



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO 645 OF 2015**

**ALFRED ELIJAH RORI.....CLAIMANT**

**VS**

**M-KOPA KENYA LIMITED.....RESPONDENT**

**RULING**

1. This ruling flows from the Respondent's application brought by way of Notice of Motion dated 9th September and filed in Court on 15th September 2015. The application seeks an order for striking out of the Claimant's claim on the following grounds:

- a. There was no employment relationship between the Claimant and the Respondent;
- b. The Claimant was an independent contractor engaged by the Respondent;
- c. This Court has no jurisdiction to hear this case;
- d. This cause is opportunistic and a waste of valuable judicial time;
- e. The suit is an abuse of the court process.

2. In a supporting affidavit sworn by the Respondent's Director-Legal, Administration and External Affairs, Pauline Githugu on 7th September 2015, it is deponed that on 7th October 2013, the Claimant and the Respondent entered into a sales representative contract that defined the parameters of their relationship.

3. Githugu further depones that the status of the relationship between the parties was clearly stipulated in paragraph 7 of the contract which provided that the Claimant's engagement was one of an independent sales representative. All payments due to the Claimant were to be invoiced to the Respondent and paid according to the respective invoices and at no point was the Claimant paid a salary.

4. According to the Respondent, the relationship between an independent contractor and a client is a purely commercial one that is not governed by the Employment Act and the Employment and Labour Relations Court Act. As a consequence, this Court lacks jurisdiction to hear and determine this matter.

5. In a replying affidavit sworn by the Claimant, Alfred Elijah Rori on 2nd December 2015, he

depones that upon his employment by the Respondent, he was issued with a Company Identify Card indicating his position as Sales Representative. The Respondent also issued him with payslips showing that he was its employee. Rori states that the standard contract referred to by the Respondent and in particular Clause 7 did not apply to him.

6. When the parties appeared before me on 7th December 2015, they agreed to dispense with the application by way of written submissions.

7. The issue before the Court is whether there was an employment relationship between the Claimant and the Respondent, capable of enforcement by the Court. It was submitted on behalf of the Respondent that this Court lacks jurisdiction to entertain the Claimant's claim on account of absence of an employment relationship between the parties.

8. The jurisdiction of this Court is anchored in Article 162(2)(a) of the Constitution which provides as follows:

***(162)(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-***

***(a) employment and labour relations and***

***(b).....***

9. Pursuant to this constitutional provision, Section 12 (1) (a) the Employment and Labour Relations Court Act provides that:

***12(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—***

***(a) disputes relating to or arising out of employment between an employer and an employee;***

***(b) .....***;

10. The Court agrees with the Respondent's submission that where there is no employment relationship, it has no jurisdiction. In addition, the holding in ***Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1*** on the centrality of jurisdiction remains good law.

11. In advancing its argument that the Claimant's claim is not properly before this Court the Respondent relied on a contract titled 'M-Kopa Sales Representative Contract'. Clause 7 of this contract provides as follows:

***7. Contractor Status***

***a. Nothing contained herein shall constitute the Sales Rep an employee or agent of M-KOPA, and the relationship of the Sales Rep to M-KOPA shall be one of an independent Sales Rep to and not a servant of M-KOPA. In such capacity the Sales Rep shall bear exclusive responsibility for the payment of her his/her national health insurance/social security payments as a self-employed person and for the discharge of any income tax and value added tax (VAT) liability arising out of remuneration for her work performed under this Agreement.***

***b. ....***

***c. As the Sales Rep is not an employee of M-KOPA, he will not be eligible to participate in any pension, medical, insurance or other scheme or plan established by M-KOPA for the benefit of***

*its employees.*

12. From this Clause, it would appear that the Claimant was not an employee of the Respondent. However, according to the terms and conditions appearing on page 1 of the same contract, the Claimant was to work for eight (8) hours six (6) days per week at a daily rate of Kshs.1,400.00.

13. 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”***

14. 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”***

15. 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”***

16. My perusal of the 'M-KOPA Sales Representative Contract' reveals that the Claimant earned a fixed daily rate which was grossed up at the end of the month to form a predictable remuneration which could pass for a monthly salary. In addition, the Claimant was required to put in normal working hours for six (6) days per week. From this arrangement, there was no chance that the Claimant could pick up any other assignment outside his engagement with the Respondent.

17. As held by the Supreme Court of Canada in ***Ontario Ltd v Sagaz Industries Inc. 2001 SCC 59*** in determining whether an employment relationship actually exists, the Court must examine the total relationship between the parties. A disclaimer clause such as Clause 7 in the contract between the Claimant and the Respondent does not by itself nullify the existence of an employment relationship.

18. The Court must examine the intention of the parties not only as expressed in the documents of engagement but as evidenced in their fundamental behaviour as well. Having done so in this case, I find it unsafe to rule that there was no employment relationship between the parties at the interlocutory stage. This issue however remains live up to the final determination of the Claimant's claim and parties are at liberty to call evidence in support their respective positions.

19. The result is that the Respondent's application fails and is dismissed. The costs of this application will be in the cause.

20. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 29TH DAY OF JANUARY 2016**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Ndege for the Claimant

Mr. Kimani for the Respondent