



**Eldotec Consultancy Services Ltd v Otieno & another (Employment and Labour Relations Cause E019 of 2023) [2025] KEELRC 2078 (KLR) (10 July 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2078 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET**  
**EMPLOYMENT AND LABOUR RELATIONS CAUSE E019 OF 2023**  
**MA ONYANGO, J**  
**JULY 10, 2025**

**BETWEEN**

**ELDOTEC CONSULTANCY SERVICES LTD ..... CLAIMANT**

**AND**

**OLIVER JESSE OTIENO ..... 1<sup>ST</sup> RESPONDENT**

**THE COOPERATIVE BANK OF KENYA LTD ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Claimant instituted this suit vide a Statement of claim dated 2<sup>nd</sup> August 2023 seeking judgment against the Respondents jointly and severally for: -
  - a. A refund of the overpaid sum of Kshs. 409,359.44
  - b. Costs of the suit
  - c. Any other relief or orders that the Honourable court may deem fit and just to grant.
2. The Claimant's case is that it offered the 1<sup>st</sup> Respondent employment as a Manager-Compliance support vide an employment contract dated 29<sup>th</sup> September 2016. That at the time material to this suit, his salary was Kshs. 84,433 per month less statutory deductions.
3. The Claimant avers that the 1<sup>st</sup> Respondent's employment came to an end on 2<sup>nd</sup> June 2023 through mutual separation pursuant to which the parties signed an agreement dated 17<sup>th</sup> May 2023 whose terms were: -
  - i. The 1<sup>st</sup> Respondent shall be paid salary up to 2<sup>nd</sup> June 2023, 26 weeks salary as notice pay and leave days earned and not utilized (7.75 days).
  - ii. The 1<sup>st</sup> Respondent shall discharge and release the Claimant from any and all claims arising from his employment.



- iii. The agreement supersedes any other discussion between the parties and that parties have not relied on any representation other than those set out in the agreement.
    - iv. Upon execution, the agreement shall be treated as an open document evidencing a binding agreement.
4. The Claimant avers that as per the separation agreement, the Claimant was entitled to be paid Kshs. 553,565.49. That through an inadvertent error on its part there was a gross miscalculation of the terminal dues payable to the 1<sup>st</sup> Respondent and he was paid Kshs. 962,924.33 which amounted to an overpayment of Kshs. 409,359.44
5. The Claimant alleges that the overpayment, amounting to nearly twelve (12) months of the 1<sup>st</sup> Respondent's monthly salary, was undeniably significant, and the 1<sup>st</sup> Respondent cannot claim ignorance having unreservedly accepted the terms of the separation agreement.
6. The Claimant contended that upon realization of the error in payment, it wrote to the 2<sup>nd</sup> Respondent a letter dated 9<sup>th</sup> June 2023 requesting a recall of the funds that had been sent to the 1<sup>st</sup> Respondent's account and that the 2<sup>nd</sup> Respondent thereafter froze the 1<sup>st</sup> Respondent's account pending the resolution of the overpayment issue.
7. The Claimant states that despite it exercising diligence in informing the 2<sup>nd</sup> Respondent of the said error, and the 2<sup>nd</sup> Respondent undertaking to secure the funds, the 2<sup>nd</sup> Respondent has since utilized some of the overpaid funds to settle debts owing to it on the account of the 1<sup>st</sup> Respondent.
8. According to the Claimant, the overpayment was caused by an accounting mistake and was in contravention of the express terms of the separation agreement between the parties and it was entitled to recover the same pursuant to the provisions of section 19 (1) (c) of the [Employment Act 2007](#).
9. The Claimant has thus asserted that it is entitled to a refund of the overpaid sum of Kshs. 409,359.44
10. In response the 1<sup>st</sup> Respondent filed a Response to Claim and a counterclaim dated 12<sup>th</sup> September 2023. In his defense, the 1<sup>st</sup> Respondent stated that he was invited to an online meeting with 9 others who were also laid off and was informed that his services would be terminated immediately. That he was further informed that he would be paid for 2 weeks as unpaid leave and in addition, he would be paid other leave days not taken, salary up to 2<sup>nd</sup> June 2023 and 26 weeks' pay being the release package.
11. It is the 1<sup>st</sup> Respondent's contention that he was informed that a mutual separation agreement had already been prepared and that it would be forwarded to him. He avers that he was informed that the payments promised would only be paid upon execution of the agreement. On this basis, the 1<sup>st</sup> Respondent stated that since the payment of the release package was conditional on execution of the agreement, it cannot be said to have been a mutual separation.
12. The 1<sup>st</sup> Respondent further contends that he wrote to the Claimant requesting for the agreement to be reviewed upwards and for increase of the release package to enable him adapt to the current situation which request he avers was accepted whereupon the Claimant agreed to extend the medical cover to him and further, that the Claimant orally agreed to give the 1<sup>st</sup> Respondent together with the 9 colleagues a better offer by offering to pay 52 weeks instead of 26 weeks that had been offered earlier. The 1<sup>st</sup> Respondent avers that the Claimant did not prepare an addendum agreement in light of the new agreement but it promised that the payment would reflect the new oral agreement.
13. It is the 1<sup>st</sup> Respondent's claim that when he returned office equipment and cleared with the Claimant, he was given his pay slip which reflected the new oral agreement and that the Human Resource



Manager explained to him that the Claimant had decided to revise and offer the 1<sup>st</sup> Respondent a better package and took him through each item totaling to Kshs. 962,924.93. The 1<sup>st</sup> Respondent therefore refuted claims that there was gross miscalculation of his dues and maintained that the payment of Kshs. 962,924.33 was deliberate and intentional.

14. The 1<sup>st</sup> Respondent maintained that this suit is an afterthought and an attempt by the Claimant to get the court to review the terms of the agreement between it and the 1<sup>st</sup> Respondent and that this court does not have powers to vary the said terms.
15. Additionally, the 1<sup>st</sup> Respondent maintained that the instant application is overtaken by events as he no longer has funds in his account and cannot raise the said amount as he is currently jobless.
16. In his counterclaim, the 1<sup>st</sup> Respondent averred that he was unlawfully and unfairly terminated from employment. He prayed for compensation for the alleged unfair termination, one month salary in lieu of notice and house allowance.
17. The suit was disposed of by way of written submissions.

### **The Claimant's submissions**

18. In its submissions dated 23<sup>rd</sup> October 2024, the Claimant identified the issues for determination to be:-
  - i. Whether the Claim is merited and whether the Claimant is entitled to the reliefs sought
  - ii. Whether the Counterclaim is merited;
  - iii. Who should bear the costs of the claim and the counterclaim
19. On the first issue, the Claimant reiterated that it got into a mutual separation agreement dated 17<sup>th</sup> May 2023 that saw the 1<sup>st</sup> Respondent's employment come to an end on 2<sup>nd</sup> June 2023. The Claimant submits that a copy of the mutual separation agreement was sent to the 1<sup>st</sup> Respondent via email on 17<sup>th</sup> May 2023 which email the 1<sup>st</sup> Respondent responded to on 26<sup>th</sup> May 2023, confirming that he was in agreement with the mutual separation agreement. The Claimant submits that the 1<sup>st</sup> Respondent thereafter executed the said agreement and initialed each page confirming the same as a binding agreement. The Claimant contends that the said agreement was binding once it was executed by both the Claimant and the 1<sup>st</sup> Respondent
20. It is the Claimant's submission that the 1<sup>st</sup> Respondent has not pleaded that there was coercion, duress, use of force or that he signed the said mutual separation agreement as a result of misrepresentation or that he did not have the capacity to do so. In support of this position, the Claimant cited the case of Coastal Bottlers Limited v Kimathi Mithika [2018] eKLR.
21. The Claimant further submitted that the 1<sup>st</sup> Respondent has not adduced any evidence to show that the Claimant and the 1<sup>st</sup> Respondent had an oral agreement to review the terms of the mutual separation agreement as alleged by the 1<sup>st</sup> Respondent. While citing section 109 of the Evidence Act, the Claimant averred that it is incumbent upon the 1<sup>st</sup> Respondent to prove that there was an oral agreement that reviewed the terms of the mutual separation agreement dated 17<sup>th</sup> May 2023 which burden has not been discharged by the 1<sup>st</sup> Respondent.
22. It is therefore contended that the 1<sup>st</sup> Respondent having failed to adduce evidence in support of his allegations that there was an oral agreement between the 1<sup>st</sup> Respondent and the Claimant for payment of 962, 924.93/- as opposed to the payment of Kshs. 553, 565.49/- as pleaded by the Claimant, the



Claimant's position remains un rebutted hence the Claimant has discharged the burden under Section 107 and 108 of the *Evidence Act*.

