



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1221 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

ESTHER NYARUAI KABAU WANYOIKE.....CLAIMANT

VERSUS

GEORGE SICHANGI AND JOSEPHINE NJERI

NAMASAKA T/A SICHANGI PARTNERS ADVOCATES.....RESPONDENT

JUDGMENT

Introduction

1. In her Statement of Claim dated 9th July, 2015 and filed in Court on 10th July, 2015, the Claimant seeks compensation for the unlawful refusal to pay contractual benefits upon the termination of her employment contract with the Respondent herein.
2. The Claimant seeks the following reliefs:
 - (i) The sum of Kshs.1,129,500 plus interest thereon at Court rates from the date of Judgment until settlement in full.
 - (ii) Costs of the suit plus interest thereon from the date of the Judgment.
 - (iii) Any other/further relief that this Court may deem fit to grant in the interests of justice.
3. The Claimant maintains that she was employed as a Senior Associate Advocate by the Respondent serving in its Commercial and Conveyancing Department. She further maintained that her engagement with the Respondent was governed by among others the Association Agreement dated 6th July, 2012 between her and the Respondent.
4. The Claimant contends that as per the provisions of the Association Agreement she was entitled to payment of salary and benefits comprising the following:
 - (a) Net monthly Salary of Kshs.150,000
 - (b) House Allowance being 15% of Salary
 - (c) Personal Shopping and entertainment allowance computed at 7.5% of her salary
 - (d) Fuel Allowance computed at 6% of the salary
 - (e) Transport Allowance of Kshs.20,000
5. The Claimant maintains that she was entitled to an aggregate monthly salary of Kshs.212,750/-.
6. The Claimant averred that despite the Association Agreement providing for the above the Respondent only paid her basic salary leaving all other allowances unpaid totaling to Kshs.62,750/- monthly for a total period of 18 months running from August, 2012 to January, 2014.

7. She further averred that the Respondent had acknowledged its indebtedness to her in the sum of Kshs.1,129,500 through various email communications between the Claimant and representatives of the Respondent.
8. The Claimant maintains that the withholding of the various allowances due and owing to her is unlawful, wrongful and unfair and urges this Court to allow her Claim in terms of the reliefs sought therein.
9. In response to the Claim the Respondent filed a Statement of Response and Counter Claim dated and filed in Court on 20th August, 2015 in which the Respondent maintained that at the time of the Claimant's engagement it was a registered partnership under the Partnership Act and that the Claimant's practice and payments were directly under Mr. Cyrus Maina, one of the partners.
10. It is contended that the Claimant's engagement with the Respondent was not that of an employer-employee but rather that the Claimant carried on her business as an Associate of the firm whose engagement was governed by the Association Agreement.
11. The Respondent further averred that it had no knowledge of any payments due and owing to the Claimant during the subsistence of her engagement with the firm.
12. It further maintained that following the exit Mr. Cyrus Maina in the year 2014 the firm was reconstituted and would therefore only be liable for proved claims after the reconstitution.
13. The Respondent posits that the Claim has been made in bad faith, is bad in law and an abuse to the Court Process. It as a result urged this Court to accordingly dismiss the claim with costs to the Respondent.
14. The Respondent further maintained that the Claimant in the Course of her engagement with the firm exposed it financially to the tune of Kshs.4,000,000/- particulars of which the Respondent averred cannot be disclosed due to professional and evidence Rules of Confidentiality.
15. The Respondent requested this Court to enter Judgment in its favour against the Claimant herein in the following terms:
 - (i) *The Claimant suit be dismissed;*
 - (ii) *Judgment against the Claimant on the counter claim;*
 - (iii) *An order of Indemnity and restitution under paragraph 10;*
 - (iv) *Costs of this Suit be borne by the Claimant; and*
 - (v) *Any other relief that this Court may deem fit and just to grant.*
16. In her response to the Statement of Response and Counter Claim the Claimant maintained that she is entitled to the reliefs sought in her Claim and urged this Court to allow it as prayed.
17. She further averred that she was an employee of the Respondent by dint of the signed Association Agreement between herself and the Respondent and was not under any specific partner as pleaded by the Respondent.
18. The Claimant argued that the alleged reconstitution of the Respondent could not affect her claims as the same were made with respect to the period between August 2012 and January 2014.
19. She further denied any acts or omissions during her tenure at the firm that would have exposed the Respondent to financial exposure as pleaded by the Respondent and therefore urged this Court to dismiss the counter claim as it has been made in bad faith and with a view of denying her the chance to enjoy her hard earned dues.
20. In conclusion the Claimant urged this Court to strike out the Response and Counter Claim with Costs and to enter Judgment in her favour in terms of the reliefs sought in her Claim.

