



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 465 OF 2017

(Originally Nairobi High Court Civil Case No. 215 of 2009)

Before Hon. Justice Dr. Jacob Gakeri

JAMES KIMONYE.....CLAIMANT

VERSUS

KENYA MEAT COMMISSION.....RESPONDENT

JUDGMENT

1. The case has had a long and chequered history. It commenced as a judicial review application, miscellaneous Civil Cause No. 2 of 2008 which quashed the notice of compulsory leave by the Permanent Secretary, Ministry of Livestock and Fisheries Development dated 11th December 2007 and the termination letter by the Minister Hon. Joseph Konzolo Munyao dated 21st December 2007 and held that the ex parte applicant (the Claimant) was an employee of the Respondent for the entire duration of his contract even if some other person or persons had performed his functions.

2. Relatedly, the High Court declined to quash the appointment of the new managing commissioner since the Ex Parte Applicant's contract had already lapsed. This decision was not appealed against.

3. Subsequently, Civil Suit No. 215 of 2009 was filed at the High Court by way of a plaint on 20th April 2009. The Plaintiff alleged that he was employed by the Defendant as its Chief Executive Officer (CEO) on 28th November 2007 under a 3 year contract terminable by a three months' notice by either party. That on 11th December 2007, the Permanent Secretary of the Ministry of Livestock and Fisheries Development purported to terminate the Plaintiff's contract of employment and thereafter appointed another CEO of the Respondent.

4. In the judicial review application, the Respondent supported the Ministry's actions on compulsory leave and termination. Both letters were quashed by the High Court.

5. The Plaintiff prayed for –

(a) Basic pay for 11 months at Kshs.340,000

per month Kshs.3,740,000

(b) House allowance for a period of 11 months at Kshs.80,000 per month Kshs.880,000

(c) Other allowances for a period of 11 months at

Kshs.60,000 per month Kshs.660,000

(d) Telephone allowance for 11 months at Kshs.25,000 per month Kshs.275,000

(e) Leave allowance (leave not taken) Kshs.113,333

(f) Club Membership (annual) 2008 Kshs.74,500

(g) Motor vehicle benefit Kshs.1,263,240

(h) Gratuity (36 months) Kshs.3,794,400

(i) Medical travel insurance 2007 and 2008 at Kshs.79,000

Total Kshs.10,967,555.15

(j) The Plaintiff also sought costs for the suit.

6. The Defendant filed its statement on Defence and Counterclaim on 22nd May 2009. It averred that the Plaintiff had no reasonable cause of action against the defendant, that the plaintiff had engaged in acts of misconduct such as –

(a) Procuring goods without compliance with procurement procedures

(b) Failing to account for imprest

(c) Varying defendant's projects without consulting the Board thereby exceeding the projected budgets

(d) Billing the defendant for expenses incurred while on personal undertakings

(e) Failing to give Board an accurate account of the business

(f) Imprest not accounted for

i) 01/02/2007 Farmers field day – Kiboko Kshs.20,000

ii) 21/05/2007 Business advance Kshs.15,000

iii) 09/03/2007 Trip to Amsterdam from 11th – 13th March 2007 Kshs.50,260

iv) 19/06/2007 Business advance

(office imprest) Kshs.10,000

v) 09/07/2007 Business advance

(office imprest) Kshs.10,000

vi) 14/06/2007 Official duties to Mombasa (16th – 18th June 2007) Kshs.15,000

vii) 22/06/2007 Official duties from 16th – 18th June

2007 Kshs.15,000

viii) 22/06/2007 B/A (Attending Hon. Munyao's father burial on 23/06/2007) Kshs.10,000

ix) 07/07/2007 Business advance Kshs.20,000

x) 09/07/2007 Trip to Botswana from 10th – 20th July 2007 Kshs.128,206

xi) 22/07/2007 Trip to Qatar, UAE from 23rd – 28th July 2007 Kshs.100,000.

