



REPUBLIC OF KENYA



KENYA LAW
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**Ayoo v Nursing Council of Kenya & 2 others (Cause 270 of 2019)
[2023] KEELRC 3315 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3315 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 270 OF 2019
JK GAKERI, J
DECEMBER 20, 2023**

BETWEEN

FRANCIS OGOLA AYOO CLAIMANT

AND

NURSING COUNCIL OF KENYA 1ST RESPONDENT

EDNA KIMAIYO TALLAM 2ND RESPONDENT

DUKE O. ONGECHI 3RD RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Memorandum of Claim filed on 24th April, 2019 alleging withholding of emoluments and allowances, violation of right to equality, freedom from discrimination, pecuniary embarrassment incurring of extra expenses and violation of the right to human dignity, fair labour practices and legitimate expectation.
2. The Claimant avers that he was employed by the Ministry of Health on 13th February, 1997 and at the material time he was working at the Nursing Council of Kenya effective 13th May, 2013 and served with dedication.
3. That on 20th March, 2015, he was transferred to the Mathari Teaching and Referral Hospital but the transfer was subsequently cancelled.
4. It is the Claimant's case that in March 2014, he applied for a Masters Degree Course at Makerere University but was requested to defer the course owing to exigencies of duty and the intake was in August 2015 and he received provisional admission letter dated 12th September, 2015 and applied for the Principal Secretary's approval on 21st September, 2015 as the course was full-time.



5. That he did another request for approval to the Cabinet Secretary on 30th September, 2015, Director of Medical Services and Director Nursing Council of Kenya and received a no objection letter from the Director, Nursing Council of Kenya on 2nd October, 2015.
6. That as the course had commenced, he travelled to Uganda, was officially admitted and informed the Director, Nursing Council of Kenya through the Deputy Chief Executive Officer by word of mouth.
7. That the 1st and 2nd Respondents issued him with a letter dated 6th October, 2015 on his absenteeism from office from 28th September, 2015 and was called upon to explain and did so by letter dated 14th October, 2015.
8. That the 2nd Respondent demanded course approval letter and minutes of the Ministerial Training Committee within 10 days.
9. According to the Claimant, the Respondents were aware of the course approval and that he was in Uganda.
10. The Claimant further avers that on 2nd November, 2015, the 3rd Respondent issued a suspension letter on account of absence and unknown whereabouts and demanded a response within 21 days which demand the Claimant honoured.
11. That on 16th November, 2015, the 2nd Respondent forwarded the Claimant's case to the Principal Secretary, through the Director of Nursing Services, copied to the Director Human Resource & Development.
12. That by letter dated 7th November, 2015, the Claimant was transferred to the Ministry of Health Headquarters, Nursing Unit and his request for release via emails fell through. That he had a meeting with the 2nd Respondent and the Acting Director of Nursing on 5th December, 2016.
13. It is the Claimant's case that while still in Uganda, he was compelled to attend the Kibera Law Court on 20th March, 2017 to testify in a criminal case.
14. That he received the course approval and salary reinstatement on 10th May, 2017 from October 1st 2015.
15. That the 2nd Respondent refused to reimburse the Claimant's allowances which he is claiming.
16. The Claimant catalogues what he describes as false information and abuse of office by the 2nd and 3rd Respondents.
17. The Claimant prays for;
 - i. A declaration that withholding the Claimant's allowances and dues was unfair, unprocedural, wrongful and illegal.
 - ii. Kshs.1,705,190/= being the total allowances that are due and owing as against the Respondent unpaid since October 2015 at Kshs.41,590/= per month.
 - iii. Allowances held for 3 months after the court cancelled the transfer and release letter reversed between 20th March, 2015 and 24th June, 2015, Kshs.124,770/=
 - iv. Kshs.29,570/= the total interest charged for dormant loan account by AFYA Sacco Kshs.13,612/= dividend forfeited due to dormancy as per the sacco letter dated 18th May, 2017.
 - v. Kshs.22,274/= charged by Jubilee Insurance for unpaid premiums as per their letter dated 13th August, 2018.



