



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kenya Wine v Amoro (Cause 180 of 2015)
[2022] KEELRC 3967 (KLR) (20 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3967 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 180 OF 2015
MA ONYANGO, J
SEPTEMBER 20, 2022**

BETWEEN

KENYA WINE AGENCIES LIMITED CLAIMANT

AND

YOBESH AMORO RESPONDENT

JUDGMENT

1. The Claimant initially instituted the suit herein in the High Court as HCCC 312 of 2006 vide a plaint dated June 5, 2006. The suit was thereafter transferred to this Court and assigned ELRC Cause No. 180 of 2015. The Claimant seeks the following reliefs;
 - a) Kshs.5,941,924.74 comprised off:
 - (i) Advances Kshs.3,233,000.00
 - (ii) Purchase of wines and spirits on credit Kshs.41,276.48
 - (iii) Debit note – motor vehicle transfer
 - (iv) KAP 292W Kshs.2,410.00
 - (v) Plaintiff’s guarantee for Defendant at NIC Bank Limited for loan taken of Kshs.2.5 million as at January 31, 2006 plus interest at 17% per annum applied on reducing balance Kshs.2,675,238.26
 - (vi) Payment cheque to account (Kshs.10,000.00)
 - b) Interest on the sum guaranteed to NIC Bank at 17% on reducing balance or such other rates as the bank may charge on the sum of Kshs.2,675,238. 26 from February 1, 2006 until payment in full.



- c) Interest on the sum of Kshs,3,266,686.48 at commercial rates (being the overdraft interest rate of Bank at date demand) until payment in full.
 - d) Such further or other relief as this Court may deem just and appropriate to grant.
2. The respondent in a statement of defence dated November 6, 2006 denied the Claimant's allegations in toto. He contended that the purported termination of his employment was null and void. That the various advances he received when in employment were received on account of his salary and other emoluments which were never paid as agreed. He avers that the termination was without any foundation in law as he was not guilty of misconduct nor was he on probation as alleged.
 3. The respondent further averred that any claim in respect of any borrowing from NIC Bank was premature and did not lie. That the plaintiff had not been called upon to pay any monies pursuant to the guarantee for monies advanced to the Respondent and had no basis in law for claiming the same. He further averred that Motor Vehicle Registration Number KAPXXXX was held by the plaintiff without lawful cause and continued to be so held despite a demand for return of the same. It is the Respondent's averment that the plaintiff was thus not entitled to the prayers sought and the claim should be dismissed with costs.
 4. After numerous applications and appeals that led to the delay of the suit from 2006, the case was finally heard during which the claimant called two witnesses who testified on its behalf while the Respondent testified on his behalf.

Claimant's Case

5. The claimant's two witnesses adopted their witness statements and produced documents as per the lists of documents dated November 2, 2012 and supplementary list and bundle of documents dated October 11, 2016.
6. CW1, Gladys Wakhu testified that she is the claimant's employee attached to the Accounts Department. It was her testimony that the respondent was her boss. She used to collect cheques from him for banking. On January 6, 2005, the respondent handed her a cheque dated January 5, 2005 for Kshs.900,000/= and directed her to encash the cheque at Barclays Bank of Kenya and take the money to General Motors EA for the purchase of a motor vehicle for Yobesh Amoro, the respondent. The money was used to purchase Motor Vehicle registration Number KAP XXX. She later learnt that the respondent's employment with the claimant had been terminated and that he had been charged in the Anti-Corruption Court.
7. CW2, Bernard Kariuki Ngono adopted and relied on his witness statement dated November 8, 2012. He testified that he joined the claimant in 2007 and was therefore not physically present when the cause of action in the instant suit arose. He relied on the records in the claimant's possession. It was his testimony that the respondent was advanced Kshs.900,000/= which he used to purchase Motor Vehicle Registration Number KAP xxxx. He also requested for and was granted salary advances on several occasions. The claimant also guaranteed the respondent for a staff loan of Kshs.2,500,000/= advanced by NIC Bank. The said loan together with interest was repaid by the claimant.

Respondent's Case

8. The respondent on his part testified and adopted his witness statement filed on October 16, 2014. He also produced documents as per his bundle of documents dated November 20, 2014.



9. It was his testimony that he was a former employee of the claimant having joined on December 10, 2004 as Finance and Administration Manager. He was entitled to a basic salary of Kshs.295,000/=, housing allowance of Kshs.60,000/= and other allowances of Kshs.35,000/=. He was also entitled to mileage claim or company car, medical cover, telephone allowance of Kshs.10,000/= per month, monthly drinks, car loan scheme as per the plaintiff's Car Loan Scheme, house Loan and gratuity payment at 31% of the basic salary at the end of the 3 year contract.
10. He further testified that in the course of his employment, he was not fully paid the contracted salary. He was however afforded loan facilities as a manager of the plaintiff. In June 2005, he received a letter that summarily dismissed him retrospectively with effect from April 2005. He was not afforded any hearing before the dismissal nor were the terms of the alleged gross misconduct brought to his attention. His Motor Vehicle KAP xxx and a title deed in respect of property known as LR Number 209/xxx were illegally detained by the plaintiff. On the loan with NIC Bank, it was his testimony that the plaintiff was only a guarantor and that it can only be called upon to pay if and when the principle debt is due and outstanding and the borrower has refused to settle the same. He prays that the case be dismissed with costs.

Submissions by the Claimant

11. The claimant through its Advocate on record submits that the instant Claim condenses into the following issues for determination;
 - i. Whether the respondent is indebted to the claimant;
 - ii. The Remedies this court ought to grant to the claimant.
12. Counsel points out that the court should take note that the instant case is not a case where the question of fairness or unlawfulness of termination of the respondent is being addressed. The application by the respondent dated December 12, 2018, seeking to amend his defence and raise the issue of unfair termination in a counterclaim was dismissed. What is before the court is a suit for recovery of monies from the Respondent.
13. On whether the respondent is indebted to the claimant, Counsel submits that the respondent owes the claimant Kshs.5,941,987.74 made up of monies for wine and spirits bought on credit, advances given to the respondent and the Staff Loan given to the respondent through NIC Bank.
14. Counsel submits that the claimant had a staff loan scheme with NIC bank where its staff were advanced loans at discounted interest rates. The respondent utilized this scheme and albeit illegally secured a loan of Kshs.2,500,000/=. That it is not in dispute that as at 31st January 2006, the outstanding loan plus interest was Kshs.2,873,833/=. The said amount was repaid by the claimant. Counsel relies on the case of *Jane Jerotich Sirma v Postal Corporation of Kenya* [2021] eKLR where the court held:

“Where the claimant had obtained a house loan from the respondent upon terms and conditions agreed upon, at the end of her employment with the respondent, such became due. All lawful dues owing to the employer become lawfully due at the end of employment...”
15. Counsel further relied on the case of *John Ogutu Ragama v Elimu Co-operative Savings & Credit Society Limited* [2013] eKLR where the court observed as follows;

“An employee whose employment is terminated and at the same time is owing and has not made a repayment...must have this deducted from terminal dues and where these are not



sufficient, this becomes a debt recoverable directly from himself. Where an employee has enjoyed a loan facility from the collective kitty he is equally under a duty to make good any dues where his relationship with the collective is severed by virtue of the termination of his relationship with the principal.”

16. On the claimant’s claim for credit purchase of wine and spirits for the sum of Kshs.41,276/= Counsel submits that the claimant has proved the same on a balance of probabilities. That the allegation by the respondent that according to his terms and conditions, he was entitled to drinks up to Kshs.80,000/= are unfounded and based on no evidence. He cites sections 107 and 108 of the Evidence Act which provide that the burden of proof lies with the person who would fail if no evidence was given on either side. He urges the court to be guided by the case of Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR where the court of Appeal restated the provisions of sections 107 and 108 of the Evidence Act.
17. Counsel further submits that the claimant is entitled to the refund of the money advanced to the respondent amounting to Kshs.3,233,000/=. He relies on the case of David N Nyamu v Insurance Training and Education Trust Registered Trustees [2015] eKLR where the court allowed a counterclaim for liabilities owed to the employer in form of advances and loans. He submits that the claimant is entitled to the prayers sought.

Respondent’s Submissions

18. The respondent through his Counsel on record propose the following issues for determination;
 - i. The terms of the employment contract of the respondent;
 - ii. Whether the sums sought are owed to the claimant.
19. On the first issue, Counsel submits that vide a Committee Paper No. S&A 005/2005, the respondent’s terms included *inter alia* a monthly salary in the sum of Kshs.400,000/=. That the respondent thereafter received advances on the basis of the committee paper pending confirmation of his terms of employment by the board. That the instant claim is a suit cleverly coined and whose effect is to ask the court to ask an employee to refund a salary and other benefits received while in employment. It seeks to develop jurisprudence where employers can seek insulation from the courts to allow them seek services of employees at no cost. That it is a bold step towards modern slavery.
20. Counsel submits that the claimant is not entitled to the Kshs.5,941,924/= claimed. On the advances in the sum of Kshs.3,233,000/= Counsel submits that the same constituted payment made to a serving manager at the material time. That in the committee paper No. S&A 005/2005 it was determined by the management that the respondent would be paid advances on the basis of the discussions on his remuneration pending confirmation by the board. That recovering the same from him would effectively mean that the respondent worked from December 13, 2004 to June 2005 without pay yet he had been offered an indicative pay of Kshs.400,000/= per month.
21. With respect to the claim for Kshs.900,000/= Counsel submits that the sum was granted to the respondent for the purchase of a motor vehicle which was later seized and sold by the claimant at a throw away price of Kshs.150,000/=. That it was impossible for the vehicle to depreciate to a tenth of its purchase value within months and that it would be unjust to condemn the respondent to pay the sum of Kshs.750,000/=.
22. On the claim for allowances for wines and spirits, Counsel submits that the respondent was entitled to monthly benefits that included an allowance for drinks in the sum of Kshs.80,000/=. Counsel relies on section 10(7) of the Employment Act which places the burden of proving or disproving an alleged



term of employment stipulated in the contract on the employer. He also relies on the case of *Jonathan Zacharia & 24 others v Bulk Warehouse Management & 2 others* [2013] eKLR where the court held that pursuant to provisions of section 10(5) of the *Employment Act*, the burden of disproving verbal allegations of terms of contracts lies with the employer.

23. On the claim for compensation for the loan with NIC Bank, Counsel submits that NIC Bank is not a party to the proceedings herein, the claimant did not produce in evidence a loan agreement between the respondent and the NIC Bank, guarantee agreement or proof of payment for the loan. That the Employment and Labour Relations Court lacks jurisdiction as such is a matter to be determined by the Commercial and Tax Division of the High Court.
24. Counsel further submitted that the claimant failed to produce any demand letter from NIC Bank for settlement of any debt. That the liability of a guarantor is a secondary liability which does not arise until the principal debtor has defaulted.
25. Counsel submits that owing to the above, the claimant's claim should be dismissed with costs.

Analysis and Determination

26. Upon consideration of the issues arising from the pleadings, the testimonies before court and the submissions on record, this court is being called upon to determine the following.
 - a) Whether this court has jurisdiction to hear and determine this suit;
 - b) Whether the respondent owes the claimant the sums claimed;
 - c) Whether the claimant is entitled to the orders sought.

a) Jurisdiction

27. It is not in dispute that the claimant secured a loan to the tune of Kshs.2,500,000/=. As at January 26, 2006, the outstanding loan and interest was Kshs.2,873,833/=. The respondent's position is that the claimant was not the borrower and that the claim was premature. That the liability of a guarantor is a secondary liability which does not arise until the principal debtor has defaulted. Further that this is a commercial dispute and as such this court lacks jurisdiction to hear and determine it as it is reserved for Commercial and Tax Court.
28. As has been stated herein above, this suit was originally filed in the High Court. The suit was transferred to this court on the application of the respondent dated October 28, 2014. The respondent is therefore estopped from denying the jurisdiction of this court.
29. The issue was again raised by the claimant on October 12, 2018 when the court again observed that the file having been transferred from the High Court Civil Division, nothing had changed to warrant the transfer of the file back to the same court on grounds of jurisdiction. The court further observed that the monies claimed in the plaint having been advanced to the respondent in the course of his employment in his capacity as an employee of the claimant, the suit is properly before this court.
30. The issue of jurisdiction of this court is therefore *res judicata* having been the subject of a determination in both the High Court and this court and there having been no appeal or application for review of either of the said decisions.



b. Whether the Respondent owes the Claimant the amount claimed

31. The substantive issue herein is therefore whether the respondent owes the claimant the monies sought in the plaint. It is common ground that the respondent was employed by the claimant as Finance and Administration Manager by letter dated December 9, 2004 and reported for duty on December 13, 2004.
32. According to the letter of offer of appointment, the terms and conditions of service for the respondent were to be drawn up after negotiations between the claimant's then Managing Director, Mr. F. E. Oyugi, and the respondent were concluded.
33. It is the position of the respondent that his terms of employment were as contained in a board paper prepared by the Managing Director of the claimant and presented to a committee of the claimant's Board in an undated Board Paper titled "Committee Paper No. S&A 005/2005: Terms of Employment of the Finance and Administration Manager"
34. In the Board Paper the Managing Director reported to the Board that Mr. Yobesh Amoro, the respondent had been offered the position and had reported for duty on December 13, 2004 based on a proposed salary of Kshs.400,000/= which was subject to approval by the Board. In the Board Paper the terms of service of the Finance and Administration Manager are proposed as follows: -

"Terms of Employment

The Finance and Administration Manager is a level two post within the new structure and therefore reports directly to the Managing Director. The incumbent will be responsible for Finance, Human Resource/Administration and ICT functions within the Company.

In view of these, Management would like to recommend that Mr. Amoro's terms and conditions of employment be as follows:

1. Basic salary of - Kshs.295,000=p.m.
 2. Housing Allowance - Kshs.60,000=p.m.
 3. Other remunerative allowances - Kshs.35,000 =p.m.
- Total Cost Kshs.390,000=p.m.

The contract term is 3 years renewable subject to satisfactory performance and the Board's Approval.

Benefits

1. Mileage claim or Company car as per approved regulations
2. Medical for himself and family as per the Company's Medical Scheme.
3. Mobile telephone usage Kshs.10,000/= per month
4. Monthly drinks as approved by the Board.
5. Car loan scheme as per the Company's Car Loan Scheme. House Loan as per the Company House Purchase Scheme. Annual leave of 30 working days in each in a Calendar year
6. Gratuity payment at 31% of basic salary at the end of the 3 year contract Period.
7. Personal Accident cover (Group accident cover)



8. Club membership (subject to one club only).

Moreover, the above terms should be effective from the date Mr. Amoro reported to work.”

35. The Claimant’s *Ad hoc* Committee of the Board later approved the engagement of the Respondent on the following terms –

2.0 Recommendations

2.1 The Managing Director has recommended a package for Mr. Amoro as set out in Committee Paper No. S&A 005/2005 of March 24, 2005.

2.2 The *Adhoc* Committee recommends the adjustments in the proposed scale as follows:-

Basic Salary Kshs.200,000=p.m.

Housing Allowance Kshs.50,000= p.m.

Other Allowances (Utilities) Kshs.20,000= p.m.

Total Kshs.270,000=p.m.

36. The Board’s decision does not appear to have been communicated to the respondent. There is no letter informing the respondent of the same that has been produced in court.

37. It is not contested that before the respondent was informed of his terms of employment, he was paid an advance of salary. He drew a total of Kshs.3,163,000/=. The said sum was to be recovered from the salary once approved by the Board. The claimant has produced the schedule of the payments together with the requisitions. The requisitions clearly indicate that the payments were in respect of advance against salary.

38. It was the responsibility of the claimant to draw up the terms of service of the respondent according to the provisions of section 14(3) of the *Employment Act*, No. 2 of 1976 (repealed) which was in force at the relevant time which provides which provides –

(3) Every employer who is a party to a written contract of service shall be the person responsible for causing the contract to be drawn up and consented to by the employee in accordance with subsection (2).

39. In view of the fact that the respondent was never informed of his salary, the only salary that can be assigned to the respondent is that discussed and agreed with the claimant’s Managing Director as set out in the Board Paper presented to the Board by the said Managing Director which was Kshs.400,000/= per month. I therefore find that the respondent’s salary was Kshs.400,000/= per month consolidated.

40. At this rate the respondent would have earned Kshs.253,400/= for December 2004 being salary from 13th December to December 31, 2004, then Kshs.2,000,000/= from January to May 2005 and Kshs.53,334/= being two (2) days salary for June 2005 (at Kshs.26,667/= per day). Having been paid a total of Kshs.3,163,000/=: he was thus overpaid by Kshs.883,993/= which he owes to the claimant.

41. The Respondent averred that he was entitled to the drinks that he collected as per invoices adduced by the claimant amounting to Kshs.41,276.48. According to the approval by the Board, the terms of employment of the respondent does not include the same. It was also not included in the discussions between the claimant’s Managing Director and the respondent.

42. I find that the respondent is liable to pay for the drinks as there is no evidence that the Board approved any monthly drinks as alleged by the respondent.



43. With respect to motor vehicle Registration No. KAP xxx, the respondent signed an irrevocable authority as follows:

“March 29 2005

The Managing Director

Kenya Wine Agencies Limited

Box 40550

Nairobi

Dear Sir,

In consideration of my getting a bridging finance through NIC, to assist me purchase a vehicle under the Car Loan Scheme for the Vehicle Reg. No. KAP 029Z, I hereby pledge the Log Book to the said vehicle toto KWAL and further give an irrevocable undertaking that in the event of me leaving the Company or dying in whilst_in_the employment of the Company the Company is authorized to repossess my said vehicle and dispose the same in order to recover in full the balance of any loan remaining unpaid. Should the sale proceeds exceed the balance of the loan, I authorize the Company to pay such balance to me or my personal representatives as the case may be.

I further authorize that all or part of the loan balance outstanding at the point of my departure be, deducted from my final dues payable from all the employee benefit schemes.

This irrevocable authority remains in force until the advance is fully paid by me.

Given under my hand this March 29, 2005

Name Yobesh Amoro

Signed

Witness: Grace Obonyo”

44. A copy of the log book for the motor vehicle is attached to the irrevocable authority. The same was included in the demand of Kshs.3,163,000/= which I have already dealt with above.

45. On the loan of Kshs.2,500,000/=, it is the respondent’s position that the sum of Kshs.2,675,238.26 does not lie because the court in interrogating the claim under this head has to consider the following facts which do not exist herein;

i) NIC Bank Limited is not a party to these proceedings;

(ii) The claimant did not produce in evidence any of the following;

(a) Loan Agreement made between NIC Bank Limited and the respondent;

(b) Guarantee between the claimant, NIC Bank Limited and the respondent; and

(c) Evidence of payment by the claimant of the sums allegedly owed by the respondent to NIC Bank Limited.

(iii) The Employment and Labour Relations Court is not the Commercial & Tax Division of the High Court.

46. Further, that a Guarantee is defined in *Halsbury’s Laws of England*, 4th Edition paragraph 101 as “An accessory contract by which the promisor undertakes to be answerable to the promise for the debt, default or miscarriage of another person, whose primary liability must exist or be contemplated.”



47. The respondent further avers that the statement of accounts produced herein at page 35 of the claimant's Bundle of Documents dated November 2, 2006 is not in respect of the respondent's alleged Loan Account but in the name of KWAL, the claimant.
48. He avers that no officer from NIC Bank Limited appeared to speak on the said document and neither was there any evidence that the same was settled by the Respondent.
49. From the evidence on record, the loan was approved by a letter dated April 20, 2006 as reproduced below –

“April 20, 2005

Finance and Administration Manager

Kenya Wine Agencies Limited

Box 40550

Nairobi

Dear Sir

Staff Loan: - Yobesh Amoro– KSHS.2,500,000.00

Further to the approval of the above mentioned facility and subsequent disbursement of funds, we advise that the monthly installment payable is Kshs.62,131.44. All installments fall due on the 30th of each month with effect from 30th April 2005. The loan is repayable in 60 monthly installments and will be fully repaid on April 30, 2010.

We have allocated the facility account number CL2-4-200-

XXXXXX, which should be quoted on all correspondence in respect of the loan as well as when making payments.

Yours Faithfully

Signed

Branch Manager”

50. This is clear indication that the loan was issued for the respondent but in the name of the claimant who was liable to make deductions from the salary of the respondent and remit to the bank.
51. In a letter dated February 9, 2006 the Bank advised the claimant of the amount due as follows –

“Your Ref: P/G51/06

February 9, 2006

Atten: V. Chiuli

Human Resources Manager

Kenya Wine Agencies Limited

Box 40550

Nairobi

Dear Sir



Staff Loan: - Yobesh Amoro – A/C CL2-4- XXXXX,

We acknowledge receipt of your letter dated February 2, 2006.

We wish to advise on the following: -

1. Principal amount advanced was Kshs.2.5 m in April 2005.
2. Accrual interest as at today February 9, 2006 is Kshs.384,739.25.
3. Interest rate charged is 17% on reducing balance.

Yours Faithfully

Signed

M. Maigua

Branch Manager”

52. The advance was in the name of the claimant as is evident from the letter from the bank to the claimant dated April 20, 2005. This explains why the claimant paid the loan. The arguments by the respondent that there was no loan agreement between the respondent and NIC therefore does not reflect the correct position and does not absolve the respondent of liability to refund the money paid to the bank by the claimant. In this case there was no guarantor. The money was advanced to the respondent through the claimant. The claimant was therefore responsible to pay the loan on behalf of the respondent. The loan is admitted by the respondent in his testimony where he stated:

“I was granted a loan by NIC Bank of 2.5 million. The facility account number allocated to the loan by MC is as stated in pages 32, 33 and 34 of my documents. It was CL2-4-XXXX. Immediately I got this loan, I was terminated. I did not service the loan. It is in the name of KWAL.”

53. In the statement at page 35 and the reverse of the said page the claimant has demonstrated that it paid the loan together with interest long after the respondent had left its employment. It is further evident that at the time the claimant paid it, the loan was in default. The claimant settled the outstanding loan together with interest. The claimant did not need a demand letter from the Bank to pay a loan in its name. The claimant has demonstrated that it demanded payment from the respondent who failed to pay the loan.
54. For the foregoing reasons, I find that the claimant has proved on a balance of probabilities that the respondent owes it a sum of Kshs.5,941,924.74 less Kshs.2,280,067/= which was his salary. Leaving a balance of Kshs.3,661,857.74
55. I accordingly enter judgment for the claimant against the respondent in the sum of Kshs.3,661,857.74.
56. The same shall attract interest at court rates from date of judgment. The respondent shall pay the claimant’s costs for this suit.

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

JUDGMENT ELRC NAIROBI Cause No. 180 of 2015 Page 1

