



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1466 of 2011

COLLINS N. ONEKO..... CLAIMANT

VERSUS

G4S SECURITY SERVICES (K) LIMITED..... RESPONDENT

RULING

The Claimant Collins N. Oneko filed a claim against the Respondent alleging unfair termination of a consultancy agreement entered into between the parties. He claims Shs.2,040,000 as outstanding remuneration arising out of the wrongful, unprocedural, unfair and unlawful termination of the employment contract.

The Respondent in its Memorandum of Reply has denied that the contract between the Claimant and the Respondent is an employment contract. They allege it is a consultancy agreement for services and that the same does not fall within the jurisdiction of this Court as it does not create an employment relationship.

The Respondent filed a Notice of Preliminary Objection on 6th September 2011 on the following grounds:-

1. The Industrial Court lacks jurisdiction to hear this claim as this is not an employment matter.
2. The dispute arises from a Contract for Consultancy Services which specifically provided that no employment was created by the said contract.
3. Without prejudice to the foregoing, even if the contract between the parties creates an employment relationship, the claimant's right to make any claim for wrongful termination has not accrued by dint of Section 45(3) of the Employment Act.
4. The claim herein is therefore frivolous and an abuse of the court process.

The Preliminary objection came up for hearing on 4th October 2011 when parties agreed to proceed by way of written submissions.

Both parties subsequently filed their detailed submissions which are both supported by several authorities.

I have considered the pleadings and the submissions by the parties. The issue for determination is whether the consultancy agreement between the Claimant and the Respondent constitutes an employment

relationship or not. I have looked at both the contract and the letter terminating the agreement.

The letter of termination of contract reads as follows:-

RE: TERMINATION OF CONTRACT

I refer to our meeting of the 29th October 2010 during which I informed you of the company's decision to terminate your contract.

As I informed you, this decision was necessitated by your failure to report on duty on the Monday 25th and Tuesday 26th without permission, contrary to employment regulations.

In addition on three occasions while in employment you engaged in behavior inconsistent with your appointment, company values and regulations

You will be paid the equivalent of 14 days based on the base pay agreed.

Kind regards

For G4S Security Services

The letter does not refer to any clause in the agreement as the basis of termination but rather to failure to report on duty without permission, contrary to employment regulations.

As submitted by both parties in their submissions, there are several tests for determining whether or not an employment contract exists between parties. These include the control test, integration test, multiple test and other considerations such as what the contract says as well as the intention of parties as may be determined from their conduct.

In this case there is no clear distinction as to whether the contract was a contract of service or a contract for services. Specifically the grounds for termination as set out in the letter of termination tend to show that the Claimant was subject to other employment regulations that are outside the agreement signed by the parties. It is not clear if the reference to regulations refers to staff regulations that other employees were subject to or a different document.

In the *MUKISA BISCUIT MANUFACTURING CO. LTD V. WEST END DISTRIBUTORS LTD (1969) E.A 696, Sir Charles Newbold, P.* defined a preliminary objection in the following terms:-

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

In this case, the agreement contains elements of both an employment relationship and a contract for services with an independent contractor. It will be necessary for the parties to be heard for the Court to determine which of the two it really is.

For these reasons I find that this is not a suitable case for a preliminary objection as the facts as set out in the pleadings and the submissions by the parties will require to be supported by other evidence for the Court to make a determination on whether or not the relationship between the Claimant and the Respondent constitute an employment relationship or a contract for services.

The preliminary objection is dismissed. Costs will be in the cause.

Orders accordingly.

Read in open Court and signed on this 6th Day of February, 2013.

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE.

Ms. Kwindu

In the presence of:- _____ for Claimant

Makori

_____ Respondent