



REPUBLIC OF KENYA



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Okware v Nyanza Initiative for Girls Education & Empowerment (Cause E046 of 2022) [2023] KEELRC 2443 (KLR) (12 October 2023) (Judgment)

Neutral citation: [2023] KEELRC 2443 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E046 OF 2022
CN BAARI, J
OCTOBER 12, 2023

BETWEEN

JAMES EMUDO OKWARE CLAIMANT

AND

**NYANZA INITIATIVE FOR GIRLS EDUCATION &
EMPOWERMENT RESPONDENT**

JUDGMENT

Introduction

1. Before Court is the Claimant's a Memorandum of Claim dated 28th October, 2022, and filed on 8th November, 2022. The Claimant seeks the following reliefs:
 - i. A declaration that he was no longer employed on a fixed term basis, but was a permanent employee by dint of working without a contract from the year 2021 to the time of unlawful termination.
 - ii. A declaration that his termination was unfair and unlawful.
 - iii. One month salary compensation in lieu of notice for both capacities served as Project Accountant and Compliance Officer both of Kshs.88,200 amounting to Kshs.176,400.00
 - iv. 12 months salary compensation for unlawful termination for both positions at Kshs.2,116,000.00
 - v. Salary for the period April 2019 – December, 2019 as a Compliance Officer assessed at Kshs. (42000 by 9) = 378,000.00
 - vi. Full salary as a Compliance Officer in the year 2020 from January to December. (Kshs.84,000 by 12 months)=Kshs.1,008,000.00



- vii. Salary for January, 2021 to March, 2021 as a Compliance Officer being Kshs.264,600.00
 - viii. Half salary as Compliance Officer from April – December, 2021 at Kshs. 396,900.00
 - ix. Salary as a Project Accountant from the month of April 2021, - December, 2021 at Kshs. 793,800.00
 - x. Half salary as a Compliance Officer from April – August, 2022 of Kshs.(88,200 by 5)=Kshs.441,000.00
 - xi. Salary as a Compliance Officer from April – August 2022 of Kshs.(88200 by 5)=Kshs.441,000.00
 - xii. Salary as a Project Accountant in the period January 2022 – August 2022 of Kshs.(88200 by 8 months)=705,600.00
 - xiii. Certificate of Service.
2. The Respondent entered an appearance on 22nd November, 2022 and filed a statement of defence on 15th December, 2022, wholly denying the Claimant’s claim.
 3. The Claimant’s case was heard on 27th March, 2023, followed by the defence hearing on 21st June, 2023. The Claimant testified in support of his case, adopted his witness statement, and produced a list and bundle of documents filed as exhibits in his case.
 4. The Respondent presented Ms. Evelyne Kawango Agot, to testify in support of its case. The witness adopted her witness statement and produced documents filed in the matter in support of the Respondent’s case.
 5. Both parties filed submissions in the matter.

The Claimant’s Case

6. The Claimant states that at all material times to this claim, he was employed by the Respondent on fixed term contracts since the year 2013, where he served as a Project Accountant until the year 2017.
7. It is his case that his salary during the period was reviewed from time to time from Kshs.35,000 in 2013 to Kshs.50,000 in 2015, Kshs.65,000 in 2016 and Kshs.80,000 in 2017.
8. The Claimant states that he was moved to the position of Compliance Officer, while retaining the same salary of Kshs.80,000 until his unlawful termination. He further states he later served in two capacities where he signed two contracts, one in the capacity of a Project Account and the other concurrent contract as a Compliance Officer in the year 2020.
9. It is the Claimant’s case that he held the two positions until 2022 when he was relieved of his duties unlawfully. He states that his salary was Kshs.84,000 in each of the two capacities he served the organization respectively.
10. The Claimant further avers that the two distinct contracts were accorded to him only to be paid when it was expedient to the Respondent as she chose to pay him any of the two capacities interchangeably without adhering to the contracts, yet he had performed his duties per the obligations without any disciplinary issues whatsoever.
11. The Claimant states that in the subsequent years, 2021 and 2022, he was not given any contract but proceeded to work for the Respondent in the same positions as a Project Accountant and a Compliance



