



**Kololi v CMC Motors Group Ltd (Cause E003 of 2022)
[2023] KEELRC 3183 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3183 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KITALE
CAUSE E003 OF 2022
MA ONYANGO, J
NOVEMBER 30, 2023**

BETWEEN

RICHARD SIMIYU KOLOLI CLAIMANT

AND

CMC MOTORS GROUP LTD RESPONDENT

JUDGMENT

1. *Vide* a Claim dated 21st July 2022, the Claimant avers that he was employed by the Respondent, a motor dealer company registered under the Companies Act from 2004 until he retired in 2014.
2. The Claimant avers that in 2015 he was employed by the Respondent on a fixed term contract for a period of 1 year at a basic salary of ksh 264,000 per month. The contract expired on 5th October 2016 and according to the Claimant, he was entitled to payment of terminal dues as follows:
 - a. October salary 5 days
 - b. *Ex-gratia* payment 30 days
 - c. Leave earned 62.14 daysTotal 97.41 days
3. The Claimant tabulated the terminal dues at ksh 600,046 which amount he claims from the Respondent whom he alleges has refused to pay.
4. According to the Claimant, at the time the contract came to an end he owed the Respondent ksh 359,000 which he states should be off set from the amount owed to him by the Respondent leaving a balance owed to him by the Respondent of ksh 241,000. He prays for judgment against the Respondent in the said sum.



5. The Respondent filed its response to the Claim on 19th August 2022 and confirmed that the Claimant was its employee. It however denied that the Claimant was earning ksh 264,000 and stated that his salary was ksh 200,000.
6. The Respondent denied owing the Claimant the alleged ksh 600,046.
7. By way of counter claim and set off, the Respondent averred that during the Claimant's employment with the Respondent between December 2014 and October 2018, the Claimant had a staff account with the Respondent which he utilized for servicing of his tractor and incurred a bill of ksh 657,044.65 which amount remains unpaid to date. The Respondent prays that the said amount should be utilized to set off any claim that the Claimant may have against the Respondent.
8. The Respondent urged the court to dismiss the Claimant's suit with costs and enter judgment for the Respondent as prayed in the counter claim and set off.
9. At the hearing, the Claimant testified on his behalf while the Respondent called Churchill Ombeta Odongo, its legal counsel, who testified as RW1.
10. After the close of the Respondent's case, the parties filed written submissions. The Claimant's submissions were filed on 27th September 2023 while the Respondent's submissions were filed on 29th September 2023.

Claimant's Case

11. The Claimant testified that he was an employee of the Respondent from July 1986 to October 2016 being a period of over 30 years. He adopted his witness statement dated 21st July 2022 as his evidence in chief together with his bundle of documents as filed in court. In the witness statement the Claimant reiterated the averments in his claim.
12. The Claimant stated that by the time he left the employment of the Respondent he was earning ksh 264,000 as evidenced by the pay slip which formed part of his consolidated bundle of documents.
13. The Claimant testified that he was supposed to be paid salary for 5 days worked in October, 2015, *ex gratia* pay and leave days up to 5th October 2016. According to the Claimant, his outstanding leave of 62.14 days, 5 days salary and *ex gratia* pay works out to ksh 857,208 less 30% PAYE (257,162) which leaves a net of ksh 600,064.
14. The Claimant further testified that before he left employment, he made it clear that he owed the Respondent ksh 359,000 which amount he requested the Respondent to deduct from his final dues.
15. He maintained that after deduction of the amount owed to the Respondent from his final dues, there was a balance of ksh 241,046 which he is claiming.
16. The Claimant testified that at no time did the Respondent raise the issue that the Claimant owed it the sum ksh 657,044.65 that is claimed in the counter claim and set off.
17. The Claimant also disputed the Respondent's claim that there were false entries on his account and maintained that the Respondent's statement dated 28th July 2022 which forms part of the Respondent's bundle of documents was printed out on 28th July 2022 after he had already filed the instant suit.
18. On cross-examination the Claimant maintained that his salary upon employment on contract was ksh 200,000 which was later increased to ksh 264,000 *vide* the letter dated 24th June 2015 effective from 1st July 2015.



19. The Claimant disputed that he owed the Respondent ksh 657,044 and maintained that he owed it ksh 359,000 only.
20. On being cross examined about the *ex gratia* payment he sought to be paid, the Claimant explained that the *ex gratia* payment referred to medical bills above the medical limit which amount he admitted does not reflect on his salary.
21. On re-examination, the Claimant explained that he worked for the Respondent from 1986, left on 24th March 2000 and came back in 2014. He maintained that at the time he left employment with the Respondent on 5th October 2016, he was earning ksh 264,000.