- vi. Kshs.38,600/= unpaid allowance for court attendance on 20th March, 2017 as SRC Circular as per diem and transport.
- vii. Encroachment fees charged by Barclays Bank on loan account at 29.5% of the Principal amount charged monthly for 17 months on compound interest.
- viii. Interest on (ii) to (vi).
- ix. Any other relief this Honourable Court may deem fit to grant.
- x. The 2nd Respondent be charged with contempt of court.
- xi. The 2nd and 3rd Respondent be declared unfit to hold public office for malice, incompetence and falsification of information.
- xii. The 2nd and 3rd Respondents be charged with abuse of office.
- xiii. The 2nd Respondent to step aside until the case is heard and concluded.

Respondents' case

- 18. In their response to the Claimant's claim, the 1st and 2nd Respondents aver that on 22nd September, 2015, the Claimant sought approval to pursue a Masters Degree in Immunology and Clinical Microbiology at the Makerere University from 22nd August, 2015 to 22nd August, 2017 by completion of the Biodata Form and Letter to the Cabinet Secretary of Health and on 2nd October, the Deputy Registrar wrote a recommendation letter on behalf of the 1st Respondent stating that it had no objection to the proposed studies at the Makerere University.
- 19. The Respondent avers that the Claimant was seconded by the Ministry of Health to the 1st Respondent as Head of Programmes for the Implementation of the Nursing Commodity effective 13th May, 2013 but remained an employee of the Ministry of Health which paid his salary.
- 20. That neither of the Respondents had authority to approve such course, a fact the Claimant was aware of.
- 21. It is the Respondents case that on 28th September, 2015, the Claimant absconded duty and a letter to that effect was served as he had not obtained course approval and was suspended on 2nd November, 2015 and his salary stopped.
- 22. That disciplinary action of the Claimant fell under the Ministry of Health Human Resource Advisory Committee.
- 23. It is the Respondents case that the Claimant understood the course approval procedure but proceeded to the University before it was granted and the Respondents did not conduct any disciplinary proceedings against the Claimant, a preserve of the Ministry of Health.

Claimant's evidence

- 24. On cross-examination, the Claimant confirmed that he was employed by the Ministry of Health and second to the Nursing Council of Kenya on 13th May, 2013.
- 25. That he received the admission letter dated 12th September, 2015 and applied for approval on 30th September, 2015 but did not receive the same from the Cabinet Secretary or the Principal Secretary.



26. The witness testified that he received a no objection letter from the 1st Respondent and admitted that such requests were approved by the Training Committee of the Ministry of Health and the 1st and 2nd Respondents had no mandate to approve courses.
27. The Claimant confirmed that all information obtained from the Makerere University came to him and the Respondents were not privy to it and he did not inform them in writing but had notified them his intention and updated them by word of mouth.
28. That he proceeded and attended the course before the approval was granted and did not take leave as the training had not been approved.
29. The Claimant testified that the Respondents notified him of his absence from duty without permission and denied being absent without permission, because he was already at the University.
30. CWI confirmed that he did not respond to the letter dated 21st October, 2015 because he had no authority to be away.
31. It was his testimony that he received the suspension letter from the Ministry of Health as it was the duty of the Principal Secretary and Mr. Ongechi signed on his behalf, according to the Claimant inappropriately.
32. That none of the Committees sat to approve the course.
33. The Claimant admitted that he received two letters from the Ministry of Health allegedly because the Respondents misinformed the Ministry about where he was as they had his letter of intention.

Respondents' evidence

34. RWI, Dr. Edna Tallam confirmed that the Claimant, one Francis Ogola Ayoo was posted to the 1st Respondent on 13th May, 2013.
35. The witness confirmed that since the Claimant was a public officer, he was supposed to be working at the 1st Respondent's premises and the 1st Respondent was unaware of where he was, the explanation notwithstanding.
36. That he was not available to be allocated duties by the Chief Executive Officer.
37. As regards the bond to attend court, the witness testified that the Claimant was not at work at the time.
38. That since the Claimant was an employee of the Ministry of Health and it did not advise the 1st Respondent to pay any allowance to the Claimant, none was due as he had not rendered any service when he was away.
39. That the 2nd Respondent forwarded the case to the Ministry as the employer to deal with.
40. On re-examination, RWI testified that the Claimant was absent from duty from 28th September, 2015 to 6th October, 2015, hence the letter dated 6th October, 2015 to the Ministry of Health.
41. That although the 1st Respondent gave the Claimant a recommendation letter, he was aware of the attendant steps on course approval and did not provide an approval or minutes on course approval and at any rate the 1st Respondent would have been copied.
42. That the witness could not recall the alleged court attendance.



