



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO 385 OF 2017**

**CHRISMER EXPRESS LIMITED.....CLAIMANT**

**VERSUS**

**KILIMALL INTERNATIONAL LTD.....RESPONDENT**

**R U L I N G**

1. The respondent raised an objection that there was not employer-employee relationship between the respondent and the claimant hence the court lacked jurisdiction to entertain the claim. The objection was based on secondment agreement between the 1<sup>st</sup> and 2<sup>nd</sup> claimant and the respondent. The agreement is dated 15<sup>th</sup> September, 2016.

2. Page 1 of the agreement provided that:

*“any grievance related to matters associated with the secondment should be resolved through Kilimall’s grievance procedure”*

3. Page 2 provided that:

*“nothing in the contract shall create nor be deemed to create any relationship of employer and employee between Kilimall and the secondees who will remain throughout under the terms and conditions of their contract of employment with the employer”.*

4. According to the respondent the employer in the contract were the claimants and the employees being the claimant’s secondees who were directly under the employment of the claimant as employers. Counsel for the respondent further submitted that this suit was commenced in violation of the express terms of the secondment agreement between the 1<sup>st</sup> and 2<sup>nd</sup> claimant and the respondent whereby all parties contracted that no form of employment relationship would exist between the claimant and the secondees.

5. Further to this the parties specifically contracted that the employer employee relationship will exist only between the 1<sup>st</sup> claimant and 2<sup>nd</sup> claimant and secondees (delivery riders) and at no time had the claimant hired or offered employment to delivery riders.

6. Mr Ngugi for the respondent further submitted that at no time were the claimants ever paid wages or salaries and as such the claim does not fall under section 12 of the ELRC Act. The claimants on the other hand submitted that vide the secondment agreements entered into between the 1<sup>st</sup> and 2<sup>nd</sup> claimant and the respondent, the claimant’s agreed to second/provide the respondent their services of courier delivery riders for a period of one year.

7. On 23<sup>rd</sup> January, 2017 the respondent terminated the claimant’s contracts contrary to the secondment agreement. Counsel further submitted that according to the agreement, Kilimall stipulated rules, working practices and financial regulations and conduct of the secondees being the riders and further that Kilimall undertook to pay for the deliveries.

8. A preliminary objection is usually on a point of law. It usually implies that the facts as pleaded are correct but save for the legal barrier to the sustenance of the suit. A preliminary objection on point of law should be apparent on the face of the pleadings. It should not be gleaned from the pleadings. It further does not require extensive analysis of facts and circumstances.

9. An employer –employee relationship sometimes may not be clear but can be deduced from the circumstances of the parties and their relationship. It may require calling evidence to establish or refute the existence of the relationship. The evidence as to the existence or otherwise of the relationship must be tested through cross-examination. This is only possible through trial on merit and not contested arguments through submission by counsel.

10. The relationship between the parties to this claim does not come out quite clearly to enable the court uphold the preliminary objection. For that reason, this issue will only be decided after a full trial.

11. The preliminary objection is therefore disallowed and the suit shall proceed to full trial on merits.

**Dated at Nairobi this 22<sup>nd</sup> day of November, 2019**

**Abuodha Jorum Nelson**

**Judge**

**Delivered this 22<sup>nd</sup> day of November, 2019**

**Abuodha Jorum Nelson**

**Judge**

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.

**Abuodha J. N.**

**Judge**