



**Periasamy & another v Shri Gayatri Borewell (K) Limited (Cause E003 of 2022) [2023] KEELRC 1827 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1827 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS  
CAUSE E003 OF 2022  
B ONGAYA, J  
JULY 28, 2023**

**BETWEEN**

**SAMINATHAN PERIASAMY ..... 1<sup>ST</sup> CLAIMANT**

**MURUGESAN PERIASAMY ..... 2<sup>ND</sup> CLAIMANT**

**AND**

**SHRI GAYATRI BOREWELL (K) LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimants filed the statement of claim on 24.02.2022 through Nduati & Company Advocates. The claimants prayed for judgment against the respondent for:
  - a. A declaration that there was a contract of service entered into by the claimants and the respondent
  - b. A declaration that the purported resignation of the 1<sup>st</sup> claimant was obtained by duress
  - c. A declaration that the termination of the claimants' employment and dismissal was unfair
  - d. A declaration that the claimants are entitled to pro-rate annual leave for the years 2015 and 2016
  - e. That judgments be entered against the respondent for the sum of Kshs 10,230,000.00, with interest at court rates from the date of filing of this suit.
  - f. An order directing and compelling the respondent to issue a certificates of service to the claimants in accordance with section 51 of the act.
  - g. The costs of this suit be awarded to the claimants with interest thereon at court rates from the date of filing of the claim



- h. Any other relief as the court would deem just and expedient to grant
2. The response to the statement of claim was filed on 14.09.2022 through Kimathi Wanjohi Muli Advocates. The respondent prayed that the suit be dismissed with costs to the respondent.
  3. The parties are not in dispute that the respondent employed the claimants although a contract for employment was not produced in this regard.
  4. The claimants state that the respondent is a limited liability company registered under the Companies' Act, 2015 with the objective of providing borehole drilling, installation and maintenance services.
  5. The claimants state that the respondent was a concept of its promoters, including the claimants, and that during the pre-incorporation period the promoters orally agreed on the issues of financing, shareholding and post-incorporation management of the company. Specifically, the promoters agreed that all promoters will be shareholders to the proposed company, that each promoter would pay shares to enable the company to start operations and that with respect to the company's working capital, the shareholders will contribute capital to be utilized for acquisition of machinery, specifically drilling rigs, needed by the company to meet its objectives.
  6. The 1<sup>st</sup> claimant's case was that he was allocated 150,000 shares, being 15% of the ordinary shares, worth Kshs 10 per share, the equivalent of Kshs 1,500,000 which he paid the respondent over a period of time in late 2017.
  7. That sometime in December 2017 and January 2018 the shareholders agreed orally that there was need to source for financing. The shareholders agreed to raise the working capital of the company from themselves through contribution based on the value of a drilling rig set (consisting of two lorries platforms and a rig) valued at Kshs 36,000,000. Although the quasi shareholder agreement was not reduced into writing its salient terms were as follows:
    - a. The required drilling rig was to be identified and the value established.
    - b. Each shareholder was to contribute a percentage based on the purchase price for the drilling rig.
    - c. The percentage to be contributed by individual shareholders was based on the percentage of share ownership in the company.
    - d. That distribution of profits was to be based on the individual shareholder's contribution towards the purchase of the rigs.
    - e. The shareholders were to meet every three months, once operations had started, during which meeting the company officials were to table the company account statements, declare revenue and profits. The profits were then to be shared on a percentage basis.
  8. In January, 2018 the terms of the quasi-shareholder's agreement dealing with capital contribution, was performed in full by all members. With respect to the 1<sup>st</sup> claimant his capital contribution was pegged on his 15% shareholding, this, based on the value of the drilling rig, translated to approximately Kshs 5,400,000. It was further agreed, due to his financial limitation, that the 1<sup>st</sup> claimant's capital contribution into the company's working capital pool in would take two forms:
    - a. The 1<sup>st</sup> claimant was to contribute to the working capital of the company by, in the first instant, by cash injection into the company.



