



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

CAUSE NO. 455 OF 2014

GILBERT SULE OTIENO.....CLAIMANT

v

SEVENTH DAY ADVENTIST CHURCH (EAST AFRICA) LTD

(Sued on behalf of S.D.A. Church, Kiamunyi East).....RESPONDENT

RULING

1. The Claimant commenced legal proceedings against the Respondent on 29 September 2014 wherein he pleaded as may be material

5) Sometime in August 2011 the Claimant entered into a contract for the construction of the Respondent's church referred to as Kiamunyi East through the churches' representatives (A copy of the agreement dated 24th July 2011 is herewith attached and marked as G.S.O 3)

6) After the above-mentioned agreement, the Claimant started the construction work following a down payment of Kshs 125,000/= from the Respondent on the 29th August 2011 (See a copy of the bank slip attached and marked as G.S.O 4)

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13) On 22nd of October 2013, the Claimant asked the engineer to show him the defects on the said column (2) as earlier on implied by him but he was told not to disturb since he had written a letter and that the Claimant had to move out of the site immediately. The same day, the engineer handed over the letter to the Claimant terminating the contract (see copy of the termination letter attached and marked as appendix G.S.O 7).

2. The Claimant consequently seeks a total of Kshs 4,725,000/- and compensation pursuant to section 49(1) (c) of the Employment Act.

3. The gravamen of the Claimant's cause of action appears to be breach of contract dated August 2011.

4. When the Respondent was served with the pleadings, it filed a Notice of Preliminary Objection on 4 November 2014.

5. The objection was that

1. The honourable court lacks jurisdiction to hear and determine the suit herein.
2. That the Claimant is barred from invoking the intervention of the court without first referring the dispute herein to arbitration as per paragraph 9 of the contract.

6. On the same day, the Court in the presence of both parties Advocates on record directed that the objection be taken on 4 December 2014.

7. When the Cause was called for the objection to be urged, the Claimant and his Advocate were not present. No explanation was tendered.

Jurisdiction question

8. The Respondent submitted that the contract between the parties was a contract for services and not a contract of service and thus not within the ambit of the Employment Act, 2007.

9. It was submitted that the Claimant was an independent contractor not under the direct supervision or control of the Respondent. Further, it was urged that the Claimant was free to dictate how the work was done and employ his own labour and pay the workers. He was an expert with skills in the field of construction guided only by the specifications provided by architects and structural engineer and on completion of the works was entitled to the contract sum as agreed.

10. It was also submitted that the Respondent was not in the business of construction.

11. The Respondent alternatively submitted that the contract in question provided for arbitration and therefore the Court should refer the dispute to arbitration.

12. The Respondent cited the authority of *Everett Aviation Ltd v Kenya Revenue Authority* (2013) eKLR.

13. The parties signed a contract dated 24 July 2011. The contract referred to the Respondent as *the employer* and the Claimant as *the foreman*.

14. However, to establish the legal character of the relationship and to determine the true and correct relationship between the parties, the Court must go beyond the use of the words *employer* and *foreman*.

15. The contract provided for the obligations, duties and responsibilities of each party. None of the obligations, duties and responsibilities accruing to the Claimant are of the genre which constitute the fundamental rights or basic conditions and terms of employment of an employee such as entitlement to a wage/salary, which is an essentialia of a contract of service, hours of work, entitlement to annual leave, public holidays, accommodation or in lieu housing allowance, pensions and protection against unfair or wrongful dismissal.

16. The contract was not one of service but a contract for services or a contract for works.

17. In *Francis M Bwire & 12 others v Krystalline Salt Ltd* (2014) eKLR, while discussing a similar question, I stated that

25. The hallmarks of a true independent contractor have been the subject of discussion in Court decisions and academic writings. This Court has discussed the issue in *Kenya Hotel & Allied Workers Union v Alfajiri Villas (Magufa Ltd)*, (2014) eKLR.

26. Several tests have been identified in decisions such as in *Cassidy v Min.of Health* [1951] 2 KB 343 and *Ready Mixed Concrete v Minister of Pensions* [1968] 2 QB 497. These tests include the organizational/integration test and the mixed factor test.

27. In the *Alfajiri Villas* case this 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.

18. The Claimant herein was an independent contractor who entered into a contract for services or contract for works and it is therefore correct as submitted by the Respondent that the relationship was outside the scope of the Employment Act, 2007.

19. But the Industrial Court does not draw its jurisdiction only from the Employment Act, 2007 nor is its jurisdiction confined to disputes arising from contracts of service. The Court also draws jurisdiction from other written laws such as the Industrial Court Act, the Labour Relations Act and the Labour Institutions Act.

20. My reading of these mentioned Acts do not suggest that the Court has been clothed with jurisdiction over commercial disputes which essentially arise from contracts for service or contracts for works such as presents itself from the breach of the contract between the parties.

21. I am therefore, based solely on the arguments advanced by the Respondent constrained to hold that the dispute here is properly for a different forum, the High Court or the Magistrate's Court where there is pecuniary jurisdiction.

22. Because of the conclusion I have arrived at, it is not necessary for me to discuss the arbitration question. The parties may raise it at the appropriate forum.

23. On the basis of the decision of the Court of Appeal in *Daniel N. Mugendi v Kenyatta University & 3 others* (2013) eKLR, rather than decline jurisdiction and strike out the Cause, I order that it be transferred to the Chief Magistrate's Court in Nakuru for adjudication.

24. There will be no order as to costs.

Delivered, dated and signed in Court in Nakuru on this 18th day of December 2014.

Radido Stephen

Judge

Appearances

For Claimant Geoffrey Otieno & Co. Advocates

For Respondent Mr. Ogutu instructed by Motanya & Co. Advocates