



**Kuria v Tigoni Water Supply Co Ltd (Cause E213 of 2021)  
[2023] KEELRC 1473 (KLR) (8 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1473 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E213 OF 2021  
BOM MANANI, J  
JUNE 8, 2023**

**BETWEEN**

**GORGE KAMAU KURIA ..... CLAIMANT**

**AND**

**TIGONI WATER SUPPLY CO LTD ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claim before me relates to alleged nonpayment of the claimant's terminal dues following his alleged retirement from employment. The claimant asserts that the respondent has failed to settle these dues necessitating this action. Through the action, the claimant seeks, *inter alia*, orders compelling the respondent to pay up the amounts claimed.
2. The respondent does not admit the claim. According to the respondent, there was no employment relation between the parties to warrant the claim.

**Claimant's Case**

3. According to the claimant, he was engaged by the respondent in the position of operations director starting January 1998. His starting salary is said to have been Kshs 35,000.00.
4. The claimant contends that he continued serving the respondent until January 31, 2020 when he was asked to retire. At the time of his alleged exit, the claimant asserts that he had risen to the position of Executive Director of the respondent earning a monthly salary of Kshs 100,000.00.
5. The claimant avers that on his retirement, the respondent was required to pay him gratuity for twenty two years of service. At the same time, the respondent was required to settle the claimant's accrued leave dues for the twenty two years that he had allegedly been in service of the respondent. According to the claimant, these dues were ordinarily payable to all retiring employees of the respondent.



6. The claimant avers that in contravention of the normal practice in respect of retiring employees, the respondent failed to settle the aforesaid terminal dues. The claimant states that the respondent's failure to make these payments not only violated the claimant's constitutional protection against discriminatory treatment but also exposed him to emotional anguish and financial embarrassment. It is the claimant's case that it was his lawful expectation that the respondent will remit these payments.

### **Respondent's Case**

7. On its part, the respondent denies having employed the claimant as alleged or at all. According to the respondent, the claimant's service to it was in the form of a member of the board of directors of the respondent. This position, the respondent contends, was voluntary attracting no monthly remuneration as would the position of an employee.
8. The respondent's case is that for the duration of his service, the claimant was entitled to allowances for board meetings that he attended. In addition, he was entitled to reimbursement of out of pocket expenditure such as travel expenses whilst attending to the respondent's activities.
9. According to the respondent, the position of director and indeed any other directorship within its rank and file is voluntary and does not attract payment of a monthly salary. The respondent states that apart from directors who serve on voluntary basis, it has employees who are remunerated as stipulated under the applicable employment laws. As such, a distinction ought to be drawn between the two lots of individuals.

### **Issues for Determination**

10. Although the respondent filed a list of issues for determination at the pre-trial stage, the claimant did not. However, he framed his version of issues in his final submissions.
11. After evaluating the pleadings and other documents on record, it is clear to me that there is no consensus between the parties regarding whether there was an employment relation between them. Therefore, this becomes a central issue for resolution in the case. Depending on how the issue is determined, other issues may arise for determination. These include: whether the claimant was treated differentially in respect of payment of terminal dues: and whether he is entitled to the reliefs that he now claims.

### **Analysis**

12. In order to assume jurisdiction over a legal dispute presented before it, the Employment and Labour Relations Court (ELRC) must ascertain that the matter arises from or affects an employment relation. Absent this, the dispute will be deemed to lie outside the court's jurisdiction.
13. The question whether directors of a company are employees of the company has been the subject of considerable litigation. Unless otherwise stated, the general legal position is that they are not. Directors only serve as officers of the company.
14. Although directors of a company may sometimes serve as its employees, this must be clear from the relation between the parties. Where they have been accorded the role of employees of the company, the directors will in effect hold dual positions of officers and employees of the company. Whether they hold the dual status of officers and employees of the company in which they serve is a matter of fact to be determined by evidence.