xii) 08/08/2007 Business advance Kshs.12,000

xiii) 24/09/2007 Business advance Kshs.20,000

xiv) 28/09/2007 Business advance Kshs.15,000

xv) 04/09/2007 Business advance

(Garissa show) Kshs.20,000

xvi) 22/08/2007 Mombasa ASK Show from 22nd – 24th August 2007 Kshs.200,000

xvii) 21/09/2007 Business advance Kshs.30,000

xviii) 08/10/2007 Business imprest/Dubai Kshs.85,400

xix) 31/11/2007 Salary advance Kshs.50,000

xx) 31/11/2007 Business advance Kshs.10,000

TOTAL Kshs.835,866

7. It also averred that the Plaintiff refused/failed or neglected to return the Defendant's property –

a) Nokia mobile phone N95, Bluetooth Motorola Kshs.57,998

b) Nokia mobile phone, 9300 Kshs.60,000

c) One Laptop Kshs.148,800

d) One computer set Kshs.45,000

e) Hp Laser jet printer 1320 Kshs.25,000

f) Computer desk Kshs.10,250

g) Computer chair Kshs.5,000

Kshs.351,648

8. It was further averred that the Defendant paid Kshs.497,881 to the Charleston Travel Limited on behalf of the Plaintiff, an amount he did not reimburse.

9. It is also averred that in August 2007, the Plaintiff, without approval of the Board, varied the Defendant's Kibanda at Mombasa from temporal to a permanent one of large size leading to a loss of Kshs.785,154 being the difference between the budget of Kshs.480,000 against a total cost of Kshs.1,265,154. That the Plaintiff authorised payment of contractors engaged in the construction of senior staff office at Athi River without authority of the Defendant leading to a loss of Kshs.1,354,300 for electrical and extra civil works.

10. That the Plaintiff obtained office furniture for the Defendant's Landhies Road Office without compliance with procurement procedures leading to a loss of Kshs.190,200. The particulars are as itemised below:-

(a) 4 window blinders Kshs.60,000.

(b) 1 office desk Kshs.69,000

(c) 1 high back Kshs.5,000

(d) 3 stackable chairs at Kshs.3,000 Ksh.9,000

(e) 2 sliding door cabinets at Kshs.9,900 Kshs.19,800

(f) 1 set of office tables Kshs.12,400

(g) 1 top connection Kshs.5,500

(h) 1 computer table Kshs.9,500

Total: Kshs.190,200

11. That the Plaintiff committed the Respondent to unprofitable business ventures to export products to Southern Sudan leading to a loss of Kshs.1,996,507.50.

12. That the matters averred in paragraphs 5 to 12 of the Statement of Defence and Counter claim amounted to gross misconduct and a repudiatory breach of the contract of employment.

13. That the judgment in the judicial review found that there was no termination of employment by the Defendant commission, hence the Plaintiff had no reasonable claim against the Defendant's counter-claim.

14. The Defendant prayed for dismissal of the suit with costs and damages amounting to Kshs.6,011,556.50 for the Counter claim with costs.

15. The Plaintiff responded to the defence on 29th May 2009. The Plaintiff avers that the Defendant had authority to sanction him for any misconduct or egregious conduct but did not. He denies the particulars of loss or damage particularised in the Statement of Defence and contends that it was during his reign that the Defendant made a profit after a long time. He denies ever engaging the Defendant in unprofitable ventures.

16. Finally, he avers that the Defendant was an Interested Party in the judicial review application and supported the Respondent therein and also failed to allow the Plaintiff to continue with his duties as the Managing Commissioner and his action against the Defendant was well founded.

17. On 9th June 2009, the Plaintiff responded to the Counter claim. He averred that –

- He was not given the opportunity to account for the imprest and is ready to do so.
- The amount particularised by the Defendant were monies lawfully taken by the Plaintiff as imprest or *per diem* during his tours as the CEO of the Defendant.
- The Defendant had been notified to collect items listed under paragraph 7(b) to (g) but has not done so.
- The furniture for the Landhis Road Office was acquired lawfully
- That he never requested the Defendant to pay the Kshs.497,881.00 to Charleston Travels Limited. At any rate the payment was scrutinised by the auditor and the Company Secretary.
- That the contract of the senior staff offices was procured lawfully by the Engineer and the Procurement Department. That the engineer was responsible for the civil and electric works.

