

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI

ELRC CAUSE NO E569 OF 2023

LARMAN GITHIGA NJENGA...
.....**CLAIMANT**

VERSUS

MILIKI SPACE PROPERTIES
LIMITED.....RESPONDENT

JUDGMENT

Background

1. The Claimant avers that the Respondent hired his services as an accountant in October 2021. He contends that the parties agreed on a net salary of Ksh. 80,000.00 per month.
2. The Claimant avers that he worked for the Respondent diligently until 26th October 2022 when the latter terminated his services without reason and in disregard of due process. He contends that the Respondent first issued him with a letter of suspension on 12th October 2022 after he questioned its decision to issue him with a performance contract and reduce his salary by 80%. He asserts that this was followed with the decision to terminate his services.
3. The Claimant contends that the Respondent did not pay him house allowance during the term of his contract. He further accuses the Respondent of not granting him annual leave

and withholding his salary for October 2022. As such, he prays for the various reliefs as set out in the Memorandum of Claim.

4. In response, the Respondent asserts that it engaged the Claimant's services as a financial advisor on consultancy basis. It avers that the Claimant's main duties were to advise it on financial affairs, policies and procedures and to conduct market research on financial documents such as audit reports and financial statements on need basis.
5. The Respondent contends that the Claimant executed the aforesaid tasks in liaison with its accounts clerk. However, it avers that it is the accounts clerk and not the Claimant who was on its payroll.
6. The Respondent asserts that the Claimant delivered on only three assignments before he ceased to take up further instructions from it. It contends that when it sought to ascertain the reason for his decision, it learned that he had secured another job
7. The Respondent avers that after it learned that the Claimant was in the employment of another entity, it ceased to engage him. It contends that by the time it took this decision, it had settled all of the Claimant's consultancy fees and there was nothing owing between the parties.
8. The Respondent denies that the parties had an employment relationship as claimed by the Claimant. As such, it prays for the suit to be dismissed with costs to it.

Issues for Determination

9. After evaluating the pleadings, evidence and submissions by the parties, the following issues arise for resolution:-
 - a) Whether the parties had an employment relationship.
 - b) If the answer to the first issue is in the affirmative, whether the employment relationship between the parties was unlawfully terminated by the Respondent.
 - c) Whether the Claimant is entitled to the reliefs which he seeks through this suit.

Analysis and Determination

10. The Claimant contends that the parties had an employment relationship on the basis of which he was to provide the Respondent with the services of an accountant. However, he avers that they did not execute a written contract of service.
11. On the other hand, the Respondent denies that the Claimant was its employee. It contends that it only engaged his services as a consultant on need basis.
12. The Respondent relies on the letter dated 21st September 2021 to assert that it hired the Claimant as a consultant and not an employee. Nonetheless, it is important to keep in mind that the court is not obligated to rely on the description which the parties assign to their labour relationship to determine whether it qualifies as a contract of service or a contract for services. It (the court) is required to evaluate the evidence presented before it to determine whether it discloses the presence of an employment or independent

contractor relationship (***Pietro Lunghi v Simba Hospitality Services Limited t/a Villa Rosa Kempinski [2022] KEELRC 1083 (KLR)***). As such, the fact that the Respondent's letter dated 21st September 2021 describes the relationship between the parties as a consultancy is not, of itself, proof that they had a consultancy and not employment relationship.

13. The Claimant tendered evidence to demonstrate that the Respondent paid him a sum of Ksh. 50,000.00 per month consistently from the time they entered into the labour relation until July 2022. Thereafter, there is evidence that the Respondent paid the Claimant Ksh. 80,000.00 per month for August and September 2022.
14. The Claimant contended that these payments covered his monthly salary. On the other hand, the Respondent contended that the Claimant only executed three assignments during the period of their engagement. In effect, the Respondent insinuated that the Claimant was assigned only three consultancies.
15. If it is true that the Claimant executed only three assignments during the term of the relationship between the parties as asserted by the Respondent, one would have expected that he would only have been paid three times for the consultancy services he rendered. However, the evidence on record shows that he was paid multiple times. The fact that he received several monthly payments gives

credence to his assertion that he was an employee of the Respondent.

