



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT ELDORET

CAUSE NO.326 OF 2017

CONSOLIDATED WITH

CAUSE NO. 324, 327,354(A), 225, 226, 227, 194, 195, 192, 197 OF 2017

Cause No.326 ADEYO WAGA SAMWEL.....CLAIMANT

Cause No.324 MAYAKA SILVANIUS DANIEL

Cause No.327 CHARLES MWASI MUHEYI

Cause No.254(A) GEOFFREY ONSANDO OMWOYO

Cause No.225 SHADRACK WAFULA PANYAKO

Cause No.226 NGENO HILLARY KIPKEMOI

Cause No.227 NELSON LUNG'ANYI ATEGA

Cause No.194 ARNEST ANGUCHE MAKUTSA

Cause No.195 EVANCE OUMA

Cause No.192 HARON OCHOKI MAKOMA

Cause No.197 EVANS IRAP

VERSUS

WESTERN STEEL MILLS LTD.....1ST RESPONDENT

VERO INVESTMENT LIMITED.....2ND RESPONDENT

AND

JOKALI HANDLING SERVICES.....2ND RESPONDENT

RULING

1. The Ruling herein related to Notice of Preliminary Objections filed by the 1st respondent, Western Mills Ltd on 11th December, 2017 on the grounds that;

As per the Claimant's National Social Security Fund (NSSF) statement of Account and pursuant to section 12 of the Employment and Labour Relations Court Act, this court lacks jurisdiction to adjudicate between the claimant and the 1st respondent since the 1st respondent is/was not an employer of the claimant.

2. The 2nd respondent supported the objections filed by the respondent on the grounds that there existed a commercial relationship between the parties the claimants being independent contractors and therefore this is a matter which ought to have been filed in the commercial division and not before the employment and labour relations court as herein done.

3. Parties made their oral arguments in court.

4. The 1st respondent's advocate submitted that section 12 of the Employment and Labour Relations Court Act sets out the jurisdiction of the court and in this case where there is no employer/employee relationship between the claimants and the 1st respondent, the court lacks jurisdiction to hear and determine the matter. The claimants have attached their NSSF statements which indicate the 2nd respondent was the employer and the notice terminating employment was also issued by the 2nd respondent. The 1st respondent provided the 2nd respondent with money for work to be done and who then hired the services of the claimants. As such there is no relationship between the claimants and the 1st respondent to justify enjoinder in this suit.

5. The 1st respondent relied on the authority and cases of **Okiya Omtatah Okoiti versus The President of Kenya & Others, Petition No.19 of 2016** and **David Randu versus Malindi Water & Sewerage Company Limited, cause No.110 of 2012 (Mombasa)**.

6. The 2nd respondent filed a list of cases and relied on **John Charo versus Christopher Njao [2005] eKLR; safari Joseph Ngala & 2 others versus Rapid Kate Services Ltd [2017] eKLR; and George Kamau Ndiritu & another versus Intercontinental Hotel [2015] eKLR**.

7. The claimants' advocate opposed the objections made on the grounds that the 1st respondent has failed to articulate the application of the principles set out in the case of **Mukisa Biscuit Manufacturing Co. Ltd versus West End Distributors Ltd (1969) EA 696** where an applicant must satisfy that there exists a pure point of law; that all facts pleaded are true and settled. Objections therefore must raise a **pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.**

8. The claimants also submit that paragraph 4 of the Memorandum of Claim sets out that the claimants were employees of the respondent from 2015 to 2017 when employment was terminated these facts and averments are denied by the respondents. This then becomes a question of fact which must be proved by call of evidence and the defence that the claimants were independent contractors by the 2nd respondent is subject to proof. The objections raised fail to satisfy the principle objectives and should be dismissed.

9. The claimants have relied on the authority and cases of **Attorney General & Another versus Andrew Maina Githinki and another [2016] eKLR** and **Elijah Okemwa versus Clerk County Assembly Nyamira & Others [2018] eKLR**.

10. The jurisdiction of the court established by the constitution and legislation and in accordance with article 162(2) of the Constitution, 2010 and the Employment and Labour Relations Court Act, 2011. In the case of **Samuel Kamau Macharia & another versus Kenya Commercial Bank Limited & 2 others [2012] eKLR** and the Supreme Court held that;

*A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, **In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011**. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.*

11. As a rule, jurisdiction must flow either the constitution and or legislation as a court cannot confer or arrogate to itself jurisdiction. It is not a matter for discretion as jurisdiction is everything and without it, a court must stop as to move forward on any aspect of a matter without jurisdiction would be to waste judicial time. See **Owners of the Motor Vessel "Lillian S" versus Caltex Oil (Kenya) Limited, Civil Appeal No.50 of 1989**.

12. In this case, the claims at paragraph 4 and 5 are that;

4. the claimant[s] was at all material times to this claim under the employment of the respondents.

