an "**employee**" under the Employment Act a term which is understood to mean:

***"a person employed for wages or salary..."***

That Clause 6.1 provided that the Claimant was to be paid a fee for the services rendered.

That the distinction between a contract of service and contract for services is critical as observed in **Halsbury's Laws of England Fourth Edition paragraph 501** thereof where it is stated:

*"The law of employment does not apply to all contracts under which one person agrees to work or provide services for another. The law distinguishes between a contract of service and a contract for services, and correlatively, between an employee and an independent contractor. There is no generally used term for a person who enters into a contract with an independent contractor. The distinction between an employee and an independent contractor is particularly important in terms of the relationship which each enjoys with the employer and of the liability of the employer to third parties,"*

That given the provisions in the Contract and the services which were to be provided by the Claimant, the Claimant was not an employee but was an independent contractor. The dispute between the Respondent and the Claimant is not therefore a dispute relating to or arising out of employment between an employer and employee. That this is not a dispute between an employer and a trade union nor any other type of disputes listed under Section 12 of the Employment and Labour Relations Court Act.

That as per the Contract the Claimant having not been an employee of the Respondent within the definition of that term under Section 2 of the Employment and Labour Relations Court Act 2011 and also Section 2 of the Employment Act 2007, the Claimant has no capacity to institute a suit in the court as provided by Section 12(2) of the Employment and Labour Relations Act 2011. That any attempt by the Court to entertain the suit before it will be ultra-vires the express provisions of the Law.

The respondent cited the case of **Elijah Moranga v John Leinsly Irene Onderi (2014) eKLR** where Radido J. distinguished an independent contractor from an employee by observing 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 hallmarks of a true independent contractor are that the contractor will be a registered taxpayer, 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 PAYE (tax on income), will not get annual leave, sick leave, 13<sup>th</sup> Cheque and so on.*

*13. Prom the way the Claim has been pleaded and documents attached, there is no doubt that the Claimant was expected to perform certain specified tasks (construction of a building) and was not obliged to perform the work himself but through the labour of others. He was an independent contractor."*

That under Clause 6.1 of the Contract the Respondent was to pay the Claimant fees as opposed to wages as would be the case with employees. Any amount of fees alleged to be outstanding as has been pleaded by the Claimant can therefore only be recoverable as a commercial debt. But the court has no jurisdiction to entertain disputes of a commercial nature between contracting parties.

That in an attempt to bring the suit within the ambit of the court's jurisdiction, the Claimant has enjoined as Interested Parties persons whom it claims to be its employees whom it engaged to provide the necessary services to the Respondent. That ironically at paragraph 3 of the Memorandum of Claim the Claimant describes the interested parties as "*Respondent's employees outsourced from the Claimant/Applicant vide the contract of provision of service*". That the contract itself is categorical that the so called interested parties are employees of the Claimant.

It is submitted that Interested Parties in a dispute are not protagonists in the dispute so as to be considered as persons against whom or in favour of whom a decision of the court can be made. That other than being interested in the suit because a decision arrived at by the court can indirectly affect them one way or another, they have no capacity to execute the court's decision. That the Claimant cannot therefore rely on the fact that it paid its employees with proceeds of the fees paid to it under the Contract it has with the Respondent in order to justify its contention that the dispute between the Claimant and the Respondent over the payment of such fees is an employment dispute. That it is not

even clear whether the Interested Parties were served with summons and pleadings in this case.

The Respondent submits that it raised the issue of jurisdiction vide its Notice of Preliminary Objection dated 31<sup>st</sup> August 2020 and repeated it by way of pleading at paragraph 22 of the Statement of Response filed under protest and dated the same date. On its part the court repeated its concern over the issue of jurisdiction in the order issued on 31<sup>st</sup> August 2020. That the Claimant has not taken cue of these concerns and has insisted on continuing with the prosecution of the case. It is the Respondent's submission that this is an ideal case which qualifies to be struck out as being an abuse of the process of the court.

The Respondent prays that the entire suit be struck out and the costs be awarded to the Respondent.

