



**Abdulkadir v Silverstar Automobiles Limited (Cause E335 of 2022)
[2024] KEELRC 2683 (KLR) (30 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2683 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E335 OF 2022
B ONGAYA, J
OCTOBER 30, 2024**

BETWEEN

ABUBAKAR ABDULKADIR CLAIMANT

AND

SILVERSTAR AUTOMOBILES LIMITED RESPONDENT

JUDGMENT

1. The claimant filed the memorandum of claim on 23.05.2022 through Kairu Kimani & Advocates. The claimant prayed for judgment against the respondent for:
 - a. A declaration the termination was irregular, unlawful, and illegal.
 - b. 12-months' salaries in compensation $124,000 \times 12 =$ Kshs. 1, 488,000.00.
 - c. Service pay at 15 days for each of 27 years served Kshs. 1, 931, 538.50.
 - d. Unpaid leave for 27 years Kshs.3, 348, 000.00.
 - e. Salary arrears for June 2021 Kshs.61, 200.00.
 - f. Commission on Kshs. 60,000,000.00 at 1.5% = Kshs. 900,000,000.00.
 - g. One-month salary in lieu of notice Kshs. 124,000.00.
 - h. Payment of interest at 25% on claimed amounts from date of termination until payment in full.
 - i. Delivery of certificate of service.
 - j. Costs of the claim.
2. The claimant pleaded as follows:



- a. The respondent employed the claimant from 1994 to 2021 to perform general duties at the respondent's business premises.
 - b. In June 2021, the respondent locked the claimant out of the premises and without a notice. The lock out was without reason and was contrary to Employment Act 2007.
 - c. At termination the claimant earned Kshs.124,000.00 per month.
 - d. The claimant claimed per headings in the prayers.
3. The respondent filed the statement of response and counterclaim through ALP Kenya Advocates. The respondent prayed as follows:
- a. Dismissal of the suit against the respondent with costs.
 - b. Judgment for the respondent against the claimant as counterclaimed.
 - c. Award of Kshs. 2, 673, 000.00 for the respondent against the claimant as counterclaimed being the monies advanced unlawfully to the claimant per counterclaim.
 - d. A declaration that the subject house and Utange plots are being held by the claimant in trust for the respondent and are the property of the respondent, the employer.
 - e. An award of Kshs. 49,000,000.00 being the value of house and the Utange plots advanced to the claimant as employment benefit.
 - f. An order directing the claimant to forthwith release the mobile phone line registered in the respondent's name back to the respondent for business use.
 - g. An order directing the claimant to release all information, records and documents in his possession about respondent's business creditors and debtors.
 - h. Interest on monies awarded at court rates until payment in full.
 - i. Costs and interest.
 - j. Any other remedy the Honourable Court may consider expedient in the circumstances.
4. The claimant pleaded as follows:
- a. The respondent admitted employing the claimant as a Sales Manager alongside the claimant's wife one Sabah Ahmed who the respondent employed as a General Manager.
 - b. The claimant's wife resigned in January 2021 as General Manager and was uncooperative causing the respondent serious business hindrance and losses due to her attitude.
 - c. In solidarity with his wife the claimant abandoned his duties and refused to resume duty despite pleas from the respondent's director. In June 2021 the claimant completely stopped reporting at work. By so doing, the respondent deserved summary dismissal with no benefits. The respondent suffered business losses.
 - d. The claimant and his wife registered mobile phone numbers in their names but meant for official respondent's business and thereby disrupted business. Further, they refused to properly handover as directed by the respondent. They deleted important business sales and debtor records on their way out. They delinked from the bank accounts the assigned mobile phone lines and inconvenienced business. On the way out he spread rumours that the respondent



business was not a going concern and generally acted inconsistent with respondent's business interests.

- e. As at termination the claimant's monthly salary was Kshs. 30,000.00.
 - f. The claimant voluntarily abandoned the employment and unfair termination does not arise as alleged.
 - g. The claimant was entitled and utilised annual leave, paternity leave, and, compassionate leave,
 - h. A claim of 22 years' leave days is statute barred.
 - i. The claimant's wife with whom he worked closely was the General Manager who scheduled leaves and it is unbelievable he failed to take leave as claimed.
 - j. The respondent provided the claimant a fully paid house in Green 2 Estate South C, Nairobi and two plots of land in Utange, Mombasa transferred to the claimant and his wife as an upward consideration for all employment benefits post-exit that may accrue from their employment. The value of the house and plots far exceed any employment claims as made.
 - k. The claimant's NSSF dues were fully paid.
 - l. The claimant and his wife accessed the respondent's staff accounts, bank accounts, M-Pesa accounts and entrusted company resources, which he exploited to unlawfully, unfaithfully and without authority paid himself more than was due. The respondent counter-claims, accordingly.
 - m. The respondent counterclaimed over Kshs. 2, 673, 000.00 the claimant paid himself without authority and was not documented.
 - n. The claimant realised that the respondent was closing on him and decided to suddenly leave employment to defeat intended disciplinary action. The claimant left employment maliciously by deleting crucial records, registering business mobile phone lines in his name and that of his wife, refusing to handover, delinking business mobile phone lines from the bank accounts, and generally, acting inconsistent with best interests of the business.
5. The claimant filed the reply to the statement of response and response and defence to counterclaim dated 22.07.2022. The claimant pleaded as follows:
- a. The wife resigned but that she had not been uncooperative as alleged.
 - b. She gave a 3-months' notice prior to exiting but on 30.04.2022 the Managing Director Mohamed Abdalla asked her not to set foot in the respondent's premises. Further, he continued to work until he was locked out.
 - c. The claimant denied all allegations made against him and pleaded for the respondent. He had no opportunity to handover.
 - d. The phone lines registered in the claimant's and his wife's names belonged to them and not the respondent as alleged.
 - e. The amounts on the payroll do not reflect the true employee salaries. For 15 years, the payroll shows the claimant earned Kshs. 30, 000.00 without an increment and which is unbelievable.



