



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI
PETITION NO.39 OF 2017

LORNA ADHIAMBO ALINGPETITIONER

VERSUS

SAFI INTERNATIONAL ASRESPONDENT

JUDGEMENT

1. The petitioner filed the Petition on 24th March, 2017 together with the Notice of Motion application of equal date. Interim orders were issued on 25th April, 2017. On 5th May, 2017 the respondent and seeking to set aside the interim orders issued in favour of the claimant with regard to freezing the respondent's account. The court allowed the respondent to serve the claimant and did set aside the order for the reinstatement of the claimant. However it has since been confirmed by the respondent and counsel that there was error in the communication, transmission and execution of orders issued on 5th May, 2017 as the counsel advised the respondent that the order to freeze account had been set aside. Following such advice and misrepresentation of the court orders, the respondent proceeded to move the funds in the subject account out of jurisdiction. It has also come to the attention of the court that such monies have been moved to Norway and bankruptcy proceedings commenced against the respondent who is registered in Norway and authorised to operate in Kenya among other jurisdictions.

Petition

The petitioner is seeking for orders that;

- a) *A declaration that the petitioner remains and continues to serve in her employment as country director/vice President of the respondent's East Africa Region.*
- b) *A declaration that the respondent has no constitutional and or statutory role in terminating and/or removal of the petitioner illegally from the organisation without following the law.*
- c) *The respondent bears the costs of this petition.*
- d) *In the alternative the court do assess damages payable to the petitioner for the unlawful and unconstitutional removal from employment.*
- e) *Damages for discrimination on racial grounds.*
- f) *Such further orders as this court may deem just and expedient.*

2. The petition is premise don the facts the petitioner as a female adult was employed by the respondent

company as incorporated in Norway and authorised to operate in the country. On 10th April, 2017 the petitioner received letter of termination of employment with the respondent which stated that as a “consultant” she would be terminated with effect from 30th April, 2017. The said action is illegal and without any valid reason thus being in violation of section 5 of the Employment Act, 2007 and article 41 of the constitution.

3. The petition is also that the termination of the petitioner’s employment is unconstitutional and illegal and amounted to removal of the due emoluments and other benefits payable to her by the respondent. This is contrary to article 27(1) of the constitution which provides that every person is equal before the law and has the right to equal protection and equal benefit of the law. The respondent’s action and conduct in purporting to unconstitutionally dismiss and or terminate the petitioner from serving her entire term in office offends section 27 of the constitution and is discriminatory.

4. The termination of employment has been effected without basis or justification and is unfair and unlawful and in violation of the Bill of Rights. The respondent while operating in Kenya is duly bound and obligated to comply with the provisions of Article 10 of the constitution which embodies national values and principles of good governance. In this regard the respondent has violated articles 10, 19(2), (3), (4), 21(1), 27(1), (2) and (8), 41(1) and (2), 165(3) and (9)(b) and 258(1) of the constitution.

5. The petitioner having been employed as the respondent’s Country Director/Vice President East Africa on 20th May, 2016 and having undertaken her duties had legitimate expectations to serve in such position within the law and based on constitutional protection. The actions of the respondent to terminate the petitioner’s employment is arbitrary, discriminatory and against the letter and spirit of the constitution. The procedure applied is contrary to the law and fair administrative action.

6. In evidence the petitioner testified in support of her petition. In 2013 the petitioner while at the Norwegian Ambassador’s residence she met and was introduced to the shareholders and Managing Director of the respondent Ole Saethre and Une Amundsen. The request as to help set up a pilot project in Kibera slums and the petitioner obliged. The respondent was registered in Norway and got a certificate to operate in Kenya in 2015 and the petitioner was registered as one of the shareholders.

7. The petitioner was then paid for her time in helping the respondent set up its office in Kenya.

8. In 2016 the respondent had a crisis and Ole was recalled back to Norway and the claimant was asked to help with operations. She was not based at the respondent offices until May, 2016 when the respondent offered her a full time job. There was a job description signed in October, 2016 when she went to Oslo with the chairperson. The petitioner was appointed as the Executive Vice President for East Africa and the Country Director for Kenya. She was required to oversee overall Kenya operations on a full time basis.

