



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 811 OF 2018

(Before Hon. Lady Justice Maureen Onyango)

PETER GORDON HORSEY **CLAIMANT**

VERSUS

CIVICON LIMITED **RESPONDENT**

CONSOLIDATED WITH CAUSE NO. 785 OF 2018

JASON HORSEY **CLAIMANT**

VERSUS

CIVICON LIMITED **RESPONDENT**

JUDGMENT

1. This judgment arises from two consolidated claims being Cause 811 of 2018 and Cause 785 of 2018. The main relief sought in both claims is the payment of salary arrears by the Respondent. The consolidated claims proceeded for hearing on the 23rd October 2019 for the Claimants' cases whilst the Respondent's witness was heard on the 23rd February 2021.

2. It is stated for the Claimant, Peter Gordon Horsey, in Cause 811 of 2018 that he was employed by the Respondent by virtue of a contract of employment on the 19th March 2012. He resigned from his post as Manager and gave one month's notice.

3. He states that he was never paid his salary for the months of June to September 2017 and the 17 days worked in October 2017.

4. He prays for judgment in the following terms;

a. The Claimant be paid compensation amounting to the sum of USD 51,372, that is unpaid salary for the months of June, July and August 2017 and for days worked in October 2017 in the sum of USD 6,412.

b. The Respondent be ordered to issue the Claimant with a certificate of service as provided by the law.

c. The Respondent be ordered to pay costs of the suit.

d. Interests on the awards at court rates.

e. Any further awards as the court may deem fit to grant

5. In Cause 785 of 2018 the Claimant, Jason Horsey, states that he resigned in writing from his post as the CEO of the Respondent and gave one month's notice.

6. He states that the Respondent has failed to pay him his salary for the months of June to September 2017 and the 13 days worked in October 2017.

7. He prays for judgment in the following terms;

a. The Claimant be paid his unpaid salary by the Respondent amounting to the sum of USD 72,919 being unpaid salary for the months of June, July, August and September in the sum of USD 66,000 and unpaid salary for days worked in October 2017 in the sum of USD 6,919.

b. The Respondent be ordered to issue the Claimant with a certificate of service as provided by the law

c. The Respondent be ordered to pay costs of this suit.

d. Interests on the awards herein at Court rates.

e. Any further orders as the Court may deem fit to grant.

8. The Respondent entered appearance through the firm of Mboya Wangongu and Waiyaki Advocates on the 20th June 2018 for both claims. It denied all the allegations contained in the statements of claim and put the Claimants to strict proof thereof.

Claimants' Case

9. **Jason Andrew Horsey** testified as CW1 and adopted his witness statement as part of his evidence in chief. He testified that he had worked for Civicon for many years both in Uganda and Kenya. He was appointed the CEO in 2015 at a salary of USD 16,500 which he earned until he voluntarily resigned on the 26th July 2017.

10. He testified that after his resignation he worked for an extra 2 months. He was not paid salary from June to September and 13 days in October 2017. The witness states that email communication relating to the unpaid salary was initially replied to by Ben Kiilu but the Respondent subsequently stopped the replies. In cross-examination he stated that there was no express indication that the Company was not going to pay the arrears. He reiterated in re-examination that he has not been paid.

11. **Peter Gordon Horsey** testified as CW2. He stated that he was an employee of the Respondent from 1st April 2009 to 18th October 2017. He adopted his witness statement and documents filed with the claim as his evidence in chief.

12. He testified that he resigned from employment. He testified that he was not paid for four months up to September and 17 days worked in October 2017. That his salary was USD 11,240 per month. That he made efforts to get paid and interacted with an employee of the Respondent by the name Florence who was helpful in computing his arrears. Later the Respondent stopped answering his phone calls.

13. He prayed for payment of unpaid salary, legal fees and interest.

14. Under cross examination, CW2 stated that the Respondent acknowledged owing his unpaid salary through Florence. That he had both email and telephone communication with the Respondent who kept promising to pay but did not. That there was no indication that the Respondent would not pay.

15. CW2 reiterated in re-examination that he had not been paid.

Respondent's Case

16. RW1 JAMES MURAGE testified that he worked for the Respondent as the Head of Legal Services. He adopted the witness statements filed in both Causes 811 of 2018 and 785 of 2018 as part of the Respondent's evidence in chief. The witness reiterated that the Company that had entered into a contract of employment with the Claimants was a different entity from the Company sued. He testified that Jason was engaged by Civicon Kenya Limited which is a separate entity from the Respondent.