5. The claimant[s] worked for the respondents as a cleaner from July 2015 until on 2nd July, 2017 when the respondents unlawfully terminated the services of the claimant[s] and refused to pay his terminal dues.

13. The claimants seek reliefs of the nature that there was discrimination and unfair labour practices by the respondents and there should be a declaration that such violated their rights, compensation is due under section 49(e) of the Employment Act, issuance of Certificate of Service under section 51 of the Act and costs of the suit.

14. In response to the claims, the 2nd respondent denies ever employing the claimants as pleaded and that the claimants were contracted to supply human resources with effect from 26th October, 2016 and there was no hiring as the claimants were contractors to supply labour based

on availability of work. The 2nd respondent was an independent contractor to supply periodic labour for 3 months to the 1st respondent on condition that work was available. At paragraph 7 the 2nd respondent avers that;

The 2nd respondent avers that vide clause 2.11 under termination of the contract they [the] contract of work at the 1st respondent's premises or by either giving week notice were the employee not to have completed a period of 3 months' probation on the signing of the agreement.

15. What then was the nature of engagement of the claimants by the respondents?

16. Section 12 of the Employment and Labour Relations Court Act, 2011 sets out relationships within which if they exist, the court is conferred with jurisdiction. Under section 12(1) the Act 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— [underline added]

17. The court is to address matters relating to 'employment' and 'labour relations'. Various relations are then set out. Under section 12(2) the Act goes further to provide as follows;

(2) An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer's organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose. [underline added].

18. Where jurisdiction is conferred under any established law for the purpose of addressing employment and labour relations, the court in addressing 'such purpose' is clothed with the requisite mandate. The Court of Appeal in addressing the court jurisdiction in this regard in the case of **Civil Appeal No. 6 of 2012 Prof. Daniel N. Mugendi versus Kenyatta University & Others** the court held as follows;

in the same token we venture to put forth the position that as we have concluded that the Industrial Court can determine industrial & labour relations matters alongside claims of fundamental rights ancillary and incident to these matters, the same should go for the Environment & Land Court, when dealing with disputes involving environment & land with any claims of breaches of fundamental rights associated with the two subjects.

19. However, where parties have agreed to undertake specific duties as an independent contractor, the status changes as an independent contractor lacks the requisite characteristics of an employee as defined under section 2 of the Employment Act, 2007 and thus not subject to the court jurisdiction under article 162(2) of the constitution or under section 12 of the Employment and Labour Relations Court Act, 2011 jurisdiction.

20. The court in addressing the matter of whether one was an employee or an independent contractor in the case of **Fredrick Byakika versus Mutiso Menezes International Unlimited [2016] eKLR** held as follows;

On the question whether the Claimant was an employee, the Employment Act section 2 define who an employee is. Such definition sets clarity with regard to the payment of salary or wage. Any employee is thus paid a wage or salary. However, even where a salary or wage is paid, where parties have reduced the terms and conditions regulating the relationship into writing, such is to be given importance with reference as such form the basis and intentions of such parties. In this case, the letter of appointment issued to the claimant, he accepted it on 26th July 2014. Such letter spelt out the terms and conditions of engagement between the parties. The Claimant was appointed as a Resident Engineer for a project in Uganda; he was appointed as a Consultant and was required to be part of the Project Consultancy Team. Further, the work hours were to be in accordance with the project programme Schedule but would go beyond such scheduled time at no extra remuneration. Of paramount importance was the mode of payment – monthly gross remuneration was \$5,260.00 upon issuance of an invoice and subject to withholding tax at 5%.

21. In **Kenya Hotel & Allied Workers union versus Alfajiri Villas [2014] eKLR**. The Court analysed the difference between an employee under the Employment Act and an independent consultant thus;

... a true independent contractor are that the contractor will be a registered taxpayer, will work his own hours, runs his own businesses, will be free to carry out work for more than one employer at the same time, will invoice the employer each month for his services and will be paid accordingly and will not be subject to usual 'employment' matters such as the deduction of PAYE, will not get annual leave, sick leave ...

22 In this case, the 2nd respondent has attached contracts between themselves and the 1st respondent as part of the defence. The nature of such a contract is that the 1st respondent contracted the 2nd respondent to;

The Contractor shall be responsible for the following:

3.1 the contractor will continue providing required manpower to the client in client's factory situated at Kambi Somali Road, Eldoret town, Kenya and will increase/decrease his work force numbers as per the requirements of the client from time to time so long as due access of employment statute is adhered to the current schedule of workers allocated by Depart., designation, name and rates of employees is enclosed as per annexure marked "A". ...