9. The petitioner was paid by raising an invoice to the respondent. The rationale was that by raising such an invoice this would address taxation purposes in Oslo. The petitioner sent the invoices to the chair to offset respondent taxes in Norway. The petitioner was paid Kshs.600, 000.00 as a consultant. The advice was specific by the respondent’s chairperson.

10. Other than the visa application which described the petitioner as the executive vice president for East Africa, there was no other document giving a description of a consultant. The defence that the petitioner was a consultant is not correct as such status ceased when she moved into the respondent premises in May, 2016 and as a bank signatory, all her bills were to be paid by the respondent.

11. The petitioner also testified that all was well between her and the respondent until 7th April, 2017 when she got a letter terminating her consultancy services. Before this letter she had travelled to Oslo to attend Une funeral and there she met with the respondent’s operations manager. She was informed that since the respondent was going to expand to Mombasa and Kisumu, that there was need to have an office administrator but when the petitioner came back to Kenya she was asked to step down. At the time the petitioner had no knowledge of the consultancy status.

12. In January, 2017 Mr Geir was sent to the Nairobi office as the Logistics director and the claimant was his supervisor. By 17th March, 2017 she did not know that he had been made the Country Director since the petitioner had signed his contract as the Logistics Director. She had no knowledge of the change. She had no information that the respondent was looking for a Norwegian instead of a Kenyan.

The respondent's communications manager called the petitioner with information that there would be changes and that the new board formed after the death of the chairman, Mr Une was uncomfortable and for security reasons did not wish to have a Kenyan as country director due to the amount of cash the respondent was sending to the regional office. The petitioner asked to have written communication over the matters addressed in the call.

13. Verbally the petitioner was told that due to security reasons and questions of cash, the respondent needed a Norwegian in her office. There was no other reason of misconduct or anything given for the proposed changes.

14. This communication was followed with the notice to the petitioner terminating a consultancy taking effect on 30th April, 2017. The petitioner filed suit and obtained interim orders and when she went back to work, she found the respondent had moved out.

15. The petitioner also testified that since the time Mr Geir moved to the Nairobi office, there was a lot of verbal communication in Norwegian between him and the operations director in Oslo and they kept mentioning the Kenyan office staff names. There was a lot of tension.

16. Mr Geir went to Kisumu for work and he used his credit card. The petitioner used the same process but was required to put in claims to Norway for the head office to scrutinise and approve which was not similar to what Geir was required to do.

17. The petitioner was replaced for purported security reasons so that a Norwegian could take over. These events, actions and operations were discriminatory and based on racism.

Response

18. In response the respondent's case is that there was no termination of employment with the petitioner. The petitioner was not an employee of the respondent and was at all material times a consultant engaged to provide certain services to the respondent as detailed in her job description. The description of the same as "job description" was never intended to create an employment relationship between the petitioner and the respondent. The intention of the parties was for the petitioner to provide consultancy services to the respondent and this was confirmed by the fundamental behaviours of the parties in the course of the engagement.

19. The defence is also that the respondent, through a former employee Mr Ole Saethre offered employment to the petitioner in December, 2013 but she declined and insisted on a consultancy engagement she provided until January, 2015. The petitioner was re-engaged as a consultant in June, 2015 and a job description was signed in October, 2016. Mr Saethre is no longer with the respondent and Mr Amundsen is deceased.

20. The petitioner's consultancy engagement was terminated vide letter dated 7th April, 2017. The engagement as a consultant is confirmed by the fact of the petitioner raised invoices for the services rendered to the respondent; she offered services consistent with a consultancy save that the respondent retained a general power of inspection of the services rendered by the petitioner for the purpose of determining that the contracted work was executed but not in the nature of an employer and employee relationship; the petitioner had no fixed work hours, she had no reporting timelines and was not on the leave schedule; the petitioner used her own telephone and the bills were paid by the respondent but debited against her monthly invoices; and the level of control was limited to general inspection of work undertaken.

21. The defence is also that the petitioner was engaged as a consultant on a month to month basis. The provisions of the Employment Act and the constitution alleged to be violated do not apply, the petitioner having been a consultant and not an employee. The averments that the petitioners rights to legitimate expectations and fair administrative action do not arise.

22. The allegations of racial discrimination are denied and the respondent also states that the respondent was founded by Mr Une Amundsen, who passed on in March, 2017. He was then the chairman and the Chief Executive Officer of the respondent and was running the business. Upon the demise of Une, his widow Mrs Amundsen took over control but has no experience in running the business. It was therefore necessary to reorganise the business and make some changes. The changes included the appointment of Mr Odd Harald Hauge and Geir Ostrem, both Norwegian national as the chairman and country director of the respondent respectively. Mr Geir has been in Kenya for long and understands the business well. Before his death Mr Une as the chairman and Chief Executive Officer of the respondent had intended to employ a substantive head of the team in Kenya as opposed to having a consultant held by the petitioner. In a meeting held in February, 2017 Mr Une communicated his intentions to the petitioner. Following his demise, the need to have changes with the respondent were expedited and Mr Geir was appointed which had nothing to do with the petitioner's position.

23. The respondent being a foreign company engaged the petitioner as a consultant to ensure compliance with local laws and requirements and as set out in the job description. The failure to reduce the consultancy agreement into writing was as a result of the petitioner's failure to properly advise the respondent and constituted breach of the consultancy agree. The petitioner's claims are therefore unsustainable as based on her own breach or inaction and the reliefs sought do not arise.

24. In evidence, the respondent called Mr Geir Ostrem who testified that he is a Norwegian national and the respondent's Country Director. He joined the respondent in January, 2017 as the director Logistics and Distribution for East Africa.

25. The respondent is a branch of a company registered in Norway and the core business is a social enterprise with the objective of improving human and environmental wellbeing particularly in Africa through the development, manufacture, sale and distribution of clean stoves which use environmentally friendly bioethanol.

26. Mr Geir also testified that the respondent was founded by Mr Une Amundsen, who died in March, 2017. He was replaced as chairman by Mr Odd Harald, who approached the witness to take up the role of country director which he accepted following emails exchange on 21st April, 2017. From the communications with the chairman, it was clear that Mrs Amundsen and widow of Mr Amundsen preferred a Norwegian national to run the business in Kenya for ease of communication and interaction as she had not been previously actively involved in the business. The petitioner does not speak Norwegian which Mrs Amundsen is conversant with.

27. It was also clear that Mr Odd Harald and Mrs Amundsen preferred a substantive employee to take over the country director position for the respondent instead of engaging a consultant. The reason was because the two, chairman and the widow are not conversant with the business operations in Kenya. At the time the witness ahead been working with the respondent and had knowledge and conversant with the business in Kenya. He has grown up in Kenya and his parents are resident in Kenya since 1970 to date. He has previously worked in Kenya with Nordic Trailers Limited and Sales Director for Jambo Travel house Safaris.

28. In a meeting held in February, 2017 Mr Une had expressed his intentions to terminate the petitioner's consultancy. Present at the meeting were m rune, now deceased, the witness and the petitioner and other management team member. The petitioner was at all material times a consultant and not an employee of the respondent.

Submissions

29. The petitioner submit that her constitutional rights under article 27 and 41 of the constitution and section 5 and 49 of the Employment Act, 2007 and section 47 of the Fair Administrative Actions Act have been violated by the respondent. In 2016 the petitioner was appointed the Vice President and Country Director by the respondent and a job description was issued to her. The petitioner diligently served until 7th April, 2017 when she was issued with a letter terminating her employment but purporting it to be a termination of consultancy. There was no consultancy agreement as the petitioner was an employee of the respondent. The mode of termination was inhumane as the petitioner was terminated after the respondent exhibiting racist utterances and discriminatory actions aimed at driving her out of employment.

30. The respondent has not produced any evidence with regard to the petitioner's employment. There is equally no consultancy agreement. The petitioner raised invoice for payment of her salaries by the respondent for the respondent to avoid paying the taxes due in Norway. The petitioner thus followed directions given to her by her employer.

31. For the unfair termination of employment, the petitioner is entitled to her salaries due from April to June, 2017 at Kshs.1, 800.000; notice pay of 6 months at Kshs.3, 600,000.00; leave pay for one month at Kshs.600, 000.00; damages for discrimination against the petitioner at Kshs.10, 000,000.00; and damages for loss of employment at 12 months' pay all at Kshs.7, 200,000.00. The petitioner should also be paid her costs.