- Officer, wherein, he received salary which had then been reviewed to Kshs.88,200.00 for each of the two positions held.
12. The Claimant avers that on the 7th July, 2022, the Respondent served him with a termination notice without giving him cogent reasons and or adhering to the well laid down statutory threshold in the purported termination in utter disregard to the length of time and his dedication to duty.
 13. The Claimant states that the termination was unlawful and contrary to the provisions of Articles 41, 50(2)(a), (j), (k) of *the Constitution* of Kenya, 2010 as read with Section 41 and 43 of the *Employment Act*, 2007.
 14. The Claimant avers that even as he performed his duties as a Compliance Officer, the Respondent unlawfully withheld his salary in the period of April 2019 – December 2019. It is his case that he only received half salary of Kshs.42,000 hence, the Respondent owes him a salary of Kshs (42,000 by 9 months) =Kshs.378,000 for that period.
 15. The Claimant states that the Respondent further failed to pay his full salary as a Compliance Officer in the year 2020 from January to December 2020, despite having signed a valid contract for that period.
 16. The Claimant further states that the Respondent failed to pay his full salary from January 2021 to March 2021, when he served as a Compliance Officer being a total of Kshs.(88200 by 3 months) = Kshs.264,600.00 and which has not been remitted to date.
 17. The Claimant avers that the Respondent also failed to pay his half salary as Compliance Officer from April – December 2021 thus his salary of Kshs.(44100 by 9) =396,900.00 is still owing to date.
 18. It is the claimant's case that in the year 2021, the Respondent failed to pay him salary as a Project Accountant from the month of April 2021 – December, 2021, hence the Respondent owes him a salary of Kshs.(88200 by 9)=793800.00 on this account.
 19. The Claimant further states that the Respondent did not pay his salary as a Compliance Officer from April – August 2022, hence the claim for Kshs.(88200 by 5) =Kshs.441 000.00 which is owing to date.
 20. The Claimant further states that the Respondent failed to pay his salary for the position of Project Accountant in the period January, 2022 – August 2022, in the sum of Kshs.(88200 by 8 months)=705,600.00
 21. The Claimant states that as a result of the foregoing action and/or inaction of the Respondent, he has suffered immense emotional, and mental trauma which he is yet to recover from.
 22. On cross-examination, the Claimant told the Court that the position of Compliance officer was superior to that of Project Accountant. He further told Court that he served the Respondent in the period April, 2019 to December, 2019 in the position of compliance officer without a contract.
 23. It was the Claimant's testimony on cross-examination that his contracts were fixed term and that he had no contract for positions of driver and Project Accountant. He further confirmed that he did not hold the position of Acting Project Assistant beyond March, 2021.
 24. It is the Claimant's further confirmation that he was employed as Project Accountant and project officer, but that the payroll only shows that he was project officer. He further stated that the payroll is exhaustive on who employees of the Respondent were and their salaries.
 25. The Claimant told the Court on cross-examination that no documents/evidence showed that he held the position of Project Accountant.



26. The Claimant confirmed that the Respondent depended on donor funding but also had projects that did not depend on donors. He further testified that he was in a meeting where communication was made to the Respondent's staff informing them of payment of reduced salaries owing to shortage of funding. He further confirmed that he was a member of the Respondent's management team.
27. The Claimant told this Court that he was given a one month notice of termination, and that the termination letter provided reasons for the termination.
28. He confirmed that the Respondent's businesses became difficult to run without funding, and that a timber business the Respondent ran had equally stalled.
29. The Claimant prays that he be awarded the reliefs in his memorandum of claim.

The Respondent's Case.

30. The Respondent denies being a Non-Government Organization, but avers that it is duly registered under the applicable law. It is the Respondent's further case that the claim as filed is incompetent and a non-starter and seeks that it be struck out and/or dismissed.
31. The Respondent states that the Claimant joined their organization sometime in October, 2013, in the position of Project Accountant.
32. It is the Respondent's further case that on 1/10/2018, the Claimant was employed as a Compliance Officer for a period of six (6) months on a salary of Kshs.84,000.00. The Respondent further states that on 1/1/2020, the Claimant was employed as a Project Accountant again on a fixed term contract of one (1) year at an agreed salary of Kshs.84,000.00 per month.
33. It is the Respondent's case that owing to financial challenges facing the organization, the Claimant was appointed as the Acting Project Assistant for a period of three (3) months effective January, 2021, which position he held to the end of funding on 31st March, 2021 to support closeout activities after some staff separated from the Organization.
34. The Respondent states that a meeting was held on the 2/8/2019, where it was agreed that salaries of senior employees who sat in the management committee would be reduced due to shortage of funding. The Respondent further states that the Claimant was present in the meeting and that he fully endorsed the proposal and is thus estopped from denying this fact having readily accepted to receive reduced salary.
35. It is the Respondent case that on 8th April, 2021, the management committee held a meeting that resolved to reduce senior staff salaries to enable the Organization cope with the financial crunch it was facing following the withdrawal of donor funding that was paying the Claimant's salary. It states that the Claimant was present at the meeting hence his claim that he was being paid half salary for the period of April 2021 to July 2022 is false.
36. The Respondent states that while in employment, the Claimant never held the two positions of Project Accountant and Compliance Officer at the same time. It further states that the duties of the Compliance Officer are audit in nature and cover financial audit of the work done by Programme Accountants, hence the two positions are mutually exclusive as one cannot supervise/oversee their own work. It is the Respondent's case that the Claimant's claim that he held the two positions at the same time is thus false.
37. The Respondent states that the assertion that it withheld the Claimant's salary during the period of April, 2019 – December, 2019 is thus false.



