



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1000 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

DR. ZIPPORAH GATHUYA.....CLAIMANT

VERSUS

THE REGISTERED TRUSTEES OF GERTRUDE'S GARDEN

T/A GERTRUDE CHILDREN'S HOSPITAL.....RESPONDENT

RULING

The Respondent filed a Preliminary Objection on 5th February 2018 opposing the Claimant's Memorandum of Claim filed on 30th May 2017 on grounds that this Court lacks jurisdiction to entertain the Claimant's claim on the following reasons:

a) The Claimant was not an employee of the Respondent but a consultant engaged on a Service Contract Agreement dated 14th May 2007 and hence the claim does not fall within the ambit of the Employment and Labour Relations Court Act, 2014 which provides as follows:

(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.**

b) Article 162 (2) (c) of the Constitution provides that:

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

employment and labour relations

c) This Court lacks jurisdiction to hear and determine commercial matters pertaining to civil contract law which civil dispute falls within the ambit of the commercial courts. The right Court is the high Court or Chief Magistrates Commercial Court.

The Claimant filed an affidavit sworn on 20th April 2018 in response to the Preliminary Objection in which she states that the issues raised in the Preliminary Objection are not points of law and that the Service Contract attached to the Preliminary Objection cannot be admitted in evidence. She further states that she used the Respondent's equipment, was allocated work by the Respondent, was in charge of the anaesthesia department and for a period of time was placed on retainer for theatre services. She states that all patients paid their medical care costs to the Respondent which then would make payment to her after collecting its fees.

Respondent's Submissions

The Respondent submits that the facts averred under paragraph 3 of the Memorandum of Claim indicate that the claimant was engaged as a Consultant Paediatric Anaesthetist in 2007 and it is therefore clear that the Claimant was not an employee but a consultant under a Consultancy agreement. The Respondent further submitted that these facts are also confirmed under paragraph 2 of the Claimant's Witness Statement.

The Respondent submits that the terms of engagement between the Claimant and Respondent do not fall within the scope of the Employment laws and the reliefs sought under the nature of the engagement are not provided under Section 49 of the Employment Act.

The Respondent submits that this Court lacks jurisdiction to entertain the claim relying on both article 162(2)(c) of the Constitution and Section 12(1) of the Employment and Labour Relations Court Act. The Respondent submits that this Court lacks jurisdiction to hear and determine commercial matters. It relied on the case of **Starsky Limited v Five Forty Africa Limited & Don Smith, ELRC Cause 606 of 2016**.

Claimant's Submissions

The Claimant submits that the Preliminary objection falls outside the ambits of a proper preliminary objection as it raises and requires determination of issues of fact. The Claimant relies on the definition provided in the Court of Appeal decision in **Mukhisa Biscuit Manufacturing co. Ltd v West End Distributors (1969) EA**.

The Claimant submits that the service contract attached to the Preliminary Objection dated 1st February 2018 is evidence that the Claimant was offering consultancy services and was an employee and under the directions of the Respondent. The Claimant submits that she worked under the directions of the Respondent, worked under the timetable and facilities provided by the Respondent, was accorded practising privileges by the Respondent and was required to meet the minimum criteria of the Credentialing Committee.

The Claimant relies on Section 2 of the Employment Act and the decision in **Nick Githinji Ndichu v Clerk, Kiambu County Assembly & Another [2014] eKLR**. The Claimant further relies on the decision in **Maurice Oduor Okech v Chequered Flag Limited [2013] eKLR** where Ndolo J. held:

“In determining the existence of an employment relationship, the Court is expected to go beyond mere terminologies employed by the Parties either in their pleadings or in their testimony. The Court is called upon to inquire into the entire spectrum of facts and circumstances to establish whether an employer/employee relationship as defined in the Employment Act, 2007 actually exists.”

The claimant further relies on the decision in **Stanley Mungai Muchai v National Oil Corporation of Kenya [2012] eKLR** and submits that a question whether a contract of service exists is not a preliminary issue as it is a substantive issue of law and fact to be determined after hearing.

Determination

I have considered the pleadings and the submissions of the parties. What I gather is that the only reason the respondent avers that there was no employment relationship between it and the claimant is that her contract describes her as a consultant. No consideration has been made to the terms of the contract. No consideration was taken of the fact that the claimant was on a fixed salary and worked for hours fixed by the respondent, under the respondent's supervision. Further, that the contract provides that she would be subject to respondent's Code of Conduct and performance management and appraisal system as designed by the respondent.

There is even provision for termination of the engagement by one month's notice or pay in lieu thereof in terms of Section 35 of the Employment Act.

Section 2 of the Employment Act defines an employee as “a person employed for wages or a salary and includes an apprentice and indentured learner” while a contract of service is defined thus:

“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;”

There are various decisions in which the courts have determined the tests to be considered in disputes relating to the nature of engagement. In

Kenneth Kimani Mburu & another v Kibe Muigai Holdings Limited [2014] eKLR Rika J. held:

“Consultancies/independent contracts are based on the periphery of the employer’s business. They are not integral to the business. The roles played by the Claimants were integral to the business. One was designated as the General Manager; the other as the Food and Beverage Manager. They would continue in their respective roles once the business opened. This indicates that the Respondent considered their roles integral to the business. They were not in the periphery, as to fit the nature of consultancy.”

In **Everret Aviation Limited V Kenya Revenue Authority (Through The Commissioner of Domestic Taxes) [2013] eKLR** Kimondo J. 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 Laundry 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”.

In agreeing with the Claimant the Court at this instance cannot determine if it has jurisdiction to determine the suit as the Preliminary Objection is not based on facts admitted by the both sides. In **Maurice Oduor Oketch v Chequered Flag Limited [2013] eKLR**, relied upon by the Claimant, Ndolo J. held that the court is expected to go beyond mere terminologies employed by the parties in determining the existence of an employment relationship. Hence the mere reference to a person being a Consultant without a conclusive determination of the tests set out in the **Everest Aviation Limited case** (supra) cannot determine the nature of the party’s relationship.

The Preliminary objection therefore fails and is accordingly dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF FEBRUARY 2019

MAUREEN ONYANGO

JUDGE