



**Cain v Elsek and Elsek (K) Limited (Cause 1953 of 2015)  
[2022] KEELRC 13094 (KLR) (7 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13094 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1953 OF 2015  
MA ONYANGO, J  
NOVEMBER 7, 2022**

**BETWEEN**

**KEVIN CAIN ..... CLAIMANT**

**AND**

**ELSEK AND ELSEK (K) LIMITED ..... RESPONDENT**

**JUDGMENT**

1. Vide a statement of claim dated October 27, 2015 and filed on November 3, 2015, the Claimant seeks the following orders against the Respondent –
  - a. An order directing the Respondent to immediately and unconditionally pay the Claimant’s dues for the period between January and April, 2015 being the sum of US\$40,000.00.
  - b. An award for appropriate compensation for breach of contract by the Respondent for twelve months’ salary being the sum of US\$ 120,000.00.
  - c. Damages for breach of contract
  - d. Exemplary damages.
  - e. All other benefits that the Claimant is entitled to.
2. The Respondent filed a reply to the statement of claim denying the existence of an employment relationship between the Claimant and the Respondent.
3. At the hearing of the case, the Claimant testified on his own behalf while the Respondent called its Finance Manager, Mr Shahame Aziz Mwidaniwho testified on its behalf. The hearing was virtual with the Claimant testifying from Brighton, England in United Kingdom (UK) while the Respondent’s witness testified from Kikambala in Kilifi County. The parties thereafter filed and exchanged written submissions.



### **Claimant's Case**

4. The Claimant testified that he got acquainted to the Respondent while he was working in a bank where the Respondent was a customer. He then started working for the Respondent on January 1, 2015 until March 2015. His role was Financial Advisor. He attended symposiums and seminars and introduced customers to the Respondent. He specifically introduced Shelter Afrique to the Respondent.
5. He testified that his employment was not officially terminated. What the Respondent did was ask him to return a car that was allocated to him. He was also not paid any salary. He therefore presumed the contract had ended. He went back to Europe at his expense.
6. The Claimant adopted his witness statement and relied on his bundle of documents.
7. Under cross examination the Claimant stated that he had not provided evidence that he worked for the Respondent. He testified that he was offered a house, a car and a salary of USD 10,000 per month. He stated he was not paid any salary or offered a house. He was offered a small car with no driver.
8. He testified that his salary was to be paid into his bank account but he did not give the particulars of his bank account as he was not asked for it.
9. He testified that he started work in January 2015 and the place of work was Nairobi though the Respondent's office is located in Mombasa.
10. He testified that the parties agreed on the terms of contract through email correspondence. He referred to the email correspondence filed in Court in his bundle of documents at page 2. The email is dated November 27, 2014.

### **Respondent's Case**

11. RW1, Mr Mwidani adopted his witness statement dated July 15, 2021 as his evidence in chief. On cross examination he testified that the Claimant was known to him. That there were discussions between the Respondent and the Claimant with possibility of employment. That he sent some work to the Claimant while the Claimant was still an employee of the Bank of Africa. That the communication was through email.
12. RW1 testified that he was not party to the correspondence between the Claimant and Respondent relating to the Claimant's appointment. He denied that the Claimant was appointed by the Respondent as Financial Advisor. He stated that as Financial Manager of the Respondent he would have corresponded with the Claimant if he was a Financial Advisor of the Respondent but only communicated with the Claimant while he was an employee of the bank in 2014.

### **Analysis and Determination**

13. I have considered the pleadings, evidence and submissions. The issues arising for determination are:
  - a. Whether there was an employment relationship between the Claimant and the Respondent;
  - b. If the answer to (a) above is positive, whether the employment relationship between the Claimant and the Respondent was breached; and
  - c. Whether the Claimant is entitled to the prayers sought.



## Whether the Claimant was an employee of the Respondent

14. The Claimant submits that an employment relationship was created through the email correspondence between the parties which indicate both expressly and impliedly that the Claimant and the Respondent had the legal intention of entering into an employment contract.
15. The Claimant submits that there was an offer, acceptance and consideration. The Claimant relies on the definition of a “contract of service” in the *Employment Act* which refers to an agreement whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time.
16. The Claimant submits that offer and acceptance supported by consideration equates to a valid contract as was held in *Charles Mwirigi Miriti v Thananga Tea Growers Sacco Ltd & Another* [2014] eKLR and also *Karmali Tarmohammed & Another v I H Lakhani & Company* [1958] EA 567.
17. The Claimant submits that the offer and acceptance was signalled when the Respondent communicated to the Claimant confirming the agreed terms as evidenced by the correspondences dated November 27, 2014. Particularly, an email correspondence on the said date, sent from info@elsek-elsek.com at 15:03 and sent to the Claimant, which partly read:

“I am thinking salary will not be an issue. That’s why I wrote 7,500-10,000 ..... I have to share profit with you according to what we agreed.”
18. The Claimant replied to the above email on the same date at 3:15 pm by stating: “Salary of \$10,000 is fine and profit we can discuss on my performance....” That based on the above correspondences and other correspondences between the Claimant and Respondent dated November 27, 2014, there was a meeting of minds in the instant case as the Claimant was to receive a salary in exchange for his services.
19. Further that the email dated November 27, 2014 sent at 12:55 pm shows the roles the Claimant was expected to perform as a Financial Advisor. The Claimant testified to his roles as a Financial Advisor and the fact that he was assigned work in that capacity in the form of meetings and various fora.
20. The Claimant submits that while the Respondent failed to convert the executory consideration in terms of salary during the period in question when it became due to executed consideration, the Claimant’s consideration was executed when he rendered performance in accordance with his promise during the period in question. Therefore, the existence of an agreement between the parties was also characterised by the Claimant’s performance.
21. The Claimant submits that he has produced emails which clearly show that the Claimant had worked for the Respondent including emails with the subject “Change of User on Plot No Kilifi/Mtwapa/867-Kikambala Housing Estate” dated January 22, 2015, January 23, 2015, and February 2, 2015.
22. The Claimant relies on the decision in the case of *Mamta Peeush Mahajan [Suing on behalf of the estate of the late Peeush Premal Mahajan] v Yashwant Kumari Mahajan [Sued personally and as Executrix of the estate and beneficiary of the estate of the late Krishan Lal Mahajan]* [2017] eKLR where the court while paraphrasing a statement in the 27<sup>th</sup> Ed of *Chitty on Contracts* Vol 1 on continuing negotiations stated that:

“When parties carry on lengthy negotiations it is hard to confirm when an offer has been made and accepted and that the court is then duty bound to look at the correspondence and decide whether on its true construction the parties had agreed.”



23. The Claimant also relied on the decision by Steyn LJ in *G Percy Trentham Ltd v Archital Luxfer Ltd* [1993] 1 Lloyds Rep 25 where it was held that:

“...It is important to consider briefly the approach to be adopted to the issue of contract formation ... It seems to me that four matters are of importance. The first is that... law generally adopts an objective theory of contract formation. That means that in practice our law generally ignores the subjective expectations and the unexpressed reservations of the parties. Instead the governing criterion is the reasonable expectations of honest men. ... that means that the yardstick is the reasonable expectations of sensible businessmen. Secondly it is true that the coincidence of offer and acceptance will in the vast majority of cases represent the mechanism of contract formation. It is so in the case of a contract alleged to have been made by an exchange of correspondence.”

24. The Claimant further relies on the decision of the Supreme Court of the United Kingdom in the case of *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)* [2010] UKSC14, [45] where it was stated:

“The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement.”

25. It is submitted that the reason the Claimant travelled from the United Kingdom to Kenya was because he had reached an employment agreement with the Respondent. From the emails produced by the Claimant, particularly the one sent by Elsek at 15:03 hours, the Respondent even offered to buy the flight ticket so that both the Claimant and the Respondent arrive in Nairobi at the same time. In the said email, the Respondent requested the Claimant to confirm his official names as contained in his passport for the purpose of facilitating the Claimant’s travel, which the Claimant did. The Claimant travelled to Kenya as planned and was issued with a car.
26. For the Respondent it is submitted that there was never an employer-employee relationship between the Claimant and Respondent as the parties did not enter into a contract of service. That sometime in 2014 the Respondent held discussions with the Claimant on the possibilities of entering into an employment relationship and/or partnership but the same never actualized.
27. The Respondent submits that there has never been any contract of employment or any document and/or terms of employment to signify an employment relationship between the Claimant and the Respondent.
28. The Respondent submits that the Claimant has not produced a duly signed contract of service or by oral or other evidence proving the existence of an employment contract. That during cross examination the Claimant testified that he did not have any evidence to show he worked for the Respondent.



29. The Respondent relied on the decision in *Samuel Wambugu Ndirangu v 2NK Sacco Society Limited* [2019] eKLR [2019] eKLR, where the Court while dealing with the issue of employer-employee relationship stated in part as follows:

“ .... Put another way, where the element of control is lacking and where the person who works for another does so more or less at his own pleasure and is not subject to definite conditions of work or hours of work, the relationship of employer-employee does not exist. The indicia of this relationship of employer-employee is largely absent in the case before me. A review of the elements above reveals that in order for a positive determination of the existence of the employer-employee relationship there must be the selection and engagement of the employee (the hire after either a restricted or open interview process), proof of payment of wages, the power of dismissal and finally, the power to control the employee’s conduct (this is what gives the test the nom de guerre – control test). In my considered view, there is insufficient indicia for the assumption of the relationship the Claimant asserts and having failed to discharge the evidentiary burden the Claimant’s case is only fit for dismissal. The suit is dismissed but with no order as to costs.”

30. The Respondent also relied on the case of *Joseph Munene Murage v Salome Ndung’u* [2019] eKLR where the Court held that it was the burden of the Claimant to prove the existence of an employment relationship.

31. The Respondent further relied on the case of *John Matete Abayo v Digital Imaging Systems Limited* [2018] eKLR where the claimant sought to prove employment relationship by solely relying on an NSSF statement and a MEMO from the Respondent and the Court found the two documents as having not been sufficient to establish an employer-employee relationship between the parties.

32. The Respondent further relied on the case of *Casmir Nyankuru Nyaberi v Mwakikar Agencies Limited* [2016] eKLR, where the Court held that;

“ 11. This Court is fully aware that it is the responsibility of an employer to document the employment relationship and in certain respects, the burden of proving or disproving a term of employment shifts to the employer. This does not however release the claimant from the burden of proving their case. Even where an employment contract is oral in nature, the claimant must still adduce some evidence whether documentary or viva voce to corroborate their word. More importantly, where an employee believes that the employer has in its possession some documents that would support the case of the employee, that employee is obligated to serve a production notice.”

33. The Respondent further relied on the decision of the Court in *Kenya Union of Commercial Food and Allied Workers V Mwana Black Smith Limited* [2013] eKLR where the Court held that; -

“ An employment relationship has serious implications on the parties. The Court must therefore be fully satisfied that it actually exists, A Claimant claiming employment rights must prove the existence of an employment relationship.”

34. The Respondent further submits that while testifying during the hearing, the Claimant stated that his salary was to be channelled to the bank but gave no bank account details to the respondent. The Respondent submits that it is absurd that someone would render services for four months without asking for payment where there was an agreement to be paid 10,000 USD. That the email dated November 27, 2014 at 15:03 relied upon by the Claimant was merely prospective of the intended



relationship and did not even state the exact figure that was to be paid in the event that the discussions were to be finalized. Furthermore, the Claimant suggested the figure of USD10,000. That was not expressly accepted by the Respondent thus no valid contract was entered into by the parties.

35. The Respondent submits that when the Claimant was put to task by the Respondent's Counsel to explain the duties he specifically performed for the Respondent, he could not demonstrate any specific task he ever performed for the company for the period claimed. He referred this Honourable Court to an email dated November 27, 2014 which only shed light on the current structure of the Respondent's Company but did not state any roles to be performed by the Claimant. That the Claimant cannot therefore seek payment for work not done.
36. The Respondent submits that the Claimant did not adduce any evidence as to any transaction or financial advice he had offered to the Respondent's Company if at all. The Claimant was never engaged by the Respondent as a Financial Advisor and did not receive any invoice or salary request from the Claimant claiming fees for any financial advice given.
37. From the evidence on record it is clear that there was intention between the Claimant and the Respondent to enter into an employment relationship. This is evident from the elaborate email correspondence exchanged between the Claimant and Mr Elsek on November 27, 2014. The intentions are summarized in the lengthy email from Mr Elsek to the Claimant at 12.55 pm which ends as follows –

I am happy to work with you as I think that there is a lot to do and that it will be very interesting I always wanted to work with you and I have so much pressure on my shoulder. I need professional advises and applier also. I want you to work with us together.I would prefer to start full time when I return in the New Year, but I am happy do some preparatory work in the meantime as detailed above It is ok for me as you know nothing going on December in Kenya.However, we have to finalize the terms on which I will be working for you and how much I will be earning. My idea is if you accept we will be very happy to pay you USD 7500 or 10,000 after organize our financials. I am talking to you very straight forward and I am ready to share any profit:I want you to organize company structure. You may even bring your team.I want you to organize for us finance for Aiden Housing Project. I know you need project cash flow and profit projection. I may tell you roughly it is 700,000 kshs profitable project.I want you to organize Finance for Daewoo project.I want you to be a part of this company and I am ready to give shares from the company for your pension.”

38. The response from the Claimant by email at 2.32 pm on the same day was as follows –

“Subject: Re: Our meeting

First, for the meeting in Nairobi, that is fine with me. Will you organise the tickets? I prefer to fly from Diani and I will stay overnight as I need to sort some stuff out and return the next day.

It seems that we are on the same page as far as what needs to be done, and I think that we need to sit down and priorities these issues and fix time lines and action points.

I think that maybe the separation should include three divisions: Factory, marketing and construction but we can discuss this better face to face and we should find time to discuss this in Nairobi.

The most urgent thing is to fix the structure and I think that we should start discussions straight away with the auditors to see if they can do this. We would also need to involve



lawyers at a later stage to get a legal opinion on the structure. Once the structure is in place then we can sort out the accounting issues between the companies. This will make it much easier to deal with banks. If we can find the right bank, then each construction project will be handled as a separate project finance, but it is clear that the banks you have dealt with so far are not competent do this, and we need to find a proper solution.

Also can you explain in more detail what you mean when you refer to \$7,500 or \$10,000 as this is not clear?

Also what do you think it will cost me to find a decent 2 bedroom apartment in Mombasa? Do you know someone who can help? I will need a car as well – how much will it cost to hire one?

Thanks

Kevin”

39. The response from Mr Elsek was –

“Dear Kevin

Am thinking salary will not be an issue. That’s why I wrote 7500 -10,000. I am thinking every end of the year we have to sit and I have to share profit with you according to what we agreed. For the ticket there is no problem either you buy or I can buy. But better I buy for you because we have to arrive Nairobi same time. Please confirm your passport name is Kevin Cain. I have car at airport and we may stay in my house in order to discuss more.

Best regards

Elsek”

40. After exchanging several emails, the last email from Mr Elsek to the Claimant at 16.14 was as follows –

“It is ok Kevin. Yes do understand. Lets meet and talk when we meet.

Best regards

Elsek”

41. There appears to have been no further written communication after this regarding the terms of engagement between the Claimant and the Respondent. However, there is correspondence between the Claimant and Mr. Aziz Shahame Mwidani, RW1 on 22<sup>nd</sup> and January 23, 2015, February 2, 2015 and March 12, 2015 under the title; Change of User on Plot No Kilifi/Mtwapa/867 – Kikambala Housing Estate. From the correspondence it is clear that the Claimant did some work for the Respondent between January and March 2015.

42. Under the *Employment Act*, it is the duty of the employer to prepare a contract of employment and to ensure that the employee signs the same. Section 9(2) of the Act provides as follows –

“(2) An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with subsection (3).”



43. Further Section 10(7) of the Act provides as follows –

"(7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer."

44. From the foregoing, it can be presumed that the Claimant and Mr Elsek of the Respondent held discussions when they met following the email of November 27, 2015 at 14.14 when he wrote to the Claimant stating –

"It is OK Kelvin. Yes I do understand. Let's meet and talk when we meet."

45. It is further apparent that Mr Elsek agreed to the salary of USD 10,000 as proposed by the Claimant in the email of November 27, 2014 at 3.15 pm. Had they disagreed over the same, the Claimant would not have been doing work for the Respondent in January, February and March 2015 as is evident from the correspondence referred to above.

46. The fact that the Respondent provided the Claimant with motor vehicle KBX xxxx is further evidence that there was an employment relationship between the parties.

47. Based on the evidence on record, I am satisfied that there was an employment contract between the Claimant and the Respondent.

#### **Was the contract breached by the Respondent?**

48. It is the Claimant's position that the Respondent breached the employment relationship fundamentally by failing to pay his salary as agreed.

49. It is further the Claimant's evidence that the Respondent repossessed the motor vehicle it provided for his use which he considered as a repudiation of the employment relationship.

50. RW1 in his witness statement which he adopted at the hearing, states as follows at paragraph 7 –

7. Due to the mutual friendship and trust the Respondent had with the Claimant, he gave him a car Registration Number KBX xxxx Mitsubishi Colt for personal use while in Nairobi at no cost but the Claimant transferred the said vehicle to a third party without notice to the Respondent forcing the Respondent to hire the services of a car tracking company and repossession agent to trace and repossess the vehicle from the third party."

51. The Claimant explained that he hired a driver whom he instructed to release the car to the Respondent when he discovered that the Respondent had enlisted the services of a private investigator and the police to repossess the motor vehicle.

52. The Claimant has relied on the decision in *Vincent Omollo Obuom v Catholic Diocese of Nakuru* [2015] eKLR where the Court held –

"Payment of wages as agreed and on due dates is one of the essential terms of an employment contract. Failing to pay agreed wages goes to the root of the contract of employment. The Respondent was in breach when it did not pay wages according to the agreed terms. The Respondent was also in breach in withholding wages in 2012. The Court consequently





finds that the Respondent was in breach of an essential term of contract and therefore the Claimant was entitled to treat himself as having been discharged by the Respondent's conduct."

### **Is the Claimant entitled to the remedies sought?**

53. From the foregoing, I find that the Respondent fundamentally breached the terms of the contract of employment with the Claimant by failing to pay his salary and repossessing the motor vehicle issued to him. The Claimant was thus entitled to deem the contract terminated by the actions of the Respondent. I therefore find that it is the Respondent who constructively terminated the services of the Claimant.

54. The Claimant prayed for payment of salary from January to April 2015 at USD 40,000, compensation equivalent to 12 months' salary, damages for breach of contract and exemplary damages.

55. The Claimant is entitled to salary as the Respondent admits that it did not pay him any salary for the period worked. I however do not agree with the Claimant that he is owed four (4) months' salary as claimed. At paragraph 17 of the claim, the Claimant pleaded as follows –

17. Since the Claimant's return into the country at the end of March, 2015, the Respondent has totally refused to communicate with the Claimant or pay his dues but the Respondent is yet to communicate any termination of the Claimant's employment.

56. Further, there is no correspondence among the Claimant's documents that shows that he did any work for the Respondent in the month of April.

57. I therefore award the Claimant USD 30,000 being salary from January to March 2015.

58. The Claimant is entitled to compensation, having found that the Respondent breached the contract of employment. The claim of 12 months' salary as compensation is however not justifiable taking into account, the length of service of the Claimant.

59. Considering the manner and circumstances under which his contract was terminated and the length of time the Claimant worked for the Respondent, it is my view that compensation equivalent to two month' salary is reasonable compensation. I award him the same in the sum of USD 20,000.

60. The Claimant prayed for damages for breach of contract. Damages for breach of contract are payable under the laws of Kenya which only recognise compensation for breach of contract. I therefore decline to grant this prayer on grounds that it is a duplication of the prayer for compensation which I have already awarded.

61. Exemplary damages are payable in circumstances that were set out in the case of *Godfrey Godfrey Julius Ndumba Mbogori & another v Nairobi City County* [2018] eKLR where the Court stated:

"Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the word is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of *Rookes v Barnard* [1964] AC 1129 where Lord Devlin set out the categories of cases in which exemplary damages may be awarded which are: i) in cases of oppressive, arbitrary or unconstitutional action by the servants of the government, ii) cases in which the Defendant's conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and Hi) where exemplary damages are expressly authorized by statute."



62. It is my view that the Claimant has not proved that the circumstances of this case would fall under those set out in the above case to warrant payment of exemplary damages. The prayer is accordingly dismissed.
63. In conclusion, judgment is entered in favour of the Claimant against the Respondent in the total sum of USD 50,000.
64. Having been successful in this suit, I award the Claimant costs of the suit. I also award the Claimant interest from date of judgment until payment in full.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 7<sup>TH</sup> DAY OF NOVEMBER 2022**

**MAUREEN ONYANGO**

**JUDGE**

