



Kuria v Badoer (Cause E149 of 2022) [2023] KEELRC 833 (KLR) (13 April 2023) (Judgment)

Neutral citation: [2023] KEELRC 833 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

CAUSE E149 OF 2022

JK GAKERI, J

APRIL 13, 2023

BETWEEN

FRED KURIA CLAIMANT

AND

RICARDO BADOER RESPONDENT

JUDGMENT

1. The Claimant initiated this claim by a Statement of Claim dated 2nd March, 2022 alleging unlawful and wrongful termination of employment.
2. The Claimant avers that he left employment with Knowlton Consulting in U.A.E, Dubai to join the Respondent as an employee and moved to Kenya in order to discharge his duties more effectively.
3. That as the only employee of the Respondent, he was in charge of all administrative and general matters that fell within his powers including making financial decisions, a responsibility he discharged conscientiously with vigour, enthusiasm and as a consequence his salary rose from USD 3,000 to USD 4,000.
4. The Claimant avers that he finalised the Hakika Microfinance Bank Ltd share purchase and approval by the Bank of Tanzania, incorporated and setup Badoer Group ADK ETF Ltd, among other companies of the Respondent, facilitated share purchase of Business Today Media Ltd, Shona EPZ Ltd, acquisition of Madgoat Television Ltd, registered trade marks with the Kenya Industrial Property Institute (KIPI) of Ursaria Filthy Lucre Club, Ursaria Symbol Madgoat TV, held account mandate for Ricardo Badoer as well as Badoer Investments Ltd and Wazi to FC represented the Respondent in Sumac Microfinance Bank Ltd and Hakika Microfinance Bank Ltd and attended Annual General Meetings on his behalf and was responsible for day to day management of his itinerary when he visited Kenya and Tanzania.



5. It is the Claimant's case that he served the Respondent selflessly to ensure his business flourished but his employment was illegally terminated by word of mouth as the Respondent had neither reason nor did he follow the law and did not pay terminal dues.
6. That the Claimant had a legitimate expectation of long term employment and suffered psychological distress having left a senior position to join the Respondent.
7. The Claimant prays for;
 - i. 12 month's salary compensation USD 48,000.
 - ii. One month's salary in lieu of notice USD 4,000.
 - iii. Salary for November 2018 USD 4,000.
 - iv. Accrued leave days for the entire period USD 4,000.
 - v. Costs of the claim.
 - vi. Interest on (i), (ii), (iii) and (iv) above at court rates.

Respondent's case

8. The Respondent avers that he made an offer to the Claimant to join him in his businesses in Kenya and the Claimant willingly accepted.
9. That the Respondent appointed the Claimant a Director and gave him shareholding in the following companies.
 1. MadGoat TV Ltd 20%
 2. Ursaria Sports Ltd 10%
 3. Red Lion Sport Management Ltd 10%
 4. Badoer Media Ltd 20%
 5. Badoer Talent Agency Ltd 10%
 6. Badoer Jambs69 Ltd 15%
 7. Ledona Kenya Ltd 5%
10. That the Claimant was paid Kshs.500,000/= salary as a Director and had to perform the duties of a Director.
11. The Respondent further avers that investigation showed that the Claimant was engaged in unlawful activities as a Director and shareholder and after several meetings, the Claimant agreed to resign as a Director and the Respondent bought his shares and terminated their relationship vide the Settlement Agreement dated 21st July, 2020.
12. That the Claimant signed the Settlement Agreement voluntarily and received Kshs.2,000,000/=.
13. It is the Respondent's case that the Claimant was not terminated but voluntarily resigned his position as Director of the Respondent and was paid.
14. That the Claimant's suit reeks of dishonesty, greed and underhand machinations to coerce and blackmail the Respondent to make more payments despite his resignation.



15. The Respondent prays for dismissal of the Claimant's suit with costs.

Claimant's evidence

16. The written witness statement of the Claimant rehashes the contents of the statement on claim.
17. The witness testified that he, the Respondent and one Alubala formed several companies towards the end of 2018 and early 2019 and his shareholding was out of employment and was a Director and as an employee he received a salary up to October 2019.
18. That he offered his shares for sale and the Respondent accepted the offer and paid Kshs.2,000,000/=.
19. On-cross examination, the Claimant stated that he was an employee of the Respondent but had no formal contract. That he was a personal assistant and oversaw all the companies and did not provide money to purchase the shares in the companies.
20. It was his testimony that he signed the settlement agreement after reading and understanding its contents and was not coerced and both parties fulfilled their obligations. He testified that the Registrar of Companies had raised issues but had not included them in his statement. That he did not deny the allegations made.
21. He testified that the demand letter was dated 16th December, 2021 after payment of the Kshs.2,000,000/=.
22. The Claimant further testified that his salary was USD 4,000 having risen from USD 3,000 and the transfers commenced in 2018.
23. On re-examination, the Claimant testified that the Respondent had not denied that the Claimant was his employee and had confirmed as such and no investigation had been conducted.
24. That his claim related to employment from 2018 to 2020.

Respondent's evidence

25. On cross-examination, the Respondent stated that the Claimant was his employee engaged to render certain services and was paid a monthly salary. The witness could not remember when he stopped paying the Claimant.
26. It was his testimony that he considered both the employment and the shares in the settlement agreement and the last salary was in October 2019.
27. That the Claimant was in the habit of demanding money all the time.
28. The witness admitted that he did not accord the Claimant a termination notice as he was in Spain.
29. That the settlement agreement related to both employment and shares.
30. On re-examination, the witness testified that the Claimant's role was to assist him invest in Kenya and had joined the companies as a friend and was being rewarded for work done and they had agreed to part ways mutually.
31. That the settlement agreement waived further claims against each other.



Claimant's submissions

32. The Claimant's counsel submitted on the contract of employment between the parties, termination and entitlement to reliefs.
33. On the first issue, counsel submitted the Respondent admitted that there was an employment relationship between them as evidenced by paragraph 2 of the Respondent's witness statement and the Respondent had on cross-examination admitted that he paid the Claimant a salary.
34. Counsel urged that the Respondent's attempt to portlay the salary paid to the Claimant as directorship was misleading as the companies were incorporated after the Claimant had been engaged by the Respondent and the Claimant testified that he incorporated the companies.
35. Counsel submitted that the Respondent's counsel's letter dated 13th March, 2020 confirmed the relationship.
36. The Respondent's counsel submitted that the Claimant was engaged as a director and shareholder in the Respondent's companies and adduced no evidence to prove his remuneration and only received payments as a director and shareholder and had no payslip with statutory deductions.
37. Reliance was made on the provisions of Sections 20 and 21 of the Employment Act to urge that the Claimant was engaged as a director shareholder.
38. As regards termination of employment, counsel relied on the provisions of the Employment Act to urge that the employer could terminate the employment of an employee subject to compliance with the provisions of the Act.
39. Counsel submitted that in his case, the Respondent had neither a reason nor complied with the prescribed procedure and the termination was by word of mouth and no notice to show cause was sent.
40. The decision in Kenfreight (EA) Ltd v Benson K. Nguti [2016] eKLR was relied upon to underscore the essence of the right to be heard and compliance with the provisions of Section 41 of the Employment Act, 2007.
41. Reliance was also made on the decision in Joseph Mwaniki Nganga v United Millers Ltd [2020] eKLR to reinforce the submission on procedural propriety.
42. Counsel further submitted that the Respondent offered no reason for terminating the Claimant's employment.
43. That the Settlement Agreement was limited to shareholding of the companies' submissions.
44. Counsel did not submit on the reliefs sought.
45. On termination of employment, counsel submitted that when the Respondent discovered unlawful acts by the Claimant, they agreed that the Claimant resigns as a director and the Respondent agreed to buy his shares so as to terminate their relationship and the settlement agreement waived the right to further claims and thus the parties were fully discharged.
46. As regards the reliefs sought, counsel for the Respondent submitted that the Claimant was not entitled to any of the reliefs sought as he had been fully compensated pursuant to the settlement agreement.
47. That the Claimant was estopped from asserting otherwise.



48. Reliance was made on the decisions in *Coastal Bottlers Ltd v Kimathi Mithika*, *Trinity Prime Investment Ltd v Lion of Kenya Insurance Company Ltd* [2015] eKLR and *Christine Adot Lepvio v Wycliffe Mwachhi* [2013] eKLR to reinforce the submission on the effect of a discharge voucher.

Determination

49. After careful consideration of the pleadings, evidence and rival submissions by counsel, the issues for determination are;
- i. Whether the Claimant was an employee of the Respondent.
 - ii. Whether termination of the Claimant's employment was unfair.
 - iii. Whether the Claimant is entitled to the reliefs sought.
50. As regards the relationship between the Claimant and the Respondent, parties adopted a similar position. Both the Claimant and Respondent are in agreement that the Respondent made an offer which the Claimant accepted while in the U.A.E and relocated to Kenya for effective rendering of services to the Respondent as his Personal Assistant and overall overseer of his businesses and companies which the Claimant incorporated.
51. Notably, the Respondent has not denied that the Claimant rendered the services catalogued in his witness statement including incorporation of companies and registration of trade marks among others.
52. Although the Respondent's counsel submitted that the Claimant was employed as a director, he did not identify which of the companies employed him as such and under what terms and conditions and his duties as a director bearing in mind that directors are not employees. It was incumbent upon the Respondent to demonstrate that the Claimant's position was not that of an employee.
53. More significantly, however, on cross-examination, the Respondent was unambiguous that the Claimant was his employee, having employed him to render certain services and paid him a monthly salary.
54. In addition, the Respondent testified that according to him, the settlement agreement covered both employment and the shares. Strangely, neither the Claimant nor the Respondent could tell the date of employment or engagement.
55. Similarly, the Respondent could not recall when the Claimant became a shareholder or director of any of the companies. What is evident however, is that there was neither directorship nor shareholding when the Respondent engaged the Claimant in Dubai.
56. Puzzlingly, although the Respondent testified that he was paying the Claimant Kshs.500,000/= as a director, he adduced no supportive evidence.
57. Finally, the Respondent counsel's demand letter dated 13th March, 2020 leaves no doubt that the Claimant was an employee of the Respondent. The letter is explicit that the relationship started in September 2018 and catalogues the duties of the Claimant as searching for investment opportunities in Kenya, negotiating favourable terms in mergers and share acquisition with different companies, purchasing assets among others at a monthly salary of Kshs.500,000/=.
58. From the evidence on record, it is also discernible that the Respondent was a regular traveller outside Kenya and left the Claimant to superintend over all his investments including dealing with clients. Email communication between them reveal that the Respondent had expressed a desire to take the Claimant from Knowlton Consulting Limited, Dubai as he was very happy with the services rendered



and wanted the Claimant to work with him on a full time basis as early as February 2018. The Claimant was to take care of the Respondent's interests in Kenya and the Respondent promised to pay a salary and paid USD 3,000 in May 2018, was to leave in early May 2018 and sums of money were deposited in the Claimant's account at the Emirates NBD between June 2018 and October 2019, evidence the Respondent did not controvert.

59. In his evidence, the Respondent testified that he paid the Claimant a salary of Kshs.500,000/= as a director as confirmed by the Respondent's counsel's letter dated 13th March, 2020.
60. Section 2 of the [Employment Act](#), 2007 provides employee means a person employed for wages or a salary and includes an apprentice and indentured learner.
61. Relatedly, there is no gainsaying that the definition of employer in section 2 of the [Employment Act](#), 2007 is sufficiently wide to encompass the Respondent or any of his companies.
62. Based on the evidence on record, the court is satisfied and finds that the Claimant has on a balance of probabilities demonstrated that he was an employee of the Respondent.
63. As to whether termination of the Claimant's employment was unfair, parties have adopted contrasting positions. While the Claimant alleges that his employment was terminated by word of mouth, the Respondent testified that the parties agreed to separate mutually in accordance with the Settlement Agreement dated 21st July, 2020.
64. Intriguingly, neither the Claimant's written statement nor the oral evidence adduced in court mentions the date of termination of employment with regard to the Settlement Agreement. The Claimant maintained that it addressed the issue of shares exclusively and the Kshs.2,000,000/= paid was consideration for the shares.
65. The Respondent on the other hand testified that the Claimant resigned as a director of the Respondent voluntarily and was paid the sum in full and final settlement.
66. The Settlement Agreement or Deed of Settlement states that;
 1. Parties are joint director/shareholders in various companies within the Republic of Kenya.
 2. Fred Kuria is the holder of various shares in the said companies as outlined:
No.
Company name
Shareholding
MadGoat TV Ltd
Ursaria Sports Ltd
Redion Sports Management Ltd
Badoer Media Ltd
Badoer Talent Agency Ltd
Badoer Jams69 Ltd
Ledona Kenya Ltd
 3. Fred Kuria has expressed the intention to voluntarily surrender his shares to Badoer Ricardo.



4. Badoer Ricardo has voluntarily expressed the intention to purchase the said shares at a mutually agreed purchase price.
5. Discussions have been held between the parties as a result of which it has been mutually agreed that shareholding be valued at Kshs.2,000,000/= . . .”
67. In the courts view, the Deed of Settlement between the Claimant and the Respondent was a contract for the transfer of shares in 7 companies from the Claimant to the Respondent at an agreed consideration of Kshs.2,000,000/= and both parties fulfilled their part of the bargain.
68. The court is satisfied that the Deed of Settlement dated 21st July, 2020 related to the transfer of shares as opposed to the relationship between the parties, contrary to the submissions by the counsel for the Respondent.
69. The Court of Appeal decision in *Coastal Bottlers Ltd v Kimathi Mutbika* (*Supra*) relied upon by the Respondent is inapplicable as the Deed of Settlement was reticent on the relationship between the parties other than transfer of shares.
70. On cross-examination, the Claimant confirmed that he was an employee of the Respondent and not any of his companies.
71. To the allegation that the Respondent terminated the Claimant’s employment by word of mouth and for no reason, the Respondent provided no response preferring to rely on the Deed of Settlement.
72. Section 45 (2) of the *Employment Act*, 2007 provides that for a termination of employment to pass as fair, the employer must establish that;
 1. He/she had a valid and fair reason relating to the employees conduct, capacity, compatibility or operational requirements of the employer and conducted the termination in accordance with a fair procedure.
73. The essence of these provisions were aptly captured by Ndolo J. in *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR as follows;

“ . . . However, for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness . . .”
74. Similar sentiments were expressed by the Court of Appeal in *Naima Khamis V Oxford University Press (EA) Ltd* [2017] eKLR.
75. Similarly, the provisions of Section 43 (1) of the *Employment Act* are clear that it is the obligation of the employer to prove the reason(s) for termination of employment.
76. In addition, Section 41 of the *Act* provides the procedural precepts to be complied with for a termination of employment to pass muster and as held in *Pius Machafu Isindu v Lavington Security Guards Ltd* [2017] eKLR, the provisions of Section 41 of the *Employment Act* are mandatory.
77. In the instant case, the Respondent adduced no evidence to establish that it had a valid and fair reason to terminate the Claimant’s employment or did so in accordance with a fair procedure.
78. For the foregoing reasons, it is the finding of the court that termination of the Claimant’s employment by the Respondent was unfair.
79. I will now proceed to examine the reliefs available to the Claimant.



i. One month's salary in lieu of the notice USD 4,000.

80. In his evidence, the Claimant maintained that his employment was terminated by word of mouth and the Respondent confirmed on cross-examination that he did not serve notice because he was in Spain. The Claimant is awarded one month's salary in lieu of notice.

ii. Salary for November 2018 USD 4,000

81. The Claimant adduced no evidence to demonstrate that the salary for November 2018 was not paid. Neither the written witness statement nor the oral evidence adduced in court alluded to the salary in question.

The prayer is disallowed.

iii. Accrued leave days USD 4,000

82. Neither the written witness statement nor the evidence adduced in court made reference to the particulars of the alleged leave days claimed.

The prayer is unproven and is disallowed.

iv. 12 months compensation

83. Having found that termination of the Claimant's employment was unfair, the Claimant is entitled to the relief provided by Section 49 (1) (c) of the [Employment Act, 2007](#).

84. In making the award, the court is enjoined by Section 49 (4) to take into consideration the relevant factors therein outlined. In this case, the court has considered that:

- i. The Claimant served the Respondent for a duration of about 1 year 5 months which is a fairly short time.
- ii. The Claimant received Kshs.2,000,000/= in respect of the shares he held in the Respondent's companies for which he had not paid.
- iii. It is unclear whether the Claimant wished to continue in the Respondent's employment.
- iv. The Respondent counsel's letter dated 13th March, 2020 accused the Claimant of various serious deeds including receipt of kickbacks in the course of transacting business on behalf of the Respondent. Regrettably, the Claimant neither responded to the letter nor deny the allegations and confirmed as much on cross-examination.

85. In the circumstances, the court is satisfied that equivalent of 1 month's salary is fair.

86. In the upshot, judgement is entered for the Claimant against the Respondent as follows;

- a. One month's salary in lieu of notice.
- b. Equivalent of one month's salary compensation.
- c. Costs of the suit.
- d. Interest at court rates from date of judgement till payment in full.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 13TH DAY OF APRIL 2023



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

