



**Marete v Ondieki t/a Moseti & Company Advocates (Cause 873 of 2019)  
[2024] KEELRC 13299 (KLR) (21 November 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13299 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 873 OF 2019  
S RADIDO, J  
NOVEMBER 21, 2024**

**BETWEEN**

**KENNEDY KOOME MARETE ..... CLAIMANT**

**AND**

**BENAR ONDIEKI T/A MOSETI & COMPANY ADVOCATES .... RESPONDENT**

**RULING**

1. In a judgment delivered on 2 August 2024, the Court found that Benard Ondieki t/a B. Moseti & Co. Advocates (the Respondent) had unfairly terminated the employment contract of Kennedy Koome Marete (the Claimant). The Court awarded the Claimant compensation, pay in lieu of notice and costs. A Counterclaim by the Respondent was found not proved.
2. Both the Claimant and Respondent were aggrieved and they filed Motions seeking review of the judgment.

**Respondent's Motion**

3. The Respondent's Motion was dated 12 September 2024 and it sought orders:
  - i. spent.
  - ii. That there be an order to review and set aside this Honourable Court's judgment issued on 2<sup>nd</sup> August 2024.
  - iii. That upon granting prayer 2, there be an order allowing the Respondent to testify and file a supplementary list of documents and witness statement.
4. The grounds in support of the Motion were that Respondent and his 2 witnesses were not afforded an opportunity to testify (despite being present during the hearing); the Respondent's Counterclaim was not heard; the Respondent's advocate did not submit on the Counterclaim in the final written



submissions and that justice dictated that the judgment be revisited so as not to visit the mistakes of an advocate on the Respondent.

5. The Claimant filed a replying affidavit in opposition to the Motion attesting that the Respondent, an advocate of the High Court for over a decade and his advocate did not inform the Court of a desire to lead evidence; no error apparent on the face of the record or discovery of new evidence had been demonstrated; the Court was functus officio; the Court had made a finding that the Respondent had not availed evidence to prove his case; the Respondent was seeking to re-open and re-litigate his case and that the application was meant to delay the execution of the judgment.
6. The Respondent filed his submissions on 30 October 2024, and the Claimant on 13 November 2024.
7. The Court has considered the Motion, affidavits and submissions.
8. The *Employment and Labour Relations Court (Procedure) Rules*, require a party to file witness statements and documents to be relied on at the time of filing a primary pleading.
9. The Respondent filed witness statements/documents after securing the leave of Court. The filing of the statements and documents showed an indication on the part of the Respondent that he desired to lead evidence.
10. When the Cause was mentioned on 6 February 2024 to set a hearing date, the Respondent was not represented though he was aware of the day's proceedings.
11. The Court fixed the hearing for 22 April 2024. On this day, the Respondent's advocate indicated that he was ready for a physical and not virtual hearing because of confidentiality concerns. The Court obliged the Respondent.
12. When the Cause was reached for hearing, the Claimant's evidence was taken and the Claimant cross-examined. Further hearing was adjourned to 9 May 2024. The Respondent further cross-examined the Claimant on this day and this was followed by re-examination and close of the Claimant's case.
13. Given a chance to lead evidence, the Respondent's advocate informed the Court:  
We are not calling witness. Defence rests.
14. The Court marked the Respondent's case as closed and parties were directed to file and exchange submissions.
15. While opting not to lead evidence, the Respondent and his advocate knew that there was a Counterclaim which needed to be proved.
16. Apart from knowledge of the Counterclaim, the Respondent and his advocate can be assumed to have known of the elementary evidential burden imposed on employers by sections 41, 43 and 45 of the *Employment Act, 2007*.
17. The Court did not shut out the Respondent from leading evidence. The Court granted him an opportunity to be heard. He and his advocate made a conscious decision not to lead evidence and they cannot now turn around and wave the right to be heard and not having been allowed to be heard.
18. A Court of law cannot force a litigant to lead evidence to support its case especially where there is legal representation. The Respondent did not demonstrate that the conscious decision not to lead evidence was a mistake attributable to an advocate.
19. The Respondent squandered an opportunity to exercise its right to be heard. It cannot now seek a review and/or setting aside of the judgment on the grounds advanced.



20. The Motion dated 12 September 2024 is for dismissal.

### **Claimant's Motion**

21. The Claimant's Motion is dated 20 September 2024 and it sought orders:

- i. That the judgment of Honourable Justice Nzioki wa Makau made on the 2<sup>nd</sup> August 2023 be reviewed and/or varied in terms of including an award of Kshs 70,000/- unpaid salary for the month of June 2018.
- ii. That costs of this application be provided for.

22. In seeking the review, the Claimant contended that he pleaded a claim for Kshs 96,000/- being unpaid June 2018 salary, and that the Court made an error on the face of the record by finding that the salary was not paid but failing to award the same.

23. The Respondent filed a replying affidavit in opposition to the Claimant's Motion (should have been filed and served on or before 30 October 2024).

24. This Court has perused the judgment. There is no finding at all in the body of the judgment that the Respondent failed to pay the Claimant salary for the month of June 2018.

25. In effect, this Court is of the view and holds that the failure to award the head of claim or relief of unpaid salary for June 2018 was not an error apparent on the face of the record that could be remedied through the Court's review jurisdiction.

### **Orders**

26. In light of the foregoing:

- i. The Respondent's Motion dated 12 September 2024 is dismissed.
- ii. The Claimant's Motion dated 20 September 2024 is dismissed.

27. Each party to bear own costs of the Motions since both have been dismissed.

**DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 21<sup>ST</sup> DAY OF NOVEMBER 2024.**

**RADIDO STEPHEN, MCIARB**

**JUDGE**

Appearances

For Claimant Waithaka and Partners, Advocates

For Respondent Gitonga & Tollo Advocates LLP

Court Assistant Wangu Mugo

