



Kangethe v Monarch Insurance Company Limited (Cause E959 of 2021) [2022] KEELRC 81 (KLR) (27 May 2022) (Ruling)

Neutral citation: [2022] KEELRC 81 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E959 OF 2021**

SC RUTTO, J

MAY 27, 2022

BETWEEN

GABRIEL GITAU KANGETHE APPLICANT

AND

MONARCH INSURANCE COMPANY LIMITED RESPONDENT

RULING

1. The Claimant/Applicant has moved the Court through the instant Application which is expressed to be brought under Article 159(2) (d) of *the Constitution*, Section 46 (h) and 87 of the *Employment Act*, Section 3, 12 and 20 of the *Employment and Labour Relations Act, Rules* 14 and 17 of the *Employment and Labour Relations Court (Procedure) Rules 2016*, Rule 1 Order 39 of the *Civil Procedure Rules* and all enabling provisions of the law.
2. The Application seeks the following orders: -
 1. Spent.
 2. That pending the hearing and determination of this application, the respondent be ordered to effect the clearance of the claimant and pay his terminal dues unconditionally and issue him with a certificate of service.
 3. That the respondent be ordered to pay the claimant his accrued house allowance for his period in service.
 4. That the respondent be ordered to expunge from the claimant's record any document alleging that he owes Kshs 597,000.00 forthwith.
 5. That the costs of this Application be provided for.



3. The Application is premised on the grounds appearing on its face and on the Supporting Affidavit of the Applicant. Briefly that: -
 - a. There is nowhere in his contract of employment where the 15% house allowance is indicated.
 - b. On 17/3/2021, he was accused of not accounting for the marketing activities float to the tune of Kshs 372,000.00, notwithstanding that audit for 2019 and 2020 financial years had already been completed and this alleged loss had been curiously flagged in.
 - c. He had presented all receipts related to the events to the finance department for processing and clearing.
 - d. At that time, the COO, George Nyabuti, prevailed upon the claimant to take ownership of the unaccounted funds to pave way for the clearance of the outgoing GM-GIB.
 - e. He was assured by the COO that the steps were requested purely for the purpose of clearing the GM-GIB and that there was no intention of recovering the said monies from him. That he did this in good faith not realizing that that was another step towards setting him up for resignation due to frustration.
 - f. That the amount in question miraculously rose from Kshs 372,000/= to Kshs 597,000/= following his appraisal of the then Westlands branch manager.
 - g. He resigned having been put on the spot by the GM-GIB to sign the KPI based on the arbitrary targets before the close business on the same day without the option of discussing the figure and targets as well as the period which had been backdated.
 - h. He gave 30 days' notice upon resignation but was unceremoniously kicked out of the regular Monday zoom business development meeting on 13th August, 2021 at around 8:30 am and on 15th August, 2021, his office email was disabled.
 - i. He was informed by the respondent's HR that his last working day had been reviewed to 15th August, 2021.
 - j. On 16th September, 2021, he shared his clearance form with the HR for signing but was informed that he could not be cleared since he had an unaccounted for cash amounting to Kshs 597,000/=.
4. The Application was opposed through Grounds of Opposition dated 7th December, 2021 as well as the Replying Affidavit sworn by Mr. George Mogambi Nyabuti, who identifies himself as the Acting Chief Executive Officer of the Respondent. The Respondent avers that: -
 - a. The Applicant's salary was consolidated and was inclusive of 15% of the house allowance.
 - b. The Respondent's staff policy handbook provided that the Respondent may deduct from the Applicant's salary any unaccounted imprest and/or petty cash.
 - c. On various dates in 2020, the Respondent provided the Applicant with a total sum of Kshs 905,000/= as per diems and entertainment allowances for trips taken by the Applicant in the course of his employment.
 - d. Out of the Kshs 905,000/=, paid to the Applicant, Kshs 308,000/= was in respect of per diems and the balance of Kshs 597,000/= was for entainment allowances.



- e. The Applicant has failed to provide receipts for the expenditure in respect of the entertainment allowance totaling Kshs 597,000/=.
- f. The issue of unaccounted for expenditure arose during the process of auditing of the Respondent's books of account.
- g. The Claimant was informed of the unaccounted for expenditure of Kshs 597,000/=.
- h. The Applicant admitted in writing to directly receiving the monies for entertainment allowance through his emails of 17th February, 2021 and 15th March, 2021.
- i. The Applicant voluntarily agreed to resign and the same was accepted by the Respondent.
- j. The Applicant was cleared by all the departments save for finance department, with remarks that he had not accounted for Kshs 597,000/=being entertainment allowances paid to him.
- k. The Applicant has failed to account for entertainment allowance totaling Kshs 597,000/= hence the Respondent has withheld his terminal dues of Kshs 202,769.54, to offset against the unaccounted amount;

