



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. E513 OF 2020

MIRIAM MUMBI NGINA.....APPLICANT

-VERSUS-

BRANDWORLD COMMUNICATIONS LIMITED.....RESPONDENT

RULING

1. The Claimant brought this suit seeking unpaid salary and other terminal dues totaling to Kshs 305,824, which sum was admitted by the respondent vide the letter dated 13.3.2019. He further filed a Notice of Motion dated 24.3.2020 seeking orders that:

a. This Honourable Court be pleased to enter judgment on admission in his favour and against the Respondent in the sum of Kenya Shillings Three Hundred and Five Thousand Eight Hundred and Twenty Four (Kshs. 305, 824.00) together with costs and interest at court rates as prayed in the Statement of Claim dated 24.3.2020.

b. Costs of this application be borne by the Respondent.

2. The application is premised on grounds that he Applicant was employed by the Respondent on 3.8.2017 as a Finance Manager until 22.3.2019 when she resigned due to the Respondent's failure to pay her salary and other benefits contrary the parties' contract; that by letter dated 13.3.2019, the respondent unequivocally admitted owing the Applicant the sum of Kshs. 305,824 as her unpaid salary and terminal benefits less all statutory deductions; that despite undertaking to pay the said sum of Kshs. 305, 824.00 as full and final settlement of her unpaid salary and other terminal benefits, the respondent has failed to do so; that the admission is clear and ambiguous; that the Court has the inherent power to make such orders as may be necessary to meet the ends of justice; and that allowing the case to proceed to full trial defeats the overriding objectives of expeditiously disposing of claims.

3. The Application is supported by the affidavit of the applicant sworn on 24.3.2020 in which she basically repeats the above grounds.

4. The Respondent has opposed the application through the Replying Affidavit sworn by its Head of human Resource Management, Rose Nyambura on 24.9.2020 in which she averred that the Respondent was not able to settle the dues and backdated salaries in lump sum and thus it made has made some payments to the applicant as per the payment schedules annexed to the Replying Affidavit; that the Applicant has never given a full account of details to any amounts allegedly due and owing; that it is imperative that this Honourable Court directs the Applicant to file appropriate accounts to demonstrate how much is owed; that this process can be done by viva voce evidence and not by application; and that the claim is mala fides and the application lacks merit.

Applicant's submissions

5. The Applicant submitted that the Respondent, in its Memorandum of Response, has not disputed that it owes her terminal dues; and that the schedule produced by the Respondent is for payments that were made prior to 22.3.2019 while her claim is for unpaid amounts as at 22.3.2019.

6. She argued that Rose Nyambura was not the Human Resource Manager during her time of employment and at the time of termination, and thus she is not competent to swear an affidavit on the Respondent's behalf because she is not conversant with what transpired between the parties. She cited Order 18 Rule 3 (1) of the Civil Procedure Rules and relied on **East African Foundry Works (K) Ltd v Kenya Commercial Bank Ltd [2002] eKLR** where the Court found that the affidavit contained statements based on information from a source he did not disclose.

7. She further argued that the Respondent is in the process of closing its company and changing its location.

8. She submitted that Order 13 Rule 2 of the Civil Procedure Rules provides for the principles governing an application for judgment on admission. She relied on the findings in **Cassam v Sachania [1982] KLR 191** and **Choitram v Nazari [1984] KLR 327** that admissions of fact have to be plain and obvious.

9. She submitted that the Respondent has made a clear and unequivocal admission under paragraphs 8 and 9 of its Response that it is willing to settle the amount but it has been encumbered thus it could not afford to settle the redundancy dues.

10. She relied on sections 107, 109 and 112 of the Evidence Act and submitted that the evidential burden shifts to the Respondent to prove that it made payments. She relied **Eastern Produce (K) Ltd v James Kipkeeter Ngetich [2005] eKLR** cited in **Vivo Energy Kenya Limited (Initial Party Kenya Shell Limited) v George Karunji [2014] eKLR** where the Court held that lack of evidence should have led to the trial magistrate finding that there was no proof of injury at the work place.

11. Consequently, she submitted that the Respondent should pay her the amount stated and then the remaining issues be determined by the Court after hearing both parties.

