



**Khamala v Design N - Scope Architects and Interior Designers Limited & 2 others
(Cause 159 of 2020) [2024] KEELRC 240 (KLR) (15 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 240 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 159 OF 2020
NZIOKI WA MAKAU, J
FEBRUARY 15, 2024**

BETWEEN

CHRISTABEL AMIRU KHAMALA CLAIMANT

AND

**DESIGN N - SCOPE ARCHITECTS AND INTERIOR DESIGNERS
LIMITED 1ST RESPONDENT
ANTHONY MACHARIA 2ND RESPONDENT
NELLIUS MWAURA 3RD RESPONDENT**

JUDGMENT

1. Through a Statement of Claim dated 9th March 2020, the Claimant instituted this suit against the Respondents claiming unfair termination of her employment and refusal to pay her salary arrears and terminal dues. According to the Claimant, the 2nd and 3rd Respondents are Managers of the 1st Respondent, which is a limited liability company incorporated under the *Companies Act*, Cap 486 Laws of Kenya. She averred that the 1st Respondent offered her employment as a Projects/Management Accountant on or about 2nd July 2018 at a gross salary of Kshs. 140,000/- per month. That she at all times gave full disclosure that she was a student and requested the 1st Respondent to accord her flexible working terms to accommodate her study and compensate for the same by working extra hours. That for the entire period of the employment, she served the Respondents diligently, earnestly and honestly.
2. The Claimant's case was that on or about 10th January 2019, the Respondents gave her a letter terminating her employment without according her a fair hearing, nor did it pay her salary arrears and terminal dues. She averred that the Respondents never issued her with payslips for the entire employment period and that the Respondents also neither housed nor paid her house allowance as required by law. Further, that the Respondents did not submit the entire amount of her statutory deductions and that her salary was paid partially and/or in instalments at the volition of the



Respondents. She asserted that upon termination of her employment, the Respondents have refused and/or neglected to give her a certificate of service. The Claimant thus sought for withheld salary for the months of June, August, September, October, November and December 2018, unpaid salary for January 2019, one-month pay in lieu of notice, compensation for unfair termination, certificate of service and house allowance. She prayed for award and/or judgment against the Respondent for:

- i. A declaration that the Claimant's termination from her employment was unfair, wrongful, un-procedural, unlawful and unmerited in the circumstances.
 - ii. The Respondents jointly and or severally do pay the Claimant's withheld salary arrears and terminal benefits as set out in paragraph 15 of the claim, totalling to Kshs. 2,046,667.67
 - iii. The Honourable Court to issue such Orders and other reliefs as it may deem fit and just to give to meet the ends of justice.
 - iv. The Respondents to pay the costs of the Claim
 - v. Interest on (ii) and (iv) above.
3. In response, the 2nd and 3rd Respondents filed a Memorandum of Response dated 10th November 2021 averring that they have never in their personal capacities employed the Claimant at any one time and are not associated to the 1st Respondent. They therefore denied all the Claimant's averments and claims and prayed that the suit herein be dismissed with costs to the 2nd and 3rd Respondents. The 2nd and 3rd Respondents further stated in each of their Witness Statements that the Claimant's employer is clearly outlined in appendix 1 of the Claimant's documents. The 1st Respondent never filed any response to the Claim.

Evidence

4. The Claimant testified before Court that she is an Accountant and Student Lawyer. She stated under cross-examination that the Letter of Offer in her documents was given to her by the Respondent's Director and that her contract was with Design N Scope Ltd. That the 2nd and 3rd Respondents had been sued as directors of her said former employer as she had a contract with them by extension. She notified the Court that it was the 2nd Respondent who signed her Contract and that both the 2nd and 3rd Respondents signed the Letter of Termination. She further stated that clause 6 of her Contract indicated her work hours as 5 days a week between 8.00am to 5.00pm, with varied reporting and leaving hours because special consideration was given to her school attendance. The Claimant asserted in re-examination that it was not her responsibility to keep the schedule of working hours and that the Company was to produce the same.
5. The 2nd Respondent as RW1, testified that he was not a director in the 1st Respondent Company and asserted that the company that offered the Claimant employment was Design N Scope Limited. He stated under cross-examination that for this case, he was not aware of the company named 'Design N Scope Architects & Interior Designers Limited' and affirmed that the Claimant was an employee at Design & Scope Ltd, in which company he was a Director. RW1 then confirmed being aware of the circumstances of the Claimant's termination of employment and asserted that there was a disciplinary meeting. He further stated that the Claimant did not diligently attend work and refuted being aware that she was a student at the time of employment. RW1 testified that after severally discussing with the Claimant, they mutually agreed for her to concentrate on her education as she could not serve two masters but acknowledged that the same was not captured in any of the letters it wrote to her.



Claimant's Submissions

6. The Claimant submitted that the issues arising for determination are:
 - i. Whether the Claimant was employed by the Respondents
 - ii. Whether the Claimant was unlawfully terminated
 - iii. Whether the Claimant is entitled to house allowance
 - iv. Whether the Claimant is entitled to payment in lieu of notice of termination
 - v. Whether the Claimant is entitled to her unpaid salary.
7. It was the Claimant's submission that the 2nd and 3rd Respondents having raised the issue of corporate veil in their defence, it is ripe for this Honourable Court to lift the corporate veil and find the 2nd and 3rd Respondents jointly and severally liable together with the 1st Respondent. That noteworthy, the 2nd and 3rd Respondent raised the same issues in their Notice of Preliminary Objection dated 9th October 2020 that was dismissed by this Court. The Claimant cited the case of *Ukwala Supermarket v Jaideep Shah & another* [2022] eKLR in which the Court quoted *The Halsbury's Laws of England*, 4th Edn para. 90 that addressed the issue of piercing the veil of incorporation as hereunder:

“Notwithstanding the effect of a company's incorporation, in some cases the court will ‘pierce the corporate veil’ in order to enable it to do justice by treating a particular company, for the purpose of the litigation before it, as identical with the person or persons who control that company. This will be done not only where there is fraud or improper conduct but, in all cases, where the character of the company, or the nature of the persons who control it, is a relevant feature. In such case, the court will go behind the mere status of the company as a separate legal entity distinct from its shareholders or even as agents, directing and controlling the activities of the company. However, where this is not the position, even though an individual's connection with a company may cause a transaction with that company to be subjected to strict scrutiny, the corporate veil will not be lifted”

8. Further, the Claimant noted that the appendix 1 referred to by the 2nd and 3rd Respondents is the Letter of Offer dated 2nd July 2018. That whereas the letter of employment bore the stamp of Design N-Scope Ltd, the Recommendation Letter dated 29th January 2019 (page 16 of the Claimant's documents) bears the letter head for Design N-Scope Architects and Interior Designers (the 1st Respondent herein), was signed by the 2nd Respondent and bears the stamp of Design N-Scope Ltd. In addition, the Letter of Termination that is erroneously dated 10th January 2018 instead of 10th January 2019 bears the letter head of the 1st Respondent and is signed by both the 2nd and 3rd Respondents in their capacity as directors. It was the Claimant's submission that in the *Ukwala* case (*supra*), the Court made reference to the case of *Jones v Lipman & Another* [1962] 1 All ER 442 and *H. L. Bolton (Engineering Co. Ltd v T. J. Graham & Sons Ltd* [1956] 3 ALL ER where it was held that directors and managers represent the directing mind and will of the company and that the law treats their state of mind as the state of mind of the company. That the Court in the *Ukwala* case further referred to the case of *Mugenyi & Company Advocates v The Attorney General* (1999)2 EA 199 in which the Court adopting the Principles in *Palmers Company Law* expressed itself on ten instances when the veil of corporate personality may be lifted, with the relevant grounds for the instant case being grounds (viii) to (x) as hereunder:

(viii) In abuse of law in certain circumstances;



- (ix) Where the device of incorporation is used for some illegal or improper purpose; and
 - (x) Where the private company is founded on personal relationship between the members.
9. The Claimant urged this Court to consider the admissions of the 1st Respondent in his testimony before Court and find that she was not a stranger to the 2nd and 3rd Respondents as claimed. That she had established the conditions for lifting a corporate veil in the instant case and the 2nd and 3rd Respondent should not be allowed to run away from their responsibilities. That she had demonstrated that the 1st Respondent was her employer and that the 2nd and 3rd Respondents are its directors, albeit under different names.
10. The Claimant submitted that the issue of unlawful termination was not disputed either in the Respondents' pleadings or testimony. That the Respondents had not produced any evidence before this Court in terms of any notice of termination or disciplinary hearing and that the Respondents clearly bypassed clause 9 of the Letter of Offer and section 36 of the Employment Act on notice of termination of appointment. That the Respondents had also not provided evidence describing the alleged offence she committed that warranted summary dismissal without notice. She thus urged this Court to hold that termination of the Claimant's employment was unlawful and in all circumstances irregular and that the Claimant is consequently entitled to one month pay in lieu of notice as under section 35(1)(c) of the Act, and to compensation.
11. On the issue of house allowance, the Claimant submitted that there was no evidence of housing allowance received and or receivable by her for the six (6) months she served the Respondents. That she is as such entitled to housing allowance as provided for under section 31 of the Employment Act and that in any case, the Respondents had not challenged the claim. As regards her unpaid salary, the Claimant submitted that the Respondents having equally not rebutted this claim and having demonstrated that she was not paid in some months in 2018 and worked for 10 days in January 2019, she is entitled to the unpaid salary.

2nd and 3rd Respondent's Submissions

12. The 2nd and 3rd Respondents submitted that the claim against them is vexatious because the Claimant's sworn evidence was that she was employed by the 1st Respondent. That their enjoinder into the proceedings is an attempt by the Claimant to lift the corporate veil without making a formal application proving the ingredients necessary to lift the corporate veil. That in *Salmon v Salmon and Co. Ltd* [1897] AC 22 HL, it was held that a company is a legal entity separate from its subscribers and the liability of the company cannot therefore be assigned to the subscribers except as provided by law. They further cited the case of *Aviation and Allied Workers Union v Kenya Aerotech Limited & another* (Industrial Court Case No. 1494 of 2011) in which the Court held that the Court will allow lifting of the veil only in cases where it has been demonstrated that the corporate veil is being used to defeat the ends of justice. It was the submission of the 2nd and 3rd Respondents that the claim against them should be dismissed with costs as there is no cause of action against them. They noted that the Court in the case of *Patrick Kiilu Munyau v Thika Nursing Home & another* [2014] eKLR struck out the case as against a director who had been sued as a respondent. The 2nd and 3rd Respondents thus urged the suit as against them be dismissed with costs.
13. The Claimant sued the 3 Respondents with the 2nd and 3rd Respondents asserting they were never employers of the Claimant. The 1st Respondent curiously did not appear despite the 2nd and 3rd Respondents being Directors of Design N Scope Limited which operated in the name and style of Design N-Scope Architects and Interior Designs of Suite 29 Lower Hill Duplex, Upper Hill Road



(Opposite Upper Hill School) PO Box 19424-00100 Nairobi Kenya and of telephone +254 20 205 3658 and mobile + 254 724 786 256. The 2 Directors assert they did not employ the Claimant and cite the provisions of the celebrated case of Salmon v Salmon and Co. Ltd (supra). Section 2 of the Employment Act enacted 110 years later provides as follows:-

“employer” means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes agent, foreman, manager or factor of such person public body, firm, corporation or company.

14. The definition clearly includes the 2nd and 3rd Respondent and this is without even lifting the corporate veil which even in such circumstances as was presented in this case can be permitted. This is on account of the duplicitous conduct of the 1st Respondent disavowing the claim by refusing to participate in it and having its directors throw mud at the claim by asserting that the wrong party was sued and asserting they are not properly joined in the suit. The Court sees through the haze. The Respondents were employers of the Claimant within the meaning of the law and the decision that will be made herein will bind all jointly and severally.
15. The Claimant was terminated without due process as she was not heard in terms of section 41 of the Employment Act. In the termination letter signed by the 2nd and 3rd Respondents as factors of the 1st Respondent, the Respondents proceeded to terminate the Claimant’s employ for not adhering to the working hours of the Respondents. This would in essence be a disciplinary issue falling under section 41 of the Employment Act. No hearing was held, no explanation was sought and she was merely informed vide the letter dated 10th January 2018 thus:

We have decided to terminate your contract on educational grounds for your school work takes up most of the employer’s time and think it best that you concentrate on your studies till completion.

One month’s notice shall run from the date of this letter.
16. The letter of appointment did not provide for housing allowance which is a right to any employee not provided housing by the employer. Per section 31 of the Employment Act such is payable at the rate of 15% of the monthly salary. The Claimant earned Kshs. 140,000/- and was therefore entitled to Kshs. 21,016.50 as house allowance each month. She was entitled to receive the same for the months between July 2018 and February 2019 when her employment terminated which was a period of 7 months. The amount due as house allowance is Kshs. 147,115.50. She would be entitled to receive recompense for the abrupt termination which I set at 2 months salary given she had only served the Respondent for 7 months. This amounts to Kshs. 322,033/-. There would be no service pay as she was a contributor to NSSF and the Respondents met her obligations in that regard including evidence she adduced of NHIF contributions.
17. In the final analysis I enter judgment for the Claimant against the Respondents jointly and severally for:-
 - i. Kshs. 147,115.50 as unpaid house allowance
 - ii. Kshs. 322,033/- being compensation for unfair and unlawful termination.
 - iii. Costs of the suit.
 - iv. Interest at court rates on the sums in (i) and (ii) above from the date of judgment till payment in full.



It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF FEBRUARY 2024

NZIOKI WA MAKAU

JUDGE