Submissions

5. The Application was disposed off by way of written submissions. On his part, the Applicant reiterated the averments contained in his Application and the affidavit annexed thereto. He submitted that the respondent's conduct regarding his employment and which led him to resign, is in itself a perfect exemplification of an unfair labour practice. In support of this submission, he cited the case of *Elizabeth Washeke and 62 others vs Airtel Networks (K) Ltd & another* (2013) eKLR. He further submitted that the Respondent's actions were deliberately created to block his clearance and deny him his lawful terminal dues.
6. On the other hand, the Respondent also reiterated the averments contained in its Replying Affidavit. It was submitted on behalf of the Respondent that an employer was entitled to offset terminal dues against monies owed by a former employee. To fortify this position, reliance was placed on the case of *Samuel Gacheba Chege vs Kenya Women Microfinance Bank* (2021) eKLR. That the Applicant had not controverted that on several occasions, he unequivocally admitted in writing to receiving Kshs 597,000/= and of being responsible for accounting for it. That the Applicant had not satisfied the threshold for grant of the mandatory injunctions as established in *Giella vs Cassman Brown* (1973) EA since he has not demonstrated that that he has a prima facie case and has suffered injury. That on a balance of probability, the Respondent will be more prejudiced and will suffer more injury if the orders sought in the Application are granted. The Respondent further submitted that the Applicant's case and the instant Application are frivolous, vexatious and an abuse of the court process. On this score, it relied on the case of *Muchanga Investments Limited vs Safaris Unlimited (Africa) Ltd & 2 others* (2009) eKLR.

Analysis and determination

7. Flowing from the Application, prayers sought therein, the response thereto and the opposing submissions, it is evident that the sole issue falling for the Court's determination, is whether the Application is merited.
8. It is evident that the nature of the orders sought by the Applicant against the Respondent are in the form of mandatory injunction at this interlocutory stage.



9. Essentially, the Application seek to compel the Respondent to: -
 - i. Effect clearance of the Applicant and pay his terminal dues;
 - ii. Pay the Applicant his accrued house allowance; and
 - iii. Expunge from the Applicant’s record, any document alleging that he owes Kshs 597,000/=
10. In *Locabail International Finance Ltd vs Agro Export and Another* [1986] ALL E.R. 901, the Court set out the principles applicable in cases of mandatory injunctions as follows: -

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the court thought that the matter ought to be decided at once or where the injunction was directed at simple and summary act which could easily be remedied or where the defendant had attempted to steal a match on the Plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high sense of assurance that at the trial, it would appear that the injunction had rightly been granted, that being a different and higher standard that was required for a prohibitory order.”
11. This position was reiterated by the Court of Appeal in *Kenya Breweries Ltd & Another vs Washington O. Okeya* [2002] eKLR and *Nation Media Group & 2 Others vs John Harun Mwau* [2014] eKLR.
12. In essence, a Court can only grant a mandatory injunction at an interlocutory stage, in clear cases and where special circumstances exist.
13. In the instant case, the issues in dispute and which are subject for the grant of the mandatory injunction, have been strongly contested by the Respondent, who has adduced documentary evidence to back its assertion that the claimant’s gross salary was inclusive of house allowance and that the claimant had not accounted for the sum of Kshs 597,000/= being entertainment allowance paid out to him.
14. From the face of it and without analyzing the grounds and evidence presented, this is evidently not a clear case and there are no special and exceptional circumstances, that would warrant grant of a mandatory injunction at this interlocutory stage.
15. Indeed, the issues arising in this matter are not straightforward and require to be canvassed through a full hearing where viva voce evidence is presented.
16. Further and going by the documentary evidence presented by both parties at this stage, it is prudent that a determination on the issues can only be made, upon the Court taking viva voce evidence, as this will allow for cross-examination, and thus test the strength of the evidence on record.
17. Over and above, it is also notable that the orders sought at this stage are final in nature and can only be granted upon the issues in controversy being ventilated in a full trial and the main claim being determined.
18. The upshot of the foregoing is that grant of the orders sought at this stage is not desirable and in fact, may be prejudicial to the Respondent.
19. Be that as it may, I find that the Applicant is entitled to a certificate of service as it is not in dispute that he worked for the Respondent for the period specified. The certificate of service provided for under section 51(2) of the *Employment Act*, is in relation to the name of the employer and its postal



address; the name of the employee; the date when employment of the employee commenced; the nature and usual place of employment of the employee; and the date when the employment of the employee ceased. These issues have nothing to do with an employee's liability to the employer.

20. The total sum of the foregoing, is that I find that the Application is not merited for the reasons set out herein, hence does not warrant grant of orders in the nature of a mandatory injunction at this stage save, for the issuance of a certificate of service.
21. Consequently, the Application dated 9th November, 2021, is hereby disallowed.
22. Costs shall be in the Cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27th DAY OF MAY, 2022.

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STELLA RUTTO

JUDGE

Appearance:

Mr. Njiru for the Claimant/Applicant

Ms. Wataka for the Respondent

Court Assistant Barille Sora

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.

STELLA RUTTO

JUDGE