### **Claimant's Submissions**

The claimant submits that the claim against the Respondents is for the unlawful termination of the contract for service between the Claimant and the Respondents and therefore, by extension, an unlawful termination of the employment contracts of the 29 Interested Parties. This is because the contract secured the livelihoods of the 29 Interested Parties who worked and reported at the Respondents premises for almost (5) Five years.

That it was a term of the contract for service between the Claimant and the Respondents that either party was required to provide a notice of 3 months before terminating the contract.

The Claimant submits that the core of the agreement between it and the Respondent was for provision of human resource to the Respondent's factory situated within Industrial Area and subsequently raising of invoices for settlement by the latter. The Claimant stated that on or about 12<sup>th</sup> August 2020, the 1<sup>st</sup> Respondent communicated its intention to terminate the contract on 31<sup>st</sup> August 2020 ignoring the requirement for 3 months' notice prior to termination as per clause 10.3 of the contract.

It is the Claimant's submission that the Respondents' unlawful termination of the contract without proper notice causes the unlawful and wrongful termination of the 29 Interested Parties. This is due to the fact that the Interested Parties were seconded to the Respondents premises to offer services as set out in clause 5.18 of the contract.

That the 29 Interested Parties therefore had a legitimate expectation that their employment would be secured for the duration of the contract. That the Respondent's breach of the contractual terms by pre-maturely terminating it will significantly affect the livelihoods of the 29 Interested Parties. That the immediate effect of termination of the contact between the Claimant and the Respondent is that the employment of the interested parties will be subsequently terminated.

That the contract for service between the parties was fundamentally hinged upon the availability and provision of the 29 Interested Parties as a human resource to the Respondent. That the crux of the agreement and the nature of this claim is therefore significantly centred on employment issues.

That this Court has jurisdiction to determine this matter. It urges the court to be guided by the decision of the Employment and Labour Relations Court sitting at Mombasa in the case of **Bernard Barongo Amwoma & 116 others v Orbit Chemicals Limited & another 120191 eKLR**, where it was held that;

*"The determination therefore whether there is privity of contract as between the Claimants and the 1<sup>st</sup> Respondent on the one part, and/or between the Claimants and the 2<sup>nd</sup> Respondent within the context of the statutory definition of an employer is an issue best left for a hearing on the merits where all the facts and law will be placed before the Court."*

That this is an employment-related dispute which falls within the purview of Section 12(1) of the Employment and Labour Relations Court Act.

That jurisdiction is everything, as established in **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR**. That it was further held by the Supreme Court in Samuel **Kamau Macharia & Another v KCB & 2 Others, S.C. Civil Application No. 2 of 2011** that;

*"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."*

It is the Claimant's submission that this court's jurisdiction is premised on the provisions of Article 162(2) of the Constitution of Kenya, 2010 as well as Section 12(1) of the Employment and Labour Relations Court Act No. 20 of 2011. Article 162(2) of the Constitution of Kenya, 2010 calls for the establishment of a special court at the level of the High Court with specific powers to deal with issues of Employment and Labour Relations. Following which provision, this court was formed and governed by the Employment and Labour Relations Act.

That Section 12(1) of the Act pronounces this court's jurisdiction by declaring that it has exclusive original and appellate jurisdiction to hear and determine disputes over employment and labour relations. That these sentiments were echoed in **Kenya Plantation & Agricultural Workers Union v Kenya Tea Growers Association [KTGA] (2016) eKLR**.

That there is an implied employment relationship between the Respondent and the Interested Parties and that the same is wholly dependent

on the contract between the Claimant and the Respondent.

The Claimant submits that the effect of the Respondents' actions will impact the employment of the Interested Parties. It is also the Claimant's submission that in light of the analysis of the issue presented above, this suit is properly before this court and that this court has the jurisdiction to hear and determine this matter.

The Claimant submits that it has proved the existence of an employment issue. That in the event that this court finds in favour of the Respondent/Applicant, the Claimant prays that the matter be transferred to the relevant court.