16. The evidence on record further shows that the Respondent religiously remitted National Social Security Fund and National Health Insurance Fund contributions to the relevant government agencies on behalf of the Claimant. These contributions are usually remitted by an employer as part of an employee's benefits under a contract of service. As such, the fact that the Respondent agreed to shoulder the responsibility of making these payments on behalf of the Claimant implies that it (the Respondent) understood that the parties had an employment as opposed to independent contractor relationship.
17. Finally, the evidence on record demonstrates that the Respondent consistently remitted Pay as You Earn tax (PAYE) on behalf of the Claimant. This tax is payable under an employment and not consultancy relationship.
18. When the Respondent was confronted with this evidence, it sought to discount it by asserting that it is the Claimant who was making the impugned payments. However, it is noteworthy that it (the Respondent) never objected to the payments being made during the currency of the labour relationship between the parties. Yet, it is apparent that it (the Respondent) was the provider of the funds which were applied for the aforesaid purpose.

19. A look at the Respondent's letter to the Claimant dated 26th October 2022 further fortifies the reality that the parties were in an employment as opposed to consultancy relationship. By this letter, the Respondent suspended the Claimant from duty on the ground that he was providing similar services to its competitors.
20. It is common ground that one of the indicators of the presence of an employment relationship is the degree of control the consumer of the labour product exerts on the supplier of the product. The more the control that is exerted the more likely it is that the relationship between the parties is one of employment (***Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497***).
21. By the Respondent seeking to limit the Claimant's ability to offer similar services to third parties during the term of their (the Claimant's and Respondent's) engagement, it was essentially exerting control over him. The letter implies that once the Claimant agreed to serve the Respondent, he was not to offer similar services to its competitors. This is atypical of an independent contractor who cannot be forbidden from engaging with another individual for provision of a service merely because he is offering the same service to another consumer of the service. As such, the degree of control which the Respondent was exerting on the Claimant is consistent with the fact that the two were

engaged in an employment as opposed to a consultancy relationship.

22. Finally, the Claimant tendered in evidence sample pay slips which the Respondent issued him as proof of payment of salary. Pay slips are a peculiar feature of an employment relationship.
23. They are issued to an employee pursuant to sections 20 and 21 of *the Employment Act* which deals with employment as opposed to consultancy contracts. As such, the fact that the Respondent issued the Claimant with these slips speaks to the presence of an employment relationship between the parties.
24. The totality of the aforesaid evidence demonstrates that the parties to the action had an employment and not consultancy relationship. It is so declared.
25. The next question for determination is whether the Respondent terminated the aforesaid relationship lawfully. According to the evidence on record, the Respondent's decision to sever the labour relationship between the parties was prompted by the fact that the Claimant had engaged with its (the Respondent's) competitors.
26. Pursuant to section 41 of *the Employment Act*, the Respondent was required to issue the Claimant with a letter of show cause setting out the accusations against him and to allow him an opportunity to respond to the charges. The Respondent was expected to convene a disciplinary hearing

at which the Claimant would have been given an opportunity to defend himself against the infractions he was accused of. It is only by doing so that the Respondent would have been said to have satisfied the substantive and procedural requirements for a just termination of the contract between the parties (***Walter Ogal Anuro v Teachers Service Commission [2013] KEELRC 386 (KLR)***).

27. The evidence on record does not show that the Respondent complied with these requirements of law. As such, it is apparent that the decision to terminate the Claimant's services was flawed. It is so declared.
28. The last issue for determination is whether the Claimant is entitled to the reliefs which he seeks in the suit. One of the reliefs the Claimant seeks is a declaration that the decision to terminate his services was unlawful. This relief has already been granted.
29. The Claimant prays for pay in lieu of notice to terminate his contract. Section 35 of *the Employment Act* entitled him to this notice. Absent the notice, the Respondent was to pay him salary in lieu thereof.
30. The evidence on record does not show that the Respondent either issued the Claimant with the notice required under section 35 of the Act or paid him salary in lieu thereof as required under section 36 of the Act. In the premises, the Claimant is entitled to payment of an amount which is equivalent to his salary for one month under this head. As

such, the court enters judgment for him for Ksh. 80,000.00 as pay in lieu of notice to terminate his contract.

31. The Claimant has claimed salary for October 2022. He has also claimed for accrued leave pay for the one year that he served the Respondent. The Respondent did not provide evidence to demonstrate that the Claimant was paid salary for the aforesaid month or that he took his annual leave.
32. Under section 74 of *the Employment Act*, the employer has the statutory obligation of securing employment records including those on salary and annual leave. By reason of this, the employer is deemed to have special knowledge of matters pertaining to whether an employee has been paid salary for a particular period or taken annual leave.
33. Under section 112 of *the Evidence Act*, a party who has special knowledge of a disputed fact has the obligation to present evidence to either prove or disprove the fact. As such, the Respondent bore the burden of demonstrating that the Claimant was paid salary for October 2022 and that he had taken his annual leave. As the record shows, the Respondent did not discharge this duty.
34. Importantly, section 9 of *the Employment Act* requires an employer to reduce a contract of service into writing where the employment relationship between the parties lasts for a period of more than one month. Under section 10(7) of the Act, if the employer fails to reduce the contract into writing