- f. The claimant stated that the house in South C and the Utange plots were bought using his and his wife's salaries for 27 and 20 years respectively, and, the respondent had no valid claim over the house and plots as alleged and counter claimed.
 - g. The counterclaim does not raise any triable issues and the Court lacks jurisdiction to entertain the counterclaim on the house and land or plots in Utange.
6. The claimant testified to support his case. The claimant's witness No. 2 (CW2) was the claimant's brother in law one Najma Ahmed Mohamed, the brother to the claimant's wife (the respondent's General Manager at material time). CW2 worked for the respondent as a bookkeeper or accounts clerk. The respondent's witness (RW) was Marriam Mohamed Abdalla, the respondent's General Manager as at time of hearing the suit. Final submissions were filed for the parties. The Court has considered all the material on record.
7. To answer the 1st issue there is no dispute that the claimant worked for the respondent from 1994 to June 2021. While disputing that he earned Kshs. 30,000.00 per month, the claimant confirmed that the tax returns were made and they were correct. CW2 and RW confirmed that the muster roll was accurately prepared. The Court finds that the claimant's last monthly pay was Kshs. 30,000.00. While making the finding the Court observes that the respondent was a business enterprise whose employees were related by blood and marriage. RW was the daughter of the Managing Director who was a first cousin of the claimant. CW 2 was the bookkeeper and the brother in law of the claimant. The claimant was the husband of the General Manager prior to RW taking over the role. It is therefore correct that many of the employment relationships and transactions were informal and may not have been documented. The claimant incredibly relied upon unsigned and unauthenticated petty cash vouchers to urge a case for Kshs. 123, 750.00 per month in salary.
8. To answer the 2nd issue, there is no reason to doubt the respondent's account as testified by RW that after the claimant's wife resigned as the General Manager, the claimant became sporadic in reporting at work and eventually stopped reporting at work in June 2021. The claimant is not clear on the specific date he alleges he was locked out. The Court finds that the claimant and his wife must have opted to cease working for the respondent and voluntarily so. The claim for summary dismissal because of alleged lockout is found unbelievable. The Court finds that in the enterprise where the employees were largely relatives, the alleged lock-out never took place but that the claimant decided to stop reporting to work, all by himself and voluntarily so. The Managing Director was his first cousin and they had worked together for over 27 years and the alleged lock-out is obviously inconsistent with the obtaining relationships going way beyond the formal employment relationship. Thus, the Court finds that there was no termination and the related claims for unfair termination and compensation will collapse.
9. The 3rd issue is on residual remedies as prayed for. As testified by RW the claimant must have taken his leave over the years including the paternity leave taken 9 times. CW 2 testified that all employees took leave except the claimant but offered no explanation in that respect. On a balance of probability, the Court finds that the claimant was afforded leave throughout the service. For the last about half year served in 2021, the Court has found that there was no reason to doubt the testimony by RW that for the period January to June, the claimant reported at work sporadically. The claims for leave and the base amount used to make the claims as computed is found unjustified. The claim for service pay is equally not due as the claimant was a member of the NSSF and there was no contractual basis for the claim. Section 35 of the *Employment Act* operates to bar the claim in this case where NSSF was contributed for the claimant. The contractual basis of the claim for commissions was not established at all and the claim must fail.



10. To answer the 4th issue, the respondent offered no evidence to justify the counterclaim. RW testified thus, “His cell phone received all customer payments. I have nothing to connect the M-Pesa statements to claimant’s phone.” Thus, the exhibited statement was of no probative value in establishing that the claimant had received the money as counterclaimed. Similarly, the properties in issue being the house in Nairobi and the plots in Utange have not been shown to have been bought for the claimant by the respondent, as alleged and, as anticipatory final benefits. The Counterclaim must fail as not established and unfounded. As urged for the claimant, the Court would not have jurisdiction to hear and determine a dispute about the title in the house and plots in circumstances that the same is not part of the contract of service.
11. The Court has considered the margins of success and each party to bear own costs of the proceedings. In conclusion, judgment is hereby entered for the parties for dismissal of both the claimant’s suit and the counterclaim with orders each party to bear own costs of the proceedings; and, the respondent to deliver the claimant’s certificate of service in 30 days.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS WEDNESDAY 30TH OCTOBER 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE

