



Njiriri v Zizi Investments Limited (Employment and Labour Relations Cause E404 of 2021) [2023] KEELRC 2784 (KLR) (31 October 2023) (Ruling)

Neutral citation: [2023] KEELRC 2784 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E404 OF 2021
MA ONYANGO, J
OCTOBER 31, 2023**

BETWEEN

FRANCIS KIGERA NJIRIRI CLAIMANT

AND

ZIZI INVESTMENTS LIMITED RESPONDENT

RULING

1. The respondent herein filed a Notice of Motion dated July 20, 2022 seeking the following orders That:
 - i. The claimant/respondent's claim be struck out for lack of jurisdiction and or otherwise being an abuse of the court process.
 - ii. The costs of the application be borne by the claimant/respondent.
2. The grounds upon which the application is made are contained at the foot of the application. Briefly, they are that the respondent employed the claimant on July 5, 2015 as an Accountant and he was entitled to a monthly salary of Kshs. 40,000, that the claimant was thereafter separately contracted by one Zulekha Samji for bookkeeping and accounting services, earning fees based on fee notes raised by the claimant from time to time at Kshs 120,000 per service, that the respondent is a separate entity and person from Zulekha Samji and that the applicant was paid separately by both the Applicant and Zulekha Samji, that the said Zulekha Samji is not a party to this suit and any claim against her cannot suffice within this suit, that Kshs 120,000 of the claimant's total claim arose out of a contract for service via fee notes and withholding tax and as such the claim does not fall under the ambit of an employment claim, that the claimant being an accountant earning Kshs 40,000 per month from the respondent an amount which is less than Kshs 80,000, the matter ought to have been filed in the Chief Magistrate's court and not this court, that if this court hears and determines this matter it would act contrary to the Chief Justice directives as issued on June 22, 2018 under Gazette Notice No 6024 and lastly, that the Claimant has in order to invoke the jurisdiction of this court combined the earnings from the



respondent and Zulekha Samji which constitute separate claims that ought to be filed in two separate courts.

3. In reply to the application the claimant filed a Replying Affidavit sworn on September 12, 2022 in which the claimant deposes that he was employed by the respondent as an accountant earning a consolidated salary of Ksh 40,000 and thereafter he was promoted through the ranks to the position of a chief accountant which saw his salary increased over the years from Kshs 40,000 to Kshs 160,000 per month. He avers that he entered into discussions with the respondent's director, one Rahim Samji and it was agreed that the claimant would be paid kshs 40,000 by the respondent and that any increment thereafter would be paid from Zulekha Samji's account which account belonged to the respondent Director's mother but that the said director held a power of attorney over the account. The claimant further averred that *vide* an email dated May 13, 2019, his salary was increased by Kshs 30,000 to Kshs 160,000 effective 1st July 2019 and that *vide* an email dated August 12, 2019, the director wrote to him informing him that there were conditions attached to the Ksh 30,000 increment. it was the claimant's contention that the bookkeeping work that the claimant did for Zulekha Samji was part of the claimant's work at the respondent's company and was never done separately as evidenced by the emails written by the director instructing the claimant on different actions to take regarding Zulekha's account.
4. On the issue of withholding tax as raised by the applicant, the claimant stated that the same did not have any effect on his case. That it is common knowledge that whenever someone raises a fee note, there will automatically be a withholding tax and that it is normal practice to declare all withholding tax certificates when filing personal returns. The claimant contended that by the time he left the company, his salary was Ksh 160,000. He urged the court to find that it has jurisdiction to determine this dispute.
5. In the case of the *Co-operative Merchant Bank Ltd. v George Fredrick Wekesa* (Civil Appeal No 54 of 1999) the Court of Appeal stated:

Striking out a pleading is a draconian act, which may only be resorted to, in plain cases... Whether or not a case is plain is a matter of fact... Since oral evidence would be necessary to disprove what either of the parties says, the appellant's defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent's action or which is otherwise an abuse of the process of the court.

6. It is evident from the documents on record, particularly the email dated January 7, 2019, that the respondent's director had control over the accounts of the said Zulekha Samji. In the email the director wrote-

Dear Sir,

Sorry your email is inaccurate.

1. I will pay a cash bonus of total Kshs 65,000 which is half month's salary to you. Payment terms are Kshs 35k by end of this month and Kshs 30k by end of February.
2. I want the books for all Zulekha and Zizu to be complete by January ready for audit by 1st February week
3.
4.



5.

Sincerely,

Rahim Samji

7. Based on the foregoing, it is my finding that the issue whether or not the claimant was working under the instructions of the Respondent's director on both the respondent's company and Zulekha Samji's account and whether the consolidated salary of Kshs 160,000 was agreed on with the approval of the respondent's Director is a matter of fact that can only be proved at the hearing after the parties hereto adduce evidence. The same can not therefore form the basis of striking out the suit on grounds of jurisdiction as it is this court that will determine those facts after hearing the parties.
8. In the circumstances I find that the application dated July 20, 2022 is without merit and the same is hereby dismissed with costs.

DATED, DELIVERED VIRTUALLY AND SIGNED AT ELDORET THIS 31ST DAY OF OCTOBER, 2023.

M. ONYANGO

JUDGE