- and there is a dispute regarding a term of the contract, the burden rests on him to prove or disprove the disputed term.
35. In the instant dispute, the contract between the parties lasted for more than one month. As such, the Respondent was duty bound to reduce the contract into writing. However, it did not.
 36. That being the case, the burden of demonstrating that the Claimant was paid salary for October 2022 and took his annual leave rested with the Respondent (**Jackson Muiruri Wathigo t/a Murtown Supermarket v Lilian Mutune [2021] eKLR**). As the record shows, it (the Respondent) did not discharge this burden.
 37. Having regard to the foregoing, the court finds that the Claimant has established that his salary for October 2022 was not paid. The Claimant has further made a case for accrued leave pay. In the premises, the court enters judgment for him for Ksh. 80,000.00 and Ksh. 56,000.00 respectively to cover salary for October 2022 and accrued leave pay.
 38. The Claimant has also claimed for house allowance. He contends that the Respondent did not pay him this allowance for the duration of their contract.
 39. The Respondent did not expressly deny this contention. Instead, it focused on denying the presence of an employment relationship between the parties.

40. House allowance is a benefit which the law confers on an employee (see section 31 of *the Employment Act*). The employer ought to provide an employee with either physical housing or pay him an allowance which will enable him to secure rental housing.
41. There is no evidence that the Respondent paid the Claimant the aforesaid allowance or provided him with physical housing. That being the case, the Claimant is entitled to house allowance at the rate of 15% of his basic salary (***Grain Pro Kenya Inc. Ltd v Andrew Waithaka Kiragu [2019] KECA 563 (KLR)***).
42. Between October 2021 and July 2022, the Claimant's basic salary was Ksh. 50,000.00 per month. As such, his monthly house allowance for the period ought to have been Ksh. $50,000.00 \times 15/100 = \text{Ksh. } 7,500.00$. Consequently, the house allowance for the period between October 2021 and July 2022 was Ksh. $7,500.00 \times 10 = \text{Ksh. } 75,000.00$.
43. The Claimant's salary was increased from Ksh.50,000.00 to Ksh. 80,000.00 after July 2022. As such, his house allowance between August 2022 and October 2022 was supposed to have been Ksh. $80,000.00 \times 15/100 \times 3 = \text{Ksh. } 36,000.00$.
44. Cumulatively, the house allowance that was due to the Claimant for the term of his service is Ksh. 75,000.00 + Ksh.36,000.00 = Ksh. 111,000.00. Accordingly, judgment is entered for him for this amount.

45. The Claimant has prayed for compensation for unfair termination of his contract of service. The court notes that at the time the contract between the parties was terminated, they had been in the employment relationship for hardly one year which was a relatively short duration. Taking this factor into consideration as indeed is required under section 49 of *the Employment Act*, the court awards the Claimant compensation which is equivalent to his salary for three months, that is to say Ksh. 240,000.00.
46. The amount awarded to the Claimant is subject to the statutory deductions which were applicable at the time the contract between the parties was terminated.
47. The court awards the Claimant interest on the amount awarded at court rates from the date of this decision.
48. The court awards the Claimant costs of the case.
49. The Respondent is ordered to issue the Claimant a Certificate of Service.

Summary of the Findings and Orders

50. After evaluating the evidence on record, the court makes the following findings and attendant orders:-
 - a) The parties to the action had an employment and not consultancy relationship.
 - b) The Respondent unlawfully terminated the employment relationship between the parties.
 - c) The court awards the Claimant Ksh. 80,000.00 as pay in lieu of notice to terminate his contract of service.

- d) The court awards the Claimant Ksh. 80,000.00 as salary for October 2022.
- e) The court awards the Claimant Ksh.56,000.00 as pay in lieu of accrued leave.
- f) The court awards the Claimant Ksh. 111,000.00 as unpaid house allowance.
- g) The court awards the Claimant Ksh. 240,000.00 as compensation for unfair termination of his contract of service.
- h) The award to the Claimant is subject to the statutory deductions which were applicable at the time the contract between the parties was terminated.
- i) The court awards the Claimant interest on the amount awarded at court rates from the date of this decision.
- j) The court awards the Claimant costs of the case.
- k) The Respondent is ordered to issue the Claimant a Certificate of Service.

Dated, signed and delivered on the 16th day of March, 2026

B. O. M. MANANI

JUDGE

In the presence of:

.....for the Claimant

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI