



**Kiruki v Africa Film & TV Talent Training Institute (Cause
E930 of 2023) [2024] KEELRC 72 (KLR) (30 January 2024) (Ruling)**

Neutral citation: [2024] KEELRC 72 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E930 OF 2023
JK GAKERI, J
JANUARY 30, 2024**

BETWEEN

GIDEON NJOROGE KIRUKI CLAIMANT

AND

AFRICA FILM & TV TALENT TRAINING INSTITUTE RESPONDENT

RULING

1. Before the court for determination is the Applicant/Claimant's Notice of Motion dated 15th November, 2023 filed under Certificate of Urgency seeking Orders That:-
 1. Spent.
 2. Spent.
 3. The Honourable Court be pleased to issue an Order that the Respondent pays the Claimant the sum of Kshs.2,292,139/= being undisputed salary arrears owing from the Respondent pending the hearing and determination of the main suit.
 4. The costs of this Application be borne by the Respondent.
2. The Application is expressed under Sections 1A, 1B, 3, 3A of the *Civil Procedure Act*, Order 51 Rules 1 and 3 of the *Civil Procedure Rules*, 2010 and Sections 17, 18, 45 and 87 of the *Employment Act*, 2007 and is based on the grounds set forth on its face and the Supporting Affidavit of Gideon Njoroge Kiruki, the Applicant, who deposes that he was employed by the Respondent as a trainer vide letter dated 30th May, 2016 at a basic salary of Kshs.120,000/= and was subsequently appointed the Principal vide letter dated 29th November, 2016 at Kshs.138,000/= and served diligently.
3. That the Respondent begun delaying the Claimant's salary from January 2017 upto September 2023 and owed him Kshs.2,292,139/= in salary arrears as tabulated in the Affidavit.



4. The affiant deposes that the Respondent issued a termination notice on 22nd September, 2023 and the Respondent's directors admitted owing the arrears.
5. The affiant prays that the Respondent be ordered to release Kshs.2,292,139/= as earned salary but unpaid.
6. That the application was made without undue delay.

Response

7. In its Replying Affidavit sworn by Lukas Kisili Kituyi, the Respondent depones that orders sought are untenable in law as they are vexatious, frivolous, misconceived, devoid of merit, inept and an abuse of the court process.
8. That since the Claimant's employment has been terminated, he cannot restrain the hiring of a Principal and it had been overtaken by events.
9. The affiant states that a grant of Order 3 would be too draconian as it would amount to condemning the Respondent unheard as some of the wages claimed relate to the period when COVID-19 occasioned closure of institutions.
10. The affiant denies that the applicant served diligently as a notice to show cause was issued on 21st August, 2023 for breach of the Respondent's Human Resource Policy.
11. The Claimant had to explain certain losses and the matter has been reported to the Directorate of Criminal Investigation for investigation.
12. That the matter deserves proper investigation, litigation process to avoid travesty of justice.
13. The affiant prays for dismissal of the application.
14. In his Supplementary Affidavit, the applicant avers that Mr. Lukas Kisilu frustrated the applicant and engineered his termination from employment.
15. That the Respondent has not denied owing the sum of Kshs.2,292,139/=.
16. That the applicant's contract of employment remained in force during the COVID-19 Pandemic.
17. The applicant deposes that he explained the circumstances in which the items were lost and the matter rested after the affiant had made a statement to the police and the goods were lost after an auctioneer raided the premises for non-payment of rent and the loss was not attributable to him.
18. That the sum of Kshs.1,480,115/= is undisputed and remains unpaid.
19. The affiant urges the court to allow the application.

Claimant's submissions

20. Counsel submitted that since the Respondent had not denied owing the Claimant unpaid salary and had not proved payment and had admitted that the Claimant was its employee, the Claimant was entitled to the relief sought as earned and unpaid salary was the employee's right.
21. That although the Respondent had disputed the sum of Kshs.812,024/= for 8 months owing to the COVID-19 Pandemic, the employment contract had not been suspended and the government paid its employees or accommodate unpaid leave.



22. Counsel urged that the sum of Kshs.1,480,115/= was undisputed and ought to be paid to the Claimant.
23. Reliance was made on the decision in *Michael Otieno Ouma v Bonito Hotels Ltd t/a Tourist Hotel Bungoma* [2022] eKLR.
24. Counsel urged the court to grant the Claimant's prayer as it was undisputed salary arrears as opposed to damages and was unopposed.

Respondent's submissions

25. By the time the court retired to prepare this ruling, the Respondent had not filed its submissions.

Determination

26. I have carefully considered the Notice of Motion, Supporting and Supplementary as well as the Replying Affidavit and submissions by the Claimant's counsel.
27. The only issue for determination is whether the Notice of Motion by the Claimant/Applicant is merited.
28. It is common ground that the Claimant/Applicant was an employee of the Respondent from 30th May, 2016 to 22nd September, 2023 when the Respondent terminated his employment.
29. The Claimant prays for salary arrears and the Respondent has neither denied nor adduced evidence to prove that it was not indebted to the Claimant.
30. Indeed, the Replying Affidavit makes no reference to the salary arrears except in the context of being condemned unheard, which involves the main suit yet it had the right in its reply to adduce evidence to disprove the indebtedness.
31. In the court's view, the Respondent does not appear to have a serious defence to the claim of Kshs.1,480,115/= as salary arrears due and payable to the Claimant, the nature of the termination of employment notwithstanding.
32. Under the Letter of Appointment dated 29th November, 2019, the Claimant became the Principal of the Respondent at a salary of Kshs.138,000/= per month.
33. Under the relevant clause, the Claimant's salary was payable through his bank account every 28th day of the month.
34. Under Section 10(2)(h) of the *Employment Act*, 2007, wages or salary or remuneration is one of the essential elements of a contract of service and is thus a fundamental term of the contract of employment.
35. This is underscored by other provisions of the *Employment Act*, 2007.
36. Section 20 requires the employer to give the employee a written statement containing the gross wage or salary of the employee, any variable pay, statutory deductions and method of payment.
37. Significantly, Section 18(4) of the *Act* provides that;

“Where an employee is summarily dismissed for lawful cause, the employee shall, on dismissal be paid all monies, allowances and benefits due to him up to the date of his dismissal.”



38. It is common ground that the Respondent terminated the Claimant's employment summarily on 22nd September, 2023 and is yet to pay the monies, allowances and benefits due to him, a fact it acknowledges under paragraph 4 of the letter of termination which states that;

“Some of the termination dues may delay but upon computation of what is due unto you by considering the actual months/hours worked and the clearance process, an agreeable pay-plan will be effected for any arrears due. Please note that by copy of this letter you are not supposed to check in nor transact any business on behalf of AFTTTI”.

39. The foregoing clause is an admission that the Respondent owed the Claimant certain dues and was ready and willing to pay under an agreeable pay-plan.

40. Strangely, the Respondent did not avail evidence of its proposed pay plan. Such a proposal would have demonstrated the Respondent's commitment to pay the salary arrears.

41. Puzzlingly, apart from stating that granting prayer No. 3 of the Notice of Motion is untenable in law, draconian and against the principles of natural justice, the Respondent neither denied nor adduced evidence to prove that it was not indebted to the Claimant.

42. However, the Respondent did contest the amounts claimed by the Claimant on the premise that he had not rendered service for the entire duration owing to the COVID-19 Pandemic.

43. Reference to the Notice to Show Cause dated 21st August, 2023 cannot avail the Respondent.

44. Notwithstanding the fact that the Respondent has not mounted formidable defense to the Claimant's Notice of Motion, the court is not satisfied that this is an opportune time to grant the prayer No. 3 of the Notice of Motion. As this is substantively a monetary claim, it is only fair that the same be determined comprehensively during the hearing which will be fast tracked.

45. Consequently, the Applicant's Notice of Motion dated 15th November, 2023 is disallowed.

46. Costs shall abide the outcome of the main suit.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 30TH DAY OF JANUARY 2024

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.



DR. JACOB GAKERI

JUDGE

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