



**Kinuthia v Barefoot Power Africa Limited (Cause 1187 of 2018)
[2024] KEELRC 180 (KLR) (12 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 180 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1187 OF 2018
J RIKA, J
FEBRUARY 12, 2024**

BETWEEN

JOEL NDURUHU KINUTHIA CLAIMANT

AND

BAREFOOT POWER AFRICA LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed his Statement of Claim on 13th July 2018.
2. The issue in dispute is quite narrow: the non-payment of the Claimant's 4 months' salary, for the months of March, April, May and June 2018, claimed at Kshs. 360,053 each month; and out-of-pocket expenses at Kshs. 49,716, amounting to Kshs. 1,489,930.
3. He was employed by the Respondent, as Group Segment Manager-Grants, from 1st August 2017. The contract was for a renewable term of 3 years. His salary was indicated to be Kshs. 500,000 monthly, in the written contract of employment.
4. The contract provided for 3 months' notice of termination. The Claimant notified the Respondent of his intention to terminate the contract, on 2nd April 2018. He left at the expiry of the notice period, at the end of June 2018.
5. He apprehended that the Respondent would transfer funds held in its Dollar and Kshs. Bank Accounts, to defeat his Claim.
6. He therefore filed the Claim, seeking orders for: -
 - a. Permanent injunction restraining the Respondent by itself or other persons acting on its behalf, from transferring monies in the bank account held at Kenyatta Avenue Branch of CFC Stanbic Limited Dollar Account Number 0100002375626, Kshs account number 0100002375618 and Euro account number 0100003423292, all in the name of the



Respondent, to the extent of the Claim herein being Kshs. 1,489,930 and cost of the proceedings estimated at Kshs. 200,000, totalling Kshs. 1,689,930.

- b. In the alternative to prayer [a], an order of attachment of the monies in the accounts of Respondent above, to the extent of the amount claimed.
 - c. Kshs. 1,489,930 being salary arrears owing and due to the Claimant from the Respondent.
 - d. Costs of the suit.
 - e. Any other suitable order.
7. The Claimant filed an Application contemporaneously with the Statement of Claim, seeking the prayers sought in the Claim on transfer on funds, pending hearing and determination of the Claim.
 8. The record indicates that interim orders issued before Hon. Ongaya J, on 13th July 2018.
 9. A year later, and after hearing both Parties, the Court ordered that the Respondent attends Court to show cause why its accounts should not be attached as prayed by the Claimant, in default the accounts be attached. The Respondent was granted the option of providing security in the sum of Kshs. 1,689,930, to avoid attachment.
 10. The Respondent relies on the Statement of Response dated 22nd October 2019. The Claimant was irregularly employed by then Chief Finance Officer Sean Hooper. He was not competitively hired. The Respondent states that it was undergoing restructuring due to operational problems. It had cash-flow problems.
 11. The Claimant did not clear with the Respondent upon his resignation. He left without accounting for company property and the European Union-funded project he was managing, worth Euro 825,000. He was un-cooperative with regard to accounting for the EU WISE project.
 12. The funds were disbursed to the Respondent on 18th January 2018. By February 2018, the funds had been depleted. The Respondent's Chief Finance Officer, resigned on 21st March 2018. The Claimant, who served as the Grants Manager, followed on 2nd April 2018, while the Chief Executive Officer resigned on 5th June 2018.
 13. The company was bought out by new Directors, who included Jackson Karanja Machuhi, who took over in November 2018.
 14. The Respondent states that the Claimant, alongside other Officers who resigned, had a fiduciary duty to the Respondent. They resigned one after the other, after depleting the EU funds.
 15. The Claim for arrears of salaries has no merit. The Claimant informed the CEO, that he would not be reporting to office, April-June 2018. He never worked from April 2018.
 16. The Respondent states that the Claimant and his Co-conspirators, fleeced the Respondent of Euro 825,000 [Kshs. 133,800,877]. The Claimant's failure resulted in the Respondent's inability to account for the funds to the European Commission.
 17. The Claim has no merit. The prayer for out-of-court expenses, has not specifically been proved.
 18. The Respondent urges the Court to dismiss the Claim.
 19. The Claimant gave evidence and closed his case on 20th September 2022. Director Jackson Karanja gave evidence for the Respondent on 6th October 2023, closing the hearing. The Claim was last mentioned on 15th November 2023, when the Parties confirmed filing and exchange of their Closing Submissions.