Respondent's Case

22. RW1 Churchill Ombeta Odongo, the Respondent's legal counsel adopted his witness statement recorded on 10th May 2023 as his evidence in chief.
23. RW1 testified that the Claimant had outstanding bills in the staff account amounting to ksh 657,044.65 as evidenced by the staff statement dated 28th July 2022 which amount comprised of advances and consumables (parts and services) for his vehicle that he serviced by the Respondent.
24. He attributed the non-payment of the Claimant's dues to his failure to clear with the Respondent.
25. On cross examination, RW1 stated that the Claimant was earning ksh 200,000 as at the time his contract expired. However, when he was referred to the Claimant's pay slip for August 2016, he conceded that the Claimant's salary was ksh 264,000.
26. RW1 testified that the Claimant's had not been paid his terminal dues as he was yet to clear with the Respondent. He testified that the Respondent did not write to the Claimant to go and Clear. He further testified that the Respondent did not respond to the Claimant's letters demanding payment.
27. RW1 testified that according to the Claimant's service invoice produced by the Respondent which is system generated, the amount the Claimant owed to the Respondent for service of his tractor was ksh 321,990. That the Claimant also owed the Respondent money on account of fuel and travel. RW1 conceded that he did not have invoices to confirm the amount the Respondent claimed was owed as fuel.

Determination

28. Having carefully considered the pleadings, evidence adduced and submissions of the parties, the issue arising for determination is whether the Claimant is entitled to the payment as prayed for in his claim and if the Respondent is entitled to the counterclaim and set off.
29. It is not in dispute that the Claimant was employed by the Respondent between November 2014 and October 2016 and that his employment contract expired on 5th October 2016.
30. What is in dispute is the amount the Claimant is owed as terminal dues.
31. The Claimant avers that he is owed ksh 241,000 by the Respondent while the Respondent on the other hand claims ksh 657,044.65 from the Claimant.
32. According to the Claimant, the amount he is owed by the Respondent is for 5 days salary for October, 2015, 30 days *Ex-gratia* payment and 62.14 days of leave earned. The items claimed by the Claimant are



indicated in the letter of non-extension of contract dated 26th August 2016 addressed to the Claimant by the Respondent. The letter is reproduced below:

Ref: BS/KM/2016/011158

Richard Simiyu

Branch Manager – Kitale

Staff No: CK1/1097

CMC Motors Group Ltd

Kitale

Dear Mr. Simiyu,

RE: Non-extension of your Contractual Engagement

We make reference to your contract letter dated 26th October 2015 and wish to inform you that the same will not be extended further, Your last working day will be 5th October 2016.

You are expected to prepare a comprehensive formal handover report including handing over any Company property in your possession by 5th October 2016. The handover should be made to the Acting Branch Manager — Michael Jura and witnessed by the undersigned.

Your Medical Insurance Cards for yourself and your family members (If any) should be submitted to Human Resource Department to which your Certificate of Service will be issued and your dues will be credited into your account as follows;

- a. Salary for the 5 days worked on the month of October 2016.
- b. An *ex- gratia* payment of 30 days.
- c. Payment for 62.41 days leave earned up to and including 5th October 2016.

We take this opportunity to thank you for your contribution to the company during your period of employment and wish you well in your future endeavors.

Yours faithfully,

CMC Motors Group LTD

Signed signed

Ben Siguna Mark Kass

Group Human Resources Manager Group Chief Executive Officer

Cc: Managing Director

Group Head of Finance & Shared Services

33. The Respondent in its evidence did not rebut the Claimant's averment that it owed the Claimant the terminal dues that the Claimant seeks to be paid in his claim. The Respondent only claimed that the Claimant owed it ksh 657,004.65.
34. From the Claimant's pay slip for August 2016 which was tendered in court, it is clear that the Claimant was earning a gross salary of ksh 264,000.
35. The Respondent's document titled "Customer Statement of Account" dated 28th July 2022 which forms part of the Respondent's documents, the Claimant is indicated as owing to the Respondent ksh



657,004.65 comprising of advances and consumables. The statement produced by the Respondent has entries made as late as 30th December 2016 long after the Claimant's employment with the Respondent had expired. Further, the entries in the statement are not supported by any invoices or other proof that the Claimant incurred the expenses.

36. On the other hand the Claimant produced statement checked and signed by 3 officers of the Respondent on 26th June 2016 for the officer who checked and 28th June 2016 by two officers who authorized the statement.
37. It is my finding from the evidence on record that the Respondent did not prove that the Claimant owed it any amount other than what he admitted in the claim as per the statement produced by the Claimant.
38. In the end, I find and hold that the Claimant is entitled to ksh 241,046 being the difference between his terminal dues of ksh 600,064 and the sum of ksh 359,000 which he owed to the Respondent.
39. The Respondent's counter-claim is found to be without merit and is dismissed.
40. The Claimant is awarded the costs of both the Claim and the counter claim and set off.
41. Interest shall accrue from date of filing suit.

DATED, DELIVERED AND SIGNED AT ELDORET THIS 30TH DAY OF NOVEMBER, 2023.

M. ONYANGO

JUDGE

