



**Odera v Garda World Limited (Cause 2437 of 2017)
[2023] KEELRC 1544 (KLR) (16 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1544 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2437 OF 2017
AN MWAURE, J
JUNE 16, 2023**

BETWEEN

ANTHONY LUMUMBA ODERA CLAIMANT

AND

GARDA WORLD LIMITED RESPONDENT

JUDGMENT

1. The claimant in the memorandum of claim dated the 11th day of December 2017 and filed on the 09/9/2022 claims breach of employment contract and damages for the breach.
2. The claimant says he was employed by the respondent on the September 19, 2003 as the Assistant Controller. He says he diligently and faithfully served the respondent in various capacities which culminated to his promotion to the position of Deputy Human Resource Manager. The respondent terminated the service of the claimant by the letter dated July 6, 2017.
3. The claimant says that the respondent was obligated to pay him gratuity which the respondent has refused to pay. The respondent's failure to pay the claimant his gratuity is in breach of its obligations under the contract with the claimant, and a breach of statutory duty.
4. The claimant prays for the following;
 - a. That the respondent should pay for his gratuity for the period 2003- 2017
 - b. Costs plus interests.
5. The respondent in the statement of response filed on the 30/1/2019 says that it is not and has never been the claimant's employer at any given time. That given the lack of employer employee relationship between the respondent and the claimant, the respondent avers that this honourable court lacks jurisdiction to entertain this matter.



Claimant's Evidence

6. The claimant, Anthony Lumumba Odera gave sworn testimony and adopted the witness statement dated the December 11, 2017 and filed on the 13/12/2017 as his evidence in chief. He also adopted documents in the list of documents dated 11/12/2017 as exhibits in this case marked 1-8. He said he was entitled to gratuity as once terminated, one would be entitled to gratuity. Gratuity was 18 days per year and his basic salary was ksh 156,000/=. I had worked for 14 years. He is claiming 7,310,400/=.
7. On cross-examination, claimant said that he worked for the respondent from June 2003. He says he got a contract from company called EARS Group Limited and he was put on probation and got confirmation letter by EARS group. He was later informed four years later that EARS and KK Group were merged. He said that he was informed that his entitlements were transferred to Kenya Kazi Co Ltd (KK).
8. Claimant admitted in his evidence that Garda World had no relationship with EARS. He further says that Garda came into the picture in 2016 but it was EARS that confirmed him. He was promoted in 2006 as HR manager before Garda World came into existence. He says that Garda world came into the picture when he was already the HR Manager. He also said he worked for the respondent from 2003 to 2016.
9. Claimant says his claim relate to gratuity letter dated the 13/2/2017 which is not in court and stated that all benefits will be transferred to Kenya Kazi Security ltd. He says he has not filed any claim against Kenya Kazi as they left and only Garda World remained.
10. The claimant further said that he decided to sue Garda World as it had taken everything from KK Security. He had been transferred to Garda World and there was an email to that effect dated July 10th 2016 and Garda World by that email took over KK Security employees. Claimant said there was also an email from Farah who was the incoming HR director and confirmed that Garda world was the new owner of KK Security. It was also confirmed respondent would calculate his gratuity.

Respondent's Evidence

11. The respondent's witness Nicholas Arnold gave sworn testimony and said that he is the director of the Respondent Company. He adopted the witness statement filed on the 4/3/2020 as his evidence in chief. He testified that the Respondent is owner of Kenya Kazi ltd (KK) and Kenya Kazi is a holding Company for a group of Companies in East Africa. He said one of those companies is Kenya Kazi Services Ltd. The respondent was a special purposes vehicle established by an intermediary security company to acquire Kenya Kazi ltd. The transaction took place in 2016 and since that time there has been no change in the relationship structure. He said that they have different companies in each country. There is no relationship between the claimant and the respondent company.
12. The witness further said that the claimant was never an employee of the respondent. The respondent acquired Kenya Kazi Limited which is a holding company. The holding company owns several subsidiary companies. The claimant's employer was Kenya Kazi services limited.
13. He said that in the letter dated January 20, 2017 he had written that KK Security was acquired by Garda World and did not explain they had only acquired the holding company. He said that they were clear there was no change to individual terms and conditions and they told employees there would be no changes to their terms. He also said there are many companies of Garda world which acquired holding companies worldwide.



