



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 447(N) of 2009

STANLEY MUNGAI MUCHAI CLAIMANT/APPLICANT

VERSUS

NATIONAL OIL CORPORATION OF KENYA.....RESPONDENT

RULING

This cause was filed on 14th August, 2009 by the Claimant Stanley Mungai Muchai through Tim Okwaro & Company Advocates. The Respondent National Oil Corporation of Kenya Limited filed the Reply of the Memorandum of claim on 11th May, 2010 through Sichagi & Company Advocates. The Respondent's further reply to the statement of claim was filed on 17th January 2010. On 12th April 2011 the Respondent filed the Amended Respondent's Memorandum of claim. The Claimant filed on 20.04.2012 the Reply to Amended Claimant's claim and Defence to counter-claim.

This ruling is with respect to the Respondent's preliminary objection. On 11th November, 2009 the Respondent filed a notice of preliminary objection that the court did not have jurisdiction to entertain the prayers sought namely:

- (a) General damages for false arrest and false imprisonment.
- (b) General damages for defamation.

On 12th April 2011 the Respondent filed another notice of preliminary objection that:

- (a) the court does not have jurisdiction to determine the Claimant's claim;
- (b) the Claimant was an independent contractor and not an employee within the meaning of Employment Act No.11 of 2007;
- (c) the statement of claim dated 11th August, 2009 is misconceived and does not disclose any reasonable cause of action against the defendant within the Employment Act No.11 of 2007 for defamation by the court.

In the memorandum of claim, the Claimant pleaded as follows:

“3. At all material time prior to this suit the Grievant/Claimant was employed by the Respondent as a

Dealer Manager and diligently and loyally worked for the Respondent with effect from the 8th June, 2007.

4. Pursuant to the said employment the Respondent assigned the dealership/management of its Muchatha Service Station in Kiambu District at a monthly salary of Ksh.50,000/=.

5. It was a condition of said employment that the Claimant deposits with the Respondent a land title deed, pursuant to which the Claimant deposited with the Respondent his father's Land Title Deed for Land Reference Number RUAKA/KIAMBU/1454 in Kiambu District, Kenya, which the Respondent is still unlawfully holding custody of.

6. The Claimant worked for the Respondent so hard, dutifully, loyally and committedly, that the Respondent's Muchatha Service Station which had prior to the Claimant's employment ground to a halt, was so reactivated that it became one of the Respondent's best selling outlets in the country.

7. The Claimant performed his duties strictly in accordance with the Respondent's established procedures and accounted to the Respondent for every cent for fuel products sold out through the Muchatha Service Station.

8. On 21st day of April, 2008 the Respondent wrongfully, falsely, and maliciously, alleged that the Claimant had failed to account for Ksh.1,378,814.51 vide what the Respondent purported to be undertakings".

The Claimant pleads further that the Respondent caused the Police to arrest him and the Respondent caused him to be confined at the Central Police Station and applied pressure, coercion, duress and intimidation to the Claimant to falsely sign on a purported Statement of Account prepared by the Respondent to the effect that as at 29th February 2009 the Muchatha Service Station had under-banked as to the tune of Ksh.1,378,814.51. Further while working as the Dealer Manager at the Respondent's Muchatha Service Station, the Respondent also caused the Claimant to double up as Dealer Manager of the Respondent's Sagana Service Station in February, March and April, 2008. In the circumstances, the Claimant prayed for judgment against the Respondent for:

- (a) Payment of Kshs.1,000,000/= being unpaid salaries.
- (b) Demerol damages for false arrest and false imprisonment.
- (c) General damages for defamation.
- (d) Costs of the suit and interest.

In the Respondent's reply to the Claimant's memorandum of claim, the Respondent has denied that it had employed the Claimant. In the Respondent's amended reply to statement of claim, the Respondent denies that the Claimant was an employee and in particular, the Respondent states that the Claimant was an independent contractor appointed under terms and conditions of a contract for services. The Respondent further pleaded thus,

"17. Without prejudice as the a foregoing and same that this court has jurisdiction to rule on its own jurisdiction, the Respondent denies the jurisdiction of this court to hear and determine the dispute herein as filed by the Claimant so far as the cause is based on a contract for services".

The preliminary objection filed for the Respondent raises the following key issues for determination:

- (a) Whether there was an employer-employee relationship between the Respondent and the Claimant in the nature of a contract of service so as to lawfully invoke the jurisdiction of the Industrial Court.
- (b) Whether the Industrial Court can lawfully issue the reliefs sought for alleged unlawful arrest, false

imprisonment and malicious prosecution.

(c) Whether the claim disclosed a reasonable cause of action against the Respondent and the cause of action is properly before the Industrial Court.

