



REPUBLIC OF KENYA



Brinken v Jos Hansen & Soehne (East Africa) Ltd (Cause E921 of 2022) [2024] KEELRC 763 (KLR) (11 April 2024) (Ruling)

Neutral citation: [2024] KEELRC 763 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E921 OF 2022
BOM MANANI, J
APRIL 11, 2024**

BETWEEN

THOMAS BRINKEN CLAIMANT

AND

JOS HANSEN & SOEHNE (EAST AFRICA) LTD RESPONDENT

RULING

1. The Claimant has sued the Respondent claiming for terminal benefits in the sum of Ksh. 7,202,605.00. It is his case that he worked for the Respondent initially as its General Manager and later as its Managing Director before the parties mutually separated in March 2022. The Claimant contends that he has been pursuing the Respondent to settle his exit dues to no avail thus necessitating the filing of the instant suit.
2. The Respondent filed a Statement of Response to the claim dated 23rd February 2023. At paragraph 3 of the defense, it (the Respondent) admits that the Claimant was initially employed as its General Manager and later as Managing Director before the parties mutually separated. At paragraph 4 of the defense, the Respondent concedes that the Claimant was a diligent employee.
3. At paragraph 5 of the defense, the Respondent denies that the parties agreed that the Claimant's terminal dues would be Ksh. 7,202,605.00 as claimed by the Claimant. Rather, the agreed exit dues were in the sum of Ksh. 4,976,086.96.
4. On 1st December 2023, the Respondent filed a Notice of Preliminary Objection. In the objection, the Respondent now contends that there was no employment relation between the parties. It contends that the Claimant was its director and not employee. As such, the instant suit ought to be struck out.



Analysis

5. A preliminary objection ought to be based on a pure point of law. It should not raise matters which require to be established by consideration of extraneous evidence. Ordinarily, a preliminary objection should be capable of determination by reference to the pleadings as filed by the parties and the law without more.
6. In the instant case, it is apparent that the Claimant pleaded that he was employed by the Respondent to serve as its General Manager and later as its Managing Director before the parties mutually agreed to separate. It is also apparent the Respondent filed a response in which it concedes these averments by the Claimant. Further, the Respondent concedes the Claimant's assertion that during his employment with it, he was a diligent employee.
7. Notwithstanding the aforesaid concessions and without first amending its defense, the Respondent subsequently filed a notice of preliminary objection through which it purports to dispute that the parties had an employment relationship. In my view, it is not tenable for the Respondent to dispute existence of an employment relation between the parties through the instant preliminary objection when it had conceded this fact in its statement of defense.
8. Even assuming that the Respondent had contested the alleged employment relation in its defense, the proper way to resolve the matter would be for the Claimant to provide evidence in support of his claim at the trial so that the court can determine the issue on the merits. It is not open to the Respondent to move the court to determine the issue summarily by way of a preliminary objection based on untested extraneous evidence provided by it.
9. Importantly, the mere fact that an individual is a director of a company does not necessarily denote that he cannot have a concurrent employment relation with the company (*Robert Stack v Ajar Tec-Limited* in [2015] EWCA Civ 46, CA). A company can simultaneously hire its director to serve as its employee. What is required in the circumstances is for the parties to have a clear agreement separating the two roles.
10. Therefore, the mere fact that the Claimant was recorded as the Respondent's director at the Companies' Registry is not, of itself, evidence that he was not an employee of the Respondent. Such matter must be evaluated through evidence during a full trial.
11. In *Nakuru Court of Appeal Civil Appeal No. 60 of 2015 consolidated with Civil Appeal No. 61 of 2015, Rift Valley Water Services Board and Others v Geoffrey Asanyo and Others* (the Asanyo case) (unreported), the Court of Appeal underscored the fact that directors of a company cannot assert employment with the company on the basis of such directorship. However, this is not the same thing as saying that directors cannot be separately engaged as employees of the company.
12. What I understand the court to have been saying is that in order for a director to assert employment, he must provide evidence that in addition to his role as director, he is also engaged as an employee of the company. Absent a contract showing that he (the director) is simultaneously engaged as an employee, he cannot assert employment. The court commented on the matter as follows:-

“We hasten to draw a clear distinction between an employee and a member of a board of directors of a corporate entity, such as the 1st appellant. That distinction lies in our answer to the question as to whether directors are employees of the company to whose board they are appointed. They are not. In *McMillan v Guest* [1942] AC p.561, it was held that a company director is an office-holder who is not, without more, an employee of the company. That is the position here. In the absence of a contract of service in terms of which a director is engaged as a full-time employee of a company, it cannot be



presumed that such a director is an employee of the company (see *Parsons v Albert J. Parsons and Sons Ltd* [1979] ICR p.271).” Emphasis added by underlining.

Determination

- 13. Having regard to the aforesaid, it is apparent that the instant preliminary objection is devoid of merit.
- 14. Accordingly, it is dismissed with costs to the Claimant.

DATED, SIGNED AND DELIVERED ON THE 11TH DAY OF APRIL, 2024

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant/Respondent

.....for the Respondent/Applicant

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