18. On the allegation of unprofitable business ventures in South Soudan, the Plaintiff averred that the product in question was in the hands of Defendant's Company Secretary, Marketing Manager, Finance Manager and the Security Manager in the ordinary course of business when the Plaintiff was abroad on official duty. That the loss if any, was normal business not attributable to the Plaintiff.

19. He further avers that the Defendant was a duly constituted body corporate with various organs and officers and all acts and dealings were conducted in accordance with the law.

20. Finally, it is averred that the defendant did not make any claim regarding the Counter claim and that the same was an afterthought and should be dismissed with costs.

21. The Plaintiff filed the list of agreed issues on 15th April 2010.

Subsequently, and pursuant to a notice of motion dated 29th May 2013, the High Court ordered that the case be transferred to the Industrial Court on 2nd June 2015 and was received by the Court on 7th March 2017 and became Cause No. 465 of 2017.

22. The Defendant/Respondent filed the list of agreed issues on 13th December 2018.

23. Sometime earlier on 22nd June 2016 the High Court had dismissed the cause under Order 17 Rule 2(1) of the Civil Procedure Rules for want of prosecution.

24. On 29th August 2018, the Claimant moved the Court to set aside the dismissal of the suit for want of prosecution and reinstate the same for hearing and determination. The cause was reinstated on 23rd November 2018.

25. The Plaintiff/Claimant filed a witness statement on 14th August 2019. The earlier one was filed on 9th December 2013. The Defendant/Respondent did not file a witness statement.

26. The cause was slated for hearing on 29th September 2021 in the presence of Counsels for both parties but the Respondent did not appear for the hearing. The file was placed aside at 10.05 am for the Claimant's Counsel to contact his counterpart but later reported that his attempt to establish contact fell through. Hearing proceeded at 1.00 pm.

Evidence

27. The Claimant adopted the statement on record and produced the documents attached to the plaint/claim. In sum, the Claimant denied all the allegations made by the Respondent in the Statement of Defence and counterclaim.

28. On the alleged gross misconduct in paragraph 5 of the Statement of Defence and Counter claim, the Claimant stated that the allegations were not supported by any evidence on record and the issue had been finalised by the judicial review.

29. On refusal to return company property under paragraph 7, he testified that he was hounded out of office and had no opportunity to hand over the items. Further, he indicated that he had the items and could account for them.

30. As regards Kshs.497,881 paid to Charleston Travel Limited, the Claimant stated that the amount was paid to facilitate travel in the course of execution of his duties as the CEO of the Defendant/Respondent's company.

31. On the loss of Kshs.785,154 in relation to the KMC Kibanda in Mombasa, he denied the claim and added as the CEO of the organisation, he was permitted to spend up to Kshs.500,000 without engaging the Tender Committee.

32. With regard to the loss of Kshs.1,354,300/= his response was that the contract was approved by the Board and the Respondent had furnished no evidence to establish the claim.

33. As regards office furniture in the Defendant's office on Landhies Road allegedly procured irregularly at a total of Kshs.190,200, he told the Court that the office on Landhies Road was established for purposes of marketing. It was a sales office and the furniture belonged to the Defendant/Respondent.

34. On the loss of Kshs.1,996,507.50 in the South Sudan business venture, the Claimant denied responsibility indicating that he was out of the country at the time. That that engineer responsible did not reduce the temperature to 18^o c. That the lever failed while the cargo was enroute to South Sudan and the entire consignment was lost.

35. As regards paragraph 21 of the Counter claim, the Claimant denied responsibility and claimed that in the first year of his leadership the Defendant's corporation made a profit, but provided no evidence.

36. Finally, he testified that he was not given any letter or communication explaining the alleged failures or gross misconduct.

37. Other than the pleadings on record, the Respondent tendered no evidence in Court.

Submissions

38. The Claimant identified two issues for determination: -

(i) Whether the Claimant was unfairly and unlawfully terminated;

(ii) Whether the Claimant is entitled other reliefs sought.

39. On termination, Counsel relied on Section 45(1) and (2) of the Employment Act on what constitutes unfair termination. It was submitted that during the hearing, the Claimant testified that his performance had never been questioned by the Respondent at any time. That the issue of gross misconduct pleaded in paragraph 5 of the Statement of Defence and counterclaim were never brought to the Claimant's attention.

