REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 1593 OF 2014

LINDA NASIKE MAKOKHA.....CLAIMANT

VERSUS

BHARTI AIRTEL INTERNATIONAL (NETHERLANDS)

BV – KENYA BRANCH.....1ST RESPONDENT

SUSAN NAKHANU GITHUKU AND **TONY**

WARURI GITHUKU trading as

Human Performance Dynamics Africa.....2ND RESPONDENT

RULING

1. By a Notice of Motion dated 22nd May, 2015, the 1st respondent sought that the Court strikes out the Memorandum of Claim and dismisses the claim against the 1st respondent.

2. The application was premised on the fact that the suit was for payment of dues under a contract of employment yet the letter terminating the claimant's services was signed by the 2nd respondent who according to the 1st respondent was the claimant's employer.

3. The application was further supported by the affidavit of Akbar Hussein who deponed on the main that the 1st respondent was not the claimant's employer hence was not capable of terminating her services.

4. In reply to the application, the claimant through her affidavit sworn on 9th June, 2015 deponed in the main that:-

a. That it was true that she entered into a Contract of Employment with the 2nd respondent but the 1st respondent still maintained control of the management of the contract and the 2nd respondent was a mere agent/administrator by virtue of:-

i. Paragraph 10 (a) of here memorandum of claim the Chief Human Resource officer was in the meeting stated therein and the said officer was in full control of the said meeting.

ii. Clauses 6, 2, 7, 2, 7, 4, 8, 1, 8.2, and 14.5 shows clearly that the 1st respondent had control of the

management whereas if the 2nd respondent was the employer, it would have been in total control.

iii. The control of employment makes a pretentious effort of showing that the salary was reviewed and paid by the 2nd respondent yet in actual fact the same was reviewed and paid by the 1st respondent.

iv. The 2nd paragraph of the letter of termination indicates clearly that the decision to terminate the services of the claimant was taken by the 1st respondent. Human performance dynamics Africa (HPDA) was merely executing the same as an Agent with instructions from the 1st respondent and this is confirmed by clause 14.5 of the contract.

v. That in view of the foregoing, the 1st respondent was the actual employer and the 2nd respondent merely an administrator or agent of the 1st respondent.

5. In his submissions in support of the application, Mr. Luseno for the applicant submitted that the claimant entered into a contract of employment with the 2nd respondent after which she was seconded to the 1st respondent. Counsel urged the Court while examining the relationship between the claimant and the 1st respondent to scrutinize the conduct of the parties and the evidence tabled before it. Counsel cited in support, the case of **Nahason Cheruyot Ngeno vs. Strengthening of Mathematics and Science Education Project & Anor (2015) eKLR** in which the Court held that in determining the parameters of an employment relationship within the context of a secondment, the Court is required to examine the intention of the parties as evidenced by their conduct and relevant documentation. In assigning responsibilities to the parties in a secondment arrangement, the traditional test of control and supervision are not adequate.

7. According to Counsel, clause 3.3. of the contract of employment between the claimant and the 2nd respondent provided that the claimant would receive instructions from 1st respondent's line manager and administrative instructions from the 2nd respondent. Clause 3.4 further placed obligation on the claimant to comply with all reasonable directions given to her and observe all policies and procedures and rules of the 1st respondent as may be introduced and or amended from time to time. Mr. Luseno thus submitted that the 1st respondent's limited control did not put out of place the relationship between the claimant and the 2nd respondent. He contended that the 1st respondent did not take up the duties, responsibilities or rights of the 2nd respondent by exercising minimal operational control over the claimant.

8. According to Counsel, the claimant's salary was payable by the 2nd respondent. It was also the 2nd respondent's obligation to make necessary statutory deductions from the claimant's salary and contribute towards her pension. In the event of default the claimant would have no recourse against the 1st respondent but 2nd respondent. According to Counsel, the 2nd respondent's responsibility to pay the claimant and make provision for other statutory benefits was key in determining the claimant's rightful employer.

9. Mr. Kitonga for the claimant on his part submitted that the claimant worked for the 1st respondent on permanent and pensionable terms from the year 2000 to 2012 and in the year 2013 all personal assistants were put on one year renewable contract terms administered by the 2nd respondent. According to Counsel, the personal assistants moved in the same capacity without any change in their benefits. Mr. Kitonga further submitted that although there was no contract between the claimant and the 1st respondent, her services were wholly offered to the 1st respondent. In support of the submissions counsel sought reliance on the case of **Ready Mixed Concrete (SE) v. Minister of Pension & National Insurance** where Mackenna J observed that a contract of service exists if:-

(a) the servant agrees that in consideration of a wage or other remuneration, he will provide his work and skill in the performance of some service for his master.

(b) he agrees, expressly that in the performance of that service he will be subject to the others control in a sufficient degree to make that other master.

(c) the other provisions are consistent with it being a contract of service.

10. Counsel therefore submitted that the true nature of the relationship between the 1st respondent and the claimant needs to be assessed on the basis of the evidence before the Court. According to Counsel, the claimant was totally subject to the 1st respondent as far as operational instructions were concerned even though the contract said that administrative functions rested with the 2nd respondent.

11. It is not disputed that between the year 2000 t0 2013 the claimant worked for the 1st respondent on permanent and pensionable terms. In the year 2013 the contract was revised to annual renewable fixed term contract administered by the 2nd respondent.

12. The contract of employment issued to the claimant dated 1st October, 2013 stated in the opening paragraph that the claimant was being offered full-time employment with HPD Africa – the 2nd respondent, for purposes of undertaking work at Bharti Airtel – 1st respondent. Clause 1 of the contract provided in the material part that the claimant by accepting the offer of employment with the 2nd respondent, the claimant acknowledged that all previous contractual and employment relationship between herself and Bharti Airtel were terminated and that she was willing and capable of entering into the contract as her only full time employment relationship with the intention of being legally bound to HPD Africa in all employer-employee relationship. Clause 6.1 further provided in material part that during normal working hours the claimant shall devote whole of her time, attention, skill and abilities to the performance of her duties under the contract and shall act in the best interest of Bharti Airtel. The letter of offer of employment was signed and dated by the claimant on 30th September, 2013 confirming she read and accepted the terms of the contract.

13. Labour flexibilization has been a managerial practice since the late 1970s. Through this practices the notion of inside contract system and labour outsourcing have emerged. That is to say companies especially multi-nationals in the manufacturing sector hire contractors who work for them in their factories and take full responsibility for production of a certain item, hire their own employees and set wages for them. The consequence of inside contract system at the company's or organization's level is that industrial worker has lost the determinant role and previous power and has been replaced by a service provider who hires his services.

14. In free-markets and capitalist system which our country embraces, the law does not prohibit labour outsourcing as such. The Courts can only intervene and interdict an inside contract system or labour outsourcing where it found to have been carried out in a manner that contravenes the Constitution, employment and labour relations laws.

15. The claimant herein acknowledges that she was initially employed by the 1st respondent but later hired by the 2nd respondent to perform the duties to be assigned by the 1st respondent. In her letter of appointment with the 2nd respondent she acknowledged and signed that the new contract of employment would terminate her earlier contract with the 1st respondent. In the circumstances there is absolutely no justification in joining the 1st respondent in the present suit.

16. The application therefore succeeds with the consequence that the 1st respondent is removed from these proceedings.

17. There will be no order on costs.

18. It is so ordered.

Dated at Nairobi this 2nd day of September 2016

Abuodha Jorum Nelson

Judge

Delivered this 2nd day of September 2016

In the presence of:-

……for the Claimant and

……for the Respondent.

Abuodha Jorum Nelson

Judge