- b. The balance was fulfilled by the 1<sup>st</sup> claimant surrendering his salary and that of the 2<sup>nd</sup> claimant, who is the brother to the 1<sup>st</sup> claimant of Kshs. 165,000 per month to the company translating to Kshs. 330,000 capital contribution to the company.
9. It is the claimants' case that based on the terms of the quasi-shareholder's agreement the officials of the company, who were also the majority shareholders, engaged the claimants as employees of the company both as grounds managers cum machine operators.
10. As of February 2018 the 1<sup>st</sup> claimant in fulfilment of his obligation with respect to capital contribution, injected over Kshs. 5,980,000 into the company.
11. The quasi shareholder's agreement was further performed sometime mid 2018 when the company acquired two drilling rig sets and the claimants started performing task as employees of the company.
12. That sometime in 2019 the shareholders through an oral agreement, varied the profit sharing term of the quasi shareholders' agreement through a mutual decision to reinvest the profits of the company into the company which funds were to be used to acquire more drilling rigs. They further agreed that the claimants should continue to surrender their salaries which was to be ploughed back into the company's working capital.
13. The claimants state that they faithfully performed their obligations under their employment agreement surrendering their monthly wages between 01.12.2017 to 30.06. 2020 and received no dividend for their contribution. As of 30.06.2020 the total amount surrendered was Kshs. 9,900,000.
14. That on 30.06.2021 the directors of the company summarily dismissed the 2<sup>nd</sup> claimant's employment without any reasons for termination, and subsequently on 07.09.2021 the respondent summarily dismissed the 1<sup>st</sup> claimant employment and coerced him to sign a letter of resignation which was drafted by the official of the company.
15. The respondents' defence was that the claimants were employees of the respondent until 07.09.2021 when they voluntarily resigned from employment by offering resignation letters together with a discharge agreement discharging the respondent from any claim arising from employment.
16. It is the respondent's case that after the claimants' resignations on 07.09.2021 the respondent conducted an audit which revealed that the 1<sup>st</sup> claimant had misappropriated its funds in the sum of Kshs. 12,000,000. The claimant failed to account for the said funds prompting the respondent to instruct its advocate on record to demand the amount but instead of paying the said amount, the 1<sup>st</sup> claimant instructed his advocate to respond by threatening to report the respondent to the police and Kenya Revenue Authority.
17. The respondent's director stated that on 20.12.2021 the 1<sup>st</sup> claimant threatened to kill him and one of the shareholders of the respondent by saying that
- “I will kill you both and run away to India” which threat was reported to Machakos police station and investigations were underway.
18. That in a bid not to pay the respondent the amount misappropriated in the sum of Kshs. 12,000,000 the 1<sup>st</sup> claimant on 24.01.2022 instructed his advocate to counter-demand from the respondents for the sum of Kshs. 14,190,000/= allegedly owed to the claimants by the respondent on account of unfair termination of employment and illegal and unprocedural removal of the 1<sup>st</sup> claimant from the register of members of the respondent and denial of statutory rights.



19. It is the respondents' case that the 1<sup>st</sup> claimant resigned voluntarily and discharged the respondent from any claim arising from employment and proceeded to transfer all his shares to the incoming director and further requested the directors of the respondent to remove his name from the registers of members. Therefore, his claim for a month's salary in lieu of notice, unpaid accrued salaries, interest, unpaid leave days, overtime and public holidays worked as alleged are afterthought aimed at distracting the respondent from claiming from him a sum of Kshs. 12,000,000 he misappropriated during his tenure as its director and now counterclaimed together with interest and costs.
20. The parties opted not to call witnesses and consented that the suit be determined on the basis of the pleadings and documents on record. The parties filed their respective submissions. The Court has considered the parties' respective cases and makes findings as follows.
21. To answer the 1<sup>st</sup> issue, the Court returns that by their own pleadings the parties admit that they were in contracts of employment.
22. To answer the 2<sup>nd</sup> issue the Court returns that the 1<sup>st</sup> claimant resigned by letter dated 07.09.2021. The resignation was with immediate effect without claims of breach of contract, wrongful or unfair termination, redundancy, compensation for loss of office or any other claims, demands arising from resignation or otherwise and that no agreement was outstanding under which the company has or could have any obligation to them. The resignation letter stated thus, "I confirm that I have collected all my dues including service for year worked and pending leaves upon the year ending. I hereby agree that I do not have any dues from 1<sup>st</sup> January 2018, 2019, 2020 and 5<sup>th</sup> September 2021 from the company for the work done. I will not claim anything from the Shri Gayatri Borewell K Ltd." In view of that letter and absence of oral testimonies to show the same was signed under duress or force as urged and submitted for the claimants, the 1<sup>st</sup> claimant must be bound by the terms of that letter of resignation. His claims must collapse on a balance of probabilities. However, each is entitled to a certificate of service per section 51 of the *Employment Act*, 2007. As submitted for the respondent there is no material evidence to show that the parties agreed that each claimant would earn Kshs. 165,000.00. The terms of the contracts of service appear to be at large and the Court lacks a basis to grant the claims and prayers by either of the claimants except the statutory certificate of service.
23. To answer the 3<sup>rd</sup> issue the Court returns that the counterclaim must as well collapse. There is no evidence to show that the Kshs. 12, 000, 000.00 was deposited into the 1<sup>st</sup> claimant's account by the respondent's clients as alleged and then the 1<sup>st</sup> claimant misappropriated that cash. The claim for special damages needed strict proof but which was not done.

In conclusion judgment is entered for the parties with orders:

- a. The respondent to deliver claimants' certificates of service by 01.09.2023.
- b. All other claims and prayers for the claimants are declined.
- c. The counterclaim is dismissed.
- d. Each party to bear own costs of the proceedings.

**SIGNED, DATED AND DELIVERED IN COURT AT MACHAKOS THIS FRIDAY 28<sup>TH</sup> JULY, 2023.**

**BYRAM ONGAYA,  
PRINCIPAL JUDGE**

