



Ndung'u v Nash Financial Services Limited & another (Cause E124 of 2024) [2024] KEELRC 13457 (KLR) (17 December 2024) (Ruling)

Neutral citation: [2024] KEELRC 13457 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E124 OF 2024
AK NZEI, J
DECEMBER 17, 2024**

BETWEEN

MARK MURIUKI NDUNG'U CLAIMANT

AND

NASH FINANCIAL SERVICES LIMITED 1ST RESPONDENT

ANTHONY WAGACHA MWANGI 2ND RESPONDENT

RULING

1. Vide a Statement of Claim dated 15th February, 2024 and filed in this court on even date, the Claimant sued the Respondent/Applicant and sought the following reliefs:-
 - a. A declaration that the Respondent unfairly and unlawfully terminated the Claimant's employment.
 - b. 12 months' salary for unlawful and unfair termination at the rate of Kshs.110,000/= per month Kshs.1,320,000/=.
 - c. One month salary in lieu of termination notice Kshs.110,000/=.
 - d. Leave days due but not taken (36 days) based on the monthly pay of Kshs.110,000/= (Kshs.3,667 x 42) Kshs.132,012/=.
 - e. Overtime pay at 28 hours per month from June 2021 to June 2023 (28 x 3,667 x 12 x 2) Kshs.2,464,224/=.
 - f. Damages for discrimination (general and exemplary damages).
 - g. Certificate of service.
 - h. Costs of the suit.



- i. Interest until payment in full.
 - j. Such further orders or relief the Honourable Court may deem fit.
2. The Claimant pleaded, *inter-alia*:-
- a. that the 1st Respondent is a limited liability company duly incorporated pursuant to the [Companies Act](#) (Cap 486 Laws of Kenya), while the 2nd Respondent is the 1st Respondent's Chief Executive Officer and sole Director of the 1st Respondent.
 - b. that the Respondents offered, and the Claimant accepted employment in June 2021 as a Software Engineer-Back End Applications, earning a net salary of Kshs.110,000/= per month; a position the Claimant held until 9th June, 2023 when the Respondents summarily dismissed the Claimant from employment.
 - c. that on 9th June, 2023 well after working hours, the 2nd Respondent sent the Claimant an email titled "Termination Notice", whereby he terminated the Claimant's employment immediately under the guise of redundancy.
 - d. that later on in the night, the 2nd Respondent cut off the Claimant's access to the office email address and access to all of the organization's communication software, including Microsoft Teams, thus effectively severing all communication with the Claimant.
 - e. that the Respondents did not carry out any redundancy proceedings, and that no other back-end software engineers were terminated under the guise of redundancy, other than the Claimant.
 - f. that as compared to other back-end software engineers, the Claimant had worked the longest, and was one of the most skilled in the organization. That even if the correct redundancy procedure were [to be] followed, the Claimant [would not be] a candidate for termination on redundancy basis.
 - g. that the lawful procedure was not followed before terminating the Claimant's employment in that the Claimant was not furnished with reasons for termination other than the fabricated redundancy notice, was not issued with a show cause letter, was not subjected to any hearing, was not given a termination notice, and no notice was served upon the Nairobi Labour Office stating that the 1st Respondent had a redundancy in the role of Back-End Software Engineers.
3. The Respondents defended the Claimant's suit vide a Memorandum of Response dated 17th April, 2024; denying the Claimant's claim. The Respondents pleaded:-
- a. that the 2nd Respondent is sued as an agent of a disclosed principal, contrary to the law. That the 2nd Respondent has been wrongly enjoined in the suit.
 - b. that by a contract of employment dated 30th May, 2021, the 1st Respondent engaged the Claimant as a Software Engineer-Back End Operations within its engineering team, reporting to the Chief Technical Officer, and earning a gross monthly salary of Kshs.50,000/=.
 - c. that due process was followed in the redundancy of the Claimant as laid down in Section 40 of the [Employment Act](#) 2007.
4. The 2nd Respondent filed a Notice of Motion dated 17th June, 2024 seeking Orders:-
- a. That the application be heard before the suit is set down for hearing.



- b. That the 2nd Respondent – Anthony Wangacha Mwangi- be struck out of the proceedings forthwith.
 - c. That costs of the application be borne by the Claimant.
5. The foregoing is the application before me, and is expressed to be brought under Sections 3 and 12(1) & (3)(viii) of the *Employment and Labour Relations Court Act* and Rule 17 of the *Employment and Labour Relations Court (Procedure) Rules* 2016. The application is predicated on the 2nd Respondent’s supporting affidavit sworn on 17th June, 2024. It is deponed in the said supporting affidavit:-
 - a. that the 1st Respondent engaged the Claimant as a Software Engineer-Back End Applications in June 2021, and that the employment relationship lasted until sometimes in June 2023.
 - b. that the 2nd Respondent/Applicant did not employ the Claimant in his personal capacity, but as the Chief Executive Officer of the 1st Respondent; which is a legal entity capable of contracting in its own capacity.
 - c. that the 2nd Respondent/Applicant only interacted with the Claimant in his capacity as the 1st Respondent’s Chief Executive Officer, and that the 2nd Respondent’s inclusion in the suit is deliberate, and is intended to vex him on account of actions undertaken in his official capacity as an officer of the 1st Respondent.
6. The application is opposed by the Claimant vide a replying affidavit sworn by him on 17th July, 2024. It is deponed in the supporting affidavit:-
 - a. that the 2nd Respondent is the only natural person shareholder of the 1st Respondent company; and that the 2nd Respondent is the sole shareholder and Chairman of a USA Company, Nasheq Inc; the other shareholder of the 1st Respondent company.
 - b. that according to the 1st Respondent’s search (CR 12), the said other shareholder in the Respondent Company, Nasheq Inc, is a company incorporated in Delaware, USA.
 - c. that the said USA Company is a shell company whose sole purpose is to evade liability in suits such as the one herein.
 - d. that both the 1st Respondent company and Nasheq Inc. are solely owned, run and administered by the 2nd Respondent/Applicant.
 - e. that the Claimant will be greatly prejudiced if the application is allowed, that employment law allows the 2nd Respondent to be referred to as the employer for purposes of trial.
7. It was stated as follows in *Moir v Wallersteiner* [1975] 1 All ER 849 at p. 857;

“It is a fundamental principle of our law that a company is a legal person with its own legal identity, separate from the directors or shareholders, and with its own property rights and interests to which it alone is entitled. If it is defrauded by wrong doers, the company itself is the one person to sue for the damage. Such is the rule in *Foss v Harbottle* [1943] 2 Hane 461. The rule is easy enough to apply when the company is defrauded by outsiders. The company itself is the only one who can sue. Likewise, when it is defrauded by insiders of the minor kind, once again, the company is the only person who can sue.” (Per Lord Denning).
8. It was stated in *David Njuguna Ngotho v Family Bank Limited* [2018] eKLR that a contract cannot confer rights or impose obligations on any person other than the parties to the contract.



9. While appreciating the foregoing ages-old principles of law, I must state here that none of the parties herein has placed on record the contract and/or signed contract alleged by the Respondents to have been signed and/or entered into by the Claimant and the 1st Respondent on 30th May, 2021, or that alleged by the Claimant to have been entered into between himself and the Respondents in June 2021.
10. That being the case, there is nothing before the court on the basis of which the 2nd Respondent, Anthony Wangacha Mwangi, can be struck out of the proceedings herein at this stage. Evidence will have to be taken in a full trial.
11. In sum, and having considered written submissions filed by Counsel for parties herein, the 2nd Respondent's Notice of Motion dated 17th June, 2024 is hereby dismissed with costs.
12. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF DECEMBER 2024

AGNES KITIKU NZEI

JUDGE

ORDER

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....Claimant

.....Respondent

