



REPUBLIC OF KENYA



**Khalicha v Blue Nile East Africa Limited (Cause 1651 of 2014)  
[2022] KEELRC 1721 (KLR) (12 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1721 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1651 OF 2014  
MA ONYANGO, J  
MAY 12, 2022**

**BETWEEN**

**RASHID ABDIKADIR KHALICHA ..... CLAIMANT**

**AND**

**BLUE NILE EAST AFRICA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. Vide his memorandum of claim dated 18<sup>th</sup> September 2014 as amended on 20<sup>th</sup> September, 2019, the claimant avers that his employment was wrongfully and unlawfully terminated by the Respondent who is a registered limited liability company.
2. It is his case that he was employed by the Respondent in March 1998 in the capacity of a store keeper at a basic salary of Kshs.5,000/-. That he performed his duties diligently and to the Respondent's satisfaction and as a result rose through the ranks to the position of store supervisor in the year 2006 before being transferred to the sales department with a salary increment of Kshs.7,000/-.
3. The Claimant avers that he worked with the Respondent until July 2012 when the Respondent unlawfully and unfairly terminated his employment without any notice or hearing despite the fact that his employment record was exemplary.
4. The Claimant avers that at the time of separation, he was earning a monthly salary of Kshs.14,000/-.
5. In the instant claim he seeks the following reliefs:
  - a. A declaration that the Claimant's purported dismissal was unlawful and unfair.
  - b. An order for the Respondent to pay the Claimant his terminal dues in the sum of Kshs.1,784,000/- comprising of the following:
    - i. Salary in lieu of notice Kshs.42,000



- ii. Unpaid 15 months' salary Kshs.210,000
  - iii. Unpaid NSSF monthly deductions Kshs.160,000
  - iv. Unpaid leave from 2005 to June 2012 Kshs.112,000
  - v. 15 days for every year worked Kshs.1,260,000  
Total Kshs.1,784,000
  - c. Costs of this suit
  - d. Interest on (b) and (c) above at Court rates.
  - e. Such further orders or other reliefs as this Honourable Court may deem fit to grant.
6. The Respondent in its response to the memorandum of claim and counter claim dated 23<sup>rd</sup> September, 2019 and filed in Court on 27<sup>th</sup> September, 2019, admits that it engaged the Claimant. It however denied that it terminated his employment as contended and averred that the Claimant in fact deserted his duties in June 2012 after receiving his salary on 5<sup>th</sup> June, 2012.
  7. The Respondent further averred that it made efforts to call the Claimant to inquire on his whereabouts but all its calls went unanswered.
  8. The Respondent maintained that the Claimant's claim as filed raises no cause of action as against it and therefore urged this Court to dismiss the claim with costs to the Respondent.
  9. The Respondent in its counter claim avers that the Claimant having absconded lawful duties remains indebted to it in the sum of Kshs.14,000/- being one month's salary in lieu of notice.
  10. The Respondent further claims that on various dates it supplied the Claimant through its sister company, Gulf Steel Limited, with goods on credit in the sum of Kshs.28,489,415.09/-, which goods the Claimant acknowledged receipt of but paid a sum of Kshs.21,720,270.20/- leaving a balance of Kshs.6,769,144.89/- inclusive of bank charges that remains due and owing to the Respondent.
  11. The Respondent prays for judgment against the Claimant for the following:
    - i. The sum of Kshs.14,000/- as salary in lieu of notice.
    - ii. The sum of Kshs.6,769,144.89/- for goods supplied
    - iii. costs of and incidental to this suit
    - iv. Interest in (i) and (ii) above at Court rates
    - v. Any other relief that this Honourable Court may deem fit to grant.
  12. The suit was heard on 28<sup>th</sup> November, 2019 and 9<sup>th</sup> November, 2021 with the Claimant testifying on his behalf and the Respondent calling one witness to testify on its behalf.

### **Claimant's Case**

13. The Claimant testified as CW1 and adopted his witness statement dated 11<sup>th</sup> March, 2019 as his evidence in chief. In his statement he reiterated the averments made in his amended memorandum of claim. He relied on the list and bundle of documents dated 18<sup>th</sup> September, 2014 and 11<sup>th</sup> March, 2019. He testified that as salesman his job description was to source for orders and to supply the orders. He



testified that some of the orders were paid in cash while others were paid by way of post-dated cheques drawn in favour of the Respondent.

14. The Claimant testified that he worked for the Respondent until 21<sup>st</sup> July, 2012 when sales were stopped for lack of work. He stated the last salary he received from the Respondent was on 5<sup>th</sup> June, 2012.
15. The Claimant testified that his total sales over the period he worked for the Respondent was Kshs.301,717,819.50/- and the amount collected was Kshs.298,915,676.50/- leaving a deficit of Kshs.2,797,143/- which was the accumulated debt owed by the Respondent's customers.
16. The Claimant testified that he was underpaid as his salary should have been Kshs.42,000/- but he was earning Kshs.14,000/- at the time of his separation.
17. The Claimant urged the Court to find merit in his claim and allow it in terms of the reliefs therein.
18. On cross examination, the Claimant stated that he was never issued with a termination letter. He confirmed that he was paid salary until 5<sup>th</sup> June 2012. He further confirmed having been a member of the National Social Security Fund. However, he stated that he was not aware of the amount remitted to the fund.
19. On the issue of Gulf Steel Limited, the Claimant maintained that he was employed by the Respondent but remained evasive on what relationship existed between him and Gulf Steel. He confirmed that Gulf Steel Limited did business with the Respondent.
20. When queried on his directorship as evidenced by Company registration details, which enlists him as one of the directors and that the company (Gulf Steel Limited) had issued bounced cheques to the Respondent for goods it received, he stated that there was no proof that the goods had in fact been received by Gulf Steel Company.
21. On further cross examination, the Claimant agreed that he was never terminated by the Respondent but rather left when the Respondent failed to pay him his dues.
22. On re-examination, the Claimant stated that he was a director of Gulf steel Limited. He stated that there were other directors in the company.

### **Respondent's Case**

23. The Respondent called one (1) witness, Lidia Gode Yusuf(RW1), a Director, who adopted her witness statement dated 23<sup>rd</sup> September, 2019 and filed in Court on 27<sup>th</sup> September, 2019 as her evidence in chief. In her statement RW1 reiterates the averments made in the Respondent's response to the claim.
24. She further testified that the Claimant is also known as Rashid Abdikar Ismail to whom the letter dated 8<sup>th</sup> June, 2012 was addressed.
25. She further testified that the Claimant remains indebted to the Respondent to the tune of Kshs.6,769,144.89/- for goods supplied and not paid for. She therefore urged this Court to find the Claim devoid of merit and to dismiss it with costs and instead, find in the Respondent's favour in terms of the counterclaim filed and allow it as prayed.

### **Submissions**

26. This Court takes note that at the time of writing this judgment there were no submissions on record filed on behalf of the Respondent despite the fact that it was accorded the opportunity to file the same even after time allocated had lapsed.



27. It is submitted on behalf of the Claimant that the termination of his employment by the Respondent was wrongful, unfair and unlawful as he was neither informed of the reason for the termination nor given an opportunity to defend himself of any wrongdoing prior to the termination.
28. He submitted that the termination of his employment was contrary to the mandatory provisions of Sections 41, 43, 45, and 47 of the Employment Act, 2007 and relied on the Court findings in the cases of Nicholas Otinyu Muruka v Equity Bank Ltd [2013] eKLR, Kenya Union of Commercial Food & Allied Workers v Meru North Farmers Sacco [2014] eKLR, David Gichana Omuya v Mombasa Maize Millers Limited [2014] eKLR and Anthony Makala Chitavi v Malindi Water & Sewerage Company [2013] eKLR where the Courts emphasised the need for an employer to comply with the provisions of Section 41 and 43 of the Employment Act, 2007 for a termination to be both substantively and procedurally fair.
29. The Claimant further submitted that this Court ought to disregard the Respondent's assertion that he absconded lawful duties for want of proof as no evidence was tabled by the Respondent to support this assertion, no duty roster was filed indicating instances where the Claimant absconded duties.
30. On the counter claim the Claimant submitted that the same is devoid of merit and should be dismissed with costs to the Claimant.
31. The Claimant submitted that the claim for Kshs.14,000/- being one month's salary in lieu of notice is without basis as he did not abscond duties as contended by the Respondent. He maintained that the Respondent without just reason withheld his salary for the months of June and July 2012 forcing him to source for another means of livelihood.
32. On the claim for unpaid debt owed by Gulf Steel Limited, the Claimant submitted that he has never issued any cheques on behalf of the company and can therefore not be held liable for debts of the company.
33. He submitted that he is a separate entity and distinct from Gulf Steel Limited hence cannot assume liability for the company. To buttress this argument the Claimant relied on the cases of Salomon v Salomon (1987) AC 78 and the Court of Appeal decision in the case of Victor Mabachi & another v Nurtun Bates Limited [2013] eKLR where the Courts emphasised that companies are separate and distinct from the stakeholders.
34. In conclusion the Claimant submitted that he had proved his case on a balance of probability and urged this Court to allow his Claim as prayed and that the counter claim is devoid of merit and should be dismissed with costs to the Claimant.

