



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA
(BIMA TOWERS)
CAUSE NO. 363 OF 2013
ELIJAH MORANGA.....CLAIMANT
v
JOHN LEINSLY
IRENE ONDERI.....RESPONDENTS

RULING

1. The Claimant filed a Statement of Claim on 1 November 2013 against the Respondents and in the Statement of Claim it was pleaded that
 4. On or about the 17th March 2011, the Respondents jointly and severally contracted the Claimant to build and supervise their respective premises at Ukunda at a daily consideration of Kenya Shillings 1,200/=. It was covenanted that the Claimant was to be overall and in charge of operation till the Respondents returned from their trip overseas.
 5. The Claimant contends that when the Respondents returned from abroad on 22nd November, 2011, the Respondents were duly informed of the amount due and owing nevertheless refused and or failed to pay the same to the same to the Claimant part thereof or at all.
 6. The Respondents are truly and honestly indebted to the Claimant in the said sum.
2. The main relief sought was Kshs 286,600/-.
3. The Respondents filed a Response on 2 December 2013 and denied that the Claimant was ever their employee but had contracted him to build premises for them and therefore the suit was incompetent, misconceived, badly constituted and an abuse of the Court's process.
4. On 8 January 2014 the Respondent filed a Notice of Preliminary Objection on the grounds that the claim was bad in law, mischievous, scandalous and an abuse of the court process and, lack of jurisdiction. The Claimant filed grounds of opposition on 6 March 2014.
5. The preliminary objection was argued on 18 March 2014. Ms. Tsuma who had held Mr. Gichana's brief when the Cause was called earlier and indicated Mr. Gichana would be ready to proceed was not in Court nor was Mr. Gichana when the file was reached for the hearing of the objection.

6. Mr. Omuja for the Respondents submitted that the Court did not have jurisdiction to hear the claim as pleaded because there was no employer and employee relationship between the parties. The dispute was not a labour dispute in his view. The contract, the subject of the cause of action was a contract for works.
7. He further submitted that this Court could not transfer the claim to another court and cited the authority of *Adero & another v Ulinzi Sacco Society Ltd* (2002) 2 KLR 577 where the High Court (Ringera J as he then was) held that where a cause is filed in a court without jurisdiction, there is no power in that court to transfer it to a court of competent jurisdiction.
8. The Respondent also cited Nairobi High Court Petition No. 170 of 2012, *United States International University (USIU) v the Attorney General* (2012) eKLR and *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696.
9. The Constitution, the Industrial Court Act and the Employment Act, 2007 have all provided for the remit of the jurisdiction of the Industrial Court. The fulcrum upon which one of the jurisdictions of the Industrial Court turns is a contract of service, which has been defined in section 2 of the Employment Act.
10. A contract of service unlike a contract for works or contract for service has certain peculiarities.
11. Drawing a distinction between an employee and an independent contractor depends on statute, and tests which have been set out in case law. These tests include organisation/integration test conceived in context of the professional worker ? see *Cassidy v Min.of Health* [1951] 2 KB 343 and multiple or mixed factor test which was initially formulated in *Ready Mixed Concrete v Min.of Pensions* [1968] 2 QB 497.
12. This Court has also discussed the issue previously in Mombasa Cause No. 31 of 2013, *Mwalimu Kalimu Gamumu v Coastline Safaris Ltd & Others*. In Mombasa Cause No.229 of 2013, *Kenya Hotels & Allied Workers Union v Alfajiri Villas (Magufa Ltd)*, the Court observed that

An independent contractor's contract, in my view is a contract of work (contract for service) and not a contract of service, or to use the ordinary language a contract of employment. The hallmarks of a true independent contractor are that the contractor will be a registered taxpayer, will work his own hours, runs his own business, will be free to carry out work for more than one employer at the same time, will invoice the employer each month for his/her services and be paid accordingly and will not be subject to usual "employment" matters such as the deduction of PAYE (tax on income), will not get annual leave, sick leave, 13th Cheque and so on.
13. From the way the Claim has been pleaded and documents attached, there is no doubt that the Claimant was expected to perform certain specified tasks (construction of a building) and was not obliged to perform the work himself but through the labour of others. He was an independent contractor.
14. The Industrial Court has no jurisdiction for contracts for works. The question therefore arises whether the Claim should be struck out or be transferred to a Court with jurisdiction.
15. In this regard, Mr. Omuja submitted that this Court, lacking jurisdiction cannot transfer the matter to a competent Court. And the authority for that decision was cited.
16. But in my view, the *Adero* decision can be distinguished from the present case. One, the Industrial Court as presently established derives its mandate from Article 162(2) of the Constitution as read with section 12 of the Industrial Court Act and various other statutes such as the Employment Act. Two, the jurisprudence on the exact limits of the jurisdiction of the Industrial Court as against the High Court is still evolving. Three Article 159(2)(d) of the Constitution has elevated to a constitutional imperative the need for Courts to administer justice without undue regard to procedural technicalities (the jury is still out on exactly what would amount to undue regard to technicalities though the Supreme Court has given an

exposition on the point).

17. Last but not least the Court of Appeal in *Daniel N. Mugendi v Kenyatta University & 3 others* (2013) eKLR in dealing with an appeal in which the High Court had dismissed a Petition on the basis that it should have been filed in the Industrial Court endorsed as the correct legal position the approach taken by Majanja J in the *USIU* case, set aside the order striking out the Petition and held

Believing as we do that the approach taken by Majanja J is the correct one, and in endeavoring 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 pertains to industrial and labour relation matters.....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 harmonisation, effect the necessary transfers among themselves until such time as the citizenry is well-acquitted with the appropriate forum for each kind of claim.

18. I would follow the ratio in the above decision and, rather than strike out the Cause, order that it be transferred to the Resident Magistrate's Court in its civil jurisdiction for determination on the basis that the amount being sought falls within its pecuniary jurisdiction.

19. The order commending itself is therefore that this Cause be transferred to the Magistrates Court for hearing and determination.

20. The Deputy Registrar to forward the file with requisite notice to the parties.

Delivered, dated and signed in open Court in Mombasa on this 16th day of May 2014.

Radido Stephen

Judge

Appearances

Gichana Bw'Omwando & Co. Advocates for Claimant

Mr. Omuya instructed by

Hezron Gekonde & Co. Advocates for Respondent