



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO 606 OF 2016

STARSKY LIMITED.....CLAIMANT

VERSUS

FIVE FORTY AFRICA LIMITED.....1ST RESPONDENT

DON SMITH.....2ND RESPONDENT

RULING

1. The Respondent's application brought by Notice of Motion dated 18th May 2016 and filed in Court on 23rd May 2016 seeks striking out of the Claimant's claim.

2. The application which is supported by an affidavit sworn by the 2nd Respondent is based on the following grounds:

- a) The general consultancy agreement dated 1st October 2007 and executed by the parties on 5th December 2007 falls outside the jurisdiction of this Court;
- b) The said consultancy agreement is not a contract of employment or related purposes envisaged by the Employment Act, 2007;
- c) The claim, if any, has been filed in the wrong Court;
- d) The Claimant, as a limited liability company, is incapable of being employed as an employee as defined by the Employment Act, 2007;
- e) The Claimant was for all intents and purposes, an independent contractor and not an employee;
- f) It is in the interest of justice that this matter be filed before a proper forum;
- g) Further, it is in the interest of justice that this matter be dismissed with costs.

3. In a replying affidavit sworn by the Claimant's Managing Director, Erick Murilla on 12th August 2016, it is deponed that the agreement dated 1st October 2007 is a contract of employment falling within the jurisdiction of this Court.

4. Murilla further depones that a limited liability company is a person capable of being employed as an employee as defined by the Employment Act, 2007.

5. The question for determination in this application is whether there was an employment relationship between the Claimant and the Respondent capable of enforcement before this Court.

6. Section 2 of the Employment Act defines an employee as:

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

7. The question then is whether this definition would extend to cover a corporate person such as a limited liability company. Section 10 of the Employment Act sets out the mandatory particulars to be contained in an employment contract.

8. Looking at these particulars in their totality, it would appear that the definition of an employee is limited to natural persons. Additionally, the responsibilities assigned to an employee in an employment relationship cannot be shared among different stakeholders in a corporate entity.

9. I therefore find that the contract dated 1st October 2007 between two limited liability companies does not create an employment relationship capable of enforcement by this Court. Consequently, the Court lacks jurisdiction to entertain the Claimant’s claim which arises from this contract.

10. I would have struck out the Claimant’s claim at this stage in line with the decision in ***Rob De Jong & 4 Another v Charles Mureithi Wachira [2012] eKLR*** where it was held that a suit that is filed in a court without jurisdiction is a nullity that cannot be salvaged.

11. I am however aware of the Court of Appeal decision in ***Professor Daniel N. Mugendi v Kenyatta University & 3 Others (Civil Appeal No 6 of 2012)*** to the effect that a suit that is filed in the wrong court ought to be transferred to the right court for determination on merit.

12. I therefore direct that this case shall be transferred to the Commercial Division of the High Court for disposal.

13. Each party will bear their own costs.

14. It is so ordered.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 30TH DAY OF SEPTEMBER 2016

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JUDGE

Appearance:

Mr. Onsomu for the Claimant

Mr. Kimeto for the Respondents