Respondent's submissions

12. With respect to the law on judgment on admission, the Respondent also relied on Order 13 Rule 2 of the Civil Procedure Rules and **the Cassam and Choitram Cases (supra)**. It further cited **Cannon Assurance (Kenya) Limited v Maina Mukoma [2018] eKLR** to urge that admission must be unequivocal in the material facts capable of being established by the law argued without the benefit of trial.

13. It argued that it has been willing to settle the Applicant's terminal dues and unequivocally admitted that it is still ready to do so once the Applicant gives a full account of any amount due by way of viva voce evidence. It relied on **Rashid Odhiambo Aloggoh & Others v Haco Industrial Ltd (unreported)** where the court held that the burden of proof is on the claimants to show that the facts which they base their claim were true or they were admitted.

14. It argued that its indebtedness to the Applicant to the tune of Kshs. 277,524 is undisputed and no other inference may be made or determined therefrom. It submitted that the balance of the claim needs to proceed to claim.

Determination

15. Having considered the pleadings, application, affidavits and the submissions filed by the parties, it is common ground that the claimant was employed by the respondent as a Finance Assistant from 3.8.2017 for a monthly salary of Kshs.120, 000 and worked up to 22.3.2019 when she resigned. It is without dispute that as at the time of the resignation, the respondent had not paid the claimant all her salaries and she admitted the same vide the letter dated 13.3.2019. The main issues for determination is whether judgment on admission should be entered for the claimant against the Respondent for the sum of Kshs. 305, 824.00.

16. The Applicant seeks judgment on admission for the sum of Kshs. 305, 824 together with costs and interest based on the admission contained in the letter dated 13.3.2019. However, the Respondent contended that it has since made some payment as per the schedule annexed to the Replying Affidavit and accused the Applicant of not giving a full account of the amount due. For the said reasons, it urged that the amount claimed should be subjected to viva voce evidence.

17. The relevant law in this application is Order 13 Rule 2 of the Civil Procedure Rules which provides:

“Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just.”

18. The Respondent in its Memorandum of Response at paragraphs 8 and 9 averred that it is financially encumbered and was not in a position to afford to settle the dues. In addition, it admitted that it is willing to settle the Applicant's terminal dues totaling to Kshs.277, 524 and urged that the rest of the claim should be proved at the trial.

19. I have considered the Schedule of payment dated 13.3.2020 annexed to the Affidavit of service which indicates that the amount due to the claimant after some part payment is Kshs.277,524. I have also considered the express admission of the said amount by the respondent in its defence, Replying Affidavit and the Written Submissions and find that indeed the respondent has admitted that the claimant is entitled to Kshs.277,524 out of the Claim for kshs.305,824. The said admission is unequivocal and clear that the Respondent is agreeing to settle part of the amount of money owed.

20. I gather support from **Choitram Vs Nazari (1984) KLR 327** , cited by both parties, where Madan JA (as he then was) held:

“...Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends upon the language used. The admissions must leave no room for doubt that the parties passed out of the stage of negotiations onto a definite contract. It matters not if the situation is arguable, even if there is a substantial argument, it is an ingredient of jurisprudence, provided that a plain and obvious case is established upon admissions by analysis...” [Emphasis Added]

21. I gather more support from **Ideal Ceramics Limited v Suraya Property Group Ltd [2017] eKLR** where the Court held:

“Once the unequivocal admission is established the court ought to ordinarily enter judgment at the request of the plaintiff who has also exhibited good faith. There is judicial involvement and in exercising its discretion, the court considers not just the

admission but all the circumstances of the case and the issues of fact or law raised by the defendant. In my view as well, it is not enough to simply find an issue has been raised. The issue must be a bona fide issue and must have some prospects of success otherwise it would amount to disproportionate use of court resources to simply allow an 'issue' bound to fail to proceed to trial."

22. In the end I allow the application and enter judgment in favour of the claimant for the sum of Kshs. 277, 524 which has been unequivocally admitted by the respondent. The sum awarded shall attract interest at the Court rate from the date of filing the suit. The rest of the claim will be determined on merits upon trial. The claimant is also awarded costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF JUNE, 2021.

ONESMUS N. MAKAU

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 April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE