



**Isack v Kesom Freight International (Cause E035 of 2022)
[2022] KEELRC 13236 (KLR) (17 November 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13236 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E035 OF 2022
AK NZEI, J
NOVEMBER 17, 2022**

BETWEEN

IBRAHIM HASSAN ISACK CLAIMANT

AND

KESOM FREIGHT INTERNATIONAL RESPONDENT

RULING

1. The claimant/applicant sued his employer, the respondent, on 7th June 2022 and pleaded that he was employed by the respondent as a night guard in May 2005 at a monthly salary of ksh 15,000, and that he has never been provided with a written contract of service as required under section 9(1) and (2) of the *Employment Act*.
2. The claimant/applicant further pleaded that since employment seventeen years ago, the claimant has all along been deployed to provide night watch security services at the respondent's Mombasa Branch office situated at Spaki Area opposite Associated Motors along Jomo Kenyatta Avenue, where he is currently serving his normal working hours every day, being 6.00pm to 6.00 am, a minimum of twelve hours daily, including Sundays and Public Holidays.
3. It is the claimant/applicant's further pleading that since March 2022, he has been experiencing difficulties in getting his salary paid on time, and that the respondent did not pay the claimant's salary for the months of April and May 2022, thus subjecting the claimant to serious financial hardships related to his upkeep and that of his family, as well as payment for his rental accommodation. The suit herein was filed on 7th June 2022.
4. On 26th July 2022, the claimant/applicant filed a Notice of Motion dated 25th July 2022 seeking the following orders:-



- a. that pending hearing of the application inter-partes, the Respondent be ordered to pay the claimant/applicant his withheld salary for the months of April, May, June and July 2022 amounting to ksh. 60,000.
 - b. that pending hearing and determination of the application and the main suit, the respondent be ordered to continue paying the claimant his salary for each and every month worked in arrears promptly as and when the salary falls due.
 - c. that the claimant's suit be listed for hearing on priority basis with a view to making an expedited determination on the claimant/Applicant's employment status with the respondent.
5. This is the application before me, and is supported by the claimant's supporting affidavit sworn on 25th July 2022.
 6. On 26th September 2022, the respondent's Director, Abdi Munim Haji Abdi, filed a replying affidavit sworn by himself on 23rd September 2022, and deponed, inter-alia:-
 - a. that the claimant/applicant has never been an employee of the respondent, and that the allegations by the claimant that he continues to report to work at the respondent company are false and unfounded as he is not an employee of Kensom Freight International Limited.
 - b. that the claimant has never been engaged by the respondent, whether on permanent or casual basis.
 - c. that the deponent came to know the claimant/applicant in or about the year 2021, during which period the claimant would hang around the respondent's business premises in search of meaningful employment, but there was no opening whatsoever to employ the claimant.
 - d. that on humanitarian grounds, the respondent would occasionally call upon the claimant/applicant to assist in offloading trucks, which assignment would take a maximum of two hours to complete, after which the claimant would be paid for the completed task and leave.
 - e. that the claimant/applicant was not engaged on daily basis with a monthly salary, and cannot be said to be the respondent's employee within the meaning of section 2 of the [Employment Act](#).
 - f. that the claim for alleged withheld and overdue salary for the months of April, May, June and July 2022 is an attempt at unjust enrichment as the claimant was not an employee of the Respondent.
 - g. that the claimant has not adduced any evidence to demonstrate that he was an employee of the respondent.
 7. On the court's directions, both parties filed written submissions on the application, which I have considered.
 8. In view of the fact that the pivotal issue of the claimant's employment by the respondent is one that is vehemently disputed by the respondent, and in view of the fact that no material has been placed before the court regarding the claimant/applicant's alleged employment by the respondent, the twin issues of the claimant's alleged employment by the respondent and withholding of salary by the respondent can only be determined upon full trial. Evidence must be adduced before the court can determine the issues involved in one way or the other.



9. Consequently, I decline to allow the application dated 25th July 2022, to the extend that it seeks payment of alleged withheld salary and payment of salary pending hearing and determination of the suit herein. I however allow the prayer seeking hearing of the claimant's suit herein on priority basis. The suit shall forthwith be listed for hearing on priority basis.
10. The application partly succeeds to the aforestated extend. Each party will bear its own costs of the application.
11. Orders accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MOMBASA THIS 17TH DAY OF NOVEMBER, 2022.

AGNES KITIKU NZEI

JUDGE

Appearance:

Mr. Mokaya for Claimant

Mr. Arunga for Respondent