20. The Claimant adopted as his evidence-in-chief, his Witness Statement and 19 Documents, exhibits 1-19. He also relied on a supplementary bundle containing 1 Document –exhibit 20.
21. He states that he was Head of Sales. His gross monthly salary was Kshs 500,000, with a net of about Kshs. 360,000. Notice period was 3 months. He signed his contract on 5th October 2017. He resigned on 2nd April 2018. He issued 3 months’ notice, which ended on 30th June 2018. He exited on 30th June 2018.
22. He claims arrears of salary for March, April, May and June 2018, and out-of-court expenses as specified in the Statement of Claim. He was in employment, during the notice period.
23. He denies the allegation made by the Respondent, that he did not clear with the Respondent. He cleared, in accordance with the directions issued by the Hon. Justice Ongaya.
24. There was a grant of Euro 825,000 from the EU. The Claimant gave an account on how it was handled. How it was spent, was mainly, the responsibility of the accounting officer.
25. The Claimant was not signatory to the funds. The CEO and CFO were the signatories. The grant applied to Kenya, Uganda and Sierra Leone. The Claimant never received any money in his account. He did not give instructions for the funds to be deposited in any account. He was never prosecuted with respect to misappropriation of any funds. There is no money counterclaimed by the Respondent from him.
26. He worked during the notice period. There are work-related e-mails on record, to show this. He was not called to show cause, for absconding. CFO Josephine wrote e-mail on 28th May 2018, saying that the Claimant was leaving at the end of June 2018. There was a similar e-mail dated 21st May 2018. The Claimant left at the end of June 2018. The Respondent was experiencing financial constraints, but other Employees were in the end paid.
27. On out-of-court expenses claimed, the Claimant denies that he spent the money in a frolic of his own in Uganda, Ghana and Sierra Leone. Josephine had confirmed that the expenses would be reimbursed. The Claimant would be asked to use his own resources, and would be reimbursed later. USD 4,800 had, according to Josephine, been approved for Uganda. The allegation that the Claimant was not regularly recruited had no foundation. It was only raised in the Statement of Response.
28. Cross-examined, the Claimant told the Court that he was the Grants Manager. He reported to the CEO or his designate. The Claimant’s contract was signed by Rick Hooper and himself. Grants fell under the Claimant’s responsibility. The Claimant was the project manager. He was in charge of its implementation. The e-mail of Rick Hooper dated 23rd January 2018, confirms the Claimant’s responsibility.
29. The Claimant issued his letter of resignation, in April 2018. It is addressed to Rick Hooper. Demand letter issued by the Claimant referred to his resignation. Hooper was the Claimant’s supervisor. Demand letter issued by the Claimant came before his letter of resignation.
30. Other Employees were paid their salaries; the Claimant was not. Senior staff at his grade, were part-paid. The Claimant has not exhibited evidence of such payment. He did not know when, or if, Rick Hooper resigned. He did not know that the Respondent was experiencing financial constraints. The Claimant did not know that the EU account had been embezzled. He was not required to attach any report or paperwork on his travel, to support reimbursement. He is aware that the Court froze the Respondent’s bank accounts. It is the Employer who determines if an Employee has cleared satisfactorily, upon termination of employment.



31. Redirected, the Claimant told the Court that clearance was not tied to his salary. The Respondent did not raise objection to the clearance report. The Claimant cleared. The freezing orders were confined to the amount sought by the Claimant. The EU project was in its early stages. The Claimant could not issue a report on a project which was in its formative stage. Rick Hooper signed the Claimant's contract in his capacity as the Respondent's CEO, not in a personal capacity. The Claimant made demand for his arrears of salary, when he learnt that others received theirs. The Respondent has conceded it was struggling financially. The Claimant did not receive the EU funds. His role was in the implementation of the work plans.
32. Jackson Karanja told the Court that he is a Director of the Respondent. He became a Director in November 2018. He was previously an Employee of the Respondent, from 2013. He acquired the Respondent company in 2017.
33. He resigned for personal reasons. The company was a good going concern. He received information that the Australian parent company was going under, and selling its subsidiaries. Together with his friends, Karanja bid for, and acquired the Respondent, after due diligence.
34. The Claimant was employed several months, before Karanja left as an Employee. The Claimant was Grants Manager. There were bilateral grants. The Respondent wrote grant proposals. The EU confirmed that one of the proposals was successful. The grant was worth Euro 5.5 million. 15% was paid as first instalment. By the time Karanja returned to the company, the money was gone.
35. The Claimant was to manage the funds, alongside Rick Hooper, the CEO. There was no accountability. Karanja found that the Claimant had filed this Claim. EU was breathing down on the Respondent, asking for accountability. The Claimant froze the Respondent's bank accounts. EU was asking Karanja to account. Karanja had to fly to Brussels, to look for information. The Claimant was nowhere to be found. He resigned, and vanished. He did not hand over. The Respondent distributed solar products in Kenya, Uganda and Sierra Leone. The Parties' Advocates met, and the Claimant gave a sketchy report. Freezing of the Respondent's bank accounts has hampered its operations. EU has been calling for refund of its money. The Respondent suffered reputational damage. The Court should compel the Claimant to account.
36. Cross-examined, Karanja told the Court that he still works with the Respondent. The Claim is about arrears of salary. It is not about unfair termination. There is no counterclaim presented by the Respondent. The Respondent has not paid the Claimant's salary arrears. It has not been determined what those arrears are. He has tabulated this in his Claim. The respondent has its own computation. this computation is not before the court. Karanja resigned as an Employee, before he acquired the respondent. The claimant resigned. He issued 3 months' notice, in April 2018. There is nothing wrong, in an Employee resigning. There was no disciplinary case against the claimant. Karanja did not know, if the claimant served his notice period. His salary rate is not disputed. The months in arrears are not disputed. Josephine Gachiri was the Finance Officer. The claimant was not. there was no report finding that the claimant misappropriated funds.
37. Redirected, Karanja told the court that the claimant was in a fiduciary position. By the time Karanja took over the Respondent, litigation was already in motion. He told the court that he has not refused to pay the claimant his arrears of salary. The hurdle lies in the claimant's lack of clearance and accounting. The respondent is not an enemy to the claimant. It employs over 300 Employees, and also needs protection from the court. Karanja told the court that he has a business to run.



38. Although the file is quite bulky, and the proceedings needlessly protracted, from the year 2018, the issue in dispute, is quite narrow: whether the claimant is owed arrears of salary; and whether, those arrears should be paid to him by the respondent.

The Court Finds: -

39. This claim is a stark reminder, of the Kenyan Litigant's uncanny ability, to create a dispute where there is none; prolong the dispute so created unnecessarily; and use the court process, in resisting clear statutory and contractual obligations.

40. It is not disputed that the claimant was employed by the respondent, as the Group Segment Manager-Grants, on 1st August 2017. His gross monthly salary of Kshs. 500,000 is not disputed. It is agreed that he resigned, as he was entitled to under his contract, through a notice of resignation issued on 2nd April 2018. Termination took effect after 3 months at the end of June 2018. The contract provided for a notice period of 3 months.

41. Importantly, it is common ground that at the time he left employment, the Claimant was owed arrears of salary, for the months of March, April, May and June 2018. The monthly salary, at a net of Kshs. 360,053 is not disputed. It is the common evidence of the Parties, that the Respondent was experiencing financial constraints, and was unable at the time, to pay staff salaries.

42. In his evidence on cross-examination, Director and Respondent business proprietor, Jackson Karanja, told the Court that: -We have not paid arrears of salary.The salary rate is not disputed.The months in arrears are not in dispute.

43. Redirected, Karanja told the court: -I have not refused to pay.I am not his enemy.

44. So why, has the respondent not paid the claimant his arrears of salary, dating back to March 2018?

45. The respondent gave a potpourri of wobbly reasons, to justify the withholding of the claimant's salary from March 2018.

46. It is alleged that the claimant was responsible for a project grant, in the sum of Euro 825,000, which was misappropriated. There was a conspiracy theory, alluded to in the submissions of the respondent, drawing in the claimant, the Chief Executive Officer and the Chief Finance Officer, who are alleged to have resigned in quick succession, presumably having fleeced the Respondent of the EU windfall. There were allegations that the claimant refused to account and clear with the Respondent, leaving Karanja hard-pressed to explain to Brussels, how the grant was expended. Karanja also lamented that the claimant obtained orders freezing his company's bank accounts, stifling its operations. Another unconvincing justification, is that the claimant did not serve out his notice period to the end of June 2018. The respondent told the court, that the claimant was hired irregularly. It was not suggested to the court, what irregular hiring, if any, had to do with the withholding of salary. There is communication between the claimant and the respondent's Managers, over the notice period, indicating that he was still at work. The respondent would have brought disciplinary proceedings against the claimant for desertion, if there was an iota of truth, in the allegation that the claimant did not work to the end of June 2018.