3.2 Drawing of his employees' contracts in accordance with the labour laws and maintaining proper employee's files with full details of the Employees as per annexure B for 8 hours and Annexure C for 12 hours and the original second copy MUST be given to the client and the files stored at the Client's Head Office in Nairobi. Any changes to the annexures should be updated and communicated formally to all parties concerned and reviewed on month to month basis. For any changes or additional of employees it should be with due approval of the client.

23. The respondent therefore had each a defined mandate. The 1st respondent was to provide the resources whereas the 2nd respondent was required to provide manpower. Employees provision was the responsibility of the 2nd respondent and terms of engagement thus set out under clause 3 of the contract between the respondents.

24. The 2nd respondent has also attached and introduced a third party **Afritop Enterprises Limited**. This entity of Afritop Enterprises Limited has contracts with claimants for employment with the contractor and the 1st respondent, **Western Steel Mills Limited, Eldoret**. Other claimants fell under the contract with **Jokali Handling Services**.

25. Whereas it is clear the 1st respondent offered a contract agreement to the 2nd respondent, such contract required the 2nd respondent be responsible for the provision of manpower to the 1st respondent's client or clients, drawn employment contracts with the employees in accordance with the law and such records be provided to the client or clients and to update all the parties thereto. Such then required the 1st respondent to be informed of matters of the 2nd respondent with regard to the responsibilities set out in the contractor agreement.

26. It is also not lost to the court that a third party has herein been introduced by the 2nd respondent, *Afritop Enterprises Limited* and who contracted the claimants to serve the 1st respondents. The claimants thus inherently offered their labour for the benefit of the respondent and its clients.

27. In the returns filed with the NSSF as a statutory body and as required under section 35 of the Employment Act read together with the NSSF Act, all the claimants are noted as employees of Vero Investments Limited, the 2nd respondent.

28. Who then employed of the claimants?

29. With the given contracts between the respondents, the contract with the entity *Afritop Enterprises Limited*, the question above becomes a matter of fact to be established by the call of evidence. The intricacies of the contracts and the sub-contracts and the attached records cannot remove the respondents from this matter as to do so would be to deny the court an essential and relevant party vital for the effectual determination of the claims herein.

29. These findings are guided by the principles set out in Case of **Werrot and Company Ltd & others versus Andrew Douglas Gregory & Others, HCCC No. 2363 of 1998, LLR 2828;**

For determining the question of who is a necessary party there are two tests; (i) there must be a right to some relief against such a party in respect of the matter involved in the proceeding in question and (ii) it should not be possible to pass an effective decree in the absence of such a party.

30. This is reiterated by the court in the case of **Kizito M. Lubano versus Kemri Board of Management & 8 others [2015] eKLR** as follows;

The question should then be whether the current respondents are properly joined herein and if so whether such presence is necessary in order to enable the Court effectually and completely adjudicate upon and settle all the questions involved in the suit. There must be a demonstration by the Petitioner that there is a direct and real interest in the reliefs sought against the listed respondents and thus necessary parties herein. ... the joinder of the respondents herein is necessary as this will enable the Court to effectually and completely adjudicate upon and settle all questions involved in the petition.

31. As I conclude and noted above, both the claimants and the respondents should take into account the role of *Afritop Enterprises Limited* and which entity holds and or held employment contracts with the claimants. It is not lost to the court that even where the 1st respondent is herein found as a necessary party, the records submitted testify to other necessary and relevant parties. This will enable the court to determine all matters with regard to employment and labour relations and intended purposes between the parties herein.

Accordingly, the objections filed by the 1st respondent and supported by the 2nd respondent are without merit and are hereby dismissed with costs in the cause. The 1st respondent has 14 days to file defence. Parties shall take a mention date for taking hearing directions.

It shall be important to separate these consolidated files with regard to the different respondents separating those with JOKALI HANDLING SERVICES and those with VERO INVESTMENTS LIMITED as the 2nd respondent as follows;

Cause 326 Andenyo Waga Samwel;

Cause 325 Job Mamati Omulei;

Cause 324 Muyaka Silvanus Daniel;

Cause 226 Ngeno Hillary Kipkeoi;

Cause 227 Nelson Lung'anyi Atega;

Cause 194 Arnest Aguche Makutsa;

Versus

Western Steel Mills Limited1st claimant

Jokali Handling Services2nd respondent

And

Cause No.225 Shadrack Wafula Panyako

Cause No.327 Charles Mmasi Muheyi

Cause No.195 Evance Ouma

Cause No.192 Haron Ochoki Makoma

Cause No.193 Evans Ikap

Versus

Western Steel Mills Limited 1st respondent

Vero Investment Limited 2nd respondent

And

Cause No.254 (A) Geoffrey Onsando Omwoyo

Versus

Western Steel Mills Limited..... respondent

Delivered in open court at Eldoret this 28th day of May, 2018.

M. MBARU JUDGE

In the presence of:

Court Assistants: Robert and Martin

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