40. Reliance was made on the decision in **Shadrack Mwaniki Ngaru v Aegis Construction Limited [2018] eKLR** on the right of an employer to observe the safeguards provided by law before terminating an employee. Counsel paraphrases the provisions of Section 41 of the Employment Act to urge that no evidence was adduced to demonstrate that the Respondent complied with the law in the dismissal of the Claimant.

41. As regards the failure to account for imprest, it was submitted that the Claimant had denied the allegations and testified that all the travel he undertook as official and the allegation was an afterthought, as a desperate measure after the suit herein was filed. That the issue had not been brought to the Claimant's attention in the course of his employment by the Respondent.

42. On the items specified under paragraph 11 of the Statement of Defence and Counter claim, the Claimant contended that he never refused to return the same but the manner in which he was hounded out of the office prevented an orderly handover, an illustration of the chaotic manner in which the Respondent handled the Claimant's situation.

43. With regard to the alleged expenses of Kshs.1,597,881.00 due to Charleston Travel Limited, it was submitted that the Claimant not only clarified the same but further stated that expenses were incurred officially in the course of his employment in the course of procurement of air tickets.

44. It was further submitted that the averments in paragraphs 9 – 19 of the Statement of Defence and Counter claim were unsupported by evidence and had not been brought to the Claimant's attention at any time during his employment and only emerged after the claim herein was filed.

45. It is contended that the Respondent did not demonstrate that termination of the Claimant's employment was grounded on valid reasons, that there was no substantive justification of the termination and due process was not followed. That the provisions of Sections 41, 43 and 45 of the Employment Act were not complied with. That there was neither a show cause letter no a disciplinary hearing and the Claimant learnt of the allegations from the Respondent's Statement of Defence and Counter claim.

46. Reliance was made on the decision in **Daniel Kiplagat Kipkeibut v Smeep Deposit Taking Micro Finance Limited [2016] eKLR**, on the application of Section 45(1) and (2) of the Employment Act

47. Further reliance was made on the decision in **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** on the essence of substantive and procedural fairness in termination of employment. The Court was urged to follow the decisions relied upon by the Claimant, since the Claimant's evidence was uncontroverted.

48. The decision in **Peyiai Nkoitoi v Aruba Mara Camp Safaris Ltd [2021] eKLR** where the Court cited with approval the holding in **Francis Otile v Uganda Motors Kampala HCCS No. 210 of 1989** that pleadings cannot be evidence nor can they be a substitute thereof.

49. The decisions in **Shaneebal Limited v County Government of Machakos [2018] eKLR** and **Trust Bank Ltd v Paramount Universal Bank Ltd & 2 Others, Nairobi HCCS No. 123 of 2001** were also relied upon for the proposition that where a party fails to call evidence in support of its case, the party's pleadings remain mere statements of fact since in so doing, the party fails to substantiate its pleadings. Similarly, the evidence adduced by the other party against the allegations remain uncontroverted.

50. Further reliance was made on decisions in **Janet Kaphiphe Ouma and another v Marie Stopes International (Kenya), HCC No. 68 of 2007** and **Edward Mariga through Stanley Mobisa Mariga v Nathaniel David Schulter & another [1997] eKLR** on the effect of filing a Statement of Defence and not adducing any evidence in support of the assertions as he who asserts or pleads must support the same by way of evidence.

51. Finally, the High Court decision in **Interchemie E. A. Limited v Nakuru Veterinary Centre Limited [2001] eKLR** was cited where the Court was categorical that where no witness is called on behalf of the Defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted.

52. The Court was urged to make a similar finding since the Respondent herein tendered no evidence in support of the **counterclaim** and the same be dismissed.

53. As to whether the Claimant is entitled to the reliefs sought, it was submitted that since the Respondent offered no testimony to rebut the Claimant's averments, the Claimant's case remained uncontested. The Court was urged to find that that Claimant had on a balance of probabilities established its case and award the prayers ought in the plaint dated 20th April 2009.

