



**Merwe v Technomed Limited (Employment and Labour Relations Petition
E002 of 2024) [2024] KEELRC 1947 (KLR) (18 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1947 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E002 OF 2024**

MN NDUMA, J

JULY 18, 2024

BETWEEN

LORRAINE VAN DER MERWE PETITIONER

AND

TECHNOMED LIMITED RESPONDENT

JUDGMENT

1.
 - a. An order be and is hereby issued ordering the respondent to allow the petitioner back to the office, reinstate her company mail account and give her access to all company instruments to enable her to continue with her work.
 - b. An order requiring the respondent to pay all outstanding salary to the petitioner/applicant
 - c. General damages as shall be assessed by the honourable court for violation of the petitioner's constitutional rights and psychological anguish visited upon the petitioner by the respondent.
 - d. Costs of the petition.
2. That the petitioner held position of Director since the year 2018 and has served the respondent for a period of five (5) years. That the monthly salary of the petitioner is ksh. 703,944.
3. The petitioner is a director and a shareholder of 5% of the shares of the respondent, a limited liability company tasked with directing and controlling the operations and resources of the company.
4. That no complaint or any allegation of misconduct has been brought against the petitioner but the respondent has stopped remitting salary to her account without any explanation. That the petitioner is the wife of the former managing Director who has since been terminated from employment. That the



respondent has blocked the petitioner's access to the office premises and have discontinued her official email access and she is thus not able to work from home.

5. On 14/9/2023, the respondent disabled the company email accounts of the petitioner. That there is intention to terminate the employment of the petitioner.
6. That the respondent has by aforesaid action violated the rights of the petitioner protected under Articles 41, 47 and 27 of *the Constitution* of Kenya 2010, hence the reliefs sought.

Replying affidavit

7. The respondent filed a replying affidavit sworn to by Eric Aswani, Acting Managing Director of the respondent.
8. He deposes that the petition is misconceived and legally misguided since the petitioner has never been an employee of the respondent. That the petitioner is a wife of one Andre Van Der Merwe, a former employee of the respondent herein who served as the respondent's Managing Director until 26th October 2023 when his employment was terminated on account of gross misconduct.
9. That the said Managing Director had sought to have his wife employed in the respondent's branch in Uganda. That the request was rejected.
10. That the respondent has never given the petitioner any employment benefits but the Managing Director chose to share his remuneration with his wife and unlawfully made his wife to assume a management role in the respondent's company without the approval of the Board and Management.
11. That the respondent commenced disciplinary process against the Managing Director and he was invited to a disciplinary hearing on 25/10/2023 to answer to the charges laid against him including unlawful employment of his wife and daughter in the company without the approval of the Board of Management. Mr. Andre Van Der Merwe was found guilty of gross misconduct for employing his wife and daughter unlawfully and was in addition found to have breached his fiduciary duty to the respondent and his employment was terminated on 26/10/2023.
12. That there was no employer and employee relationship between the petitioner and the respondent. This court lacks jurisdiction to entertain this suit and it be struck off and or dismissed for lack of merit.
13. That the petitioner has not provided any documents before court to prove that she was lawfully employed by the respondent.

Further Affidavit.

14. The petitioner filed further affidavit in which she joins issues with the respondent and reiterates her case against the respondent.
15. The petitioner reiterates that she held the position of director of the respondent. She produced pay slips for the month of March to October 2011; January 2022 to August 2022; February 2019 and March 2019 to August 2023. The pay slips are in the name of the petitioner and bear the letter head of the respondent. The pay slips are for specific dates stated on the face of the pay slips. That she had a medical cover from the respondent and had electronic communication accounts with the respondent.
16. That the deponent of the replying affidavit is a stranger to the suit and is not conversant with the matters raised in the petition. That the prayers sought be granted.



DETERMINATION

17. The parties filed written submissions which the court has carefully considered together with the evidence adduced by the petitioner and the respondent in their respective depositions.

The issues for determination are: -

- i. Whether the petitioner was an employee of the respondent.
 - ii. Whether the petitioner is entitled to the reliefs sought
18. The petitioner disclosed in the petition and supporting affidavit to the petition that she is a South African national and an employee of the respondent holding the position of a director. The petitioner did not provide any letter of appointment to that position. The petitioner did not also provide any work permit or valid working visa to work and remain in Kenya. The petitioner disclosed that she has a 5% shareholding in the respondent's company and is a director. The petitioner did not provide any official company records to prove that allegation. It was deposed by the respondent that the husband of the petitioner was the managing director of the respondent and his employment was terminated for unlawfully employing his wife and daughter and allowing the two to draw income from the respondent
19. The petitioner did not provide any evidence to rebut this credible evidence by the respondent that her husband had unlawfully employed her and their daughter in the company and had unlawfully allowed them to draw remuneration from the company.
20. The court is not satisfied that the petitioner has proved that she was lawfully employed in Kenya by the respondent or any other employer having not produced any employment contract backed by a lawfully granted work permit to work and remain in a Kenya.
21. This court cannot be called upon to enforce an unlawful arrangement between the petitioner and her husband which arrangement is not supported by any legal documents before court.
22. The Court of Appeal in *D. Njogu & Company Advocate versus National Bank of Kenya Ltd* (2016) e KLR had the following to say on the enforceability of illegal contracts;
- ‘Likewise, any contract that contravenes a statute is illegal and the same is void ab initio and is therefore unenforceable’.
- In *Josephat Mutunga Mutisya versus Eric Theuri & Another* (Petition E070 of 2022) (2023)(KLR) Maurine Onyango J held that
- ‘It is my finding that the Petitioner’s contract is unenforceable for two reasons, the first is that it was entered into against the clear provisions of section 26(5) of the Law Society of K Act as read together with Regulation 45(2) of the LSK Regulations as the position had not been declared vacant. The second is that the body that entered into the contract with the Petitioner was declared unlawful and its actions void ab initio in the Judgment of Mrima J. in *Odundo v Havi* case’.
23. The alleged employment of the petitioner by the respondent would, if true, be in violation of the immigration and employment statutes of Kenya.
24. Furthermore, the petitioner has failed to prove that her rights protected under Article 27, 41 and 47 of *the Constitution* of Kenya, 2010 have been violated by the respondent.
25. Indeed, the petition does not disclose any such breach and/or violation of the stated rights with specificity and detail necessary to prove the grave allegations, casually made in the petition. These remain only bare allegations not proved by the petitioner.



26. If indeed there are disputes regarding the management and control of the respondent as a limited liability company as between its shareholders and directors, the correct forum to resolve such dispute is the High court of Kenya and not the Employment and Labour Relations Court.
27. In the final analysis, the petition is devoid of merit and the same is dismissed with each of the parties to bear the costs of the suit.

DATED AT NAIROBI THIS 18TH DAY OF JULY, 2024

Mathews Nderi Nduma

JUDGE

Appearance

M/s Muthoni Njoroge for Petitioner

Mr. Barack for Respondent

Mr. Kemboi Court Assistant