43. The witness admitted having received the letter on course approval and reinstatement of the Claimant's salary dated 10th May, 2017 and confirmed that the Claimant had not worked with the 1st Respondent after reinstatement of his salary.

Claimant's submissions

44. The Claimant isolated (3) three issues for determination touching on;
- i. Whether the Respondents acted beyond their powers that caused grievous psychological and financial harm to the Claimant.
 - ii. Whether the Claimant should be paid all the allowances held by the 1st and 2nd Respondent
 - iii. Whether the 1st and 2nd Respondent should compensate the Claimant for the financial harm incurred due to their inappropriate action.
45. On the 1st issue, the Claimant submitted that the Respondent's witness admitted having referred to him as Oyoo while his name was Ayoo yet they had his file and 2 secretaries and there was no room for mistakes.
46. That since the personal number belonged to One Francis Ogola Ayoo as opposed to Francis Ogola Oyoo, that was evidence of carelessness, malice and incompetence.
47. The Claimant submitted that since RWI admitted that there was correspondence before and after reporting to school (not clear by who), the witness was aware as to where he was and her letter of 6th October, 2015 was untruthful.
48. That between 28th September, 2015 and 3rd October, 2015, he was shuttling between Ministry of Health Offices and the 1st Respondent's offices processing documents for course approval and the Respondents had his phone contact and email address.
49. The Claimant admits that his salary was paid by the Ministry of Health. That the Respondents paid the remunerative and reimbursement allowances.
50. That the disciplinary process is delegated to the Head of Department or other officer and the Respondent was bound to do so.
51. The Claimant submitted that the officer handling the criminal case got the Claimant's number from the Respondents and contacted him directly.
52. That the Section P6 of the Code of Regulations, 2006 annexure 048 provides for the payment of allowances and travelling privileges of Government Offices travelling on duty.
53. The Claimant submitted that he was not given any assignments and failed to execute.
54. That when the transfer dated 20th March, 2015 was quashed by the court, the Respondents refused to pay allowance arrears.
55. The Claimant submitted that he was accorded belated course approval dated 10th May, 2017 backdated to 1st October, 2015 and the 1st Respondent had not paid allowances due.
56. Finally, the Claimant submitted that the totality of the evidence before the court showed that the 2nd Respondent had no reason to maintain that she was unaware of his whereabouts.
57. The Claimant attached the letter of course approval to his submissions.



1st and 2nd Respondents submissions

58. Counsel for the Respondents isolated 5 issues for determination on whether there is an employer/employee relationship between the parties, whether the Claimant's action is statute barred, whether the suspension was justified, exhaustion of internal mechanisms and reliefs.
59. On the 1st issue, counsel urged that since the Claimant admitted that the Ministry of Health was his employer and secondment does not confer an employment relationship, the 1st Respondent was an agent of a disclosed principal and the suit against it was unsustainable in the absence of the actual employer as held in *Anthony Francis Wareham t/a A. F. Wareham V Kenya Post Office Savings Bank* and restated in *Amos Mwago V Kings Pride Properties Ltd* (2023).
60. Counsel submitted that in the absence of an employment relationship between the Claimant and the 1st Respondent, the court has no jurisdiction to determine the dispute.
61. On the 2nd issue, counsel submitted that since the alleged suspension took place on 2nd November, 2015, the claim was statute barred by virtue of Section 90 of the *Employment Act*, 2007.
62. Counsel urged the court to strike out the proceedings as was the case in *Attorney General & another V Andrew Maina Githinji & another* (2016) eKLR, *Justin S. Sunyai V Judicial Service Commission* (2017) eKLR among others.
63. Counsel submitted that the Claimant's suspension was justified.
64. As regards exhaustion of existing mechanisms, counsel relied on the sentiments of the court in *William Odhiambo Ramogi & 3 others V Attorney General & 4 others* (2020) eKLR as well as in *Geoffrey Muthinja Kabiru & 2 others V Samuel Munga Henry & 1756 others* (2015) eKLR to urge that the Claimant invoked the court's jurisdiction pre-maturely.
65. Finally, counsel submitted that the Claimant's suit was time barred and did not disclose an employer/employee relationship between the parties.