### **Determination**

This court derives its jurisdiction from Article 162(2) of the Constitution and Section 12(1) of the Employment and Labour Relations Court Act which provide as follows –

#### **Article 162.(2)**

**Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—**

- (a) employment and labour relations; and**
- (b) the environment and the use and occupation of, and title to, land.**

#### **Section 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.**

The claim herein does not fit into the definition of the nature of disputes set out under either Article 162 of the Constitution or Section 12(1) of the Employment and Labour Relations Court Act.

The Employment Act further defines the terms employer, employee and employment contract as follows –

***“employee”* means a person employed for wages or a salary and includes an apprentice and indentured learner;**

***“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;**

***“contract of service”* means 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;**

The contract between the claimant and the Respondents, as agreed by the parties, was one for provision of services. No employment relationship exists between the claimant and the Respondents. The relationship between them is one of provision of services. As submitted by the Respondent, **Halsbury's Laws of England Fourth Edition paragraph 501** distinguishes a contract of service from a contract for service as follows –

*"The law of employment does not apply to all contracts under which one person agrees to work or provide services for another. The law distinguishes between a contract of service and a contract for services, and correlatively, between an employee and an independent contractor. There is no generally used term for a person who enters into a contract with an independent contractor. The distinction between an employee and an independent contractor is particularly important in terms of the relationship which each enjoys with the employer and of the liability of the employer to third parties."*

The claimant has submitted that because the contract between it and the Respondents was for provision of human resource to the Respondent's factory, there is an implied employment relationship between the Respondent and the Interested Parties which is dependent on the contract between the claimant and the Respondents. I do not agree. The contract between the claimant and the Respondents is in writing and sets out the nature of the relationship between the parties. None of the Interested Parties is named in the contract. Specifically, paragraphs A, B, C, D and E at the introduction section of the contract provides –

*A. The Contractor is engaged in the business of provision of outsourced labour services to persons who have no intention of directly employing workers to perform certain functions.*

*B. The Contractor has in its sole and absolute employment persons it uses in the course of the provision of such functions and services to persons who contract to receive the Contractor's services.*

*C. The Contractor holds a valid operating license and has complied with all the statutory and regulatory requirements relevant for the carrying out of the Contractor's business and trade.*

*D. The Contractor is of good repute, sound financial standing and professional competence relevant, to the Contractor's trade and further the Contractor has a competent management team to supervise the Contractor's employees in the course, of the provision of such services to its clients.*

*E. The Contractor has offered to provide and the Company has agreed to be provided with outsourced labour services at the Company's factory' situated within Industrial Area of Nairobi.*

An employment contract cannot be presumed between an employer and an unnamed and undefined employee. The format of the contract of employment between the claimant and the Interested Parties is set out at Schedule 2 to the contract between the claimant and the Respondent and names the claimants as the employer while the 1<sup>st</sup> Respondent referred to as the "client".

The case of **Bernard Borongo Amwoma and 116 Others v Orbit Chemicals Limited and Another (2019) eKLR** is distinguishable from the instant claim as in the said claim it is the employees (equivalent of the Interested Parties herein) who filed suit. The court therefore had to determine who the employer of the claimants was as between the two respondents. The court rightfully determined that the issue was for determination at the hearing.

In the instant suit it is clear from evidence adduced by the claimant that it was the employer of the Interested Parties and the Respondents were merely consumers of the services offered by the claimant.

A court's jurisdiction flows from either the Constitution or legislation, as was held by the Supreme Court in **Samuel Kamau Macharia and Another v Kenya Commercial Bank Limited and 2 others (supra)**. Having found that neither the Constitution nor the Employment and Labour Relations Court Act confers jurisdiction on this court to hear the issues arising from the suit herein, this court must down its tools and decline to hear the matter.

**The preliminary objection therefore succeeds to the extent that this court has no jurisdiction to hear and determine the suit herein.**

**Does that mean that the court should dismiss the suit?**

I think not. Under Article 159 of the Constitution the court must imbue substantive justice over form. The fact that this 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.

**For the foregoing reasons, this suit is transferred to the High Court for hearing in the Civil Division.**

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19<sup>TH</sup> DAY OF NOVEMBER 2020**

**MAUREEN ONYANGO**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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.

**MAUREEN ONYANGO**

**JUDGE**