### **Analysis and Determination**

35. Having considered the facts of this cause, evidence, submissions and authorities cited by the Claimant there is no dispute that the Claimant was employed by the Respondent from the year 1998 to July 2012 when his employment ended. The issues for determination are therefore the following: -
  - i. Whether the Claimant's employment was terminated unfairly or he absconded duty;
  - ii. Whether the Claimant is entitled to the reliefs sought;
  - iii. Whether the Respondent is entitled to the reliefs sought in its counterclaim.
36. The Claimant maintained that his employment was unfairly and unlawfully terminated by the Respondent without prior notice or an opportunity to defend himself as required under the mandatory provisions of Section 41 of the Employment Act, 2007.



37. At the hearing the Claimant stated that he did not receive any letter of termination from the Respondent but left employment when the Respondent failed to pay him his dues citing unsettled bills for goods supplied to a company affiliated to the Claimant.
38. The Respondent on the other hand maintained that it did not at any time terminate the Claimant's employment but rather the Claimant was guilty of absconding lawful duty in July 2012 after failing to settle a debt owed to the Respondent.
39. The evidence of both the Claimant and the Respondent point to the Claimant having left employment after the Respondent withheld his salary and demanded that he settles debts owed by Gulf Steel Limited, a company the Claimant was associated with and where he was a Director. There is evidence that the Claimant at some point after leaving employment issued cheques to the Respondent in respect of the debts owed which cheques were dishonoured upon presentation to the bank on account of insufficient funds.
40. During cross examination RW1 testified that the Respondent funded the Claimant and another former employee to start their business.
41. The records from the Registrar of Companies produced by the Respondent shows the Gulf Steel Limited Directorship to be Rashid Abdikadir Khalicha with 500 shares and Mohamed Ali Mustafa with 500 shares out of the total of 1,000 shares of the company.
42. The Claimant stated that there was no relationship between him and Gulf Steel Limited which issued bounced cheques to the Respondent. He also testified that he was not terminated by the Respondent. He testified that the Respondent stopped mobile sales and he was informed there was no work from 5<sup>th</sup> June 2012 but he continued reporting for work until 21<sup>st</sup> July 2012.
43. The Claimant admitted that Gulf Steel Limited was doing business with the Respondent and that there were bounced cheques issued to the Respondent by Gulf Steel Limited.
44. In his witness statement filed with the amended memorandum of claim at paragraph 8 the Claimant states "That sometimes July 2012 we reported to work as usual and approached the store keeper as routine to take the goods for our various customers. However one of the company director Mr. Komi Rao stopped the goods and directed us to make recoveries of all the pending payments."
45. In his evidence in Court, the Claimant testified that he stopped working because the Respondent stopped paying his salary.
46. RW1 confirmed this when she testified that the Claimant absconded duty because he owed the Respondent a lot of money for goods sold to other customers whom he supplied as salesmen and for goods supplied to him when he started his own business.
47. From the foregoing, I find neither proof of absconding duty by the Claimant as alleged by the Respondent, nor proof of unfair termination as alleged by the Claimant.

#### **Whether the Claimant is entitled to the reliefs sought**

48. Having found no proof of unfair termination of the Claimant's employment, I now consider whether he is entitled to any of the prayers sought in the memorandum of claim.

#### **(a) Salary in lieu of notice**

49. The Claimant is not entitled to pay in lieu of notice as he did not prove unfair termination of his employment by the Respondent.



**(b) Unpaid 15 months' salary totalling to Kshs.210,000/-**

50. In his evidence the Claimant confirmed having been paid his salary up to June 2012. This claim fails for want of proof.

**(c) Unpaid NSSF monthly deductions**

51. This claim stands dismissed for want of proof as in his own evidence the Claimant confirmed that he was not aware which months were not paid but was stating what he was told.

**(d) Unpaid leave from 2005 to June 2012**

52. No records were availed to indicate days taken and those pending over the period between the year 2005 and June 2012. The Claim therefore fails for want of proof.

**(e) 15 days for every year worked totalling to Kshs.1,260,000/-**

53. This prayer is declined by dint of the provisions of Section 35 of the Employment Act, 2007 as the Claimant was a member of the National Social Security Fund.

54. The Claimant is not entitled to costs of this suit as his entire claim has not been proved.

**Counter claim**

55. With regard to the counterclaim, the claim for one month's salary in lieu of notice is dismissed having found that there was no proof that the Claimant absconded duty.

56. On the claim for payment of Kshs.6,769,144.89/- owed to the Respondent by Gulf Steel Limited, I agree with the Claimant's submission that he cannot be held liable for the debt of the company as he, despite being a director in the company and having himself advanced goods on credit to the company, the Claimant and the Company are distinct and separate legal entities as was held in the case of Salomon v Salomon (supra). For the claim to succeed, the Respondent should have enjoined Gulf Steel Limited as a party.

57. In conclusion both the claim and the counter claim fail and are dismissed with no orders for costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 12<sup>TH</sup> DAY OF MAY 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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.



**MAUREEN ONYANGO**  
**JUDGE**

