



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 1459 OF 2014**  
**(Before Hon. Lady Justice Hellen S. Wasilwa on 31<sup>st</sup> July, 2017)**  
**DAVID ODWORI NAMUHISA.....CLAIMANT**  
**VERSUS**  
**MAGNATE VENTURES LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant herein filed his Memorandum of Claim on 5.9.2014 through the firm of Ojienda & Company Advocates. He avers that on 9.11.2009 he entered an agreement with the Respondent for provision of consultancy services on all electrical works of the Respondent Company. He avers that under the contract, he was appointed as a Consultant to oversee, supervise and undertake electrical works of the Respondent for a period of three years.
2. It was a term of the contract that the Claimant shall be paid *inter alia* a consultancy fee for 4% of the revenue net of extension on all electrical works the Claimant oversees, supervises and undertakes.
3. He further avers that it was a term of the agreement that the Respondent shall acquire exclusive use of the Claimant's Licence Registration No. 1174'A' in the duration of the contract.
4. He submits that using this Licence referred to in 6 above, the Respondent bid and were awarded several tenders. He avers that under the type of works involved, the tenders won by the Respondent can only be awarded to class 'A' Licence holders which the Respondent would not have been awarded but for the Claimant Licence.
5. The Claimant avers that on or about 9<sup>th</sup> November 2011, the Respondent varied the terms of the contract which the Claimant was not agreeable to leading to severance of the contractual relationship.
6. The Claimant avers that despite several reminders, the Respondents have perpetually refused, ignored and/or neglected to pay his contractual four per cent consultancy fee.
7. The Claimant's claim is for special and general damages for breach of contract made up of the following:

**(a) Tender No. KAA/ES/JKIA/648/E: Rehabilitation of Airfield Ground Lighting system at Jomo Kenyatta International Airport. Contract amount Kshs.302,811,080.25. Notification of award**

*dated 26<sup>th</sup> May, 2010. 4% thereof = Kshs.12,112,443.20/=.*

*(b) Tender No. DOD WKS/015/10/11: Proposed Securitization of Military Camps at Kahawa Garrison, Embakasi Garrison, Moi Airbase and Kenya Navy Base Mtongwe. Contract amount Kshs.83,706,881.00. Notification of award dated 7<sup>th</sup> October 2010. 4% thereof =3,348,275.28/=.*

*(c) Tender No. KAA/ES/MLD/677/E: Relocation of Electrical Power Station and Rehabilitation and Ducting for Airfield Ground Lighting System at Malindi Airport. Contract amount Kshs.54,152,129.00/=.* Notification of award dated 22<sup>nd</sup> December 2010. 3% thereof = Kshs.2,166,085.16.

*(d) Installation of a 30 meters Promulgation Flag at Uhuru Park contracted by Department of Defense (DoD) at Kshs.4,500,000.00/=.* Contact date 27<sup>th</sup> September, 2010. 4% thereof = Kshs.180,000.00.

*(e) Installation of 13 No 30 meters Electric Powered High Mast in Witmere, Kahawa, Ruringu, Kamukunji stadium, Gatitu, Kamakwa and Mathari Nyeri town contracted by Ministry of Housing (KENSUP) Nyeri at Kshs.41,172,969/=.* Contract date 17<sup>th</sup> May, 2010. 4% thereof = Kshs.1,646,918.76.

*(f) Installation of 30 meters High Mast at Kaptembwa Nakuru town at Kshs.25,664,615.00/=.* Contract date, May 2011. 4% thereof = Kshs.1,026,584.60/=.

*(g) Installation of 30 meters of Electric Powered High Mast in Informal settlement in Homabay at Kshs.12,255,308/=.* Contract date May 2011. 4% thereof = Kshs.490,212.32.

**Total claimed Kshs.20,970,519.30/=**

8. He also prays for costs and interest at Court rates.

9. He attached contract documents as part of his evidence plus the consultancy agreement between him and Respondents dated 10/11/2009.

10. The Respondents on the other hand filed their response on 16.10.2014 through the firm of Kimondo, Gachoka & Company Advocates.

11. The Respondents have averred that on or about 9<sup>th</sup> November 2009, they entered into a consultancy agreement with the Claimant pursuant to which the Claimant was to supervise electrical engineering works by the Respondent for a period of 3 years. In consideration for the said consultancy services, the Respondent would pay the Claimant a retention fee of Kshs.15,000/= per month and a consultancy fee equivalent to 4% of the net revenue of all electrical works he would supervise.

