



**Lumumba v Prime Steel Mills Limited (Cause 480 of 2018)
[2023] KEELRC 2573 (KLR) (23 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2573 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 480 OF 2018
JK GAKERI, J
OCTOBER 23, 2023**

BETWEEN

VICTOR MUTENYO LUMUMBA CLAIMANT

AND

PRIME STEEL MILLS LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed this claim on 6th April, 2018 alleging that the Respondent had unlawfully and unfairly terminated his employment and refused to pay terminal dues.
2. The Claimant avers that he was employed by the Respondent as a loader on 17th December, 2012 at a monthly salary of Kshs.15,900/=.
3. It is the Claimant's case that sometime in December 2016, he learnt that the Respondent had not remitted NSSF dues from January 2014 to September 2016 and when he enquired on 23rd December, 2016 from one Mr. Peter, the Personnel Manager, the Manager informed him that he ought to have raised the issue earlier and stood dismissed.
4. The Claimant further avers that he did not proceed on leave nor paid in lieu and was not paid housing allowance.
5. The Claimant faults the dismissal on account that the Respondent had no reason to do so and did not comply with the law.
6. The Claimant prays for;
 - a. A declaration that termination of his employment by the Respondent was unlawful and unfair.
 - b. Order compelling the Respondent to pay the sum of Kshs.391,395.00 comprising;



- i. Pay in lieu of notice Kshs.15,900/=
 - ii. Unpaid/untaken leave Kshs.63,600/=
 - iii. Housing Allowance Kshs.114,480/=
 - iv. Service pay/gratuity Kshs.7,155/=
 - v. 12 months salary Kshs.190,800/=
- c. Interest on (b) above from date of filing suit till payment in full.
 - d. Costs of this suit plus interest thereon.

Respondent's case

7. In its response to the statement of claim dated 6th May, 2021, the Respondent avers that the Claimant was not its employee at any point and was unaware of his termination from employment or entitlement to compensation.
8. The Respondent prays for dismissal of the suit with costs.

Claimant's evidence

9. The Claimant testified that he was a casual employee working from 8 am to 5 pm and overtime 5 pm to 7 pm paid weekly and had no documentary evidence of his employment status.
10. It was his testimony that they used to sign in and sign out.
11. The witness testified that a company by the name Steel Makers Ltd was identified as his employer on the National Social Security Fund (NSSF) statement.
12. On cross-examination, the Claimant confirmed that according to the NSSF statement he had provided, his employer was Steel Makers Ltd not Prime Steel Ltd, the Respondent.
13. He was categorical that the only company he knew was Prime Steel Limited and it paid salaries through the bank but his bank statement had no name of the depositor of the alleged salary.
14. It was his testimony that he would come to the company's gate to secure work.
15. The Claimant confirmed that he had neither a document nor witness to affirm that he was an employee of the Respondent.

Respondent's evidence

16. RWI, Mr. Godfrey Oduor confirmed on cross-examination that all employees of the Respondent had written employment contracts and as the Human Resource Officer, he was the custodian of employee records.
17. The witness confirmed that he did not file any document because the Claimant was not an employee of the Respondent.
18. That the Respondent had an automated access and exit system and all employees had a number.
19. The witness confirmed that the NSSF statement on record did not relate to the Respondent.



20. On re-examination, the witness testified that while the employer indicated on the Claimant's NSSF statement was Steel Makers Ltd, the Respondent was Prime Steel Ltd and the two companies were different.

Claimant's submissions

21. As to whether there was evidence of an employer-employee relationship between the parties, counsel submitted that Respondent did not file work records or schedule of employees to disprove the Claimant's allegations and thus tendered no evidence as required by Section 10(6) and (7) of the *Employment Act*.
22. Counsel urged that in the absence of records from the Respondent, the court should believe the Claimant.
23. On the termination of employment, reliance was made on the provisions of Section 43 and 45(2) of the *Employment Act*, 2007 as were the sentiments of the court in *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR and *Pamela Nelima Lutta V Mumias Sugar Co.* (2017) eKLR to urge that the Respondent had not shown that it had a reason to terminate the Claimant's employment.
24. On the procedure adopted by the Respondent, counsel cited the provisions of Section 41 of the *Employment Act* to urge that the Respondent's action was unfair.
25. As regards the prayers sought, counsel submitted that since the termination of employment was unfair, the Claimant was entitled to all the reliefs sought.

Respondent's submissions

26. Counsel isolated four issues for determination touching on employment of the Claimant, termination, reliefs and costs.
27. As to whether the Claimant was an employee of the Respondent, counsel submitted that based on the Claimant's NSSF statement which indicated the date of employment as 1st October, 2014 and the employer was Steel Makers Ltd, the bank statement availed did not indicate the source of the deposits and no other document was provided, to support the alleged employment or a witness, no employment relationship had been established.
28. That the provisions of Section 10(6) and (7) of the *Employment Act* were only relevant where parties had an employment relationship and the Claimant had not filed and served a notice to produce.
29. On termination, counsel submitted that since the Claimant had not proved his employment with the Respondent, termination of employment could not arise as evidence showed that he worked for a different company.
30. Counsel relied on the provisions of Section 45(2) and 47(5) of the *Employment Act*, 2007 to urge that the Respondent had denied having employed the Claimant.
31. On the reliefs sought, counsel contended that the Claimant was not entitled to any of them as he was not an employee of the Respondent.

Findings and determination

32. The issues for determination are;
- i. Whether the Claimant was an employee of the Respondent.



Depending on the answer to (i) above

- ii. Whether termination of the Claimant's employment was unfair.
 - iii. Whether the Claimant is entitled to the reliefs sought.
33. As to whether there was an employment relationship between the parties, counsels have adopted contrasting positions. The Claimant's counsel maintained that the Claimant was the Respondent's employee, a submissions the Respondent's counsel vehemently opposes.
 34. It is common ground that the Respondent's pleadings, evidence and submissions are consistent that the Claimant was not its employee from 2012 to 2016 or at any other time.
 35. Other than the oral testimony, the Claimant provided a copy of his NSSF statement for the period 1st October, 2014 to 31st January, 2017, dated 9th October, 2017.
 36. The statement shows that the Claimant was registered on 16th October, 2014, employed on 1st October, 2014 and by a company under the name and style Steel Makers Ltd and contributions stopped in January 2017 yet the Claimant testified that he was dismissed on 23rd December, 2016 for enquiring about NSSF deductions.
 37. In addition, contributions had been remitted from date of employment until January 2017.
 38. The statement contradicts the Claimant's testimony on employment date, remission of NSSF contributions and the employer's name.
 39. Similarly, the Claimant availed a one page Family Bank statement, Kitengela Branch for 1st December, 2016 to 31st December, 2016.
 40. The statement shows four deposits of between Kshs.1,157.00 and Kshs.1,999.00.
 41. However, the bank statement has no indication of the source of the deposits.
 42. For unexplained reason, the Claimant did not include a bank statement for any other period notwithstanding his testimony that originally the Respondent was paying through the bank.
 43. In a nutshell, neither of the two documents provided by the Claimant as evidence establish a nexus between him and the Respondent in any respect.
 44. It need not be gainsaid that for an employment relationship to exist, there must be a contract of service between the parties and under the provisions of Section 2 of the *Employment Act*, 2007, the contract of service may be oral or in writing, expressed or implied.
 45. There must be an agreement between the parties under which one party agrees to employ while the other agrees to serve as an employee on agreed terms and conditions.
 46. Section 2 of the *Employment Act*, 2007 defines an employee as "a person employed for wages or a salary and includes an apprentice and indentured learner."
 47. Although the Claimant demonstrated that his bank account at Family Bank received monies four times during the month of December 2016, he failed to establish that the amounts constituted his wage and was paid by the Respondent.
 48. Did the Claimant establish that he was an employee of the Respondent on a balance of probabilities?
 49. Section 107 of the *Evidence Act* provides;



1. Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 2. Where a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.
50. Section 108 lays it bare that;
- The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
51. Finally, Section 109 provides that;
- The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that shall lie on any particular person.
52. In the instant case, the Claimant bore the burden of proof. It was incumbent upon the Claimant to prove the fact that he was an employee of the Respondent before establishing the alleged termination of employment.
53. Based on the evidence adduced by the Claimant, it is the finding of this court that the Claimant has on a preponderance of probabilities failed to demonstrate that he was in fact an employee of the Respondent in any capacity.
54. The documentary evidence availed by the Claimant reveal that he was an employee of a company named Steel Makers Ltd and did not allege that the Respondent was also Steel Makers Ltd or that were owned by the same person(s) or he was transferred to Steel Makers Ltd.
55. RWI testified that while Prime Steel Ltd was located at Kitengela, Steel Makers Ltd was based at Athi River.
56. It is trite law that a company is a legal entity, a body corporate distinct and separate from its directors and managers with rights and subject to obligations. (See *Salomon V Salomon & Co. Ltd* 1897 A.C. 22.)
57. It cannot be emphasized that the two companies are different legal entities.
58. Contrary to the Claimant's counsel submissions that the Respondent did not file attendance records and list of employees among other documents, the burden of establishing that there was an employment relationship between the parties lay on the Claimant.
59. Other than the uncorroborated oral testimony of the Claimant, no scintilla of evidence implicated the Respondent to warrant production of attendance records or its full complement of employees since 2012.
60. More significantly, however, the Claimant's counsel did not file a notice to produce.
61. The court is in agreement with the sentiments of the court in *Peter Ngunjiri Kariuki V Board of Management Magomano Secondary School* (2022) eKLR as follows;

“It is not enough for a party to make an allegation and expect the court to find in its favour, without substantiating such an allegation and supporting the same with oral and/or documentary evidence. This is moreso where an allegation is expected to be supported by documentary evidence to establish payment of salary or underpayment thereof.”



62. In the court's view, the oral testimony adduced by the Claimant falls below the threshold prescribed by law.
63. In the absence of an employer-employee relationship between the Claimant and the Respondent, this court lacks jurisdiction to make one more step as "jurisdiction is everything."
64. Flowing from the foregoing, it is clear that this suit is for dismissal and it is accordingly dismissed with no orders as to costs.
65. As the remaining issues were dependent on the outcome of the first issue, they are no longer amenable to determination.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 23RD DAY OF OCTOBER 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

