



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA

(BIMA TOWERS)

CAUSE NO. 31 OF 2013

MWALIMU KALIMU GAMUMU

MUTUI JOSEPH MWANIA

KITSAO CHARO MWAROGO

MWANZALA MWABAYA BAYA & 33 OTHERS

CLAIMANTS

v

COASTLINE SAFARIS LIMITED

RANDOLPH MUTUA TINDIKA

JOSEPH A YIDA

RESPONDENTS

RULING

1. The Claimants' filed a Statement of Claim against the Respondents on 18 February 2013. The first Respondent was stated to be a limited liability company, 2nd Respondent an Advocate and 3rd Respondent the Deputy Labour Commissioner at the material time.
2. The Claimants' pleaded that they were former employees of the 1st Respondent who were unfairly terminated in 2001. They instructed the 2nd Respondent to commence legal action against the 1st Respondent for compensation.
3. According to the Claimants' the 2nd Respondent filed a court case and was paid Kshs 22,031,117/- as compensation. 2nd Respondent however failed to disclose the Case number or to account for the compensation funds.
4. It was pleaded that the 3rd Respondent prevailed upon the Claimants' to withdraw the case to pursue out of court negotiations.
5. The 2nd Respondent filed a Response on 13 March 2013. There is no record of the 1st and 3rd Respondents filing their Responses.
6. On 11 April 2013, the 2nd Respondent filed a Notice of Preliminary Objection while the 3rd Respondent filed a Preliminary Objection on 8 May 2013.
7. The Objection by the 2nd Respondent was to the effect that one, the jurisdiction of the Honourable Court is clearly established and spelt out under the provisions of section 12 of the Industrial Court

- Act Number 20 of 2011 and that the Claim herein does not fall within those provisions and therefore the Court lacked jurisdiction, two, that the relationship between the Claimants' and the 2nd Respondent was adequately covered under the Advocates Act and the Civil Procedure Rules and that the Claimants had failed to pay filing fees to the 2nd Respondent.
8. The 3rd Respondent's Objection was to the effect that the Court lacked jurisdiction and that he was acting in a public office and was not privy to the contracts between the Claimants' and the other Respondents.
 9. The 2nd Respondent filed written submissions on 17 July 2013 and parties made oral submissions on 23 July 2013.
 10. The 2nd Respondent submitted that Article 162(2) of the Constitution and section 12 of the Industrial Court Act were clear that the jurisdiction of the Industrial Court related to disputes arising out of employment between, employer and employee; employer and trade union; employers organisation and trade unions organisation; trade unions; employer organisations; employers organisation and a trade union; trade union and its members; employers organisation or federation and a member; registration of trade union officials and registration and enforcement of collective agreements.
 11. It was further submitted that the relationship between the Claimants and the 2nd Respondent was one of Advocate and Client and did not fall under any of the outlined categories.
 12. Mr. Koech for the Claimants' relied on the replying affidavit sworn by the first 4 Claimants' on 6 May 2013. He submitted that the 2nd Respondent failed to account for monies allegedly received from the 1st Respondent as settlement and that he had been instructed and retained by the Claimants'. He further submitted that the dispute was an industrial dispute and that an advocate is an agent of the client.
 13. Further he submitted that the facts on which the objection was based were not agreed.
 14. And on the scope and extent of section 12 of the Industrial Court Act, it was submitted that the use of the word '*including*' meant the jurisdiction of the Court was not limited to the situations mentioned in the subsections. He also submitted he was relying on Article 159 of the Constitution.
 15. The main issue is whether the relationship between an advocate and an instructing client is the type of dispute contemplated by section 12(1)(a) of the Industrial Court Act, section 2 of the Employment Act and section 2 of the Labour Relations Act.
 16. The Industrial Court Act has not defined what a dispute is but it has defined 'employee' and 'employer'.
 17. An 'employee' in the Act is defined as, '*means a person employed for wages or a salary and includes an apprentice and indentured learner*' while 'employer' has been defined as, '*means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company*'. The same definitions are replicated in section 2 of the Employment Act and section 2 of the Labour Relations Act.
 18. Several questions arise from the definitions of employee and employer. One is whether an advocate is employed by the client for wages or salary. Wage and salary have not been explicitly defined in any of the primary labour statutes but remuneration has been defined in the Employment Act. According to the definition, '*remuneration means the total value of all payments in money or in kind, made or owing to an employee arising from the employment of that employee*'. This definition does not really assist to clarify who an employee is.
 19. Under the Advocates Act, the Chief Justice is required, on the recommendation of the Council of the Law Society of Kenya to prescribe and regulate the remuneration of advocates in respect of professional business. The Act does not define remuneration but rather defines 'costs' to include '*fees, charges, disbursements, expenses and remuneration*'.
 20. I don't need to cite any authority for the position that advocates charge their clients' fees. And who are 'clients?' The Advocates Act defines a 'client' to include '*any person who as a principal or on behalf of another, or as a trustee or personal representative, or in any other capacity, has power, express or implied, to retain or employ, and retains or employs, or is about to retain or employ an advocate or any person who is or may be liable to pay to an advocate any costs.*'
 21. The key words in the definition of client are '*retain or employ*' but still not very helpful in determining whether the contract between an advocate and a client constitutes a contract of

