



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. E014 OF 2021

(Before Hon. Lady Justice Maureen Onyango)

KENYA CONCRETE, STRUCTURAL,

CERAMIC TILES, WOOD PLYS AND

INTERIOR DESIGN WORKERS UNION.....CLAIMANT

VERSUS

TRANSFEET LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant Union through its Statement of claim dated 23rd December, 2020 and filed in Court on 7th January, 2021, alleges that the Respondent a Limited Liability Company has failed and/or ignored to pay remuneration for 200 of its employees who are members of the Claimant Union.
2. The Claimant avers that it is duly registered as a trade union and has been able to recruit into its membership 200 employees of the Respondent who have since acknowledged their membership by way of check-off forms dated 1st December 2020 and 4th December 2020 attached to the Claim herein.
3. It further avers that the 200 employees (grievants) were appointed by the Respondent on diverse dates from the year 2010 and that they each performed their duties diligently and to the Respondent's satisfaction.
4. The Union avers that the Respondent has failed to pay the grievants salaries for the period between July 2020 to the time of filing suit despite the grievants offering services to it.
5. The Claimant further avers that in efforts to resolve the issue of non-payment of salaries it did write to the Respondent vide its letter dated 30th November, 2020 seeking to have a meeting on 4th December, 2020, which meeting failed to materialize forcing it to issue a 7 days strike notice to the Respondent.
6. That parties were subsequently invited by the Ministry of Labour vide its letter dated 7th December, 2020 for conciliation on 8th December, 2020 which meeting the Respondent also absconded.
7. The Claimant union argues that the Respondent's decision to withhold the grievants salaries for months worked is unlawful and unfair and is contrary to the provisions of Articles 10, 24, 27 and 41 of the Constitution of Kenya, 2010 as read with Section 18 of the Employment Act, 2007 and the provisions of the ILO Convection 100 on Equal Remuneration Conviction, 1957
8. In the instant claim, the Claimant seeks the following orders:
 - (a) *A declaration that the actions by the Respondent of not paying the salaries and allowances to the 200 employees/members of the Claimant herein since July 2020 is unconstitutional, unlawful and unfair in its totality intent hence NULL and VOID*
 - (b) *Directing the Respondent to pay all unpaid salaries and allowances of the 200 employees/members of the Claimant with all arrears for the period between July, 2020 to date under their respective contracts of employment.*
 - (c) *Restraining the Respondent from any act of victimization including termination of existing appointments and dismissing the workers/employees herein on account of this suit.*

- (d) Directing the Respondent to pay damages assessed at Kshs.100,000/- for each of the 200 employees herein.
- (e) That this Court be pleased to grant any other Orders that it deems fit and just to meet the ends of justice.
- (f) That the costs of this suit be borne by the Respondent.

9. Given the urgency of the matter the Claimant union filed this Claim together with a Notice of Motion Application filed under Certificate of Urgency under Section 20(1) and (4) of the Employment and Labour Relations Court Act, Rule 17 (1), (2), (3), (7) and 21 of the Employment and Labour Relations Court (Procedure) Rules, Section 10 of the Judicature Act Rule 3 (1) of the High Court (Practice and Procedure) and Article 41(1) & 2(a) of the Constitution of Kenya, 2010 and the Employment Act, 2007 and all enabling provisions of the law seeking inter alia the payment of the salaries for the 200 grievants and that the Application and main suit be merged and proceed by way of documentation as provided under Rule 21 of the Employment and Labour Relations Court Procedure Rules, 2016.

10. The Application was premised on the grounds on the face of the motion and was further supported by the Affidavit of **DISHON ANGOYA**, the Claimant's General Secretary sworn on 23rd December, 2020.

11. The Respondent despite being served with the Summons, the Statement of Claim and the Notice of Motion Application failed to enter appearance and file its defence in this matter. The matter therefore proceeded as an undefended Claim and the Claimant was directed to file its submissions in respect of both the Claim and the Application dated 23rd December, 2020.

Claimant's Submissions.

12. In its submissions the Claimant maintained that the 200 grievants were under the Respondent's employment as its assertion was not disputed by the Respondent herein. The Claimant Union maintained that the grievants employment was therefore a non-issue and therefore urged this Court to make a finding in its favour.

13. The Claimant Union further submitted that the Respondent has failed and/or ignored to pay the salaries for the 200 grievants from July 2020 to date of filing suit despite them rendering their services in complete contravention to the provisions of Articles 27, 41(1) and (2)(a) and (b) and 45 of the Constitution of Kenya, 2010 as read with the provisions of Section 18 of the Employment Act, 2007.