32. The petitioner has relied on the cases of **Dr. Samson Gwer & 5 Others versus Kenya Medical Research Institute (KEMRI) & 3 others, Petition No.21 of 2013** and **David Wanjau Muhoro versus Ol Pejeta Ranching Limited, Cause**

No.1813 of 2011.

33. The respondent submit that the petitioner was not an employee of the respondent. The principle to be applied is set out in the case of **George Kamau Ndiritu and another versus Intercontinental Hotel [2015] eKLR and Collins N Oneko versus G4S Security Services (Kenya) limited [2016] eKLR**. The total relationship between the parties and the intentions as expressed in the documents of engagement and mode of payment must be interrogated. There is also the case of an independent contractor who can be engaged to carry out managerial functions but the same does not convert to employment.

34. The petitioner helped the respondent in setting up the business in Kenya and helped in managing the same. The petitioner had a job description and thus there was no intention by the parties to form an employment relationship. Clause 5 of the Job Description was to have the petitioner advice the respondent on local law compliance, prepare and execute contracts of employment for all employees including the petitioner and ensure compliance with statutory requirements such as PAYE.

35. From the documents exchanged between the parties, the petitioner had the option of becoming an employee or a consultant the employment relationship was never actualise and thus she remained a consultant. The petitioner payments were through invoicing the respondent.

Determination

Whether there is an employment or consultancy relationship between the parties;

Whether there is discrimination against the petitioner

Whether there are any remedies

36. The first question is crucial to address as with it being determined, the other are anchored on it.

37. It is common cause that the petitioner was the Vice President and Country Manager of the respondent. She was also issued with a job description. The petitioner has also submitted documents, emails and

communications between Mr Une Amundsen and herself negotiating on the position with the respondent.

38. The petitioner submitted her Supplementary List of Documents file don 5th June, 2017 and pat of this is tis at email dated 13th June, 2016 between the founder and chairman of the respondent and who engaged the petitioner. Part of the email he writes to the petitioner as follows;

- *for now we will offer you KES 600.000 as Senior Vice President East Africa. (please don?t mix up this title with the statistics you sent me) – it is up to you if you would like a certain percentage as a consultant and a percentage as employed by Safi. In addition we are prepared to cover your expenses for your phone and your internet at your house.*

The latest Safi standard contract is updated on all other aspects, such as reimbursements, eave medical, vacation and insurance. When employed by contract, we will expect you to be working in our new offices when we move out of Kibera. ...

39. This email arose out of an email the petitioner had sent to Mr Une as the chairman for the respondent and dated 12th June, 2016. The petitioner seem to be appraising on watt entails an employee salary and benefit.

40. The petitioner further sent email to Maggy Bjorgvinsdottir, the Finance and Administrative Director and with a proposal on her payment for a 50:50 I take it for an employee’s salary and for a consultant payment. This was with a view of addressing annual returns ad justifying to the taxman in that regard. This proposal was sent on 15th June, 2016 tow (2) days after the communication from Mr Une.

41. From the email exchanges, it is apparent that the petitioner received the total payment into her account. There are deposits into her bank account. The petitioner admitted that she was paid a total sum of Kshs.600, 000.00 per month after invoicing the respondent.

42. All subsequent payments to the petitioner were based on invoices sent to the respondent. such invoices are raised by *Personal and Corporate Health Solutions* being invoices for the payment of *business Consultancy*.

43. It is therefore apparent that there was no employment contract as envisaged by Mr Une in his email to the petitioner on 13th June, 2016. The salary split for 50:50 employees: consultant was also not issued. The petitioner continued to receive the sum of Kshs600, 000.00 into her account together with other invoiced amounts for various expenses.

44. In the case of **Fredrick Byakika versus Mutiso Menezes International Unlimited [2016] eKLR** the court 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 appointment 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%.

45. In **Kenya Hotel & Allied Workers union versus Alfajiri Villas [2014] eKLR** the Court in addressing the question as to whether the relationship between the parties was that of employment or an

independent consultant set out the difference between an employee under the Employment Act and an independent consultant as follows;

- *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 ...*

46. The rationale of what goes into an employment relationship as against what goes into an independent consultant relationship was summarised in the case of **Charles Juma Oleng versus M/S Auto Garage Ltd & another [2014] eKLR** as follows;

[to determine the nature of relationship one has to address the following]

- a. The control test whereby a servant is a person who is subject to the command of the master as to the manner in which he or she shall do the work.*
- b. The integration test in which the worker is subjected to the rules and procedures of the employer rather than personal command. The employee is part of the business and his or her work is primarily part of the business.*
- c. The test of economic or business reality which takes into account whether the worker is in business on his or her own account, as an entrepreneur, or works for another person, the employer, who takes the ultimate risk of loss or chance of profit.*
- d. Mutuality of obligation in which the parties make commitments to maintain the employment relationship over a period of time. That a contract of service entails service in return for wages, and, secondly, mutual promises for future performance. The arrangement creates a sense of stability between the parties. The challenge is that where there is absence of mutual promises for stable future performance, the worker thereby ceases to be classified as an employee as may be the case for casual workers.*

47. Even where all the above exists, the court must still interrogate the intention of the parties. In this case, the third test of the economic reality, in my view took centre stage. The parties, for expediency and I take it as the relationship between them fomented and before it could be determined which way to go, whether full employment or full consultancy, the petitioner was allowed full benefits of the due payment. She was able to invoice the respondent for all her payments and was paid all total dues owed to her without any statutory deductions.

48. Even where the intention was to have the petitioner as the employee of the respondent, such relationship did not exist at the time of the termination of the consultancy arrangement. Whatever duties the petitioner was able to undertake, such were agreed upon based on a job description on the roles, tasks and duties she was to undertake.

49. I find no employment relationship between the parties herein. The consultancy engagement between the parties is all too clear. Even where the duty to issue an employment contract to an employee is vested upon the employer, where no such employment relationship exists and only a consultancy engagement is apparent; such duty cannot be enforced against the respondent in this case. the basis for jurisdiction and any determination by the this court is the existence of an employment and or labour relations between the parties as held by the Court of Appeal in **Olive Mwhaki Mugenda & another versus Okiya Omtata Okoiti & 4 others [2016] eKLR**.

50. Even with the best effort to protect the rights of the petitioner as averred in the petition, without an employment relationship between the parties, this court is denied that crucial element that is all important. Jurisdiction.

51. Without jurisdiction, this court cannot move a step further. I must stop here.

52. However, save for the issues now addressed above, the petition raises other fundamental issues which whose merits should not be lost. The foundation of the petition being the court before which it was filed and not the merits of whether there were constitutional violations should not go with the court jurisdiction.

53. the Court of Appeal in addressing a case of a petition having been filed before the wrong forum held that the interests of justice demands that the same not be dismissed as the merits of the petition are not addressed and rather the court without jurisdiction ought to transfer the petitioner before the right forum. In the case of **Daniel N Mugendi versus Kenyatta University & 3 others [2013] eKLR** the Court held as follows;

- *in endeavouring to meet the ends of justice untrammelled by procedural technicalities, we set aside the order striking out the appellant's petition and direct that the High Court do transfer it to the Industrial Court which also has jurisdiction and authority to consider the claims of breach of fundamental rights as pertain to industrial and labour relations matters. It is only meet and proper that the Industrial Court do exclusively entertain those matters in that context and with regard to **Article 165(5) (b)**. And in order to do justice, in the event where the High Court, the Industrial Court or the Environment & Land Court comes across a matter that ought to be litigated in any of the other courts, it should be prudent to have the matter transferred to that court for hearing and determination. These three courts with similar/equal status should in the spirit of harmonization, effect the necessary transfers among themselves until such time as the citizenry is well-acquainted with the appropriate forum for each kind of claim. However, parties should not file "mixed grill" causes in any court they fancy. This will only delay dispensation of justice.*

I find it most appropriate that this petition is ripe for transfer before the High Court for appropriate allocation. The commercial and constitutional rights violations shall be properly addressed by the High Court and not this court.

The Registrar, Employment and Labour Relations Court shall cause the file to be moved and placed for mention before the Principal judge, High Court for appropriate allocation.

Dated and delivered in open court at Nairobi this 7th day of August. 2017.

M. MBARU JUDGE

In the presence of:

Court Assistants: Lillian Njenga & David Muturi

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