REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 752 OF 2019

(Before Hon. Lady Justice Maureen Onyango)

KOLLENGODE VENKATACHALA LAKSMINARAYAN.....CLAIMANT

VERSUS

INTEX CONSTRUCTION LIMITED.....RESPONDENT

JUDGMENT

The Claimant filed a Memorandum of Claim on 7th November, 2019 alleging that the termination of his employment was unlawful and mischievous as it was calculated to deny him full dues upon completion of his Consultancy Agreement. He seeks the following prayers:

a) A declaration that the actions of the Respondent amounted to unfair dismissal.

b) A valid Kenya Revenue Authority withholding certificate over the contractual consultancy period of January 2017 to December 2017.

c) Evidence of remittance towards the Claimant's NHIF and NSSF contributions over the consultancy period of January 2017 to December 2017.

d) Kenya Shillings One Million Two Hundred and Sixty Thousand Only (Kshs.1,890,000) for three months' salary for the balance of the consultancy period of December 2017, January 2018 and February 2018.

e) Kenya Shillings Six Hundred Thousand and Thirty Only (Kshs.630,000) being one month's fees for the 12th month while the Claimant is on holiday.

f) Kenya Shillings Five Hundred and Sixty Thousand Only (Kshs.560,000) being reimbursement for medical expenses incurred at M.P. Shah Hospital by the Claimant.

g) Kenya Shillings Three Hundred and Twelve Thousand (Kshs.312,000) for transport expenses for the 12 months worked computed at Kshs.1,000 per day.

h) Kenya Shillings Sixty Thousand Only (Kshs.60,000) for airtime expenses computed at Ksh.5,000 per month.

i) The Respondent do issue the Claimant with a certificate of service.

j) Costs of the suit.

Claimant's Case

The Claimant avers that the Consultancy Agreement was separate and distinct from the Respondent's policy having been negotiated and mutually entered into. He avers that the Respondent failed, ignored and declined to comply with the Consultancy Agreement in respect of the medical insurance, transport and airtime expenditure and other fringe benefits. He further avers that the Respondent failed to remit tax obligations including PAYE, NSSF and NHIF contributions. He further avers that the Respondent did not comply with section 35 and 36 of the Employment Act as it did not issue him with a valid termination notice as well as payment in lieu of notice.

It is his contention that his termination amounted to unlawful termination under the Employment Act and infringed on his fundamental rights as provided for in the Constitution of Kenya and the International Labour Convention (ILO) Convention No. 158. He further contends that he was not accorded an opportunity to be heard which is contrary to Section 41 of the Employment Act, Articles 28, 36, 39, 41, 47 and 50 of the Constitution.

Respondent's Case

The Respondent filed its Response to the Memorandum of Claim on 4th December, 2019. It avers that the termination of the consultancy agreement was lawful because Clause 7 of the Consultancy Agreement gave either party liberty to terminate the contract upon giving 2 months' notice.

It avers that by virtue that the consultancy agreement was separate and distinct, the Claimant is not entitled to the prayers sought in the Claim. It contends that it paid the Claimant all outstanding dues owed to him which he acknowledged by voluntarily signing a voucher wherein he confirmed receipt of all outstanding dues owed to him.

It contends that the averment that the Claimant was not afforded a hearing is misconceived. It further avers that Clause 5 (5) of the Consultancy Agreement provided that the medical insurance would be provided as per the company policy which dictated that outpatient medical cover would be provided as and when it was required.

It submitted that it was not liable to deduct and/or remit PAYE, NSSF and NHIF contributions since the Claimant was not an employee but a consultant. It avers that it was only obliged to apply withholding tax to the Claimant's income which was duly applied. The respondent denied owing the claimant any amount.

By consent of the parties, the claim proceeded by way of written submissions with each party filing its respective submissions.

Claimant's submissions

The Claimant submitted that he was wrongfully, unfairly and unlawfully terminated as the Respondent failed to prove any or all of the requirements under Section 45 of the Employment Act. He submitted that under Section 43 of the Act, it is unprocedural to fail to issue reasons for dismissal. He argued that the Consultancy Agreement did not grant the respondent the carte blanche to terminate the Agreement in violation of the Employment Act.

He submitted that he was made to believe that his contract would run to its completion and the termination means that the Respondent entered into the agreement in bad faith. He submitted that in **Cannock Chae District Council v Kelly [1978] 1 ALL ER 152** the Court held that faith or lack of good faith meant dishonesty.

He further relied on the case of **Kiti Soso v Insight Management Consultants [2016] eKLR** that an employee cannot be dismissed at will and the employer has to justify the grounds and prove the reason for termination.

He submitted that discharge and settlement voucher cannot override statutory provisions. He submitted that the Respondent having remitted and requisitioned a withholding certificate 12 months' after his termination demonstrates the Respondent's malice. He submitted that he is entitled to the reliefs sought.

Respondent's Submissions

The Respondent submitted that it did not have an employment relationship with the Claimant because they entered into a consultancy agreement. It submitted that the essential characteristics that distinguish an employee from an independent contractor are autonomy and control, which together might be described as *"subordination"*.

It submitted that in **Kenneth Kimani Mburu & another v Kibe Muigai Holdings Limited [2014] eKLR**, the Court set out the criteria for determining if a worker is an employee or a consultant. It submitted that the Claimant was paid a fee and not a salary and that withholding tax was exacted as opposed to PAYE tax. It submitted that the Claimant's duties which were limited to formulating, developing, overseeing and implementing policies and procedures, were peripheral to its business.

It argued that the nature of engagement being consultancy, the requirements for substantive and procedural fairness under Sections 35, 40, 41 and 45 of the Employment Act are not applicable. It submitted that the Claimant is not entitled to reliefs sought as he was a consultant. It further submitted that it produced a valid KRA withholding tax certificate for the consultancy period of January 2017 to December 2017. It urged the Court to dismiss the suit as it is unfounded in law.

Determination

The issues for determination are:

a) Whether the Claimant was an employee or a consultant of the Respondent.

Depending on the outcome in (a) above:

b) Whether the Claimant was unfairly terminated.

c) Whether the Claimant is entitled to the reliefs sought.

Whether the Claimant was an employee or a consultant

The Claimant was engaged by the Respondent pursuant to a Consultancy Agreement entered into on 20th January, 2017 which provided that the Claimant was expected to offer services to his client, the Respondent. The Claimant acknowledges that he commenced his employment as a consultant but his claim disputes his termination. The Respondent submitted that there is no employment relationship between the parties on account of the consultancy agreement thus the claim should fail.

The Respondent submitted that the Claimant being a consultant he was an independent contractor and not an employee. Section 2 of the Employment Act defines an employee and a contract of service as:

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

In the case of Kenneth Kimani Mburu cited by the Respondent, the court agreed with the decision of Kimondo J. in **Everret Aviation Limited v Kenya Revenue Authority (Through The Commissioner of Domestic Taxes) [2013] eKLR** where it was held:

> *"There are also various tests to be employed when there is doubt whether a person is an employee. One of those tests is whether the person's duties are an integral part of the employer's business. See* ***Beloff vs Preddram Limited [1973] ALL ER 241****. The greater the direct control of the employee by the employer, the stronger the ground for holding it to be a contract of service. See* ***Simmons Vs Heath Laudry Company [1910] 1 KB 543, O' Kelly Vs Trusthouse Forte [1983] 3 ALL ER 456.*** *That test is however not conclusive. The passage cited by the appellant in* ***Halsbury's Laws of England Vol I 26, 4th edition paragraph 3*** *is instructive*
>
> > *"There is no single test for determining whether a person is an employee, the test that used to be considered sufficient, that is to say the control test, can no longer be considered sufficient, especially in the case of the employment of highly skilled individuals, and is now only one of the particular factors which may assist a court or tribunal in deciding the point. The question whether the person was integrated into the enterprise or remained apart from and independent of it has been suggested as an appropriate test, but is likewise only one of the relevant factors, for the modern approach is to balance all of those factors in deciding on the overall classification of the individual. The factors relevant in a particular case may include, in addition to control and integration: 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. In some cases the nature of the work itself may be an important consideration."*

Applying the tests above in the instant case, the claimant was employed as a Group Financial Controller/Consultant. The work of Group Financial Controller cannot be termed not integral part of the Respondent's business. His duties are specified in an addendum to the contract. His duties included –

> *"**Scope of Services***
>
> *1. Formulating sound financial policies, procedures and systems to ensure effective control and accountability.*
>
> *2. Responsible for the accounting policies and procedures*
>
> *3. Assess organizational performance against both the annual budget and company's long term strategy*
>
> *4. Develop tools and systems to provide critical financial and operational information to the Managing Director and make*
>
> *actionable recommendations on both strategy and operations*
>
> *5. Strategic Financial Planning and costs management in alignment with the Company's strategic plan especially as the organization considers potential expansion plans and partnerships.*
>
> *6. Overseeing the IT department. Creation of business processes and documentation.*
>
> *7. Implementation of technology across all departments of the company.*
>
> *8. Any other roles and duties assigned by the Managing Director."*

