



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**

**CAUSE NO. 292 OF 2018**

*(Before Hon. Lady Justice Maureen Onyango)*

**IBRAHIM ULALO.....CLAIMANT**

**VERSUS**

**NATION MEDIA GROUP.....RESPONDENT**

**RULING**

The Preliminary Objection before the Court is dated 27<sup>th</sup> March, 2018, filed by the Respondent based on the grounds that:

1. That this Court lacks jurisdiction to hear and determine the issues raised in this Claim as there was no employment relationship that existed between the Claimant and the Respondent.
2. That accordingly the Claim filed herein is incompetent, misconceived and bad in law.

**Respondent’s Submissions**

On 12<sup>th</sup> March 2018, the Claimant filed a Memorandum of Claim alleging that he was employed by the respondent as a Freelance Sales Executive from the year 2010 up to 27<sup>th</sup> July, 2017. The Claimant did not attach any contract of employment to support his claim but the Respondent attached a letter dated 24<sup>th</sup> March, 2010 which letter contained the terms and conditions of the Claimant’s employment with the Respondent. The Claimant signed the said letter on 26<sup>th</sup> March, 2010, confirming the terms set out therein.

The respondent submits that the Court lacks jurisdiction to hear and determine the matter for the reason that the Claimant and the Respondent were not in an employer – employee relationship as defined in section 2 of the Employment Act.

The provisions of the letter dated 24<sup>th</sup> March, 2010 expressly stipulated that the claimant was engaged by the Respondent as an independent contractor and not an employee. The clauses in question read as follows:

*You will work as an independent Contractor but will be entitled to access the premises of the Company for the purposes of performing your obligations. However such access shall be subject to the Company’s discretion and while you are in the premises, you will be required to comply with regulations, policies and directives applicable to all persons within the Company premises.*

*This is not a letter or offer for employment with the Nation Media Group Limited.*

*As an independent Contractor, you will not be entitled to an Office or Specific sitting space within the Company’s premises. However, the Company may in its discretion permit you to use its furniture, or a work station or a desk or its other office equipment solely for the purpose of your functions within the Company’s premises to be shared with other sales executives.*

The Respondent submits that contracts are sacrosanct and parties are bound by the terms of their contract. That the function of the Court is to enforce a contract as agreed by the parties and should not make additions by implying a term because it deems it would be reasonable to do so as was held in the case of *Liverpool City Council Vs Irwin (1977) A.C. 239*.

That in the absence of employer-employee relationship this Court lacks jurisdiction and as such the suit should be dismissed.

The respondent further relies on the following authorities –

**Everret Aviation Limited –v- Kenya Revenue Authority (2013) eKLR** which was endorsed by Ndolo J. in **Maurice Oduor Okech –V- Chequered Flag Limited (2013) eKLR** as follows;

*“.. In determining whether a relationship between parities is a contract for services between two independent parties or a contract of service giving rise to an employer/employee relationship, the traditional tests of control of the work by the employer and its integration into the employer’s care business are no longer conclusive. In my view, the fundamental behaviour of the parties such as the form of documentation evidencing the relationship and the mode of payment is critical.”*

Further, in the case of **James Heather – Hayes –V- African medical Research Foundation (AMREF) (2014) eKLR** Marete J. stated:

*“... It is not the duty of this court to redraw agreements by parities. The court can only come in to facilitate an interpretation and implementation of these contracts and no more.”*

The Claimant on the other hand submits that the Court has jurisdiction by virtue of section 12 of the Employment and Labour Relations Court Act and Article 162(2) of the Constitution of Kenya 2010. That the cause of action herein is between an employer and employee by virtue of an employment contract signed between the parties. That the issue of employment relationship between the parties is yet to be determined and this can only be done after hearing both parties on the issue and considering the evidence presented in Court.

The claimant further submits that the Preliminary Objection does not meet the threshold set out in **Mukisa Biscuits Manufacturing Company Vs. West End Distributors (1969) E.A 696 at page 700** wherein it was held:

*“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 off the suit. Examples are objection to the jurisdiction of the Court or a plea of limitation or submission that the parties are bound by the contract giving rise to the suit to refer to arbitration.”*

It is further submitted that the substance of all disputes should be investigated and decided on merits and errors, lapses should not necessarily debar a litigant from pursuing his rights unless the lack of adherence to the rules renders the process difficult and inoperative as was held in the case of **Banco Arabe Espanol Vs Bank of Uganda (1999) 2EA 22**.

That the preliminary objection is unmerited and the orders sought ought not to be granted. The Claimant prays for the same to be dismissed with costs.

## **Determination**

In the case of **Mukisa Biscuits Manufacturing Vs West End Distributors (1969) E.A.** Law, JA stated as follows:

*“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues. This improper practice should stop.”*

In the present application there is a contract between the parties which the claimant alleges is an employment contract while the respondent avers the contract engaged the claimant as an independent contractor and there is no employer-employee relationship, that this court therefore has no jurisdiction under Section 12 of the Employment and Labour Relations Court Act.

As was stated in the case of Mukisa Biscuits, a preliminary objection is suitable in a matter raising a pure point of law where the facts are not contested. It cannot be raised where any facts are to be ascertained.

Further, was stated in the case of **Maurice Oduor Okech –V-Chequered Flag Limited**, the traditional tests of control of work by the employer and its integration into the employer’s core business are no longer conclusive. The court has to determine which of the two parties has properly interpreted the terms of their relationship and make a determination whether or not there was indeed an employment relationship.

The contract between two parties where the nature of the relationship is contested is for the court to interpret. In the interpretation the court requires evidence of the nature of the relationship between the parties. An employment relationship can be a matter of presumption based on the facts of the case.

From the foregoing it is the opinion of the court that this is not a matter for determination as a preliminary issue and is for determination by the court after consideration of evidence adduced by the parities at the hearing.

For these reasons the preliminary objection fails and is accordingly dismissed with no orders as to costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22<sup>ND</sup> DAY OF FEBRUARY 2019**

**MAUREEN ONYANGO**

**JUDGE**