Determination

66. The issues for determination are;
 - i. Whether there was an employer/employee relationship between the Claimant and the 1st Respondent.
 - ii. Whether the Claimant's suit is statute barred.
 - iii. Whether the Claimant is entitled to the reliefs sought against the Respondents.
67. Assuming the court had jurisdiction and the Claimant's suit was competent, would it have been sustainable? This issue is important for purposes of putting the matter to rest.
68. As correctly submitted by the Respondent's counsel, the plea of limitation can be raised at any stage of the proceedings as it is a matter of law and implicates the court's jurisdiction to entertain the suit before it. Indeed, the issue can be addressed by the court in its judgement suo motu.



69. Counsel submitted that since the Claimant's case of action relates to a suspension that happened in November 2015, the same was statute barred by virtue of Section 90 of the Employment Act, 2007 which provides that;

Notwithstanding the provisions of Section 4 of the Limitation of Actions Act, (Cap 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.

70. From the remedies prayed for, it is common ground that the Claimant is praying for the same in respect of commissions or omissions allegedly committed by the 1st and 2nd Respondents in 2015.
71. Similarly, the allowances claimed remained unpaid from October 2015.
72. Documents availed by the Claimant show that he was confirmed as an employee of the Ministry of Health vide letter dated 3rd June, 2002 having been employed on 13th February, 1997 and was posted to the Nursing Council of Kenya by letter dated 13th May, 2013 with three others for purposes of implementation of Nursing Commodity.
73. The letter from the Ministry of Medical Services to the Registrar (CEO) of the 1st Respondent was signed by the Chief Nursing Officer. The letter also attached the TOR to guide the three officers.
74. Copies of payslips on record reveal that the 1st Respondent was paying the Claimant Kshs.41,590.00 as basic with no other allowances.
75. It is not in contest that by letter dated 12th September, 2015, the Claimant was offered Provisional Admission at the Makerere University to undertake a Master of Science Degree Course and initiated the course approval process by completing the Training Biodata Form on 22nd September, 2015 and sought approval from the Cabinet Secretary on 30th September, 2015.
76. That the 1st Respondent by letter dated 2nd October, 2015 to the Principal Secretary stated unequivocally that it had no objection and recommended the Claimant for the course.
77. For unexplained reasons, the Claimant travelled to Uganda, was admitted to the programme on 28th September, 2015 and paid the sum of UGS 8,000,000 on 30th September, 2015.
78. A copy of the Graduate Registration Form on record show that it was completed on 5th October, 2015 and was issued with a Registration Certificate dated 20th October, 2015 and issued with a student card dated 18th November, 2015 and a student pass dated 6th November, 2015.
79. The Claimant's absence from office led to the letter dated 6th October, 2015 by the 2nd Respondent and the Claimant responded on 14th October, 2015 admitting that he had travelled to Uganda and commenced studies and sought withdrawal of the letter.
80. Thus far, it is unambiguous that the Claimant travelled to Uganda and commenced a course of study with no one's authority to do so or be away from his work place as he had neither the 2nd Respondent's authority to be away nor the Cabinet Secretary or the Principal Secretary or indeed anyone to commence any course in Uganda or elsewhere.
81. The retort in his response that he had requested for a recommendation letter and had had phone communication cannot avail the Claimant as his application had not been approved by the relevant committee and had no letter of approval or other written authority typical in the public service.