Further the contract provided for leave at Clause 5(a) where the 12th month would be paid for while the claimant was on holiday. It provides –

> *"The client agrees to pay the consultant a fee of Kshs.525,000/- per month after deduction of withholding tax on the 25th of every month for a period of 3 months and later increase to Kshs.600,000/- subject to meeting performance and the total consultancy period will be for 12 months with one month fees (26 days) for the 12th month while the consultant is on holiday."*

The fact that the Respondent paid withholding tax as opposed to PAYE alone does not automatically make the Claimant an independent Contractor. Neither does the fact that at Clause 8 of the contract it is provided –

> *"The parties agree that this agreement creates an independent contractor relationship, not an employment relationship. Neither party is, nor shall claim to be, a legal agent, representative, partner or employee of the other, and neither shall have the right or authority to contract in the name of the other, nor shall the right or authority to contract in the name of the other, nor shall it assume or create any obligations, debts, accounts or liabilities for the other."*

The contract further provided for the number of hours at Clause 6 as follows –

> *"Timings; 8.30 am to 5. pm Monday to Friday 8.30 am to 1 pm Saturdays Sundays holiday."*

It provided an office within the Respondent's premises, provided for payment of accommodation and transport while on official duty and for airtime with a cap of Kshs.5,000 per month.

Further, the contract provided for medical cover for the claimant and his wife *"as per company policy"* and for notice of termination of 2 months. All these are characteristics of an employment contract and not a contract with an independent contractor.

For the foregoing reasons, I find that there was an employment contract between the claimant and the Respondent.

The foregoing notwithstanding the Claimant cannot disassociate himself from or disown a contract he consciously and willingly entered into by aligning himself with the statutory provisions in the Employment Act. He cannot decide to pick clauses of the contract that should bind him and go out of the contract where in his view the contract was not favourable to him. If he wants to plead illegality, then the contract should be looked at as a whole and not piecemeal. I find that the contract although having clauses that offend the statutory provisions, is binding on the claimant having signed it. For this reason, he cannot use the contract and then make claims outside the contract. He cannot approbate and reprobate at the same time.

I thus find as follows in respect of the specific prayers of the claimant –

> **a) A declaration that the actions of the Respondent amounted to unfair dismissal**

I find no evidence of unfair dismissal, the termination of the contract having been in accordance with the contract signed by the parties which did not make reference to the provisions of the Employment Act with respect to termination thereof.

> **b) A valid Kenya Revenue Authority withholding certificate over the contractual consultancy period of January 2017 to December 2017**

The Respondent having deducted withholding tax from the remuneration of the claimant, he is entitled to a certificate as prayed. The Respondent is directed to issue the same to the claimant.

> **c) Evidence of remittance towards the Claimant's NHIF and NSSF contributions over the consultancy period of January 2017 to December 2017**

The Claimant is aware that his contract did not provide for remittance of either NSSF or NHIF and did not at any time require the Respondent to make the deductions from his remuneration for such payments. The claim thus fails and is dismissed.

> **d) Kenya Shillings One Million Two Hundred and Sixty Thousand Only (Kshs.1,890,000) for three months' salary for the balance of the consultancy period of December 2017, January 2018 and February 2018**

There was no provision in the contract signed by the parties for such payment. The claim fails.

> **e) Kenya Shillings Six Hundred Thousand and Thirty Only (Kshs.630,000) being one month's fees for the 12th month while the Claimant is on holiday**

The claimant is entitled to the prorated holiday pay equivalent to the period of the contract served. **I award him Kshs.472,500/- in respect of the 9 months served.**

> **f) Kenya Shillings Five Hundred and Sixty Thousand Only (Kshs.560,000) being reimbursement for medical expenses incurred at M. P. Shah Hospital by the Claimant**

The claimant did not produce a copy of the company policy on medical insurance to enable the court determine whether or not this claim is covered thereunder. I find the claim not proved and dismiss it.

g) Kenya Shillings Three Hundred and Twelve Thousand (Kshs.312,000) for transport expenses for the 12 months worked computed at Kshs.1,000 per day

The claim is not contained in the contract and is dismissed.

h) Kenya Shillings Sixty Thousand Only (Kshs.60,000) for airtime expenses computed at Ksh.5,000 per month

The prayer has not been proved and is dismissed.

i) The Respondent do issue the Claimant with a certificate of service

The claimant is entitled to Certificate of Service.

j) Costs of the suit

The claimant is awarded 50% of taxed costs in view of his partial success in the claim. Interest shall accrue on decretal sum at court rates from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6TH 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 15th March 2020 and subsequent directions of 21st 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, the 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 the 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