



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT KISUMU

CAUSE NO. E012 OF 2025

DEUSDEDIT LUSEKA

MUKABWA.....**CLAIMANT**

VERSUS

BETTER STREAM CARE LIMITED.....

.....**RESPONDENT**

JUDGMENT

1. The Claimant instituted this suit via a Statement of Claim dated 27th February 2025 seeking salary arrears. He avers that he worked with the Respondent under a collaboration agreement beginning on 19th May 2022, running for ten years, with an option to renew. According to the Claimant,

the agreement entitled him to a monthly salary of Kshs. 143,000/- and an annual payment of Kshs. 150,000/- for the Respondent's utilization of his medical licence. He states that the arrangement proceeded smoothly until April 2023 when the Respondent allegedly defaulted in payment of his salary. The default, he contends, persisted despite his continued diligence in discharging his duties until 24th September 2024 when his engagement was unlawfully terminated. The Claimant quantifies his claim as Kshs. 1,328,484/- being unpaid salary for the years 2023 and 2024, Kshs. 24,000/- being unremitted welfare deductions for the year 2024, and Kshs. 550,000/- being unpaid licence fees. He accordingly urges the Court to award him the said sums together with interest, costs of the suit, a certificate of service, and any other relief the Court may deem fit to grant.

2. Opposing the suit, the Respondent filed a Response to Memorandum of Claim dated 27th October 2025 generally denying the averments in the Statement of Claim and inviting the Claimant to strict proof. It is the Respondent's position that the Collaboration Agreement did not constitute

a contract of employment but rather created a mutually beneficial engagement between the parties. The Respondent further avers that during the subsistence of the engagement the Claimant was negligent in the performance of his duties, which resulted in complaints from patients. Consequently, a meeting was convened between the Respondent's director and the Claimant at which a decision was made to terminate the agreement. The Respondent asserts that upon termination the Claimant handed over the agreement and agreed to forego all existing liabilities, thereby leaving no outstanding claim against it. In addition, the Respondent contends that this Court lacks jurisdiction to entertain the dispute by virtue of the arbitration clause contained in the Collaboration Agreement.

3. At the hearing, the Claimant testified in support of his case while the Respondent called one witness. The Claimant adopted his witness statement dated 27th February 2025 as his evidence in chief. He also produced the collaboration agreement dated 19th May 2022, the termination letter dated 24th September 2024 and a demand letter dated 6th February 2025 as exhibits 1-3. He stated that the Respondent had

refused to pay license fees despite the continued usage of his license even after disengagement.

4. Upon cross-examination he acknowledged that he had not invoked the arbitration clause in the collaboration agreement. The Claimant also acceded to receiving money directly from clients contrary to the terms of engagement and doing so due to financial constraints. With regard to the allegation that he had agreed to forgo liabilities under the agreement, he denied signing the minutes in which such a resolution was recorded. He also conceded that welfare deductions were not provided for in the agreement. At this juncture the Claimant's case was closed.

5. For the Respondent Mr. Griffin Odhiambo Otieno its Chairman and Director testified. He relied on his witness statement dated 17th November 2025 as his evidence in chief. He produced several documents as exhibits 1 to 6, namely: an email dated 19th August 2024 from one Ms. Beryl Opiyo together with its attachments complaining about the Claimant; a Notice to Show Cause dated 24th August 2024; the Claimant's letter dated 30th August 2024 apologising for

his conduct; a letter dated 3rd September 2024 requesting a meeting following the apology; the minutes of the disciplinary hearing held on 5th September 2024; and a certificate of production of electronic evidence. He testified that at all material times the Claimant was not an employee of the Respondent but acted as an independent collaborator pursuant to the Collaboration Agreement dated 19th May 2022. According to him, the relationship between the parties was therefore not governed by a contract of employment but by a hospital-doctor collaborative arrangement regulated by the said agreement. He stated that the agreement was entered into for the mutual benefit of the parties and involved the exchange of finances, opportunities, and professional expertise as provided under Clause B of the agreement. RW1 further testified that during the subsistence of the collaboration, the Respondent received several complaints from patients regarding the Claimant's unprofessionalism. He stated that these complaints culminated in a complaint lodged by one Beryl Opiyo through an email sent to the Respondent on 19th August 2024. He testified that in the said email, Ms. Beryl Opiyo attached

communication between herself and the Claimant together with M-Pesa messages showing that she had been sending money directly to the Claimant. He added that Ms. Beryl Opiyo also lodged a formal Complaint via a letter in which she detailed the nature of her complaint against the Claimant.

