



**Omollo v Biodeal Laboratories Limited (Cause E133 of 2024)  
[2024] KEELRC 1345 (KLR) (6 June 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1345 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E133 OF 2024  
NZIOKI WA MAKAU, J  
JUNE 6, 2024**

**BETWEEN**

**EZEKIEL OKETCH OMOLLO ..... CLAIMANT**

**AND**

**BIODEAL LABORATORIES LIMITED ..... RESPONDENT**

**RULING**

1. The Claimant/Applicant vide its notice of motion application sought the following orders inter alia:-
  - a. Spent
  - b. That the Honourable Court be pleased to compel the Respondent to reinstate the Claimant/Applicant to the original place of work and to pay the Claimant/Applicant salaries, allowances and other benefit for the days he was out of employment to date pending hearing and determination of this application.
  - c. That for any reason or reasons the Honourable Court finds that reinstatement not tenable, then the Honourable Court awards for the payment of the terminal benefits as contained in the CBA clauses and also as per *Employment Act* 2007 section 49.
  - d. That costs of this application be awarded to the Claimant/Applicant.
  - e. That it is in the interest of justice that the orders sought be granted.
2. The Respondent replied through the replying affidavit sworn by .... In it, it was deposed that the notice of motion application is without a valid supporting affidavit, is without foundation, it is a non-starter, made in bad faith, lacks merit and is otherwise an abuse of the Court process and should be dismissed with costs to the Respondent. The Respondent further prayed that similarly the Memorandum of Claim dated 16<sup>th</sup> February 2024 should suffer a similar fate of being struck out with costs to the Respondent.



3. The matter was disposed of by way of submissions.

4. The Claimant made submissions that were at best a rendition of his claim as follows:-

That the Respondent terminated his employment verbally on 30<sup>th</sup> June 2021 without following due process and that the Respondent had no time to adhere to the law especially section 41, 43 and 45 of the *Employment Act*. He asserted that he had served the Respondent for a good 6 years without any break and with a clean record. He submitted that he was not given a chance to defend himself and that he had been underpaid by the Respondent during the entire duration of his service under the General Wages Order of 2022 which the Respondent violated. He submitted that the court should compel the Respondent to reinstate him to his former place of work unconditionally without loss of service, payment of all salaries and allowances for the period he has been out of employment. He submitted that should the court not find his reinstatement tenable it should award him all his terminal benefits and allowances per the law. He submitted that he should be awarded 12 month's salary as compensation for loss of employment and then proceeds to tabulate the notice payable, the days worked, pro rata leave, annual paid leave, severance pay for 6 years service, underpayment of salaries and compensation all totalling Kshs. 459,859.76 together with costs.

5. The Respondent submitted that the issues for determination were:-

- a. Whether the Applicant's Notice of motion is without a valid supporting affidavit
- b. Whether the Applicant's replying affidavit dated 15<sup>th</sup> April 2024, should be struck out as it was not commissioned and the exhibits thereon not marked and sealed by a commissioner for oath.
- c. Whether the Respondent terminated the Claimant.

6. The Respondent submitted that there is no Commissioner For Oath by the name Daniel O. Rakoro or Daniel O Rakoro. It was submitted that a Commissioner For Oath must be first be an Advocate of the High Court of Kenya. The Respondent submits that the purported 'advocate' is not an advocate per the search on the Law Society of Kenya portal. It cited the case of *Allan Boesack Onyango v The Ewaso Ng'iro North Development Authority & 2 others* [2019] eKLR, where the Respondent submits it was rightly held that: "In addition, the purported 'advocate' is not an advocate per the search on the Law Society of Kenya portal. He is therefore unqualified person in terms of Section 9 of the *Advocates Act*. As such, there is merit to the preliminary objection that the proceedings before the court are incurably defective, incompetent and ought to be and is hereby struck out with costs as I hereby proceed to do." The Respondent submitted that the Claimant/Applicant never tabled any evidence or a certificate of the Commissioner For Oath in his rebuttal. The Respondent submits that rather, the Applicant merely stated that the said 'commissioner for oath' is a long time a member of this Honourable Court and he has authority to commission the documents. The Respondent submitted that under the Judiciary e-filing portal, the Applicant is represented by the Firm of Rakoro & Co. Advocates. Under the heading Party Name, it is among other names indicated Rakoro Advocate & company. The Respondent submitted that RAKORO & Co. Advocates and Rakoro Advocate & Company are the advocates for the Applicant and are concerned with the Applicant's case, thus in violation of section 4(1) of the *Oaths and Statutory Declarations Act* Cap. 15 Laws of Kenya as the advocate cannot commission documents for his client in the litigation he represents the client. The Respondent cited the case of *Kenya Federation of Labour & another v Attorney General & 2 others* [2014] eKLR where the court held that: "A lawyer cannot commission a document drawn by his/her firm."



7. The Respondent cited the provisions of section 4(1) of the *Oaths and Statutory Declarations Act* Cap. 15 Laws of Kenya which provides as follows:

“ A commissioner for oaths may, by virtue of his commission, in any part of Kenya, administer any oath or take any affidavit for the purpose of any court or matter in Kenya, including matters ecclesiastical and matters relating to the registration of any instrument, whether under an Act or otherwise, and take any bail or recognizance in or for the purpose of any civil proceeding in the High Court or any subordinate court: Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding or matter in which he is the advocate for any of the parties to the proceeding or concerned in the matter, or clerk to any such advocate, or in which he is interested.”

8. The Respondent submits that the purported advocate at the time of filing of this case on 16<sup>th</sup> February 2024 was an unqualified person, hence not certified to practice law within the meaning of section 2(c) and section 9(c) of the *Advocates Act* (Chapter 16) Law of Kenya. It was the Respondent’s submission that Applicant’s Notice of motion is without a valid supporting affidavit.
9. As to whether the Applicant’s replying affidavit dated 15<sup>th</sup> April 2024, should be struck out as it was not commissioned and the exhibits thereon not marked and sealed by a commissioner for oath, the Respondent submitted that the Applicant’s replying affidavit dated 15<sup>th</sup> April 2024, was not commissioned by a Commissioner for Oath, which is a contravention of section 5 of the *Oaths and Statutory Declarations Act* Cap. 15 Laws of Kenya and as a consequence it should be struck out. It submits that the exhibits on the Applicant’s replying affidavit were not marked and sealed by a Commissioner for Oath contrary to Rule 9 of The *Oaths And Statutory Declarations Act* Subsidiary Legislation Cap. 15 Laws of Kenya. It was submitted that the law provides that “All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner, and shall be marked with serial letters of identification” which was not done in relation to the annexures/exhibits in the affidavit.
10. The Claimant did not respond to the issue of limitation. Nevertheless, I am bound to consider it in relation to his claim. The Claimant was dismissed on 30<sup>th</sup> June 2021. In terms of the *Employment Act* per section 90, the Claimant should have preferred a claim prior to 30<sup>th</sup> June 2024. Before me is a claim filed on 20<sup>th</sup> February 2024 which is way before the cut off date of 30<sup>th</sup> June 2024. As such, the Claimant filed his suit within time. The Respondent’s assertions to the contrary in relation to the validity of the claim are misplaced and fall to the wayside.
11. It now behoves the court to consider whether the Claimant has made out a case for grant of any interim relief. From the application and the Claimant’s submissions, it is clear the Claimant is on a frolic. Other than the fact that the affidavit was commissioned by someone who is seemingly an unqualified person, the Claimant’s application is tenuous at best. He seeks to obtain the very same orders he seeks in his suit vide the motion before the Court. This is untenable. Had he merely sought interim relief of reinstatement, that may have been a different kettle of fish since in appropriate cases relief such as reinstatement can be made. In the Claimant’s case, he makes the request for reinstatement almost 3 years to the day from the date of termination. Surely if he wanted to return to work he would not have waited for almost 3 years to elapse before moving court. The Claimant misapprehended the law by filing the motion before me. It is unclear whether he is represented by a law firm as the documents he has presented are in his name though on the Judiciary e-portal has a law firm indicated as filing the documents. The Court will give the Claimant the benefit of the doubt since the documents are expressed to be drawn and filed by him. The language used in the documents he has filed show that it is the work of someone who is not a practitioner – see para 6 of the supporting affidavit where he



deposes that he swears the affidavit with his 'clean heart and is in support of this application'. The application before me is devoid of merit and is accordingly dismissed albeit with no order as to costs. Parties will be directed to appear before the Deputy Registrar on a date to be set after this Ruling for pre-trial directions to ready the suit for hearing.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 6<sup>TH</sup> DAY OF JUNE 2024**

**NZIOKI WA MAKAU**

**JUDGE**