15. When a director is serving both as a director and employee of a company his position is governed by two distinct legal regimes: the law on companies in respect of matters relating to the position of director; and law on employment in respect of matters relating to his position as an employee.
16. The ELRC only has jurisdiction on matters pertaining to such director's employment status. It has no jurisdiction on matters pertaining to his directorship of the company (see the decision by the *Labour Court of South Africa in Chilliebush v Johnston and Others* (JR1234/08) [2010] ZALCJHB 35 (26 January 2010)).
17. Whether a director of a company can at the same time act as its employee may sometimes be specifically provided for in the company's constitution. Therefore, in determining this issue, it is essential to consider what the company's memorandum and articles of association provide on the subject. Unfortunately, in the case before me, neither of the parties considered it necessary to introduce the respondent's articles in evidence.
18. Because of a director's preeminent position as an officer of the company, whenever it is desired to entrust him with added responsibilities of serving as an employee of the company, it is important that this is expressly stated. Consequently, it is desirable that such director's contract of employment be evidenced in writing.
19. That said, there is usually a distinction that is drawn between the positions of executive and non executive directors of a company. Whilst the former are often times involved in the day to day running of the company's affairs, the latter are not. In this context, it is normally considered that whilst non executive directors may not be employees of the company, the executive directors usually serve as employees of the company.
20. However, in a recent decision by the Court of Appeal in the case of *Rift Valley Water Services Board & 3 others v Asanyo & 2 others* (Civil Appeal 60 & 61 of 2015 (Consolidated)) [2022] KECA 778 (KLR), it is suggested that executive directors, just like their non executive counterparts, are not prima facie employees of a company. As such, an individual is not entitled to claim employment status with a company merely by reason of his position as executive director of the company. He must have other evidence demonstrating that in addition to the fact of executive directorship, the company engaged him as an employee. Such evidence may be in the form of a written contract of service executed between the parties. Absent an express contract, other forms of evidence such as records of payment of a regular salary by the company and remittance of statutory deductions that accrue from an employee may come in handy to demonstrate existence of an employment relation.
21. In the case before me, the claimant asserts that he served as the operations director of the respondent before he was elevated to the position of executive director. He further claims that as the respondent's executive director, he was involved in the day to day management of the respondent's affairs. indeed, the claimant contends that he would routinely attend the meetings of the respondent's Board of Directors from where he would be given instructions regarding management of the respondent's affairs.
22. It was the claimant's case that as executive director of the respondent, he was earning a gross monthly salary of Kshs 134,000.00. He stated that although his gross monthly salary was Kshs 134,000.00 his net pay was Kshs 100,000.00. The difference, he said, was applied to settle statutory deductions.
23. On its part, the respondent has denied having employed the claimant. The respondent's position is that the claimant was engaged as one of its directors and no more.
24. To justify its position, the respondent's witness stated that the respondent had employees within its rank and file who were eligible for payment of salary. According to the respondent, these employees'



salaries were subject to the applicable statutory deductions such as remittances to the National Social Security Fund. The respondent's witness stated that individuals engaged by the respondent as employees were entitled to routine benefits that accrue to employees under employment law such as house allowance, overtime pay and annual leave. The respondent produced pay slips for three of the employees to augment its averments.

25. The respondent's witness further averred that in addition to the regular employees, the respondent had directors who included the claimant. It was the evidence of this witness that unlike the regular employees, the respondent's directors were not considered as employees of the company. Unlike regular employees, the directors were not paid a salary. Neither were they eligible for benefits that accrue to employees including house allowance and annual leave. It was the evidence of the defense that the claimant, like other directors of the respondent, was neither paid a salary nor granted leave.
26. Although the claimant's list of documents filed in court alongside the statement of claim suggests that part of the documents that were intended to be filed were the claimant's pay slips, none of the alleged pay slips were, as a matter of fact filed to accompany the said list. And none were produced in evidence.
27. When cross examined on this matter, the claimant conceded that he had not produced pay slips to support his claim that he was drawing a monthly salary. To justify the failure to produce these documents, the claimant alleged that his pay slips were retained by the respondent. Yet, he asserted that he was in charge of the affairs of the respondent. If indeed it is true that the claimant was in charge of the respondent's affairs including the custody of its records, it is difficult to comprehend why he was unable to procure copies of his pay slips to demonstrate that he was on the respondent's payroll.
28. It is also noteworthy that despite insinuating that the pay slips were with the respondent, the claimant took no steps to compel the production of the documents for purposes of use as evidence. he did not apply for the respondent to furnish him with certified copies of the alleged pay slips.
29. Importantly, the claimant's attempts to justify his failure to produce the alleged pay slips to support his claim to employment cannot hold in law. Under section 20 of the *Employment Act*, although a pay slip is generated by the employer, it is issued to and in the ordinary course of things, kept by the employee. As a matter of law, the employer has a statutory obligation to issue the employee with this document. At no time did the claimant, either through his pleadings or witness statement or evidence in chief, suggest that the respondent had contrary to this express statutory edict, withheld these documents. This attempt was only made belatedly during his cross examination. Therefore, the assertion that the claimant was prevented from producing the alleged pay slips because they were kept by the respondent is unconvincing.
30. Further, the respondent produced pay slips for three of its employees (Thomas Muchiri, Samson Mwaura and Wilfred Kangethe) to demonstrate that contrary to the claimant's evidence, its employees are issued with itemized pay slips. These documents indicate that the three employees had pay slips showing their gross pay, overtime pay, house allowance and contributions to the National Social Security Fund. It is noteworthy that the claimant did not challenge the authenticity of this evidence.
31. The respondent's witness also produced an expenses ledger for the respondent dated November 29, 2019. The document shows that the respondent's expenses for the period under consideration (November 2019) covered wages for three persons namely, Thomas Muchiri, Samson Mwaura and Wilfred Kangethe, telephone expenses and motor vehicle claims among others. The claimant is indicated in the document as having a claim of Kshs 87,140.00. However, it is not indicated what this claim related to especially given the claimant's assertion that his monthly salary was Kshs 100,000.00. What is clear from the document and contrary to the claimant's testimony on the issue is that the



claimant's name is isolated from the names of the other three persons in the instrument. It is not lumped together with the three individuals against whose names the word 'wages' appears.

32. In cross examination, the claimant was quite ambivalent about the quantum of his alleged salary. Initially, he asserted that his monthly salary was Kshs 100,000.00. However, when asked why the expenses ledger for November 2019 bore a figure of Kshs 87,140.00 against his name if indeed his salary was Kshs 100,000.00, the claimant stated that in 2019, his salary was stepped down to Kshs 87,000.00. Yet, he had not alluded to this fact either in his statement of claim or witness statement or evidence in chief.
33. Further, when interrogated about remitting of statutory deductions from his alleged salary to the government, the claimant asserted that he used to pay the deductions. Although he claimed to have records of these remittances, he did not avail them to court. In effect, there is no proof that the claimant's emoluments from the respondent were subjected to the usual statutory deductions that apply to employee salary such as PAYE, National Social Security Fund (NSSF) and National Hospital Insurance Fund (NHIF). The absence of evidence that the claimant's emoluments were subjected to the above statutory deductions considered in the context of the fact that the respondent has demonstrated that its three employees were remitting some of these outgoings tends to corroborate the respondent's contention that the claimant was not serving as one of its employees.
34. The respondent also produced in evidence a schedule of refund of directors' expenses, this schedule shows that the claimant's expenses were factored under directors' expenses. This is in contrast to the evidence relating to salaries paid to the three individuals (Thomas Muchiri, Samson Mwaura and Wilfred Kangethe) who were considered as the respondent's employees.
35. On the whole, although the claimant alleges that he was serving as the executive director of the respondent and therefore as an employee of the respondent, the evidence on record suggests otherwise. If it is true that the claimant was serving as an employee of the respondent, why did he not tender in evidence his pay slips for the duration that he served as such employee? Why did he not provide evidence of the statutory deductions that his salary was subjected to such as PAYE, NSSF and NHIF?
36. In rejecting a claim to employment status by an executive director, the Court of Appeal in *Rift Valley Water Services Board & 3 others v Asanyo & 2 others* (supra) stated as follows:-

“In *McMillan v Guest* [1942] AC p.561, it was held that a company director is an office-holder who is not, without more, an employee of the company. That is the position here. In the absence of a contract of service in terms of which a director is engaged as a full-time employee of a company, it cannot be presumed that such a director is an employee of the company.....

Apart from the letter dated December 18, 2012 by which the 1<sup>st</sup> respondent's term of service as a member of the 2<sup>nd</sup> respondent's board of directors was extended, we find nothing on record to suggest that the 1<sup>st</sup> respondent had a contract of service to constitute him an employee of the 2<sup>nd</sup> respondent. A “contract of service” is defined in section 2 of the *Employment Act*, Revised 2021 (2007) as “an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time ....” Neither can it be said that the 2<sup>nd</sup> respondent's letter of December 18, 2012 aforesaid constituted “a contract of service to employ” the 1<sup>st</sup> respondent.”

### **Determination**

37. On the basis of the material before me, I am unable to reach the conclusion that the claimant was, over and above his role as director of the respondent (executive or otherwise), also engaged as an employee



of the respondent. This fact can only be established by evidence. No evidence was placed before me to demonstrate that the claimant was receiving and or subjected to the treatment, benefits and liabilities of an employee within the meaning of the law on employment.

38. As the respondent posits, the burden to establish this fact rested with the claimant. He did not discharge this burden. Consequently, I must reach the inevitable conclusion that the claimant has failed to prove his employment status with the respondent. The claim must therefore fail as it hereby does.

39. Costs of the action are granted to the respondent.

**DATED, SIGNED AND DELIVERED ON THE 8<sup>TH</sup> DAY OF JUNE, 2023**

**B. O. M. MANANI**

**JUDGE**

**In the presence of:**

..... for the Claimant

.....for the Respondent

**ORDER**

In light of the directions issued on 12<sup>th</sup> July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**B. O. M MANANI**