Analysis and Determination

54. I have considered the pleadings and evidence on record. The issues for determination are: -

- (a) Who terminated the Claimant's contract of employment;
- (b) Whether the Defendant was guilty of gross misconduct;
- (c) Whether the Claimant is entitled to the remedies prayed for.

55. Evidence on record establishes that the Respondent/Defendant competitively hired the Claimant/Plaintiff as its CEO by a letter of appointment dated 28th November 2005 under a three (3) year contract renewable at a salary of Kshs.260,000 per month, house allowance of Kshs.40,000 and other remunerative allowance totalling Kshs.45,000, a gross salary of Kshs.375,000 per month. A leave allowance of Kshs.50,000 and gratuity at the rate of 31% of the annual basic pay.

56. The contract was terminable by a three (3) months' notice of either party or payment of three (3) months' basic salary and house allowance in lieu of notice.

57. The Claimant/plaintiff was appointed as the Managing Commissioner and was responsible to the Board of Commissioners. The letter tabulated the duties and responsibilities of the Claimant. Finally, the Board of Commissioners had the right to terminate the contract prematurely depending on the Claimant's performance.

58. It would appear that the Claimant entered upon his obligations as the Managing Commissioner and acted in consonance with the policies and procedures of the corporation and the law to the satisfaction of the Board of Commissioners, until he received a letter dated 11th December 2007 from the Permanent Secretary, Ministry of Livestock and Fisheries Development requiring him to proceed on compulsory leave in order to allow an Inspection and IT Team appointed by the Minister under Section 16 of the Kenya Meat Commission Act Cap 363 to evaluate the Commission's activities without undue influence.

59. The letter required him to hand over KMC properties to Mr. Vincent Kipyebi Ngurure on Thursday, 13th December 2007 before noon. That Mr. Vincent Kipyebi Ngurure would be acting Managing Commissioner until the inspection report was acted upon by the Minister. The letter was signed by the Permanent Secretary, Dr. Jacob O. Ole Mairon and copied to the Secretary to the Cabinet and Head of Civil Service as well as the Chairman, Kenya Meat Commission, Mr. Sammy Kyungu.

60. It is unclear when the Claimant received the letter, since he alleges that he had no opportunity to hand over the Commission's property to the Acting Managing Commissioner. It appears that matters moved pretty fast because by a letter dated 21st December 2007, the then Minister for Livestock and Fisheries Development Hon. Joseph Konzolo Munyao terminated the Claimant's employment. The brief letter

stated that “Due to your gross misconduct, it has been decided that your contract with the Kenya Meat Commission be terminated with immediate effect. You will be paid your terminal dues or gratuity after you have been satisfactorily cleared by the Commission in accordance with the prevailing regulations. This letter precedes the earlier communication from this Ministry.” The letter was copied to the Secretary to the Cabinet and Head of Civil Service.

61. Noteworthy, this letter was not copied to the Chairman of the Defendant/Respondent. Subsequently, by a letter dated 24th December 2007, the minister appointed Mr. Vincent Kipyebi Ngarure as the Managing Commissioner of the Kenya Meat Commission for a period of one year effective 24th December 2007. This letter sealed the Claimant’s fate as the Managing Commissioner of the Respondent.

62. It is common ground that the letter on compulsory leave and the termination letter were signed by the Permanent Secretary and Minister at the Ministry of Livestock and Fisheries Development respectively. In addition, the Minister appointed a new Managing Commissioner on 24th December 2007.

63. Whereas the Permanent Secretary’s letter was copied to the Chairman of the Respondent, the termination letter was not.

64. In **Republic v The Permanent Secretary Ministry of Livestock & Fisheries Development, & The Minister, Ministry Livestock Fisheries Development Ex Parte James Kimonye – Misc. Civil Cause No. 2 of 2008**, Ndulu J. held that under Section 6 of the Kenya Meat Commission Act, Cap 363, the power to appoint the Managing Commissioner was vested on the Commission but subject to approval of the Minister, said the Judge –

“I see no legal basis on which the Permanent Secretary or the Minister can suspend or terminate the services of the Managing Commissioner. Therefore under the Act, it was only the Commission which could suspend or terminate the services of the Applicant.”

65. The Court held that the Minister and the Permanent Secretary of the Ministry of Livestock and Fisheries Development were strangers to the contract of employment between the Claimant and the Kenya Meat Commission. The Judge found that –

“Since the Commission or the Board did not suspend or terminate the contract of employment of the Applicant, there was no suspension or termination effected. I hold that there was no legal suspension or termination of contract of employment of the Applicant.”

66. The effect of quashing the letters of the Permanent Secretary and the Minister meant that “the Ex Parte Applicant remained an employee of the Kenya Meat Commission for the entire period of his contract even if some other person or persons have performed his functions”. The Respondent did not challenge this decision on appeal.

67. For unexplained reasons, the Respondent and the Chairman of the Board of Commission joined the judicial review application as Interested Parties and supported the decision of the Permanent Secretary and the Minister.

68. Having found that the Claimant/Applicant remained an employee of the Respondent for the entire duration of his contract, he is entitled to the emoluments he would have earned for the entire duration of his contract, since he was not terminated. However, the Claimant could not resume his duties because the Minister had appointed another person a Managing Commissioner and evidence on record shows that the Board of Commissioners supported the termination.

69. As regards the allegations of misconduct, the Minister’s letter was too general for a termination notice and no other communication was sent to the Claimant by the Respondent. The Respondent had not previously written to the Claimant on the alleged misconduct. Particulars of the alleged misconduct are set out in paragraph 5 – 12 of the Statement of Defence and paragraph 21 of the Counter claim filed on 22nd May 2009.

70. Strangely, the Respondent filed no documentation on the alleged misconduct yet all of them implicate internal documents and records such as Human Resource Manual or Policy, invoices, imprest, air tickets, Board minutes and resolutions, copies of cheques and approvals by the Claimant. Undoubtedly, the Respondent is the custodian of all these documents. Curiously, the Respondent had not filed a witness statement and as explained earlier and did not appear for the hearing though the hearing date had been mutually agreed.

71. It is important to note that the Permanent Secretary, had indicated that the compulsory leave of the Claimant was intended to pave way for an inspection/audit team appointed by the Minister under Section 16 of the Kenya Meat Commission Act. The Respondent has not indicated whether an inspection/audit was carried out and what its findings were. It is unclear on what basis the alleged acts of misconduct arose.

72. In the absence of evidence to substantiate the specific allegations of misconduct, the evidence of the Claimant and his explanation to the allegations remain uncontroverted as was held in **Janet Kaphiphe Ouma and another v Marie Stopes International (Kenya), HCC No. 68 of 2007** held that –

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remains uncontroverted and the statement in the defence therefore remains mere allegations ... Section 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence.”

73. A similar holding was made in **Interchemie E. A. Limited v Nakuru Veterinary Centre Limited [2001] eKLR** where Mbaluto J.

stated as follows –

“No witness was called to testify on behalf of the defendant and, consequently, the evidence tendered on behalf of the plaintiff stands uncontroverted.”

74. In **CMC Aviation Ltd v Kenya Airways Ltd (Cruisair Ltd) [1978] eKLR** Madan J. (as he then was) expressed himself as follows:–

*“The pleadings contain the averments of the three parties concerned. Until they are proved, or disproved, or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. As stated in the definition of “evidence” in section 3 of the Evidence Act, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved. Averments are matters the truth of which is submitted for investigation. Until their truth has been established or otherwise they remain unproven. Averments in no way satisfy, for example, the following definition of “evidence” in **Cassell’s English Dictionary, p 394:***

“Anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth.”

75. Finally in **Motex Knitwear Limited v Gopitex Knitwear Mills Limited [2009] eKLR** Lesiit J. citing **Autar Singh Bahra & Another v Raju Govindji, HCCC No. 548 Of 1998 (unreported)** observed that:

“Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the Defence rendered by the 1st Plaintiff in support of the Plaintiff’s case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.”

76. The Court is in agreement with these sentiments.

77. Applying the above principles in the instance case, it is not in dispute that the Claimant led evidence both oral and documentary in support of his averments as well to controvert the averments of the Respondent in the Statement of Defence and Counter claim.

