



**Mutua v Kenya National Trading Corporation (Cause E169 of 2024)
[2024] KEELRC 2237 (KLR) (19 September 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2237 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E169 OF 2024
JK GAKERI, J
SEPTEMBER 19, 2024**

BETWEEN

PAMELA NDUKU MUTUA CLAIMANT

AND

KENYA NATIONAL TRADING CORPORATION RESPONDENT

RULING

1. Before the Court for determination is the Claimant/Applicant's Notice of Motion dated 1st March, 2024 filed under Certificate of Urgency seeking orders that;
 1. Spent.
 2. Spent.
 3. Spent.
 4. Pending the hearing and determination of the main claim, this Honourable Court be pleased to issue Orders compelling the Respondent to compute and pay the Claimant/Applicant her terminal dues including gratuity and unpaid leave days.
 5. Spent.
 6. This Honourable Court be pleased to issue any other orders it may deem just and fit in the interest of justice.
 7. The costs of this application be provided for.
2. The Notice of Motion is expressed under Sections 3, 12 and 13 of the *Employment and Labour Relations Court Act* and Order 51 of the *Civil Procedure Rules*, 2010 and is based on the grounds set out on its face and the Supporting Affidavit sworn by the Claimant/Applicant on 1st March, 2024 who



- deposes that she was appointed the Managing Director of the Respondent on 20th January, 2021 for a three (3) year renewable contract and served diligently.
3. That meetings of the Respondent board of directors held on 31st October, 2023 and 29th November, 2023 resolved not to renew the Claimant's contract of employment and notified her in writing.
 4. The Claimant deposes that she submitted a handover report and clearance report on 10th January, 2024 and the Respondent acknowledged receipt vide letter dated 1st February, 2024 stating that it was reconciling the report with its records and financial statements and would communicate when the process was completed.
 5. The affiant further deposes that she sought classification on payment of terminal dues vide letter dated 6th February, 2024 and by a response dated 13th February, 2024, the Respondent reiterated the contents of its letter dated 1st February, 2024 on reconciliation of the report with its records, which the Claimant found unsatisfactory as the decision not to renew the contract of employment had already been made.
 6. The affiant deposes the pegging of payment of terminal dues to a meeting with the Chairman of the board of directors was illegal and unfair.
 7. Finally, the affiant deposes that the Respondent has by the delay in payment of final dues subjected her to considerable hardship and inconvenience and will suffer irreparably if the orders sought are not granted.

Respondent's case

8. By its Replying Affidavit sworn by Maureen Dwallo on 26th April, 2024, the Respondent avers that the applicant did not prepare a comprehensive handover report despite serious audit queries on the financial position of the Respondent.
9. That the Respondent had made a loss of Kshs.420 million yet the applicant reported that it had made a profit of Kshs.270 million for the financial year 2023/2024.
10. The affiant deposes that despite the applicant stating that the Respondent's assets were in a good working condition, motor vehicle registration number KDK 262C and KDK 463C were physically untraceable.
11. That the Respondent could not access Laptop Macbook Air Model A2337 Serial Number CO2FPAPWQ6LC issued to the applicant as she had refused to provide log-in credentials.
12. The affiant deposes that the applicant irregularly awarded contracts in contravention of procurement law and the Respondent continues to receive demand letters for payments not done in conformity with procurement laws such as the demand from Highway Commodity Ltd and Purma Holdings for the sum of Kshs.220,400,000/= or USD 9,501,560.00 and necessary processes had not been complied with.
13. That the Respondent is in the process of initiating recovery proceedings against the applicant, particularly motor vehicle registration number KDK 262C and KDK 463C valued at Kshs.6,000,000/=.
14. The affiant accuses the Claimant of mismanagement of the Respondent to urge that it would be imprudent to pay the applicant any terminal dues before investigations were concluded.
15. That the orders sought are final in nature and cannot be awarded at the interim stage before hearing of the claim as doing so would deny the Respondent the opportunity to be heard.



16. Finally, the affiant deposes that the Claimant's application does not meet the threshold in *Giella V Cassman Brown & Co. Ltd* (1973) EA 358 and the instant Notice of Motion lacks merit.