38. It is the Respondent's case that during the year of 2020, the Claimant was never employed as a Compliance Officer, but as a Project Accountant.
39. The Respondent in response to the Claimant's claim for salary in lieu of notice, states that there is evidence that he was given one month notice as stipulated in his contract.
40. The Respondent states that the Claimant's termination was lawful and his claim for twelve (12) month as compensation has no legal basis.
41. The Respondent states that between the period April, 2021- December, 2021, the Claimant was employed as a Compliance Officer, and was fully paid despite missing about fifty (50) days of work without permission.
42. The Respondent states that the employment of the Claimant was terminated on the 7/7/2022, and which termination was to take effect on the 7/8/2022.
43. On cross-examination RW1 told the court that the Claimant attended the management meeting that resolved to reduce staff salaries to half due to shortage of funding, and that he in fact signed the minutes of that meeting.
44. It was RW1's evidence that the Claimant was reengaged on half salary after the program he was attached to ended. She further confirmed that the Claimant was terminated owing to reduced funding and that she did not know that she was required to serve notice on the labour officer.
45. The Respondent prays that the claim be dismissed with costs.

The Claimant's Submissions

46. It is submitted for the Claimant that his dismissal was clearly unlawful and unwarranted as it offends the well laid down procedures.
47. It is submitted that a reasonable expectation was created to the effect that the Claimant was on an open ended contract with similar terms. Reliance was had to the case of *South African Clothing and Textile Worker's Union and Another v CADEMA Industries (Pty) Ltd* (C 277/05) [20081 ZALC 5, to buttress this position.
48. The Claimant also sought to rely in the case of [*Sandra M. Waswa v Article 19: Global Campaign for Free Expression*](#) [2022] eKLR, where the Court held that the Claimant had worked without a contract for 9 months upon the lapse of his fixed term contract that he was therefore on a month on month open ended contract, and was entitled to be subjected to the provisions of Section 41 and 43 of the [*Employment Act*](#) which provide for fair hearing and valid reason for termination of contract.
49. It is submitted that the Claimant worked for over a year without any contract, hence the only reasonable inference that can be drawn is that he was on a month on month open ended contract and was entitled to be subjected to the provisions of Section 41 and 43 of the [*Employment Act*](#) which provide for fair hearing and valid reason for termination of contract.
50. The Claimant further submits that having proved that he was unfairly terminated, he is amenable to be compensated as per his Memorandum of Claim.
51. Through his further submissions, the Claimant submits that the term 'Employer' under Section 2 of [*Employment Act*](#), and other labour legislations of 2007/2008, is broadly worded to ensure employees are not denied access to industrial justice, through limited characterization of the term, and through complex legal and business forms adopted by their Employers.



52. It is further submitted that the legal structure adopted by the Respondent should not be a hindrance for the Claimant's quest for justice. Reliance was had to the case of *Issa Shekue Shali vs Buscar Limited* (2018) eKLR to support this position.

The Respondent's Submissions.

53. The Respondent submits that whereas an organization registered under the *NGO Act* or *PBO Act* has a corporate seal and can be sued or sue in its own name, an organization registered under the *Societies Act* can only be sued through its registered official. The Respondent further submits that for reason of registration, this suit is wholly incompetent and a nonstarter. The Respondent sought to rely in the case of *Islamia Madrassa Society v Zafar Niaz & 8 others* [2021] eKLR, where the Learned Judge cited with approval the case of *Trustees Kenya Redeemed Church & Anor vs Samuel M'Obiya & 5 others* [2011] eKLR wherein it was held thus:

“It is trite law that a society under the *Societies Act* is not a legal person with capacity to sue or be sued. A society can only sue or be sued through its due officers orders. It has not been pleaded that the 2nd defendant has been sued in the capacity of an official of Kenya Redeemed Church nor has it been pleaded that he has been sued in his personal capacity.”

54. It is submitted that the Respondent is registered under the *Societies Act*, and that this regime of the law is totally exclusive and independent of the *NGO Act*, and they cannot be deemed to be dependent of each other.
55. The Respondent further submits that the capacity to sue and/or be sued goes to the root of the case and cannot be wished away as a legal technicality. It submits that capacity goes to the issue of locus standi which is a substantive issue of law. The Respondent had reliance in the case of *Republic v Registrar of Societies Ex-parte Narok Muslim Welfare Association* [2017] eKLR where it was opined as follows:

“It is my considered view that the amendment proposed by the Ex-parte Applicant cannot cure the capacity defect on the part of the current Applicant. Whereas this court is loathe to exalt technicality over substance, an issue of legal capacity to bring or defend a suit is not a mere technicality. It goes to the root of the entire pleading or cause. Thus, the invocation of Article 159 of *the Constitution* cannot aid the Applicant in this case.”