82. Intriguingly, the Claimant explained to the court in writing, in his submission the process of securing course approval at the Ministry of Health, a process he was aware of but ignored it with abandon and sought to convince the court that he was equally on duty and had authority to be away at the same time.
83. To her credit, the 2nd Respondent dispatched the letter dated 21st October, 2015 reiterating the requirements of course approval requesting for the course approval letter and minutes from the Claimant to obviate disciplinary action. The Claimant ignored the letter after receiving it and confirmed as much which led to his suspension by the Principal Secretary vide letter dated 2nd November, 2015 which included stoppage of his salary.
84. The suspension letter was sent more than one (1) month from the date the Claimant deserted duty.
85. The Claimant was accorded 21 days to respond or face further disciplinary action and he responded by an undated letter.
86. Puzzlingly, the Claimant states that he was sorry if his action to save his training opportunity was construed as misconduct and pleads for reconsideration of his case and stated that he was still willing and ready to serve the people of Kenya as he had done for 18 years.
87. The 2nd Respondent's letter to the Principal Secretary dated 16th November, 2015 and copies of the letters dated 6th October, 2015 and 21st October, 2015 constituted the proper course of action by the 2nd Respondent.
88. It was incumbent upon her to notify the Claimant's employer that its employee had absconded duty.
89. The alleged misrepresentation of information or abuse of office by 2nd and 3rd Respondents has nothing to stand on as the offices acted within their mandate.
90. The mis-statement of the Claimant's name was nothing but a clerical error which are typical in typing and no malice was established.
91. In the court's view, the Claimant's action of ignoring all procedures and protocols and pretending to be sorry for his actions and seeking forgiveness is difficult to describe in judicious terms, other than unbridled impunity.
92. Significantly, the Ministerial Human Resource Management Advisory Committee of the Ministry of Health approved the Claimant's application belatedly on 27th September, 2016, almost one year after the Claimant absconded duty and reinstated his salary effective 1st October, 2015.
93. The letter signed by the D.O. Ogwayo for the Principal Secretary was unequivocal that it was a warning to the Claimant for breach of the Code of Conduct and Ethics.
94. Strangely, as early as 15th February, 2016, the Director Human Resource Manager & Development wrote to the Director of Nursing Services for comments and recommendations to facilitate finalization of the case and by letter dated 2nd September, 2016, the Acting Director recommended that the Claimant be pardoned, reinstated and warned for undertaking a course out of the country without a course approval and his training be regularized. That he forfeits the salary for the period it was stopped and the salary be reinstated from the date of the MHRMAC meeting i.e 27th September, 2016.
95. Intriguingly, the recommendations were ignored and the letter by D.O. Ogwayo for the Principal Secretary citing the MHRMAC meeting of 27th September, 2016, reinstated the salary effective 1st October, 2015, in effect rewarding the Claimant for his transgressions.



96. Since the allowances claimed by the Claimant fell due in October 2015, the cause of action accrued in October 2015 and time started running thence and run to the full and the action became statute barred in 2018.
97. The claim for Kshs.1,705,190/= against the 1st Respondent is statute barred and is accordingly dismissed.
98. The same applies to the declaration that the withholding of allowances was unfair, illegal, wrongful or unprocedural as it relates to the same allowance.
99. The declaration sought is unmerited.
100. As regards the personal liability of the 2nd and 3rd Respondents, other than the plain allegations that the 2nd Respondent misrepresented information to the Ministry of Health as to the whereabouts of the Claimant, misstatement of his name and letter on non-rendering of services by the 2nd Respondent and the 3rd Respondent wrote the suspension letter and did not respond to the Claimant's response, the Claimant tendered no verifiable evidence to substantiate the allegations.
101. As adverted to elsewhere in this judgement, the Claimant was not at the workplace from 28th September, 2015 to 3rd October, 2015 as he admitted shuttling between offices searching for course approval but failed to disclose where he was from 4th – 6th October, 2015 and thereafter.
102. Contrary to the Claimant's allegation that the 2nd and 3rd Respondents were aware of his whereabouts, as a public officer and having worked for the government for over 18 years he knew or ought to have known that approval in government is always in writing and is the outcome of a process, which had not taken place.
103. The 2nd and 3rd Respondent had nothing on record as evidence of the Claimant's whereabouts and had to state the facts as they were, otherwise they would have represented facts. Evidently, the Claimant had absconded duty.
104. The 2nd and 3rd Respondents being responsible public officers acted in consonance with *the Constitution* of Kenya, 2010, *Leadership and Integrity Act*, Code of Conduct and Ethics and the Public Service Commission Manual and cannot be faulted for having refused to shield the Claimant's transgressions.
105. The Claimant tendered no evidence to show that the two officers were incompetent or acted maliciously and abused their offices. They acted as expected. The Claimant did not.
106. A more fundamental issue is whether the two public officers were properly joined in this suit.
107. Being employees of the Nursing Council of Kenya and the Ministry of Health respectively, the 2nd and 3rd Respondents were not acting in their individual capacities but on behalf of the offices they held as employees of these bodies and cannot thus be sued in person for actions done in their official capacities done in good faith.
108. The Nursing Council of Kenya for instance is a state corporation established by the Nurses and Midwives Act, Cap 257 as body corporate with a common seal, perpetual succession and capacity to sue or be sued, contract and own property among other capacities.
109. In the court's view, the 2nd and 3rd Respondents were not necessary parties to this suit and ought not to have been joined.