14. The Claimant Union maintains that the Respondent has failed to discharge the onus of proof of employment of the grievants in accordance with the provisions of Section 10 (7) as read with 74 of the Employment Act, 2007 that obligates the Respondent to keep proper records of its staff and produce the same in Court if and when required. To buttress this argument it cited and relied on the Court's findings in the cases of **Edward Isedia Mukasia v Eldo Supermarket Limited (2015) eKLR**, **Edwin Kabogo Munene v Equity Bank Limited (2012) eKLR** and **G.M.V v Bank of Africa Limited (2013) eKLR** where the Courts held that the burden of proof of employment rests on the Respondent Company through the production of employment records for the staff in question.

15. It is further submitted that all the 200 grievants are entitled to the unpaid salaries and allowances having worked for the period between July 2020 to the time of filing the instant Claim. For emphasis the Claimant cited and relied on the authority of **David Wanjau Muhoro v OI Pajeta Ranching Limited (2014) eKLR** where the Court held that an employee must receive compensation for services rendered to an employer.

16. To further fortify this argument the Claimant cited the case of **Kenya Union of Domestic, Hotels, and Educational Institutions & Hospital Workers V Young Women Christian Association (2014) eKLR** where the Court emphasised the need for payment of employee wages when they fall due in accordance with the provisions of Section 18 of the Employment Act, 2007.

17. The Claimant Union urged this Court to protect its members against any form of victimization from the Respondent by dint of the provisions of Section 3 of the Employment and Labour Relations Court Act.

18. The Claimant maintained that it had proved its case as against the Respondent herein and is therefore entitled to the reliefs sought in its Claim.

19. The Claimant further submitted that it is entitled to an award of damages for gross violation of human dignity by the Respondent assessed at Kshs.1,500,000/- for each of the grievants and relied on the Courts findings in the cases of **V.M.K v CUEA (2013) eKLR** and **Court of Appeal Civil Appeal No. 42 of 2015 OI Pajeta Ranching Limited and David Wanjau Muhoro** in which the Courts awarded the Claimants damages for discrimination.

20. In conclusion the Claimant urged this Court to find merit in its Claim and to allow it in terms of the reliefs sought therein.

Determination

21. Having considered the pleadings, evidence, submissions and authorities cited by the Claimant, the following are the issues for determination:

- (i) Whether an employee-employer relationship existed between the 200 grievants and the Respondent herein;
- (ii) Whether the Claimant is entitled to the reliefs sought.

Whether an employee-employer relationship existed between the Claimant and the Respondent herein

22. In an undefended claim such as the instant claim. It behoves the Claimant to establish the existence of an employment relationship between the grievants and the Respondent as a preliminary issue.

23. The Claimant maintained that the 200 grievants were appointed by the Respondent on diverse dates from the year 2010 and that they have all performed their different roles diligently and to the Respondent's satisfaction.

24. The Claimant contends that the existence of an employment relationship between the grievants and the Respondent has not been disputed by the Respondent and therefore urges this Court to find in its favour that indeed all its members were employed by the Respondent.

25. The Claimant further submitted that the Respondent is obligated under the provisions of Section 10(7) as read with Section 47(5) and 74 of the Employment Act to keep and produce in court employment records for purposes of scrutiny which role the Respondent failed to discharge.

26. It was thus the burden of the claimant to prove the existence of an employment relationship between the grievants and the Respondent herein.

27. In the case of **Monica Kanini Mutua v Al-Arafat Shopping Centre & Another [2018] eKLR**, the Court held that in an undefended claim, it is trite that the claimant establishes all the facts of the claim and must establish the existence of an employment relationship with the respondent as a preliminary issue before establishing the alleged unfair termination of the employment.

28. Further, in the case of **Herman Ilangarwa Shidakwa v Armati Security Solutions Limited [2019] eKLR**, the court noted that the respondent had failed to enter appearance or file a defence despite being served with summons and held that the claimant had proved his employment relationship with the respondent through bank statements, which fact was not contested by the respondent. The Court also held that the claimant had been unfairly terminated.

29. In the instant suit the only evidence adduced are the check off forms. No witness statement has been adduced. No document has been filed other than the check off forms. The Court does not even have a list of the grievants or their salaries to use as a basis for making any order in favour of the Claimant. The Court has literally no information to use to determine this suit. **In the circumstances, I find that the instant claim lacks feet to stand on and must crumble. The same is accordingly dismissed with no orders as to costs.**

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 8TH DAY OF OCTOBER 2021

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court had been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE