



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1097 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

NATIONAL AUTHORITY FOR THE CAMPAIGN

AGAINST DRUG AND ALCOHOL ABUSE.....APPLICANT

VERSUS

JENNIFER NYAMBURA KIMANI.....RESPONDENT

JUDGMENT

The Claimant filed a Statement of Claim on 1st July, 2014. It avers that the Respondent was engaged as its Secretary and Chief Executive Officer for a period of 3 years from 1st July 2007 to 30th June, 2010. It avers that upon the expiry of the contract the Respondent was paid gratuity for the financial year 2010/2011 amounting to Kshs.4,186,488/- which was determined on the basis of a total salary of Kshs.10,327,200/- and a house allowance of Kshs.985,056/-.

It contends that the contract between the Respondent and itself stipulated that the amount was to be calculated on the basis of 31% of the basic salary and in total disregard of house allowance. It avers that the accurate amount that the Respondent was entitled to Kshs.3,201,423.

It is the Claimant's case that the Respondent received an overpayment of Kshs.985,056/- and Kshs.920,520/- as a top up allowance for the financial year 2010/2011 which she was not entitled to. It therefore seeks the following prayers:

- a) A refund of all monies paid to the Respondent amounting to Kshs.1,905,576/-.*
- b) Interest on (a) above at commercial rates from date of this suit to the determination of the same.*
- c) Costs of the suit.*

The Respondent neither entered appearance nor filed a response to the Claim. This is despite her being served by way of substituted service by advertisement in The Standard Newspaper published on 26th January, 2016. Consequently, the matter proceeded as an undefended claim. The Claimant was directed to file written submissions but it did not do so.

Analysis and Determination

The issue for determination is whether the Claimant is entitled to the sum of Kshs.1,905,576/-. It is the Claimant's case that these amounts were overpaid to the Respondent and who was not entitled to these amounts pursuant to her contract.

In spite of these averments, the Claimant did not produce a single document to prove its case or the particular facts stated in its Claim. The Claimant was expected to assist the Court to determine the suit but this was not the case as neither the contract of employment nor proof of payment of the alleged sum was produced.

In the ruling the court noted that the claimant had not taken any steps to prosecute the matter more than 4 years after the same was filed.

On 24th October 2020 the court gave the following directions –

“Suit to proceed by way of witness affidavit and written submissions to be filed by the claimant within 14 days. Judgment on 18th December 2020.”

Section 107(1) of the Evidence Act provides:

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

It is therefore the Claimant’s burden to adduce sufficient evidence to prove its averments in the claim notwithstanding that the matter was undefended. The court notes the derelict manner in which this matter has been handled, almost as if the claimant was prosecuting the case as a matter of formality.

The reinstatement of this suit by the Court on 22nd November, 2019 should have elicited some action from the Claimant by filing all supporting documents in the suit to strengthen its case. In **Shamakame Adam Mbui v Kyoga Hauliers (K) Ltd [2013] eKLR** Radido J. held:

“The cause was prosecuted in a most dilatory way. Causes are determined on the basis of pleadings and evidence placed before the Court. This applies even in undefended Causes and the parties should not assume that because a Cause is undefended the obligation to discharge the statutory obligation upon the party is lowered.”

In the absence of any evidence, this Court cannot find in favour of the Claimant as the burden of proof still remains its responsibility. This burden has not been discharged by the claimant. The result is that the suit is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF JANUARY 2021

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