Claimant's written submissions

14. The claimant in the submissions invokes section 3 (1) of the [Transfer of Businesses Act](#) cap 500 Laws of Kenya which provides that 'Whenever any business or any portion of any business is transferred with or without the goodwill or any portion thereof the transferee shall, notwithstanding any agreement to the contrary become liable for all the liabilities in the business by the transferors. Under subsection (2) of section 3 of the Act 'the liability of the transferee under subsection (1) shall cease immediately notice is given in accordance with this notice has become complete. section 4 (1) of the Act provides that 'The notice required by section 3 to be given shall contain the particulars specified in subsection (2) of this section and shall be given by publication either before or after the date of transfer, in the gazette and in such newspapers circulating in Kenya.
15. The claimant submitted that the object of the [Transfer of Businesses Act](#) is to transfer of Businesses. The respondent is attempting to escape liability by circumventing the law and concealing the takeover of the company by claiming it only acquired the holding company and not its subsidiaries.
16. He further submits that if the respondent did indeed takeover the shares of the holding company and its subsidiaries as claimed, then the respondent had a duty to notify the claimant of the same. However, the respondent did not do that. It declared to all the employees that it was taking over the business and affairs of the sellers together with the entire employees along with their terms and conditions of service.
17. The claimant submitted that the issue as to who was to pay the gratuity was never in contention as the issue was how to calculate the gratuity payable given the claimant's history of employment. Garda World as the new owner of KK Security Ltd, must have done its due diligence to review the claimant's employment history and regarding to the terms and conditions of service with previous owner.
18. Garda World as the new owner was very much aware of the claimant's employment history and accepted the terms and conditions that he was engaged on.
19. The respondent having accepted to pay the claimant his gratuity is estopped in law from denying that it did not owe the claimant the duty of settling his gratuity. The Respondent cannot be heard to say that it is not liable to pay the claimant his rightful and lawful dues. The claimant further submits that from the correspondences exchanged between the parties, it is evident that the Respondent admits to the fact of owing the claimant gratuity. The admission of fact is so clear and unequivocal that it amounts to an admission of liability entitling the claimant to judgment.

Respondent's Written Submissions

20. The respondent relies on among others the case of [Casmir Nyankuru Nyaberi v Mwakikar Agencies Limited](#) (2016) eKLR where the court referring to section 12 (1) (a) of the [ELRC Act](#) held that:

“The jurisdiction of the Employment and Labour Relations Court is limited by the existence of an employment relationship as defined in law, and the Court must always satisfy itself on this account before proceeding any further.”
21. That following the acquisition of KKL, the subsidiary companies under KKL continued to operate as separate and distinct entities. That it is common occurrence in business for shareholders to sell a majority of their ownership of groups of companies they own. While this results in indirect change of control of the group, it does not make the employees of the group's subsidiaries, the employees of the new owners or holding companies. This ties in with the well established principle of separate



legal personality, which supposes that the change in ownership does not affect the subsidiaries rights, obligations, and liabilities under existing contracts.

22. The respondent submits that while the claimant is feigning ignorance, he was well aware of who his employer was as he did not provide a single payslip to the court showing that he was receiving payments from the respondent. On the contrary, the only payslip tendered by the claimant explicitly confirms that as of the date of his termination in June 2017, KKSL was paying him as his employer. The claimant admitted this statement on oath. The claimant substantively responded to the KKSL termination letter, vide a demand letter to KKSL and not the Respondent. The claimant was provided with a certificate of service by KKSL and KKSL paid out the claimant's terminal dues. All the correspondences with respect to the claimant's final dues were sent to KKSL, and while the claimant cunningly copied the respondent the correspondences, there was no single response from RW 1 or any other employee/officer of the Respondent in response to his claims.
23. The respondent also submitted that it is trite law that parties are bound by their pleadings. They relied on the case of Supreme Court in *Raila Amollo Odinga & another v IEBC and 2 others* 2017 eKLR where the court cited Indian Supreme Court in *Arikala Narasa Reddy v Venkata Ram Reddy Reddygari and another*, Civil Appeal Nos 5710-571 of 2012 (2014) said that it is 'a well settled legal proposition that no party should be permitted to travel beyond its pleadings, and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised, and they may have an opportunity of placing the relevant evidence before the court for its consideration. Therefore, it is neither desirable nor permissible that for a court to frame an issue not arising on the pleadings.
24. The respondent therefore state that the claimant cannot seek to rely on the applicability of the Transfer of Business Act as the same has been introduced at the submissions stage and not at the pleadings and goes against the well established principle. He submits that the Act is in any case inapplicable as it applies when any business or portion of any business is transferred. The acquisition in the current case related to the purchase of shares by the respondent from individual shareholders namely Derek James and others and in KKL and not the transfer of the KKL's business to the Respondent. There was no transfer of any business or operations in the acquisition and neither were KKL employees passed on the respondent.

Issues for Determination

- a. **Whether the claimant was employed by the Respondent****
- b. **Whether the claimant is entitled to claim gratuity form the respondent.**
25. The main issue which the court is being called upon to decide is factual. It is whether on the evidence proffered the claimant can be said to have been employed by the Respondent.
26. In the claimant's statement of claim, the claimant says that the respondent confirmed him to the position of Assistant Controller after successfully completing his probation before being promoted to the position of Deputy Resource Manager. Their letter of employment and confirmation was given by EARS group limited not the respondent. There is no mention at all of his services being transferred to the Respondent employer or the taking over by another company in the claim. This was a fundamental aspect of the claim which in my view should have come out in the claim. In his evidence the claimants says that he was employed in the year 2003 and Garda world came into existence in 2016. As noted by the Supreme Court in *Raila Amolo Odinga and another v IEBC & 2 others* 2017 eKLR quoted by the respondent, the parties are bound by their pleadings. The transfer of EARS or even KKSL was not pleaded in the claim.



27. The claimant was also issued with termination letter by KKSL and not the respondent and it is KKSL who paid the terminal dues including the salaries. The claimant produced a payslip of June 2017 issued by K.K Security.
28. On the authority of *Owners of the Motor Vessel „Lillian S“ v Caltex Oil (Kenya) Ltd* [1989] KLR 1 jurisdiction is everything. The court in the celebrated case held :
- “I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
29. Claimant avers he was a human resource officer of the respondent. He should have been well conversant with the legal status of his employee. He did not produce any single document like a payslip to demonstrate he was employed by the respondent.
30. Flowing from the pleadings, evidence proffered and the respective parties submissions the court holds tht here was an acquisition of a group of companies which was Kenya Kazi limited which in return was a holding company of several companies including Kenya Kazi Security Limited.
31. Indeed an email sent by K.K Security on July 5, 2016made it clear that K.K Security was to continue to run its operations as done previously and the email went further to clarify that as for the employees nothing will change in respect to their relationship with the company. The email further stated that the term and conditions of employment will remain unchanged. There is no provision in the email that Garda World would take over the employees of K.K Security and the acquisition was explained was only to be able to improve the operations of the company.
32. Considering that there is nowhere in the pleadings and evidence where it is established that there was an employer and employee relationship between the claimant and the respondent then the court can only hold that this is not a cause under its jurisdiction. The court is guided by the celebrated case of *Owners of Motor Vessel Lillian ‘S’ v Caltex Oil (Kenya) Ltd* (1989) KLR where the court held:
- “I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
33. In conclusion the court finds there is no employer/employee relationship between the respondent and the claimant as provided in section 12 of the [Employment and Labour Relations Court Act 2012](#). There is no contract between the two respective parties and so the prayer for gratuity is unproved and unmerited.
34. There is a peculiar email dated September 15, 2017 where one Achoka wrote that payment was made to the pension scheme as per the claimant’s request. Claimant was advised to liase with the pension to access his funds. It seems claimant can follow his pension dues form he relevant company if he has not already done so. This is a mere advisory opinion.



35. As this case stands however and for the reasons given hereinbefore the case is dismissed for lack of proof. Each party will bear their costs.

36 Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 16TH DAY OF JUNE, 2023.

ANNA NGIBUINI MWAURE

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 had 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.