Claimants' Submissions

17. The Claimants submit that the Court having found the Respondent's application dated May 2019 to be without merit, it means that the Respondent was for all intents their employer. The Claimants contend that they are entitled to the amounts claimed in the statements of claim as the evidence led by the Claimants remain unchallenged.

18. The Claimants relied on the cases of **Motex Knitwear Limited v Gopitex Knitwear Mills Limited [2009] eKLR** and **Mary Njeri Murigi v Peter Macharia and Another [2016] eKLR** for the proposition that *where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.*

19. The Claimants submit that the salary earned by the Claimants are not in dispute, their resignations have not been objected to, and the additional days have not been paid for. The Claimants contend that the amounts owed have been fully substantiated by way of documentary evidence attached including contracts of service, the KRA slips and the letters of resignation. The Claimants argue that the letters of resignation were written in good time and sufficient time was afforded to the Respondent to get its house in order.

Respondent's Submissions

20. The Respondent on its part submits that the Claimants were not employees of the Respondent. The Respondent submits that from the

employment contracts relied upon, the employers are Civicon Africa Limited and Civicon Kenya Limited respectively which are completely different entities from the Respondent. The Respondent argues that the Claimants are bound to prove that the Respondent was their employer in the main suit but which they have not done.

21. The Respondent relied on the decision in **Martin Juma Kundu v Kemu Salt Packers Production Limited [2016] eKLR** for the proposition that the onus of proving that the Claimant was employed lies with the Claimant. The Respondent also relied on **Kwekwe Mwakela v Krystalline Salt Ltd [2014] eKLR** for the proposition that for there to be an employer employee relationship, there must be evidence of a contract between the employer and employee upon which they shall make reference.

22. The Respondent argues that there was no meeting of the minds between the Respondent and the Claimants as the Respondent did not participate in any contractual negotiations between the Claimants and the Respondent, a position that has not been challenged by the Claimants.

23. The Respondent further contends that the import of the ruling on the Application dated the 10th May 2019 was that the Respondent's application to strike out the Claimant's pleadings was not successful, but the Court did not conclusively address the issue of employer employee relationship between the Respondent and the Claimants, which is an issue in dispute in the main suit. The Respondent submits that the Claimants cannot be discharged from their obligation to prove employment relationship on account of the ruling.

24. The Respondent submits that the resignation letters tendered in evidence by the Claimants are mere evidence of acceptance and do not give rise to existence of employment contract. The Respondent contends that the Claimants ought to have produced documents to prove existence of employment contracts between them and the Respondent since from the employment contract dated 19th March 2012, produced in Cause 811 of 2018, the employer is Civicon Africa Group Limited whilst in that produced in Cause 785 of 2018, the employer is identified as Civicon Kenya Limited.

25. The Respondent argues that the Claimant's statement of claim does not reveal a reasonable cause of action against the Respondent and therefore they are not entitled to the reliefs sought. The Respondent relied on the case of **Kenya Broadcasting Corporation v Geoffrey Wakio [2019] eKLR** for the proposition that there must be a legal justification for the award of damages and that as per the provisions of section 49 of the Employment Act, the compensation awarded to the employee should not be a form of punishment to the employer but instead should be for the purposes of restoration of the employee to the position they would have been in had the termination not occurred. The Respondent maintained that the prayers in the statement of claim should not be granted by the Court as the Claimants have sued a wrong party.

Determination

26. The issues for determination are: -

- a. Whether the Claimants were employees of the Respondent;
- b. Whether the Claimants are entitled to the reliefs sought.

27. In the employment contracts of the Claimants, the employer is Civicon Kenya Limited for Jason Horsey. The position to which he is employed is Group Chief Executive Officer reporting to the Board of Directors and Group Chief Executive Officer of TransCentury Limited.

28. The resignation letter is addressed to Civicon Limited and copied to Civicon Africa Group Limited and Board of Directors. The resignation acceptance letter is by Ndungu Gathinji, Board Chairman, on a letterhead of Civicon Engineering Africa at the top and Civicon Limited at the bottom.

29. The letter informing the Claimant of his last working date is on Civicon Limited letterhead and is signed by Ben Kiilu, Acting Chief Executive Officer – Civicon.

30. The email to the Claimant on handover and final working day is by Ben Kiilu of Civicon Limited but on letterhead depicting Civicon Limited and Civicon Engineering Africa.

