



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.10 OF 2015

JOAB ATTE OKADA..... CLAIMANT

VERSUS

BAYER EAST AFRICA LIMITED.....RESPONDENT

JUDGEMENT

On 16th February, 1998 the claimant was employed by the respondent as a Product Demonstrator at a gross monthly wage of Ksh.20, 000.00. He was promoted to the position of BCS Promoter/Area Sales Representative and worked with the respondent for 13 years until 31st December, 2013 when his employment was terminated. The last gross salary paid was ksh.124, 000.00 per month.

The claim is that the termination of employment was premature and without any reason. The claimant had not attained the retirement age of 60 years. There was no notice issued and the terminal dues paid were erroneously calculated.

The claimant is seeking the following;

- a) Terminal dues for 13 years at 15 days' pay |Ksh.806,000.00;
- b) Leave not taken for 13 years Ksh.1,612,000.00;
- c) Compensation for 12 months ksh.1,488,000.00;
- d) Notice pay Ksh.124,000.00;
- e) Certificate of service;
- f) Costs and interests.

The claimant testified that upon employment by the respondent he worked diligently until HR Strategic Partners were introduced. The respondent sourced HR Partners to support then in service delivered and the letter issued by the entity dated 28th March, 2014 terminating employment was irregular as he had no contract with such entity.

He remained an employee of the respondent supervised by Titus Kinoti. The respondent sourced HR Strategic Partners to evade payment of taxes and transferred employees to this entity but the service rendered was to the respondent. The claimant has filed suit against HR Strategic Partners as the purported to terminate his employment contract.

The claimant also testified that he was issued with a notice to show cause by HR Strategic Partners with allegations that he had false mileage claims. He responded on 24th March, 2014 and on 28th March, 2014 he was issued with a termination notice. HR Strategic Partners issued a Certificate of Service stating that employment commenced on 1st April, 2013 to 20th March, 2014 which is not correct. The termination of employment was irregular.

Upon cross-examination, the claimant testified that in his contract of 16th February, 1998 he is identified as an independent product demonstrator and the respondent hired his services as an independent person.

The payment of ksh.20, 000.00 per month was based on a debit note payable as professional service charge. The payment was made against the debit note and upon rendering service. There was no salary slip issued, no NHIF and NSSF deduction made and the respondent did not terminate employment. There was no monthly salary and the last service charge was paid on February, 2014/

The claimant also testified that he worked for the respondent until March, 2013 and when HR Strategic Partners issued him with a termination letter, he did not attend work. He has filed suit against the HR Strategic Partners as they were used by the respondent to issue the termination letter and kept on shifting employment between the two entities.

The claimant had no statutory deductions made. There was an amendment to the contract dated 8th March, 2005 which introduced Peke Farm as the business name for the claimant.

Defence

The defence is that the respondent engaged the claimant as an independent contractor and thereafter he was employed by a third party HR Strategic Partners Limited.

On 9th February, 1998 the respondent and the claimant entered into a contract for service as an independent Product Demonstrator from 16th February, 1998.

On 31st May, 1999 the parties entered into a second contract for service and the claimant was engaged as an independent product Promoter with effect from 1st June, 1999. On 1st February, 2003 the parties entered into a contact for service which was amended on 8th March, 2005. The claimant registered the name *Peke Farm* and with effect from 1st April, 2005 he started trading under the said business name.

The claimant was employed by HR Strategic Partners as an Area Sales Representative with effect from 1st April, 2013 and the respondent then outsourced labour from such third party which led to the engagement of the claimant.

In February, 2014 it was noted that the claimant was falsifying mileage claimants and upon investigations it as revealed that the falsification had occurred over a period of time. The claimant was found to be dishonest and fraudulent in obtaining reimbursement on the basis of the falsified claims. HR Strategic Partners issued the claimant with a notice to show cause on the falsified mileage claims and in reply he admitted misleading HR Strategic Partners with regard to mileage incurred. The claimant had failed to account for mileage claimed in excess of 800 kilometres up and until February, 2014. On this basis HR Strategic Partners found this to be gross misconduct and dismissed the claimant.

The defence is also that in good faith an *ex gratia* payment was paid to the claimant following the summary dismissal. This included severance pay of 15 days for each year worked at Ksh.60, 000.00, notice pay at ksh.120, 000.00, leave days earned at ksh.91, 428.57; and a certificate of service was issued for the period the claimant had worked with HR Strategic Partners.

The claims made by the claimant are not due under the Employment Act and should be dismissed.

In evidence, Damaris Kimosop testified that she is head of human resource with the respondent and the relationship between the claimant and the respondent was that of an independent contractor and not an employee. The claimant provided a professional service with farmers demonstrating and selling products for the respondent. The claimant was paid upon an invoice for service rendered the claimant registered *peke farm* as his business name and in this capacity a contract was entered into with the respondent. The respondent engaged the services of HR Strategic Partners to offer service n all labour was outsourced and they employed the claimant.

Ms Kimosop also testified that the allegations by the claimant that he was employed so as to have the respondent evade taxation and statutory payment is defamatory and should be sanctioned. The respondent is a law abiding entity and such inference that they have been evading the payment of taxes is done in bad

faith and should not be left on record.

At the close of the hearing both parties filed written submissions.

The claimant submitted that the respondent severally issued him with contracts to disguise it and to avoid any liabilities. In the case of **Laban Awando Kanyo versus Susan Larsen t/an Utamaduni Craft Centre, ELRC No.259 of 2012** the court observed the problems employees face in unearthing the legal personalities of their employer who disguise, mutate and metamorphosis their identity. The claimant was an employee of the respondent for 13 years and his employment was unfairly terminated and his dues should be paid.

The respondent submitted that there was no employment relationship between the parties as the claimant had contracts for service with the respondent and when labour was outsourced to HR Strategic Partners they employed him and terminated his employment. For the period the claimant was engaged by the respondent, there was a contract as an independent contractor; he was paid for his service without any statutory payments or deductions. The claimant has filed **Nakuru Cause No.11 of 2015 – Joab Atte Okada versus Human Resource Strategic Partners Limited** for alleged unfair termination of his employment.

There was no employment relationship between the parties as defined under section 2 of the Employment Act, 2007 to justify the claims made. In the case of **Ready Mix Concrete (South East) Ltd versus Minister of Pensions and National Insurance, 1968 2 QB** he court made a distinction between a contract of service and contract for service and held that a contract of service is where one agrees to provide work and skill for a wage, during the performance of work he is under the control of the master.

An employee and independent contractor is also distinguished in the case of **Kenya Hotels & Allied Workers Union versus Alfajiri Villas (Magufa) Ltd [2014] eKLR** and also in the case of **Fredrick Byakika versus Mutiso Menezes International Limited [2016] eKLR**.

The claimant failed to prove that he was an employee of the respondent and there is evidence he was engaged as an independent contractor and not as an employee. The letter of termination issued to him and dated 28th March, 2014 is issued by HR Strategic Partners and not the respondent.

Determination

The claimant has submitted his letter of engagement by the respondent dated 9th February, 1998. He is defined as a Product Demonstrator. The letter further states;

Bayer East Africa Limited wishes to hire your services effective from 16.02.98 as an independent Product Demonstrator on the following agreed terms. ...

Title: ...

Payment: Kshs.20, 000/- per month against debit note. Payable as professional service charge.

The claimant has also submitted letter dated 28th March, 2014 issued by HR Strategic Partners terminating employment. On this notice terminating employment, the claimant made demand for terminal dues from the respondent.

In defence, more details were submitted. There is letter dated 8th March, 2005 to *peke farm* care of the claimant being an amendment to the letter of engagement and where the respondent wrote as follows;

Your letter of engagement dated 1st February, 2003 and our subsequent letter of amendment dated 19th May, 2003 refers.

We write to confirm that following your discussions with Bayer East Africa Limited the terms and

conditions of your engagement have been further amended with effect from 1st April, 200 as follows:-

Services ...

Payment for services rendered 1. Peke farm will be paid a gross commission of Ksh.80, 000.00 per month upon fulfilling 100% of both set targets. ...

There was no payment of a salary. There were no statutory deductions or payments. The claimant was engaged as an independent contractor from the start until his employment by HR Strategic Partners who terminated employment and not the respondent who had an engagement for service delivery and payment upon completion of set targets.

As well addressed by the respondent in the submissions and in the case of **Kenya Hotels & Allied Workers Union versus Alfajiri Villas (Magufa) Ltd [2014] eKLR** the court held as follows;

A distinction between an employee and an independent contractor depends on statute, and tests which have been set out case law. These tests include organisation/integration test conceived in context of the professional worker. See Cassidy v Min.of Health [1951] 2 KB 343 and multiple or mixed factor test which was initially formulated in Ready Mixed Concrete v Min.of Pensions [1968] 2 QB 497.

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, 13th Cheque and so on.

An independent contractor offers a given service while running his own business and free to carry out his work for more than one employer at the same time. At the end of the service an invoice is drawn and payment if done accordingly or as agreed. Such a contractor is not subject to the usual employment matters such as statutory deductions or off days, annual leave or overtime pay. In this regard in the case of **Gilbert Sule Otieno versus Seventh Day Adventist Church (East Africa) Ltd (sued on behalf of S.D.A. Church, Kiamunyi East) [2014] eKLR** the court held as follows;

The contract provided for the obligations, duties and responsibilities of each party. None of the obligations, duties and responsibilities accruing to the Claimant are of the genre which constitute the fundamental rights or basic conditions and terms of employment of an employee such as entitlement to a wage/salary, which is an essential of a contract of service, hours of work, entitlement to annual leave, public holidays, accommodation or in lieu housing allowance, pensions and protection against unfair or wrongful dismissal.

Without an employment relationship, the claimant being well defined as an independent contractor and having been paid for work done upon presentation of a debit note, the suit herein cannot be sustained before this court. See **Joseph Nyaga versus United Millers Limited Cause No.267 of 2015 (Nakuru)**.

The claimant, well aware that he was an independent contractor with the respondent over the period of his engagement for a service should have paid his taxes to the KRA. The role of the respondent ought to have been that of ensuring compliance by a withholding tax and its remittance to the KRA. The evidence by the claimant that the respondent employed him so as to evade the payment of tax well interrogate it is him who failed to remit the tax due from his contractual payments. The law well applied, the KRA should ensure the claimant has remitted his tax returns with the appropriate penalties. The respondent is not without blame as the tax payments on transactions with the claimant ought to have started with them by withholding the due 5% on all payments made to the claimant upon rendering service. There is no

evidence of such deduction or remittance.

As this is not an appropriate suit for this court, the above shall suffice.

Therefore, the claims made for the payment of terminal dues in the nature of 15 days' pay for 13 years of service, payment for leave for 13 years and compensation under the provisions of section 49 of the Employment Act 2007 and notice pay or a certificate of service is not due to an independent contractor unlike a claim made by an employee covered under the provisions of the Employment Act, 2007. The claims made herein are not justified. The claimant is not before the appropriate court over any dispute or claim he may have against the respondent.

Accordingly, the claims made are found without merit and are hereby dismissed in their entirety. Each party shall bear own costs.

Delivered at Nakuru this 25th day of April, 2019.

M. MBARU

JUDGE

In the presence of:

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