On the first issue whether the contract of service existed between the Claimant and the Respondent, Counsel for the Respondent cites **Chitty on Contracts, 27th Ed. Vol.2 at page 703 para.37-008** that the factors to consider in determining the existence of a contract of service as including:

- (a) the degree of control exercised by employer;
- (b) whether the worker's interest in the relationship involved any prospect of profit or risk of loss;
- (c) whether the worker was properly regarded as part of the employer's organization;
- (d) whether the worker was carrying on business on his own account or carrying on the business of the employer;
- (e) the provision of equipment;
- (f) the incidence of tax and national insurance; and the parties own view of the their relationship.

Counsel for the Respondent then proceeded to submit that there was no contract of service because of the following reasons;

- (a) The Claimant had an interest in the relationship with prospect of profit or risk of loss because the Claimant bound himself to avail Title Number Kiambu/Ruaka/1454 to secure performance of the contract.
- (b) The Claimant was entitled to dealership licence fee upon submission of an invoice. He was not entitled to a salary.
- (c) The Respondent never deducted any tax or other statutory deductions from the Claimant, but that was an obligation imposed on the Claimant as an independent contractor, hired under a contract for services.
- (d) In execution of the contractual obligations, the Claimant was not directly controlled by the Respondent and was merely given targets or expectation which he was required to attain in discharge of his obligations and not controlled on the manner of executing his duties.

Counsel therefore submitted that in absence of an employment relationship, which the Claimant erroneously alleged to subsist, the jurisdiction of the court had been invoked *per incurriam* and the claim should be dismissed with costs.

On that issue, Counsel for the Claimant submitted that the Claimant was an employee of the Respondent and not an independent operator or contractor. Further that the dispute as to whether the Claimant and the Respondent were in a contract of service or a contract for service could only be determined by the court after hearing the case either viva voce or on written submissions.

The Industrial Court Act, 2011 in Section 2 defines employee to mean a person employed for wages or a salary and includes an apprentice and indentured learner. The section also defines employer to mean 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 Employment Act, 2007 in Section 2 defines “**Contract of Service**” 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 the Act applies.

The court holds that whether the relationship between parties' amounts to a contract of service or contract for service is an issue both of law and fact but largely, one of fact. There is no doubt that a relationship that is a contract of service, unlike one that is a contract for service, will enjoy the statutory protections accorded by the employment legislation. This is more so in view of the definitions of "**employee**", "**employer**" and "**contract of service**" under the Employment Act, 2007 and the Industrial Court Act, 2011.

A contract of service invariably relates to "**dependent**" or "**subordinate**" employment and a contract for service relates to "**independent**" or "**autonomous**" employment. Thus there is a constant line that is drawn between self-employed or independent contractors in a contract for service, and, employees in a contract of service. There is no universal formula for determining existence of a contract of service. ***Simon Deakin and Gillian S. Morris, Labour Law, 3rd Edition*** pages 146 to 168 have discussed some of the tests used by courts in determining "**employment**" or "**service**". They include the following:

- (a) The control test whereby a servant is a person who is subject to the command of the master as to the manner in which he or she shall do the work. However the formal or personal subordination of a worker as a test for existence of a contract of service may not apply for highly specialized workers such as in the case of the doctors, lawyers, and other professionals.
- (b) The integration test in which the worker is subjected to the rules and procedures of the employer rather than personal command. The employee is part of the business and his or her work is primarily part of the business. However, staff of independent contractors may as well perform entries integral or primarily part of the business when in fact, they are not employees.
- (c) The test of economic or business reality which takes into account whether the worker is in business on his or her own account, as an entrepreneur, or works for another person, the employer, who takes the ultimate risk of loss or chance of profit.
- (d) Mutuality of obligation in which the parties make commitments to maintain the employment relationship over a period of time. That a contract of service entails service in return for wages, and, secondly, mutual promises for future performance. The arrangement creates a sense of stability between the parties. The challenge is that where there is absence of mutual promises for stable future performance, the worker thereby ceases to be classified as an employee as may be the case for casual workers.
- (e) Since none of the foregoing tests can resolve the issue decisively on their own, in many cases the issue will be resolved by examining the whole of the various elements which constitute the relationship between the parties; this has been called the multiple test.

In the instant case, the relevant letter of appointment dated 8th May, 2007 was addressed to the Claimant by the Respondent as follows,

"Dear Stanley,

RE: APPOINTMENT "WITHOUT PREJUDICE" AS NATIONAL OIL CARETAKER DEALER FOR NATIONAL MUCHATHA SERVICE STATION (MUCHATHA)

Further to your application to be a dealer/manager at one of our retail outlets and the interviews conducted at the National Oil Head Office, we are happy to inform you that your application was successful, we hereby appoint you "without prejudice" as the caretaker dealer for National Muchatha Service Station in Muchatha effective 8th June 2007, subject to the following terms and conditions.

- (a) ***That National Oil will observe your performance for a period of one month after which your***

appointment will be reviewed.

- (b) That you will be the custodian of the company assets entrusted to you and you will be held accountable for the same.*
- (c) That you will deposit your title deed with National Oil as a form of security for the station assets entrusted to you as you source for the relevant bank guarantee of KES.1 million.*
- (d) That you will run the station in a professional and ethical manner.*
- (e) That you will adhere to the corporations' rules and guidelines regarding proper running of the station as communicated to you in writing form time to time.*
- (f) That it will be your responsibility to employ competent staff at the station as per the Labour laws and vetted by National Oil's Sales Representative.*
- (g) That either party will have the right to terminate this agreement after giving 30 days notice in writing.*
- (h) That National Oil reserves the right to vary the terms and conditions herein without notice and you shall be bound by such variation from time to time.*
- (i) You will be paid a dealership fee of KES.50,000 per month.*

The corporation wishes you the best of luck as you settle in the above station.

Yours faithfully,

SIGNED

RAYMOND RONO

**MARKETING AND OPERATIONS
MANAGER"**

The Claimant then signed on 16th June 2007 in acceptance of the terms and conditions in the letter of appointment.

In view of the tests for determining existence of a contract of service, the court finds that the letter of appointment does not give itself to an obvious absence of such contract of service. Even where the parties in their written contract for service and not a contract of service, the court will have to determine the issue by carefully analyzing all the circumstances and conduct of the parties during the subsistence of the contract. It is a question of mixed law and fact and to be determined on case to case basis after considering all the evidence at the full hearing of the case. The court holds that an issue whether the contract of service exists in any case is not a preliminary issue going to jurisdiction of the court. It is a substantive issue of law and fact to be determined after the hearing of the case. Accordingly, the court holds that the Industrial Court always has jurisdiction to determine matters in dispute as to whether a contract of service exists and the appropriate stay for such determination is not a preliminary point of law but a mixed point of law and fact, substantively taken up at the hearing and backed with comprehensive consideration of each case on its own merits.

A secondary issue that arises is whether the Industrial Court would not grant a remedy where it finds that parties were in a contract for service and not a contract of service. Under Section 12 of the Industrial Court Act, 2011, an application, claim or complaint may be lodged with the court by or against an employee, an employer, a trade union, an employer's organization, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose. Under Section 2 of the Act "**employee**" means one employed for wages or a salary. The definition has no reference to "**contract of service**". Under Section 2, "**contract of service**" is a necessary ingredient in the definition of "**employer**". As the court's jurisdiction is open to employees and employers, its jurisdiction

is available in both instances of contracts of service and contract for service.

There is one more compelling reason why the Industrial Court has jurisdiction in both cases of contract of service and contracts for service. It is not just that the line between the two is too thin and therefore the court is best suited to decide, but also that the jurisdiction is given by the Constitution. The court, under Sub-Article 162 (2) (a) of the Constitution, is established to hear and determine disputes relating to employment and labour relations. The respective provinces of “**contracts of service**” and “**contracts for service**” being blurred sometimes to oblivious margins to be decided one way or the other on case basis, contracts for service would properly generate disputes relating to employment and labour relations. Thus, the court is of the opinion that disputes relating to contracts for service would properly be within the jurisdiction of court.

The court cannot find that since the dispute relates to a contract for service, remedy shall not issue for want of jurisdiction. Such a finding, in the opinion of the court, would be a clear unjustified defeat of the jurisdiction as conferred under Sub Article 162 (2) (a) of the Constitution. To reinforce that opinion, Section 12(1) of the Industrial Court Act, 2011 in enumerating the disputes that the jurisdiction of the court applies to, provides that the court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162 (2) of the Constitution.

Accordingly the preliminary objection shall fail as founded on the ground that the parties in this cause were in a contract for service and not a contract of service.

The second issue raised in the preliminary objection is whether the Industrial Court can lawfully issue the reliefs sought for alleged unlawful arrest, false imprisonment and malicious prosecution. As submitted by Counsel for the Claimant, Subsection 12(3) of the Industrial Court Act, 2011 empowers the court to award damages in any circumstances contemplated under the Act or any written law. The Subsection also empowers the court to make any other appropriate relief as the court may deem fit to grant. Parties before the Industrial Court, as long as they fall within the description of the parties as provided in Section 12 of the Act, are entitled to make claims as they deem necessary and the court shall not decline jurisdiction by merely looking at the nature of claims. The propriety of the nature of the claims, in the opinion of the court, is an issue to be determined after the hearing of the dispute involved. Accordingly, the preliminary objection shall fail as grounded on the issue whether the court can lawfully issue the reliefs sought for alleged unlawful arrest, false imprisonment and malicious prosecution.

The court finds that the Claimant’s memorandum of claim raises a reasonable cause of action. The preliminary objection is dismissed with costs. The cause having been filed in 2009, the parties shall fix a convenient hearing date at the registry and on priority basis.

Signed, dated and delivered this 22nd day of October, 2012.

BYRAM ONGAYA
JUDGE