47. These justifications are clearly, without merit.

48. Karanja told the court that Josephine Gachiri, was the Finance Officer. There was no investigation report, finding that the claimant misappropriated funds. The Respondent did not present any counterclaim before the court. There was no disciplinary action against the claimant. The frozen funds are confined to the amounts claimed by the claimant. Freezing did not prevent the Respondent from



- paying the claimant his arrears of salary. Nothing would have been easier than for the respondent, to propose to the court, the unfreezing of its bank accounts, and apply the funds in settlement of the claim.
49. On the contested issue of clearance, there was intervention made by the Court, and one would think that consequently, there would have been no good ground for the respondent, to persist with its withholding of the claimant's arrears of salary.
 50. The respondent's Advocates wrote to their counterparts on 16th April 2019, indicating steps to be taken by the claimant, in meeting the demands for clearance. The claimant replied, giving an account of each item listed in the respondent's Advocates e-mail. The Advocates then met on 2nd May 2019, at the respondent's Advocates' chambers. Jackson Karanja was in the meeting. His demand was that the claimant makes a report on the EU grant. The court made orders endorsing this proposal on clearance, on November 19, 2018, December 17, 2018, January 31, 2019, and 13th June 2019.
 51. The claimant prepared a report, although he was not the Finance Manager, on June 21, 2019. Karanja acknowledged in his evidence-in-chief, that the Claimant availed the report. His position was that the report was however, sketchy. He did not tell the court what information was missing in the report, simply making an oblique statement, that "We also need protection. We have a business to run." What protection has the respondent sought from the court?
 52. The salary payable to an Employee has statutory protection.
 53. Section 17 of the *Employment Act*, requires that an Employer shall pay the entire amount of the salary earned by, or payable to an Employee, in respect of work done by the Employee, in pursuance of a contract of service.
 54. Payment shall be in the currency of Kenya; in cash; into a bank account, or building society, designated by the Employee; by cheque, postal order, or money order in favour of the Employee; and in the absence of the Employee, to a person other than the Employee, if the person is duly authorized to receive the salary on behalf of the Employee.
 55. The salary is protected in other ways: it shall be paid on a working day and hours, at or near the place of work, or other place agreed to between the Employer and the Employee; it shall not be paid at a place where intoxicating liquor is sold, or readily available for supply, except where the Employee works in such a place; no person shall give or promise to any person an advance of any valuable consideration upon a condition expressed or implied, that the person or any dependant of that person, shall enter upon any employment; and any allowances in kind to the Employee, may only be made with the Employee's consent if the allowance is for the personal use and benefit of the Employee, and does not consist intoxicating spirit or noxious drug.
 56. Under section 17[10] of the *Employment Act*, wilful refusal by an Employer to pay an Employee his salary is a criminal offence, attracting a fine not exceeding Kshs. 100,000, imprisonment of a term not exceeding 2 years, or both.
 57. The Employer has a right to recover from the Employee under Section 19 of the *Employment Act*, amounts due as contribution to provident funds; reasonable amounts for damage or loss occasioned by the Employee to the Employer; an amount not exceeding one day's salary in respect of working day, the whole of which the Employee is absent without the leave of the Employer; amount equal to the amount of any shortage; amount paid to the Employee in error; amount authorized by any written law; amount due under loan agreement not exceeding 50% of the salary payable; and other amounts the relevant Cabinet Secretary, may prescribe.



58. The respondent acted in complete disregard of the statutory protections afforded to the claimant on payment of his salary. Disregard has persisted for the past 6 years. Nothing is claimed by the Respondent from the claimant, that would justify withholding or even deduction of any sum, from the claimant's arrears of salary. What is disclosed by the evidence from the Parties, is just an irrational refusal by the respondent, to pay to the claimant his dues. The Respondent has acted in complete violation of the protections afforded to the Claimant, on payment of his salary, elaborated at sections 17, 18 and 19 of the *Employment Act*.
59. The prayer for what the claimant calls "Uganda Wise out-of-pocket expenses," at Kshs. 49,716 is not supported by adequate evidence. The terms regulating such expenditure and reimbursement were not eloquently explained to the court by the claimant in his evidence. There are no documents supporting the expenses, and no workplace policy exhibited by the claimant, mandating reimbursement from the Respondent. This prayer is declined.

It is ordered: -

- a. The Respondent shall pay to the Claimant arrears of salary for the months of March, April, May and June 2018, at Kshs. 360,053 each month, amounting to Kshs. 1,440,212.
- b. Interest on the principal amount above, is granted at court rate, per annum, from the 30th June 2018, till payment is made in full.
- c. Costs to the Claimant.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS 2020, THIS 12TH DAY OF FEBRUARY 2024.

James Rika

Judge