23. The Claimant also blamed the 2<sup>nd</sup> Respondent for not withholding the sums paid in excess to the 1<sup>st</sup> Respondent amounting to Kshs 409,359.44 immediately it was notified. According to the Claimant, the 2<sup>nd</sup> Respondent cannot deny any liability in this suit since the amount in dispute was paid to an account held by the 1<sup>st</sup> Respondent and that it did not act accordingly. The Claimant maintained that the 2<sup>nd</sup> Respondent is vicariously liable for the excess money paid to the 1<sup>st</sup> Respondent. To buttress this point, the Claimant cited the case of Kingdom Bank Limited v Wanjohi (Commercial Appeal E192 OF 202) (2024) KEHC 2677 (KLR)
24. Finally, the Claimant submitted that this being a test suit, the other suits being ELRC Appeal No. E017, E018, E019, E20 of 2023 should be allowed with costs.
25. On the issue whether the counterclaim is merited, the Claimant submitted that as evidenced by the email sent to the 1<sup>st</sup> Respondent on 17<sup>th</sup> May 2023, the mutual separation agreement had already been discussed and agreed upon by the parties before it was sent to the 1<sup>st</sup> Respondent for execution. It is submitted that the 1<sup>st</sup> Respondent responded to the email on 25<sup>th</sup> May 2023 expressing his agreement with the mutual separation.
26. The Claimant maintained that despite the May 2023 payslip and discharge voucher dated 31<sup>st</sup> May 2023 indicating that the 1<sup>st</sup> Respondent was paid Kshs. 962,924.93, the payments were made subject to an agreement which the 1<sup>st</sup> Respondent has not disputed that he executed. The Claimant submitted that the agreement constituted a complete contract which was binding and the allegations that the 1<sup>st</sup> Respondent was unfairly and unlawfully terminated from employment cannot stand.
27. The Court was urged to dismiss the counterclaim with costs.
28. On the third issue on who should pay costs, the Claimant submitted that the 1<sup>st</sup> Respondent having failed to establish that his counterclaim against the Claimant is merited, it should be awarded costs in both the claim and the 1<sup>st</sup> Respondent's counterclaim.

### **The 1<sup>st</sup> Respondent's submissions**

29. The 1<sup>st</sup> Respondent filed his submissions dated 12<sup>th</sup> November 2024 and identified the issue for determination to be whether it was the intention of the Claimant to pay the received amount to the 1<sup>st</sup> Respondent. According to the 1<sup>st</sup> Respondent, after the separation agreement dated 17<sup>th</sup> May 2023, there were further negotiations where the Claimant agreed to increase the release package for the employees released from employment to 52 weeks from 26 weeks earlier agreed on.
30. The 1<sup>st</sup> Respondent submits that he was issued with a pay slip for May 2023 of Kshs. 962,924 and was thereafter given the discharge voucher to sign. He avers that the discharge voucher dated 31<sup>st</sup> May, 2023 clearly articulated the breakdown of the payments made in comparison to the separation agreement of 17<sup>th</sup> May, 2023 in that payment for days worked up to 19<sup>th</sup> May, 2023 versus what the agreement stated that the payments would be up to 2<sup>nd</sup> June 2023 and further, release package of Kshs. 1,025,196/= being 52 weeks versus what the agreement stated that he would be paid only 26 weeks being Kshs. 552,029/=.
31. It is submitted that the Claimant banked the cheque for the payment on 29<sup>th</sup> May, 2023 and later issued the payment voucher on 31<sup>st</sup> May, 2023.



32. The 1<sup>st</sup> Respondent submitted that Contracts are meant to be binding and from the chronology of events, it is clear that the Claimant intended to pay the 1<sup>st</sup> Respondent the money that it did. It first issued a cheque, which was signed, and it was reasonable to assume from such an organization, which has more than one person executing cheques, that in the ordinary course of business, the bank calls the issuing client to confirm before paying the receiving client. It is clear that the Claimant then approved payment to the 1<sup>st</sup> Respondent. Thereafter, the Claimant called the 1<sup>st</sup> Respondent to collect the pay slip and issued discharge vouchers, both bearing the same figures which were well articulated in the discharge voucher.
33. The 1<sup>st</sup> Respondent maintained that there was no error, mathematical or otherwise as claimed since there was a breakdown which clearly stated the sums that were going to be paid.
34. The court was urged to dismiss this suit together with the other matters in this series with costs.
35. With regard to his counterclaim, the 1<sup>st</sup> Respondent maintained that he was not given notice and no reasons were given before his employment was terminated. He also maintained that from his pay slip tendered in court, he was not paid a house allowance.
36. The 1<sup>st</sup> Respondent urged the court to allow his counterclaim with costs.

### **The 2<sup>nd</sup> Respondent's submissions**

37. The 2<sup>nd</sup> Respondent filed submissions dated 13<sup>th</sup> November 2024 and framed the issues for determination to be:
  - i. Whether the 2<sup>nd</sup> Respondent is obligated to release the money claimed by the Claimant?
  - ii. Who bears the costs of this suit?
38. On the first issue, the 2<sup>nd</sup> Respondent submitted that as per the Statement of Accounts produced in court by the 2<sup>nd</sup> Respondent in its List of documents, there was a credit of Kshs. 967,975.85 to the 1<sup>st</sup> Respondent's account and from the said statement of accounts, it is evident that as at 2<sup>nd</sup> June 2023, the funds in the 1<sup>st</sup> Respondent's account had been disbursed and utilized. It was submitted that by 6<sup>th</sup> June 2023, the only available balance in the 1<sup>st</sup> Respondent's account was a sum of Kshs. 725.90.
39. The 2<sup>nd</sup> Respondent submitted that it only learnt of the issue of the overpayment of money by the Claimant to the 1<sup>st</sup> Respondent's account, when they were served with the court order dated 7<sup>th</sup> December 2023.
40. The 2<sup>nd</sup> Respondent asserted that as at the time the court order was served on it directing that the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent deposit the sum of Kshs. 409,359.44 in a joint account in the names of the parties herein, the account of the 1<sup>st</sup> Respondent held by the 2<sup>nd</sup> Respondent had insufficient funds.
41. On the allegation made by the Claimant that it issued instructions to the 2<sup>nd</sup> Respondent to freeze the 1<sup>st</sup> Respondent's account, the 2<sup>nd</sup> Respondent submitted that it was never notified at the onset of the alleged overpayment made into the account of the 1<sup>st</sup> Respondent by the Claimant. The 2<sup>nd</sup> Respondent submitted that the Claimant cannot allege that the 2<sup>nd</sup> Respondent colluded with the 1<sup>st</sup> Respondent to withdraw the funds deposited in the 1<sup>st</sup> Respondent's account as there were no instructions to the contrary.
42. The 2<sup>nd</sup> Respondent maintained that the allegations made by the Claimant against it are mere speculations that cannot be conclusively proved as is required beyond a balance of probabilities.



43. While citing the case of Family Bank Kenya Limited v Panda Co-operative Savings and Credit Society (2022) eKLR and Karak Brothers Company Ltd v Burden [g72) All ER 1210, 2<sup>nd</sup> Respondent submitted that it owed a duty of care to the 1<sup>st</sup> Respondent which duty it diligently carried out.
44. The 2<sup>nd</sup> Respondent maintained that it was carrying out instructions issued by the Claimant to pay the 1<sup>st</sup> Respondent, and that the duty of conducting due diligence and verification lied with the Claimant to ensure that the instructions issued were correct.
45. The 2<sup>nd</sup> Respondent submitted that it is not liable to pay the contested amounts since it is evident that at the time the court issued the order dated 7<sup>th</sup> December 2023, the funds in the 1<sup>st</sup> Respondent's account had already been disbursed and utilized by the 1<sup>st</sup> Respondent.
46. The 2<sup>nd</sup> Respondent urged the court to dismiss the Claimant's case against it in this suit and the other related cases with costs.

### **Determination**

47. From the pleadings and the submissions on record, the only issues that fall for this court's determination are whether the Claimant is entitled to the reliefs pleaded in the Statement of Claim and if the 1<sup>st</sup> Respondent is entitled to the prayers in his counter claim.
48. I will deal with the 1<sup>st</sup> Respondent's counterclaim before I delve into the issue of determination in the main suit. In his Counterclaim, the 1<sup>st</sup> Respondent pleaded that he was unlawfully and unfairly terminated from employment by the Claimant without notice and without any valid reason. He sought compensation for the alleged unfair termination, one month's salary in lieu of notice and house allowance dues which he alleged was owed to him by the Claimant.
49. Central to this dispute is the payments made to the 1<sup>st</sup> Respondent as a result of the mutual separation agreement dated 17<sup>th</sup> May 2023 which both parties have alluded to in their pleadings and submissions on record. The said agreement is proof that the Claimant and the 1<sup>st</sup> Respondent mutually agreed to end the employment relationship. It is therefore not true that the 1<sup>st</sup> Respondent was unlawfully and unfairly terminated from employment as he alleges. As such, his counterclaim is unmerited and is dismissed.
50. In its Statement of Claim, the Claimant sought to recover monies which he averred was an overpayment made erroneously to the 1<sup>st</sup> Respondent and the other employees as a result of the mutual separation agreement.
51. In its pleadings, the Claimant contended that it entered into a mutual separation agreement on 17<sup>th</sup> May 2023 that saw the 1<sup>st</sup> Respondent's employment come to an end on 2<sup>nd</sup> June 2023.
52. The separation agreement read as follows in part:-
  - 2.0 Payments
  - 2.1 In consideration of the mutual separation:-
    - 2.1.1 The Employer shall pay the employee
      - 2.1.1.1 Salary up to June 2, 2023
      - 2.1.1.2 26 weeks notice pay
      - 2.1.1.3 Leave days earned and not utilized (7.75 days)



- 2.1.2 The payments will be made net off all mandatory statutory deductions and any sums owed to the Employer (Final Dues").
- 2.1.3 Payment of the Final Dues in sections
- 2.1.1.2 and
- 2.1.1.3 will be made within seven (7) days of the date of execution of this Agreement but subject to receipt of the resignation letter and satisfactory clearance and handover of all the Employer's property in the Employee's possession.
- 2.1.4 The Employee will also be issued with a Certificate of Service.
53. From the above instrument, it is clear that the intention of the parties therein was that upon execution of the instrument, the 1<sup>st</sup> Respondent was to be paid 26 weeks salary as notice pay and 7.75 leave days earned and not utilized.
54. In his defence, the 1<sup>st</sup> Respondent stated that after executing the above mutual separation agreement, the Claimant further engaged the affected employees and vide an oral agreement, the Claimant was to pay the released employees 52 weeks salary as notice pay and not 26 weeks as stated in the mutual separation agreement.
55. In *National Bank of Kenya Limited v Pipeplastic Samkolit (K) Limited & Another*, Civil Appeal No 35 of 1999 [2001] eKLR, the court observed that a contract can only be set aside if it is shown that it was procured through fraud, coercion or undue influence, and the party alleging any of these grounds in a bid to upset a contract must not only plead the ground but prove it.
56. In the absence of proof that there was an oral agreement between the Claimant and the 1<sup>st</sup> Respondent reviewing the mutual separation agreement signed by the parties, the court finds that the terms of the mutual separation agreement was binding with regard to payments that were due to the 1<sup>st</sup> Respondent and that the excess payment was made in error to the 1<sup>st</sup> Respondent.
57. On the claim against the 2<sup>nd</sup> Respondent, I find that the Claimant has not proved its case against the 2<sup>nd</sup> Respondent as there is evidence on record that as at the time it was served with the court orders directing the freezing of the 1<sup>st</sup> Respondent's account, the 1<sup>st</sup> Respondent had already utilized the excess funds.
58. In the end, I find that the 1<sup>st</sup> Respondent was overpaid a sum of Kshs. 409,359.44 by the Claimant and I enter judgment in favor of the Claimant against the 1<sup>st</sup> Respondent in the sum of Kshs. 409,359.44.
59. The case against the 2<sup>nd</sup> Respondent is dismissed. The 1<sup>st</sup> Respondent shall pay the 2<sup>nd</sup> Respondent's costs while there shall be no order for costs for the Claimant.

**DATED, SIGNED AND VIRTUALLY AT ELDORET ON THIS 10<sup>TH</sup> DAY OF JULY 2025**

**MAUREEN ONYANGO**

**JUDGE**

