



Nyangasi v Sally Mahihu t/a Bowyer Mahihu & Company Advocates (Cause E499 of 2020) [2022] KEELRC 4143 (KLR) (29 September 2022) (Ruling)

Neutral citation: [2022] KEELRC 4143 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E499 OF 2020
M MBARŪ, J
SEPTEMBER 29, 2022

BETWEEN

LILLIAN NYANGASI CLAIMANT

AND

**SALLY MAHIHU T/A BOWYER MAHIHU & COMPANY
ADVOCATES RESPONDENT**

RULING

1. The claimant filed application dated June 7, 2022 seeking for orders that partial judgement on admission against the respondent for the admitted sum of ksh 270, 000 with interests from September 8, 2020 be paid to the claimant and that the rest of the claim be scheduled for hearing.
2. The application is supported by the affidavit of the claimant and on the grounds that the claim herein was filed on September 7, 2020 and the respondent filed a reply on December 1, 2020 and at paragraph 21(a) there is admission that the respondent failed to pay the claimant salaries for the months of April to July and part of August, 2020. The claimant was earning a salary of ksh 60, 000 per month and there is no evidence that such salary was paid and on the admission, judgement should be entered for this amount.
3. In reply, the respondent filed the replying affidavit of Sally Mahihu and who avers that the alleged admission of partial claim is not unequivocal on account of averments under paragraph 16 of the Response save that the claimant was not required to require to work until May, 2020 a fact which is contested and there is a counter-claim dated December 8, 2020. The admission alleged does not constitute an admission and the issue of the amounts owing has not been addressed and the orders sought cannot issue.
4. A claim for salary arrears such as has been presented by the claimant is in the nature of special damages which must be pleaded and proved. The claim is for salary arrears of ksh 660, 000 and which is now



reduced to ksh 270, 000 without any explanation and on this basis the application should be dismissed with costs.

5. Both parties filed list of authorities and made oral submissions.

Determination.

6. The application, affidavits and submissions put into account, the single issue for determination is whether partial judgement should issue for the sum of ksh 270, 000.
7. Under Rule 13 (2)(c) of the *Employment and Labour Relations Court (Procedure) Rules, 2016* once a claim is filed, in response, a respondent is allowed to respond and admit the whole or part of the claim. A claimant then is at liberty to move the court and seek judgement on admissions.

13.(1) ...

2. A respondent's statement of response shall contain-
 - a. ...
 - b. ...
 - c. Any admission of any statement of facts set out in the statement of claim as the respondent admits, and a denial of any statements made in the suit that the respondent does not admit
8. An admission to a claim must be plain and obvious and clearly discernible from a plain reading of the facts given. Based on given facts, the court is able to determine a clear case of admission and before a full trial allow such matter in judgement.
9. As a general rule, the discretionary power to grant judgement on admission must be exercised sparingly as held in *Cassam v Sachania* [1982] KLR that;
Granting judgement on admission of facts is discretionary power which must be exercised sparingly in only plain cases where the admission is clear and unequivocal. ... Judgement on admission cannot be granted where points of law have been raised and where one has to resort to interpretation of documents to reach a decision.
10. In the memorandum of claim filed on September 9, 2020 the claimant's case is that on March 20, 2020 the respondent sent her on a two weeks leave and after taking such leave the claimant was unable to return to the physical office owing to the Covid-19 pandemic and carried out her duties virtually. That the respondent failed to pay salaries for the months of March to August, 2020 and following breach of the employment contract, the claimant resigned from her employment on August 25, 2020. The claim is among others, payment of due salaries amounting to ksh 660, 000.
11. In response, the respondent admitted there was a contract of employment between the parties and on March 20, 2020 the claimant was requested to take 2 weeks annual leave and she decided to travel to Tanzania and on April 24, 2020 the claimant was informed of the respondent's intention to request employees to take unpaid leave in light of the financial situation and on May 3, 2020 the claimant was informed of the respondent's decision to declare certain positions redundant. That the claimant resumed work in August, 2020 and the respondent noted it had not been able to pay the claimant her salary for April to July, 2020 because of serious financial crisis.



12. On the application before court, the facts as presented, the claimant resigned from her employment following after a period of unpaid salaries. The respondent's case is that from March, 2020 there was a financial crisis leading to advice upon the claimant that certain positions would be declared redundant.
13. The plain reading of these facts, there is no admission of the respondent owing the claimant the sum of ksh 270,000 on the grounds that the non- payment of salary is put into context. The respondent was under a financial crisis which is a matter well regulated in law under the provisions of Section 40 of the *Employment Act*, 2007. Upon realization that the employer is being faced with operational challenges, notice should issue to employees in this regard. Whether such notice and the reasons given were justified and in accordance with statutory requirements, such is a question of law which the court must interrogate at a full hearing.
14. In the circumstances, to issue partial judgement based on the given facts will not achieve the ends of justice.
15. Application dated June 7, 2022 is found without merit and is hereby dismissed. Court will hear the claim on the merits. Costs shall be in the cause.

DELIVERED IN OPEN COURT AT NAIROBI THIS 29TH DAY OF SEPTEMBER, 2022.

In the presence of: Court assistant – Okodoi

M. MBARU

JUDGE

..... and