78. In the absence of evidence to the contrary, the Court is satisfied that the Claimant has on a balance of probabilities established this claim and is thus entitled to the reliefs sought.

79. On reliefs, the Claimant prays for the basic pay and other remunerative allowances separately. No reason is provided for this. The pay slip on record for January 2007 is as follows –

Basic pay 340,000

House allowance .70,000

Telephone 5,000

Cleaner 6,000

Cook 6,000

Security 10,000

Entertainment 13,000

Gross Pay 450,000

(d) Salary and Remunerative Allowances

80. The Court has no other basis on which to award salary and remunerative allowances and awards (Kshs.450,000 x 11 months) = **Kshs.4,950,000/=**.

(b) Leave Allowance

81. Leave allowance (leave not taken) Kshs.113,333.00. The Claimant led no evidence to establish this claim. It is declined.

(c) Club Membership (annual) 74,500

82. The claim is awarded. **Kshs.74,500/=**

(d) Medical expenses re-imburement Kshs.88,093.15

83. This claim presupposes monies spent by the Claimant. The Claimant led no evidence on the sum. It is declined.

(e) Motor vehicle benefit Kshs.1,263,240

84. The Claimant led no evidence to establish this claim. It is declined.

(f) Gratuity (36 months)

85. Paragraph 14 of the letter of appointment provided for a one off gratuity calculated at 31% of the annual basic salary and is taxable. The same is awarded as prayed **Kshs.3,794,400**

(g) Medical travel insurance for 2007 and 2008 Kshs.79,000

86. The claim was not proved. It is declined.

COUNTER CLAIM

87. In its Statement of Defence and Counter claim, the Respondent made an extensive Counter claim against the Claimant. The particulars of the Counter claim are as follows:–

- (i) Imprest not accounted for Kshs.835,866.00
- (ii) Defendant's properties Kshs.351,648.00
- (iii) Office furniture (Landhies Road Office) Kshs.190,200.00
- (iv) Sums paid to Charleston Travel Limited on behalf of the Plaintiff Kshs.497,881.00
- (v) KMC Kibanda Mombasa – losses Kshs.785,154.00
- (vi) Senior Staff office – losses Kshs.1,354,300.00
- (vii) South Sudan Investment – losses Kshs.1,996,507.50

Total Kshs.6,011,556.50

88. The Defendant prays for judgment against the Plaintiff (Claimant) for Kshs.6,011,556.50, costs and interest.

89. However no documentary evidence was filed to demonstrate the veracity of the allegations. All the Respondent did was to throw figures to the Court without any explanation. But more critically for purposes of this judgment, no evidence was led at the hearing to justify the allegations.

90. As mentioned elsewhere, the hearing date was taken by consent of Counsel for both parties before the Deputy Registrar on 10th August 2021 and on the date of hearing on 29th September 2021, the Court placed the file aside at 10.05 am for Counsel for the Claimant to contact his Counterpart. He subsequently reported that his attempts to establish contact had fallen through. Hearing proceeded at 1.00 pm.

91. The Court is in agreement with the submissions of the Claimant that on the nature and character of pleadings as enunciated in legions of decisions as well as the consequences or impact of failing to adduce evidence as explained by Odunga J. in **Shaneebal Limited v County Government of Machakos [2018] eKLR**.

92. In **Karuru Munyororo v Joseph Ndumia Murage & another eKLR** Nyeri HCCC No. 95 of 1988, Makhandaia J. (as he then was) held that –

“The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon.”

93. As demonstrated earlier in this judgment, it is trite law that pleadings are mere averments and are not a substitute for evidence. They must be proved. Since the Respondent led no evidence and there is none on record, the Claimant's case remain unchallenged and the Respondent's Defence and Counter claim remain mere allegations.

94. In the circumstances the Counter claim has no substance to stand on and must fail and is accordingly dismissed with costs to the Claimant.

95. In the final analysis judgment is entered for the Claimant for the sum of Kshs.8,818,900/= with costs.

96. Interest at Court rates from the date of judgment till payment in full.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 17TH DAY OF NOVEMBER 2021

DR. JACOB GAKERI

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.

DR. JACOB GAKERI

JUDGE