110. In sum, there is nothing for which the 2nd and 3rd Respondents may be held personally liable individually or jointly.
111. As regards the three months allowances, Kshs.124,770/=, the Claimant tendered no evidence that the Respondents are guilty of contempt of court, as there is no order allegedly violated.
112. Relatedly, the Claimant led no evidence of any decree which the Respondents have not satisfied or has been pending since March 2015.
113. The prayer is dismissed for want of proof.
114. As regards interest charged for dormant loan account of Kshs.29,570/= and dividend forfeited Kshs.13,612/=, the Respondents are not to blame and cannot be held liable for losses occasioned by the Claimant's indiscretion.
115. The Claimant travelled to Makerere University to study with no authority and expected no action against him from the employer. He expected his salary and allowances paid as usual as he was undertaking serious national duties in Uganda and procedures and other approval formalities could wait.
116. The Claimant was in this respect the author of his misfortune and has no one else to blame but himself.
117. This court cannot hold the Respondents liable for loss or liability whose proximate cause is the Claimant's imprudence.
118. The prayer is dismissed.
119. The Claimant also prays for the sum of Kshs.38,600/= as unpaid allowances for attending court on 20th March, 2017 and relies on the Salaries and Remuneration Circular Ref SRC/ADM/CIR/1/13/ Vol 111 (126) dated 10th December, 2014 on Daily Subsistence Allowance in foreign travel and Section R25 of the Nursing Council of Kenya Staff Administrative Code VH Dec 2009.
120. The Claimant testified that he attended court on 20th March, 2017 and provided a Police Bond dated 1st March, 2017 and a handwritten statement states that he attended court and gave evidence on 20th March, 2017.
121. The Bond was received by the 1st Respondent on 21st March, 2017.
122. Other than the Police Bond, the Claimant furnished no other evidence to justify the claim.
123. Instructively, by this date, he had not received his course approval letter and had no evidence of being away from duty.
124. Assuming he travelled from Uganda and went back, evidence of bus ticket or boarding pass or hotel booking in Nairobi would have buttressed his case.
125. Similarly, communication from the employer on the travelling arrangements and timing as well as his availability would have assisted the court in determining whether this was an officially sanctioned traveling for facilitation to ensue.
126. As a seasoned public officer, the Claimant knew or ought to have known that per diem is justified on receipts, tickets and/or boarding passes among other documents.
127. The Claimant testified that he was called by a police officer who got his number at his workplace.
128. The inference is that the employer was not involved in his recalling from Uganda to testify in court.