56. It is submitted for the Respondent that based on the plethora of case laws cited, the Claimant's case is without a doubt fatally defective having demonstrated that the issue of locus is at the core of these proceedings.
57. The Respondent submits that the termination notice issued to the Claimant falls within the provisions of Section 35 (l) (c) of the *Employment Act*, hence notice was proper and the question as to whether termination was unfair does not arise as it was sufficient within the relevant provisions of the law and therefore valid.
58. It is the Respondent's submission that parties are bound by their pleadings and that at no point in time did the Claimant plead that his termination was unlawful or illegal on account of redundancy. It submits that it is mischievous and wrong for the Claimant at this juncture to submit and plead that his termination was on a count of redundancy.
59. It is the Respondent's submission that at no point was the Claimant promised or given indication that his contract would be renewed for the simple reason, and as clearly admitted by the Claimant and



asserted by the Respondents witness that the Respondent substantially depended on donor funding to run its operations.

60. The Respondent finally submits that the totality of evidence when weighed against the relevant applicable law, clearly shows that the Claimant has not discharged the evidentially burden of proof based on the issues pleaded and raised.
61. The Respondent plead that the Claimant's case be dismissed with costs.

Analysis and Determination

62. I have considered the pleadings herein, the witnesses' oral testimonies and the rival submissions. The issues for determination are:
 - i. Whether the Claimant's claim is incompetent and for striking out
 - ii. Whether the Claimant was unfairly terminated
 - iii. Whether the Claimant is entitled to the remedies sought.

Whether the Claimant's claim is incompetent and for striking out

63. The Claimant lodged this claim on 8th November, 2022, against Nyanza Initiative for Girls Education & Empowerment, which he describes at paragraph 2 of his claim as a Non-Governmental Organization registered in the Republic of Kenya.
64. The Respondent in its statement of defence, denies the description given to it under the claim, of being a Non-Governmental Organization, and instead, states that it is dully registered within the applicable law, which the evidence produced, shows that it is registered under the *Societies Act*, Cap. 108 of the Laws of Kenya.
65. The Respondent's assertion is that the suit herein is incompetent and fatally defective and for striking out, on the premise that the Respondent by dint of registration does not have capacity to be sued.
66. The list and bundle of documents presented before court in support of the Claimant's case, all without exception, bear the letter head of the Respondent. The issue is whether there is a known Respondent in the suit capable of sustaining the Claimant's claim.
67. Capacity to sue goes to the question of locus and cannot therefore be disregarded as a mere question of technicality. The decision in the case of *Islamia Madrassa Society v Zafar Niaz & 8 others* [2021] eKLR where the Learned Judge cited with approval the case of *Trustees Kenya Redeemed Church & Anor vs Samuel M'Obiya & 5 others* [2011] eKLR, aptly explains the position on whether or not an entity registered under the *Societies Act* has capacity to sue in the following words: -

“It is trite law that a society under the *Societies Act* is not a legal person with capacity to sue or be sued. A society can only sue or be sued through its due officers holders. It has not been pleaded that the 2nd defendant has been sued in the capacity of an official of Kenya Redeemed Church nor has it been pleaded that he has been sued in his personal capacity.”



68. Further, in HCA No. 128 of 2013 *Peter Taracha & Anor -Vs Holiness Church & Anor* [2016] eKLR, Justice Githua held as thus: -

“I have carefully gone through the entire *Societies Act* Chapter 108 of the Laws of Kenya and I have not come across a single provision that provides for the institution of suits by or against entities registered under the Act.”

69. Again, Bosire J in *John Ottenyo Amwayi & Others v. Rev. George Abura & Others* HCCC No. 6339 of 1990 stated as follows: -

“The *Societies Act* does not contain provisions with regard to the presentation and prosecution of suits by or against unincorporated societies. It would appear to me that the legislature did not intend that suits be brought by or against those societies in their own names

70. The Claimant admitted in his oral testimony that indeed the Respondent is a Society having been registered under the *Societies Act*. Further, the distinction that the Claimant has sought to provide through his written submissions, are distinguished from the scenario herein, as the Claimant has not sought to amend his claim so as to sue the officials of the Respondent.

71. In the premise, I find and hold that the Respondent lacks capacity to be sued, and which renders the Claimant’s claim incompetent and the proceedings from it a nullity in law.

72. The Memorandum of Claim filed on 8th November, 2022 is struck out with costs.

73. The others issues herein, fall by the way side.

74. Judgment of the Court.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 12TH DAY OF OCTOBER, 2023.

C. N. BAARI

JUDGE

Appearance:

Mr. Otieno present for the Claimant

Mr. Odongo present for the Respondent