6. The Respondent's witness testified that following receipt of the complaint, the Respondent issued the Claimant with a show cause letter dated 24th August 2024 requiring him to explain the alleged misconduct relating to illegal patient financial transactions. According to him, the Claimant responded by a letter dated 30th August 2024 in which he acknowledged that he had indeed been diverting clients and asking them to send money directly to him. He testified that the Claimant explained that he had engaged in the said conduct due to financial constraints and asked for forgiveness. He further testified that after receiving the Claimant's response, the Respondent wrote to the Claimant a letter dated 3rd September 2024 requesting that a meeting be convened between the parties. He stated that the

meeting was held on 5th September 2024 to address the issues raised and that the proceedings of the meeting were subsequently recorded in minutes dated 10th September 2024, which were signed by both the Claimant and the Respondent's directors. He testified that during the meeting the Claimant was given an opportunity to respond to the complaints and admitted the wrongdoing, apologized for his conduct, and assured the Respondent of his commitment to improve. The Respondent's witness further stated that the Claimant also expressed dissatisfaction with the existing Collaboration Agreement and proposed that the parties negotiate a new agreement that would be more achievable and implementable.

7. The witness testified that during the same meeting held on 5th September 2024, the Claimant indicated that he would hand over the existing contract and forgo any outstanding liabilities that were pending under the agreement. He added that by the time the minutes were compiled on 10th September 2024, the Claimant had already handed over the original Collaboration Agreement to him personally, and this fact was recorded in the minutes. He further testified that

after the minutes were typed on 10th September 2024, both the directors of the Respondent and the Claimant appended their signatures on the document to confirm the resolutions reached during the meeting. RW1 testified that following continued complaints and after internal consultations, the Respondent resolved to terminate the Collaboration Agreement. He stated that the Respondent therefore did not owe the Claimant any salary arrears, unremitted share deductions, or unpaid license fees as alleged in the Memorandum of Claim as he had already handed over the contract and agreed to forgo all liabilities pending under it.

8. During cross-examination, the Respondent's witness acknowledged that the Claimant's monthly salary was Kshs. 140,000/-. He however maintained that the Respondent did not exercise control over how the Claimant carried out his professional duties, notwithstanding that it had purchased and maintained the equipment utilized by the Claimant in the course of his work. He further confirmed that although the Respondent issued a Notice to Show Cause, no formal disciplinary committee had been constituted. With regard to

the Collaboration Agreement, he admitted that no amendment had been made to it. He nevertheless maintained that the Claimant had agreed to forgo any outstanding liabilities under the agreement. At this point the Respondent closed its case and parties thereafter filed written submissions.

Claimant's Submissions

9. The Claimant submits that his engagement with the Respondent constitutes an employer-employee relationship. He highlights the nature of the engagement characterized by payment of salary, continuous daily service, remittance of statutory deductions, provision of work place equipment by the Respondent and the Respondent's control over his professional conduct. He relies on section 2 of the Employment Act, as well as the decision in **Martin Juma Kundu v Kemu Salt Packers Production Limited [2016] eKLR**, in which the court held that in establishment of an employer-employee relationship, there should be a total examination of the relationship between the parties, therefore daily work attendance, taking part in staff activities and receiving a salary were clear proof of an employer

employee relationship. The Claimant submits that the termination of his employment was both substantively and procedurally unfair. He asserts that his signature appearing in the minutes of the disciplinary meeting held on 5th September 2024 was forged. He further submits that the minutes do not contain any resolution to terminate his service and that, by the Respondent's own admission, the working relationship continued even after the said meeting.

10. The Claimant also submits that the letter terminating his engagement introduced new complaints in respect of which he was not accorded an opportunity to be heard. In support of this position, he relies on the case of **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** for the proposition that termination of employment must satisfy both procedural and substantive fairness. He also cites the case of **Nicholus Muasya v Famchem Ltd [2012] eKLR**, where the court held that:

“...it is not sufficient for the employer to make allegations of misconduct against the employee. The employer is required to have internal systems and processes of

undertaking administrative investigations and verifying the occurrence of the misconduct before a decision to terminate is arrived at."

11. Having established that he was unfairly terminated from employment, the Claimant therefore submits that he is entitled to the reliefs sought. He urges the Court to disregard the Respondent's assertion that he agreed to forgo his liabilities on the ground that the signature appearing in the minutes relied upon by the Respondent is a forgery.

Respondent's Submissions

12. On its part the Respondent identifies the following issues for determination:
 - a. Whether there existed a contract of employment between the Claimant and the Respondent to enable this Court determine this dispute;
 - b. Whether the Claimant is entitled to the reliefs sought;
 - c. Whether the Claimant is entitled to compensation for unlawful termination;

- d. Whether the Claimant has come to court with clean hands; and
- e. Who should bear the costs of the suit.

13. On the first issue, the Respondent submits that the nature of the engagement between the parties falls outside the jurisdiction of this Court as contemplated under Article 162(2)(a) of the Constitution and section 12(2) of the Employment and Labour Relations Court Act. It maintains that the Collaboration Agreement constituted a contract for service rather than a contract of service. In this regard, the Respondent points out that the agreement did not contain the essential particulars of a written employment contract required under section 10 of the Employment Act, including the job description, place of work, hours of work, scale or method of remuneration, details of benefits, leave entitlements, public holidays, pension arrangements, sick pay, or any applicable collective bargaining agreement.

14. The Respondent further submits that the mere use of the term “salary” in the agreement did not convert the

arrangement into a contract of employment. It relies on **Fredrick Byakika v Mutiso Menezes International Unlimited [2016] eKLR**, where the Court observed that the use of terms such as salary, employment terms, or summary dismissal does not by itself establish an employment relationship; rather, the intention of the parties must be considered to determine whether the arrangement amounts to an employment contract or an independent contractual engagement.

15. With regard to the reliefs sought, the Respondent submits that the Claimant has failed to demonstrate how the figures claimed were arrived at or to provide proof of the alleged amounts. It relies on **Kengere v Aisha Motor Dealers Ltd & 2 others (Civil Appeal E007 of 2023) [2025] KEHC 4798 (KLR)** for the proposition that he who alleges must prove. The Respondent further submits that the sums claimed are in the nature of special damages which must not only be specifically pleaded but also strictly proved, citing the case of **Githaiga v Mwangi (Civil Appeal E064 of 2022) [2024] KEHC 13449 (KLR)**.

16. In addition, the Respondent submits that the Claimant has not proved that the signature appearing in the minutes in which he allegedly agreed to forgo all liabilities was forged. It contends that the signature bears a close resemblance to that appearing in the Claimant's witness statement. For these reasons, the Respondent maintains that the claims are unsubstantiated and ought to be dismissed.

17. The Respondent further submits that compensation for unfair termination cannot arise in this matter as no such prayer was pleaded in the Memorandum of Claim. In support of this argument, it relies on the case of **Githaiga v Mwangi (Civil Appeal E064 of 2022) [2024] KEHC 13449 (KLR)**, which underscored the principle that pleadings form the foundation of a case and that evidence must remain consistent with the pleadings. The Respondent also submits that the Claimant has approached the Court with unclean hands, having acted unprofessionally by directing patients to make payments to his Mpesa line. Finally, on the issue of costs, the Respondent urges the Court to exercise its discretion in its favour pursuant to section 27(1) of the Civil Procedure Act.

Disposition

18. The question the Court has to answer is whether there was an employment relationship between the parties. The Claimant and Respondent referenced a document headed 'collaboration agreement'. What forms an employment relationship is not the heading or designation but the actual way in which the parties engage. When a person performs work or services under the direction, control, and supervision of another in return for remuneration, an employment relationship is formed. Against this mirror, the Claimant was an employee of the Respondent as the Respondent exercised control over the Claimant and the Claimant provided services under the direction and supervision of the Respondent. He also received remuneration for his service thereby cementing the relationship. In the Court's view, it mattered not that the Respondent was devious enough to frame an employment contract as a 'collaboration agreement' whatever that term means.

19. The Claimant sought relief for the dismissal by the Respondent. It would seem the Respondent had a reason for termination but did not conduct the process as required under the law. The case of **Walter Ogal Anuro v Teachers Service Commission** (*supra*) as well as section 41 of the Employment Act are instructive. There was no adherence to the dictates of the law in the termination meted to the Claimant. Minutes of a staff meeting cannot be waved as an agreement by the parties. The minutes only showed intent and in the absence of the Respondent having done what was agreed upon it cannot expect the Claimant to hold up his 'obligations' per the meeting held while it avoids doing what it stated it would do.

20. The Claimant earned Kshs. 140,000/- a month. The Claimant sought unpaid salaries for 2023 and 2024. The Respondent as the employer is the one that keeps records and under the Employment Act it was the Respondent that was to avail records. It is evident there was no proof of payment of salaries that had remained unpaid despite demand to pay. The Claimant is therefore entitled to the amount claimed being Kshs. 1,328,484/- for unpaid salary for

the years 2023 and 2024. The Claimant also sought unremitted welfare deductions amounting to Kshs. 24,000/- for the year 2024. He is entitled to the sum. He also sought Kshs. 550,000/- being unpaid licence fees which he will be entitled to. The Respondent would be well guided to cease using his licence to avoid a commercial suit for damages.

21. In the final analysis I enter judgment for the Claimant against the Respondent for:-

- a. Kshs. 1,328,484/- as unpaid salary for the years 2023 and 2024.
- b. Kshs. 24,000/- unremitted welfare deductions for the year 2024.
- c. Kshs. 550,000/- unpaid licence fees
- d. Costs of the suit
- e. Interest on the sums in (a), (b) and (c) above at Court rates from the date of judgment till payment in full.
- f. A certificate of service in terms of section 51 of the Employment Act.

It is so ordered.

Dated and delivered at Kisumu this 16th day of March

2026

**Nzioki wa Makau, MCI Arb.
JUDGE**

Original