Applicant's submissions

17. As regards the reliefs sought, counsel submits that the Respondent is still conducting reconciliation and the Claimant should await communication on the date of appointment with the Respondent's Chairman of the board.
18. According to counsel, the Claimant's dues are yet to be computed and there is no indication that the Respondent is about to honour its obligations to the Claimant.
19. Counsel relies on the doctrine of promissory estoppel as captured by Lord Denman CJ in *Pickard V Sears* (1837) 112 E.R. 179 to urge that having promised payment of terminal dues, the Claimant had a legitimate expectation of payment.
20. Reliance is made on the decisions in *National Director of Public Prosecutions V Phillips* (2000/27885) (2020) 2 AGP JHC 99 (18.05.20) on the elements of legitimate expectation and *Republic V Attorney General & another Ex Parte Waswa & 2 others* (2005) 1 KLR 280 to urge that the Claimant is entitled to terminal dues.

Respondent's submissions

21. On entitlement to the reliefs sought, the Respondent submits that the applicant seeks specific performance for the Respondent to compute and pay terminal dues in terms of gratuity and outstanding leave days also sought in the main suit.
22. According to counsel, the Claimant should not be paid as the Respondent is conducting investigations on alleged mismanagement of resources with a possibility of recovery proceedings.
23. Counsel urges that the Respondent is awaiting a proper handover and account of all assets of the Respondent in the Claimant's custody.
24. Counsel submits that granting the instant application is tantamount to granting specific performance at the interlocutory stage.
25. Strangely, counsel relies on *Giella V Cassman Brown Co. Ltd (Supra)* to urge that the applicant has not proved his case to warrant grant of an injunction, which is not among the reliefs sought.
26. Reliance was also made on the sentiments of the court in *Abdul Kadir Hawa V Rabinder Nath Anand & another* (2012) eKLR and Reliable *Electrical Engineers Ltd V Mantra Kenya Ltd* (2006) eKLR to urge that the applicant has not met the requirements for the grant of specific performance.
27. After careful consideration of the Notice of Motion, Supporting Affidavit, Replying Affidavit and submissions, the singular issue for determination is whether the Applicant's Notice of Motion dated 1st March, 2024 is merited.
28. It is common ground that the Claimant/Applicant was employed by the Respondent as its Managing Director under a three (3) year written contract of service dated 19th January, 2021 effective 20th January, 2022 and the contract was renewable at the discretion of the Board of Directors.
29. The Claimant/Applicant's monthly consolidated salary was Kshs.317,026.00, an entertainment allowance of Kshs.30,000/= and gratuity of 31% as per the Respondent's Human Resource Manual.



30. The contract of employment was terminable by three (3) months' notice of either party or three months basic salary and house allowance in lieu of notice.
31. From the documents filed by the Claimant/Applicant, it is discernible that the Claimant/Applicant had intimated to the Respondent's Board of Directors her desire not to renew the contract of employment, a request the board accepted and passed a resolution to that effect.
32. By letter dated 29th November, 2023, the Chairman of the Board of Directors, Mr. Hussein Tene Dabasso directed the Claimant to proceed on terminal leave and provide a handover report.
33. The letter is however reticent on to whom and when the handover report was required.
34. From the record, it is evident that the Claimant/Applicant prepared and submitted the handover report vide email on 15th January, 2024 which the Respondent's Acting Managing Director, Mr. Peter Njoroge acknowledged vide letter dated 1st February, 2024.
35. From communication on record, it is also clear that the Respondent did not respond to the Claimant's requests for a physical handover.
36. The Respondent's conduct leaves the court wondering why it did not wish to be associated with its former Managing Director whom it owed and owes a certificate of service and terminal dues to date.
37. By its letter of 1st February, 2024, the Respondent informed the Claimant/Applicant that it was in the process of reconciling her report with its records and financial statements for purposes of finalization of the clearance process and would communicate the same to the Claimant, a message the Acting Managing Director repeated in his letter dated 13th February, 2024 in response to the Claimant's letter dated 8th February, 2024.
38. Strangely, in her Replying Affidavit dated 26th April, 2024, Maureen Dwallo deposes that the Claimant did not prepare a comprehensive handover report.
39. The affiant additionally makes several other allegations to justify denial of the Claimant's terminal dues. For instance, she alleges that during the 2023/2024 financial year, the Respondent made a loss of Kshs.420,000,000/= yet the Claimant had stated that it made a profit of Kshs.270 million.
40. It is beyond peradventure that the figures quoted above are not correct as the financial year 2023/2024 had neither ended by 15th January, 2024 or the financial statements prepared and audited by the Auditor General when the Claimant prepared the handover report or 26th April, 2024, when the Respondent's Replying Affidavit was sworn.
41. More significantly, the basis for the figures have not been disclosed.
42. Both figures lack probative value for purposes of this ruling.
43. Concerning vehicles, the Respondent deposes that some two vehicles are physically untraceable, KDK 262C and KDK 463C. The Claimant is accused of having stated that they were in good working condition.
44. Intriguingly, the Claimant's handover report does not mention the two motor vehicles identified by the Respondent.
45. While the Claimant's handover report identifies the model of the motor vehicles, the Respondent's Replying Affidavit does not.



46. As regards the laptop and credentials, it bears reason why the Respondent's Acting Managing Director denied the Claimant her innocuous request for a physical handover.
47. Commonplace matters such as surrender of credentials, if necessary would have been resolved at that point, including location of motor vehicles.
48. Finally, the Respondent avers that it had received demand letters for payment of huge amounts of money to Highway Commodity Limited and Purma Holdings allegedly for contracts irregularly awarded by the Claimant in violation of the procurement laws.
49. In other words, the Claimant is guilty for having violated the provisions of the [Public Procurement and Asset Disposal Act](#).
50. Relatedly, and disconcertingly, the Respondent deposes that it is in the process of initiating recovery proceedings against the Claimant for mismanagement and refusal to give a proper account of the Respondent's assets valued at Kshs.6,000,000/=.
51. Would that justify denial of gratuity, terminal dues and unutilized leave days?
52. Finally, the Respondent has not contested the fact that the Claimant is entitled to gratuity at 31% or that she may have outstanding leave days, her only claim under the Notice of Motion as the court ordered the Respondent to issue the certificate of service which the Respondent had unlawfully refused to issue as by law required.
53. From the Respondent's Replying Affidavit, it is decipherable that the Respondent is dead set to cling on to the Claimant's terminal dues for an indefinite period as no timelines have been provided and the reconciliation of the Claimant's report with the Respondent's record and financial statements has been on-going since January 2024.
54. The Respondent has tendered no evidence as to who is undertaking the reconciliation. The argument on reconciliation is essential as it contradicts the Respondent's averment that the Claimant declined to prepare a comprehensive handover report which would appear to suggest that the Claimant did not prepare or submit a handover report.
55. As adverted to elsewhere in this ruling, the Claimant sought a physical handover at the Respondent's office but the Respondent's Acting Managing Director appeared disinterested which compelled the Claimant to forward the same via email on 15th January, 2024.
56. Plainly, the Replying Affidavit sworn by Maureen Dwallo, the Respondent's Human Resource and Administration Manager does not deny that the Respondent owes the Claimant gratuity for the term served and outstanding leave days and has not cited any justification why the gratuity and outstanding leave days cannot be computed and paid pending the hearing and determination of the main claim. The two items are not contested.
57. The arguments that the Claimant did not surrender credentials for the Laptop Macbook Air Model A2337 Serial No. CO2FPAPWQ6LC, demand letters from Highway Commodity Ltd and Purma Holdings, alleged mis-statement of loss as profit in the handover report and anticipated recovery proceedings, cannot, in the court's view be a justification for the Respondent's withholding of the Claimant's gratuity and outstanding leave days.
58. Relatedly, the Respondent has not formally written to Claimant on the grounds relied upon and demanded a response.



59. In other words, there are no formal accusations against the Claimant nor have the grounds cited by the Respondent in its Replying Affidavit been investigated.
60. Flowing from the foregoing, it is decipherable that the Claimant's Notice of Motion dated 1st March, 2024 is merited and is granted as follows;
- a. The Respondent shall compute and pay the Claimant's gratuity for the duration she served as its Managing Director and any outstanding leave days within 30 days.
 - b. The Respondent shall bear the costs of the instant application.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 18TH DAY OF SEPTEMBER 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