12. The Respondent avers that the above agreement was thereafter varied and superseded by another agreement entered into between Claimant and Respondent on 4<sup>th</sup> May 2011. That under the new agreement, the Respondent was to pay Claimant a retention fee of 50,000/= per month in consideration for the Claimant supervising the Respondent's electrical engineering works. The agreement was for 5 years and could be terminated by either party giving the other 12 months' notice in writing.

13. The Respondent denies varying the terms of the contract without the Claimant's consent as alluded in paragraph 9 of Statement of Claim. They aver that it is Claimant who unilaterally terminated the contract on 31.9.2013 without giving the Respondent the requisite notice. The Respondent denies being indebted to the Claimant and ask Court to dismiss this case with costs.

14. I have considered evidence and submissions submitted by the parties herein. The issues for determination are as follows:-

**1. Whether there was an employment contract between the Claimant and Respondent.**

**2. If yes what were the terms of this contract and if not what is the nature of the relationship between Claimant and Respondent.**

**3. What were the circumstances that determined the relationship between Claimant and Respondent?**

**4. What remedies if any to grant in the circumstances.**

15. In determining whether there was an employment relationship between the parties, I refer to the document Appendix 1 which is the consultancy agreement between the Claimant and the Respondent.

16. The agreement refers to the Claimant as "the Consultant". The agreement further states that the Consultant was to be paid a retention fee of 15,000/= per month and 4% of the revenue net of expenses on all electrical works he oversees, supervises and undertakes.

17. The respondent was entitled to the exclusive use of the Constant's Licence Registration No. 1174 "A" during the period of the agreement and **"the consultant shall not engage in any other business similar to compete with the Company in its electrical engineering works or take any other electrical engineering consultancy during the term of this agreement"**.

18. An employment relationship is created in an employer-employee relationship.

19. An employee is defined under Section 2 of the employment Act 2007 as:-

***"a person employed for wages or salary and includes an indentured learner"***.

20. An employer on the other hand is defined as follows:-

***"any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company"***.

21. ILO R198 – Employment Relationship Recommendation 2006 (No.198) deals with an employment relation and Part II deals with the manner for determination of the existence of an employment relationship.

22. Article 13 of R198 states as follows:-

***"Members should consider the possibility of defining in their law and regulations or by other means, specific indicators of the existence of an employment relationship. These indicators might include:-"***

***a. The fact that the work is carried out according to the instructions and under the control of another party, involves the integration of the of the worker in the organization of the enterprise, is performed solely or mainly for the benefit of another person, must be carried out personally by the worker, is carried out within specific working hours or at a workplace specified or agreed by the parties requesting the work, is of a particular duration has a certain continuity, requires the worker availability or involves the provision of tools, materials or machinery by the party requesting the work.***

***b. Periodic payment of remuneration to the worker, the fact that such remuneration constitutes the worker sole or principal source of income, provision of payment in kind, such as food, lodging or transport, recognition of entitlements such as weekly rent and annual holiday, payment by the party requesting the work for travel undertaken by the***

***worker in order to carry out the work, or absence of financial risk for the worker”.***

23. I considered this issue of the existence of an employment relationship in **Abyssinia Iron & Steel Limited (Kisumu IC Cause No.74 of 2013)** where the parameters provided for under ILO R198 were considered.

24. Hon J. Rika in **Kenneth Kimani Mburu & Another vs. Kibe Mugai Holdings (2014) eKLR** in a similar case and in deciding whether the Claimants were contracted as employees or consultants stated as follows:

***“Consultancies are limited as the duration ----- Consultancies/independent contracts are based on the periphery of the employer’s business. They are not integral to the business.....”.***

25. In the case before hand, the Claimant herein was paid some monthly fees – 15,000/= per month. He was also “tied” to the Respondents – under the contract of employment, he was not allowed to engage in any other similar work except for the Respondent. His Licence Registration No. 1174’A’ was used exclusively by the Respondent. As an electrical engineer, his Licence was the one being used by the Respondent.

26. They also forbade him from engaging in any other business similar to that of the Regulation Consultancy agreement. Applying the test in R198, it is apparent that the Claimant though termed as a Consultant, was in fact an employee of the Respondent. It matters not what title he was given in the agreement because the nature of the work he did for Respondent show, that the work was solely performed for the benefit of the Respondent and he carried out this work which required his personal presence and supervision.

27. It is my finding therefore that there was an employment relationship between the Claimant and the Respondent.

28. In regard to issue No.2, this relationship was guided by the agreement dated 10.11.2009 and it was to be for a duration of 3 years meaning it was to terminate on 9<sup>th</sup> November 2012.

29. The Respondent contends that they entered into another agreement on 4.5.2011 with the Claimant. This agreement does not refer to the previous agreement between the parties.

30. In relation to this 2<sup>nd</sup> agreement, the Claimant has stated when the Respondent varied the terms of the initial contract he was not agreeable to it and this led to severance of this contractual relations.

31. The Claimant has not however denied signing this 2<sup>nd</sup> contract which in this Court’s view then stands as valid and superceding the previous agreement. It is not clear how this 2<sup>nd</sup> contract was terminated.

32. However the Respondent avers that the Claimant terminated this agreement vide a letter dated 31.9.2013. I have looked at the letter in question dated 31.9.2013 which reads in part:-

***“All in all for my safety of my Licence and my entire life, I terminate our agreement as the electrical regulations are not only followed but also payment as per Government regulations as per from 1<sup>st</sup> September 2013. Please let me know why you wanted to kill me”.***

33. This letter is indeed a termination of the agreement then existing between the Claimant and the Respondent which is the one dated 4.5.2011. This agreement was to be terminated by giving 12 months’ notice and as such, the Claimant was in breach thereof.

34. I now delve into the issue of what is payable in view of the termination and what was not paid under the contract.

35. The Claimant has listed various contracts performed by Respondent using his Registered Certificate No. A1 001174. There projects are listed at pages 16 to 17 of this documents.

36. Contracts awarded when he was the Respondent's Consultant from 10.11.2009 to 4.5.2011 when another contract was entered into are as follows:

*(h) Tender for Rehabilitation of Airfield Ground Lighting System at Jomo Kenyatta International Airport Tender No. KAA/ES/JKIA/648/E - for Kshs.302,811,080.25 (page 19 of Claimant's documents).*

*(i) Tender No. DOD WKS/015/10/11 at page 20 of documents – Tender for proposed Securitization of Military Camps at Kahawa Garrison, Embakasi Garrison, Moi Air Base and Kenya Navy Base Mtongwe for Kshs.4,185,344.00/=.*

*(j) Tender No. KAA/ES/MLD/677/E (page 21) Tender for Relocation of Electrical Power Station and Rehabilitation and Ducting for Airfield Ground Lighting System at Malindi Airport for Kshs.54,152,129.00/=.*

*(k) Installation of a 30 meter Promulgation Flag at Uhuru Park for Kshs.4,500,000.00/= awarded on 27.9.2010.*

*(l) Installation of 13 No 30 meters Electric Powered High Mast in Witemere, Kiawara, Ruringu, Kamukunji stadium, Gatitu, Kamakwa and Mathari Nyeri town on 17/5/2010 for Kshs.41,172,969/=.*

*(m) Installation of 24 No 30 meters Electric Power High Mast at Kenya Navy Base Mtogwe Mombasa 4, Kahawa Garrison 8, Moi Air Base 6 and Embakasi 6 on 7/10/2010 for Kshs.83,706,882.00/=.*

*(n) Installation of 30 meters High Mast at Kaptembwa Nakuru town in May 2011 for Kshs.25,664,615.00/=.*

*(o) Installation of 30 meters of Electric Powered High Mast in informal settlement in Homabay in May 2011 for Kshs.12,255,308/=.*

37. All these contracts total to Kshs.528,448,327.09. This is as per the contract of employment dated 10.11.2009.

38. This is what Claimant has sought stating that he was never paid the 4% cost of contract as per their agreement. I find indeed the Claimant is entitled to this amount being 21,137,933.09 less 12 months retained fee in lieu of notice under the 2<sup>nd</sup> contract which is 15,000 x 12 = 180,000/=.

Total owing to Claimant is therefore **20,957,933.09**

**Plus costs and interest at Court rates with effect from the date of this judgment.**

Read in open Court this 31<sup>st</sup> day of July, 2017.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Kibue holding brief for Miss Bore for Respondent

No appearance for the Applicant