



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 2009 OF 2016

AARON SAFARI MUTINDA.....CLAIMANT

VERSUS

ABE-TEC (E.A) LIMITED.....RESPONDENT

RULING

1. This ruling flows from a preliminary objection raised by the Respondent by notice dated 6th February 2017, to the effect that the Claimant's relationship with the Respondent was that of an independent contractor and not an employee, and the court therefore lacks jurisdiction to entertain the claim.

2. For some reason, which was not clear to the Court, the Claimant did not respond to the objection.

3. By virtue of Article 162(2)(a) of the Constitution of Kenya, 2010 and Section 12 of the Employment and Labour Relations Court Act, this Court is clothed with specialized jurisdiction to deal with employment and labour relations matters. In employment claims, the existence of an employment relationship between the parties is a prerequisite.

4. Section 2 of the Employment Act, 2007 defines an employee as:

“a person employed for wages or a salary and includes an apprentice and indentured learner”

5. The same section defines an employer as:

“any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual”

6. A contract of service is defined as:

“an agreement, whether oral or in writing, and whether expressed or implied, to employ or serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership”

7. In *John Kamau Mburu v Program for Appropriate Technology in Health (PATH) & another [2015] eKLR* this Court made a distinction between an employment relationship and a work relationship, stating that the mere fact that parties work together does not necessarily give rise to an employment relationship.

8. In paragraphs 3 and 4 of his Memorandum of Claim, the Claimant pleads as follows:

“By a contract of employment, the Respondent agreed to employ the Claimant as a sub-contractor on project known (sic) Seychelles Power Plants Projects outside Kenya.....

The Respondent agreed verbally that the claimant should form a team of One Supervisor and four technicians and that he should give the Respondent 90 days quote for installation and he did so.”

9. From the Claimant’s own pleadings, it is evident that he was engaged by the Respondent as an independent contractor and not an employee. The effect is that the relationship between the parties was commercial in nature and did not give rise to an employment relationship as defined in law.

10. The matter is clearly in the wrong forum and in line with the decision by the Court of Appeal in ***Professor Daniel N. Mugendi v Kenyatta University & 3 Others (Civil Appeal No 6 of 2012)*** that a matter filed in the wrong court ought to be transferred to the right one, I direct that this matter shall be transferred to the Commercial Division of the High Court for disposal.

11. I make no order for costs.

12. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 1ST DAY OF SEPTEMBER 2017

LINNET NDOLO

JUDGE

Appearance:

No appearance for the Claimant

Mr. Akelo for the Respondent