129. In the absence of relevant particulars on the Claimant's participation in the case on behalf of either the Ministry of Health or the Nursing Council of Kenya as well as particulars of the travelling and lodging, the court is not persuaded that a case for payment of the amount claimed has been paid and the same is accordingly dismissed.
130. On the sum of Kshs.17,880/= allegedly charged by an unnamed money tender, the Claimant adduced no evidence to show why the Respondents ought to be held liable for the interest.
131. The Claimant failed to demonstrate the nexus between the alleged interest and his being at Makerere University, Uganda.
132. More significantly, having found that the Ministry of Health had a justification to suspend the Claimant and stop his salary for deserting the workplace, and none of the Respondents was blameworthy, the claim for interest charged by the unnamed lender is unsustainable and is dismissed.
133. As regards the encroachment fee charged by Barclays Bank of Kenya Ltd on loan account at 29.5% for 17 months, the Claimant did not specify the amount he seeks to be refunded by the Respondents. However, in support of the claim, the Claimant attached a copy of a letter from Barclays Bank of Kenya Ltd Collections and Recoveries team dated 7th June, 2016 demanding payment of Kshs.76,542.90.
134. Analogous to the previous claim, the Claimant adduced no evidence to establish why the Respondents should be held liable for the encroachment fee as he failed to demonstrate the nexus between the fee and his suspension, which was justified.
135. The prayer lacks substance and is dismissed.
136. With regard to the 2nd Respondent being charged with contempt of court, the Claimant has not placed any material to demonstrate that the 2nd Respondent disobeyed a court order or committed any other type of contempt of court.
137. More significantly, this court has no jurisdiction to charge or direct that a person be charged for contempt of court. The order is incapable of being granted by this court.
138. The same applied to the prayers for the 2nd and 3rd Respondents be charged with abuse of office and be declared unfit to hold public office.
139. The last prayer that the 2nd Respondent steps aside until the case is heard and concluded was overtaken by events and the court had no jurisdiction to grant it.
140. As jurisdiction is everything as stated in Owners of the Motor Vessel "Lillian S" V Caltex Oil (Kenya) Ltd (1989) eKLR, the court has no option but to down its tools.
141. As to whether the Claimant and the 1st Respondent had an employment relationship, counsel for the 1st and 2nd Respondent submitted that there was none and the Claimant had no sustainable claim for want of jurisdiction. The Claimant did not submit on the issue.
142. Counsel for the Respondent urged that since the principal was disclosed, the agent could not be sued as held in previous decisions.
143. 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."
144. Equally, the *Employment Act*, 2007 defines the term employer in very broad terms as it means "any person, public body, firm, corporation or a company which has entered into a contract of service to



employ any individual and includes the agent, foreman, Manager or factor of such person, public body, firm, corporation or company.”

145. The foregoing includes the 1st Respondent.
146. Be that as it may, the more salient issue for determination is whether there was a contract of service between the 1st Respondent and the Claimant.
147. Section 2 of the [Employment Act](#), 2007 defines a contract of service as
An agreement whether oral or in writing and whether expressed or implied to employee or to serve as an employee for a period of time and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which part XI of this Act applies.”
148. It is common ground that the Claimant was employed by the Ministry of Health in 1997 and was posted to the 1st Respondent vide letter dated 13th May, 2013 for purposes of implementation of a specified project and ensuing regulations, and confirmed as much on cross-examination.
149. The letter attached the Terms of Reference (TOR) for the three officers.
150. Evidence on record reveal that the Claimant was receiving a sum of Kshs.41,590/= from the 1st Respondent “styled” as “Basic” on the payslip with no allowances.
151. Contrary to the Claimant’s submission that he was seconded to the 1st Respondent, he was merely posted as the letter unambiguously states.
152. It requires no emphasis that the Public Service Commission, Human Resource Policies and Procedures Manual for the Public Service Commission contain elaborate provisions on secondment which does not appear to have been envisioned in this case.
153. In the court’s view, the Claimant was posted to the 1st Respondent for the duration of the Project and earned an allowance from the 1st Respondent in that regard but he remained an employee of the Ministry of Health which paid his salary as he confirmed in evidence and the Ministry of Health suspended him and stopped his salary vide letter dated 2nd November, 2015.
154. From the foregoing, it is the finding of the court that there was no employment relationship between the Claimant and the 1st Respondent.
155. Having so found, it is evident that the court has no jurisdiction to hear and determine the suit by virtue of the provisions of Section 12(1) of the [Employment and Labour Relations Court Act](#), 2011.
156. Even assuming that the 1st Respondent was sued as an agent of the Ministry of Health, the action would still not be sustainable as no action against an agent of a disclosed principal is sustainable as held by the Court of Appeal in Anthony Francis Wareham t/a A. F. Wareham V Kenya Post Office Savings Bank & 2 others (Supra) as follows;

“It was also prima facie imperative that the court should have dismissed the Respondent’s claim against the 2nd and 3rd appellants for they were impleaded as agents of a disclosed principal contrary to the clear principal of common law that where the principal is disclosed, the agent is not to be sued . . .”
157. The court is guided accordingly.
158. Having found that there was no employment relationship between the Claimant and the 1st Respondent and having further found that an action against the 1st Respondent as an agent of



the Ministry of Health was not sustainable at common law, it is clear that the Claimant's suit is unsustainable.

Conclusion

159. From the foregoing, it is discernible that the Claimant's suit lacks merit and it is accordingly dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 20TH DAY OF DECEMBER 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