31. For Peter Horsey, the employment contract is with Civicon Africa Group Limited as Manager.

32. The resignation is to Civicon Limited and the resignation acceptance is again by Ndungu Gathinji, Board Chairman on behalf of Civicon Limited. The letterhead used for acceptance of resignation is for Civicon Engineering on the top and Civicon Limited at the bottom.

33. The letter informing him of his last working date and handover is by Ben Kiilu, Acting Chief Executive Officer- Civicon. The letter is on letterhead of Civicon and is copied to Mr. Ndungu Gathinji – Chairman Civicon; Mr. Geoffrey Njue, Chief Finance Officer, Civicon and M/s Florence Murerwa – TCL Group Head Human Resource Administrator Civicon. At the bottom of the letter is address of Civicon Limited.

34. Both Claimants were paid salary by Civicon Limited as reflected in the Tax Deduction Card from Income Tax Department, Kenya Revenue Authority.

35. In the objects clause of the constitution of Civicon Africa Group Limited incorporated in Mauritius, the objects are set out as follows –

“OBJECTS

To acquire the entire issued share capital or no less than ninety per centum (90%) of the issued share capital in, but not Limited to, Civicon Limited (incorporated In Kenya), Civicon Limited (incorporated In Mauritius), Civicon Limited (incorporated in South Sudan), Civicon Limited (incorporated In Uganda), Civicon United (Incorporated in Rwanda) and Tructoll Limited (Incorporated In South Sudan) (the Target Companies”) through the issue of shares in the Company to the holders of shares In the Target Companies In exchange for the shares held by them in the Target Company or alternatively through the issue of shares of the Target Companies directly to the Company.

To hold the above investment and any other investment that the board may decide from time to time.

To do as such other things as are incidental or conducive to the attainment of the above objects.”

36. This is confirmed in the evidence of RW1 who stated –

“As our operations in Kenya, we have two entities, Civicon Limited and Civicon Kenya Limited. Initially, historically all operations were done with Civicon Limited. As we grew, we opened other companies such as Civicon Uganda and Civicon Sudan. It was felt that we incorporate an entity and we incorporated Civicon Limited.”

37. From the foregoing, it is clear that the Respondent operated under different entities and sued the different names of the entities interchangeably being Civicon Limited, Civicon Kenya Limited, Civicon Engineering Limited and Civicon Africa Group Limited. It is further clear that the entity that paid the salaries of the Claimants is Civicon Limited, the Respondent, as evidenced by the Income Tax Deduction Cards for both Claimants. Civicon Limited was therefore the employer of the Claimants as defined in Section 2 of the Employment Act. Section 2 of the Employment Act defines “**employer**” to mean **any person, public body, firm, corporation or company who or 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.**

38. In this case, one company signed the employment another paid the salaries and paid tax for the employees. The company that pays salaries is therefore properly held to be the employer in the absence of explanation, as is the case in the instant suits.

39. I therefore find that the Claimants filed suit against their correct employer who paid their salaries being Civicon Limited.

40. With regard to the reliefs sought by the Claimants, the Respondent has not led any evidence in relation to the demand for the salary arrears. It is apparent from email communication between Jason Horsey and the Company that there were dues of the Claimants which remained unpaid as at the time of their leaving the company. The letter from Mr Ben Kiilu dated the 17th October 2017 addressed to Jason Horsey acknowledging resignation also alludes to the final dues which were yet to be computed. I therefore find and hold that there were salary arrears which the Claimants were entitled to be paid by the Respondent as prayed, as this is not disputed.

41. Since the amounts captured in the statement of claim are undisputed, I award **USD 51,372 to Peter Horsey** based on the monthly salary of USD 11,240 for the months of June, July, August, September and the days worked in October, 2017 and **USD 72,919 to Jason Horsey** based on the monthly salary of USD 16,500 for the months of June, July, August, September and the days worked in October 2017.

42. In conclusion judgment is entered for the Claimants against the Respondent in the following terms;

- a. For Peter Horsey an award of USD 51,372;**
- b. For Jason Horsey an award of USD 72,919;**
- c. The Respondent to issue the Claimants with certificates of service;**
- d. Costs are awarded to the Claimants;**
- e. Interest shall accrue at Court rates from date of filing suit.**

43. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7TH DAY OF FEBRUARY 2022

MAUREEN ONYANGO

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 had 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.

MAUREEN ONYANGO

JUDGE