- employment or contract of service.
22. Clients' pay advocates costs and fees and not wages or salary and therefore on this limb an advocate does not fill the definition of employee in the Industrial Court Act and the Employment Act.
 23. And this means I need to turn to the definition of an employer to establish whether any assistance will be found therein. I have made reference to the definition of an employer in both the Industrial Court Act and the Employment Act. Does an advocate's client fit in with the definition. The key to answering the question, to my mind lies in the term '*contract of service*', which is not defined in the Act but is defined in the Employment Act to mean, *an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of this Act applies*'.
 24. When an advocate takes instructions/retainer from a client, it is ordinarily in respect of a specific case or brief. Of course there are cases where advocates are retained for specified periods to act on legal instructions from the client during the defined period. But the instructions are to provide professional/legal services but not as an employee.
 25. The definitions of employer and employee taken in isolation are too wide to be of assistance in resolving the question posed in the matter under discussion. But the Court must devise a legal test to determine what relationship amounts to that of an employer and employee for purposes of the Industrial Court Act and the Employment Act.
 26. To my mind devising the appropriate legal test is not an arduous task. The clue lies in the body of the Employment Act.
 27. The Employment Act in its preamble provides that its purpose is to ***declare and define the fundamental rights of employees, to provide basic conditions of employment...***
 28. And some of the fundamental rights and basic conditions of employment are a written contract of service after three months of service stating employment particulars such as job description, date of commencement of employment, form and duration of contract, place of work, hours of work, entitlement to annual leave of at least twenty days, maternity leave, house allowance, statement of disciplinary rules, payment of wages, statement of statutory deductions, itemized pay statement.
 29. The employer under the Act has also disciplinary control over the employee and must follow prescribed procedures before terminating the contract of service. If the contract is unfairly terminated remedies have been provided. There are also requirements to keep employment records.
 30. Advocates do not enjoy these fundamental rights and the basic conditions of employment do not apply them. The client has only limited control over the manner the advocate exercises his skills or work. The client has no disciplinary control over the advocate as would be expected in the normal employer/employee relationship. The client cannot dictate when the advocate goes on holiday neither can the advocate sue the client on the ground of unfair termination.
 31. Apart from the limited control over the advocate, an advocate is on business on his own account. When retaining and or employing the services of an advocate it is the advocate who bears the financial risks of his practice. The advocate is more of an independent contractor.
 32. To my mind an advocate does not fit in with the definition of either an employee of a client as defined in the statutes referred to nor does a client fit in with the definition of an employer within the statutes dealing with employment/labour relations in Kenya.
 33. The relationship of advocate and client is not a contract of service but a contract for services. Any complaints or disputes arising out of that contract are subject to determination in other fora applying not employment law but law of contract/commerce.
 34. The Claimants' sought mainly that the 2nd Respondent account to them for moneys allegedly received on their behalf. The Industrial Court has not been given jurisdiction and is not the proper forum for such claims. There are other statutes which have provided for such complaints.

Conclusion and Orders

35. In conclusion it is my considered view that the relationship between an advocate and a client is not an employee/employer relationship contemplated under the Industrial Court Act and the Employment Act. It is not a contract of service but a contract for services and therefore falls

outside the purview of the Industrial Court's mandate.

36. I therefore uphold the Preliminary objection filed by the 2nd Respondent on 11 April 2013.

37. The order which commends itself to me is to strike out the Statement of Claim filed in Court on 18 February 2013 with costs to the Respondents'.

Delivered, dated and signed in open Court on this 27th day of September 2013

Justice Radido Stephen

Judge

Appearances

Mr. Koech instructed by Koech &

Associates Advocates

for Claimants

Mr. Nanji instructed by Kishore Nanji

& Co. Advocates

for 1st Respondent

Mr. Wanjala instructed by Tindika

& Co. Advocates

for 2nd Respondent

Joseph Yida
Preliminary Objection

3rd Respondent did not appear for hearing of