Evidence

21. The matter proceeded for hearing on 13th July, 2021 in the absence of the Respondent who was properly served as evidenced by the Affidavit of Service sworn by Onditi Edwin Omulama but failed to attend Court for the hearing.
22. The Claimant testified as CW1. In her evidence, she reiterated the averments made in her Statement of Claim and Witness Statement dated 10th August, 2018. She further adopted four documents attached and marked EK -1, EK -2, EK-3 and EK-4 as part of her evidence.
23. She testified that she is entitled to all the reliefs sought in her Statement of Claim.
24. She testified that there is an allowance for September 2013 totaling to Kshs.62,750/- that was omitted from the Claim and urged this Court to allow it as well.

25. The Claimant testified that while she was still under the Respondent's employment they held several meetings and exchanged email communication between herself and the representatives of the Respondent when she demanded for the payment of the allowances that were due and owing at the time.

26. She further testified that the Respondent despite acknowledging the debt through its representatives as evidenced in exhibit EK-3, failed to settle the same.

27. She urged this Court to allow her claim as prayed.

Claimant's Submissions

28. The Claimant submitted that she had proved her employment with the Respondent and that the Respondent had failed to provide any documentation in support of its assertions. To buttress this argument the Claimant relied on the provisions of Section 10 (1), (6) and (7) of the Employment Act, 2007 and the Court's decision in the case of **Martin Ireri Ndwiga v Olerai Management Company (2017) eKLR** where the Court held that *it is the duty of an employer to keep records of its employees in relation to their employment contracts*.

29. It is further submitted that she is entitled to the reliefs sought in her Claim by dint of the provisions of Section 17 (1) of the Employment Act, 2007.

30. She further submitted that withholding of her allowances for a period of 18 months is unlawful and unfair and therefore urged this Court to award the amount claimed. For emphasis the Claimant cited and relied on the provisions of Section 17 (10) (a) and (b) of the Employment Act, 2007.

31. On the Counter Claim raised the Claimant maintained that it is a single allegation levelled against her without availing full particulars on the matter. She therefore prayed that the same be dismissed with costs. For emphasis the Claimant cited and relied on the case of **Equity Bank Limited v Gerald Wang'ombe Thuni (2015) eKLR** where the Court cited with approval the case of **Siree v Lake Turkana El Molo Lodges (2002) 2 EA 521** where it was held that *failure to plead particulars to special damages is fatal to a claim*.

Analysis and Determination

32. Having considered the pleadings, evidence, submissions and authorities cited by the Claimant the following are the issues for determination:

- (i) Whether there existed an employer-employee relationship between the Claimant and the Respondent herein;
- (ii) Whether the Claimant is entitled to the reliefs sought in her Statement of Claim.

33. The Claimant maintained that she was under the Respondent's employment in the position of Senior Associate Advocate as evidenced by the signed Association Agreement dated 6th July, 2012 until October 2014 when she terminated her employment with the Respondent.

34. The Respondent on the other hand maintained that the Claimant was not employed by it but rather carried on business as an Associate of the firm as indicated in the Association Agreement.

35. The Respondent further maintained that the Claimant was not offering any professional services to it but to its clients. It further contended that the Claimant worked directly under Mr. Cyrus Maina, one of its Partners at the time and who was directly responsible for the Claimant's practice and payments.

36. I have perused exhibit EK-1 which is the Association Agreement dated 6th July, 2012 signed between the Claimant herein and the Respondent and note that the same is duly signed between the Claimant and Sichangi Partners Advocates (the Respondent herein).

37. Further, the Association Agreement makes no reference to Cyrus Maina as being in-charge of the Claimant's duties and remuneration. The Respondent's contention that the Claimant was working under the said Cyrus Maina who was in-charge of her remuneration was not proved and is not borne by the documents in Court, especially the Association Agreement between the Claimant and the Respondent which the Respondent relied on.

38. In light of the above I find that the Claimant has indeed proved that she was employed by the Respondent. See the case of **Herman Hlangarwa Shidakwa v Armati Security Solutions Limited [2019] eKLR**, where the court noted that the claimant had proved his employment relationship with the respondent through bank statements, which fact was not contested by the respondent.

Whether the Claimant is entitled to the Reliefs Sought

39. Exhibit EK-1 the Association Agreement dated 6th July, 2012 signed between the Claimant and the Respondent provides that the Claimant is entitled to a monthly basic salary of Kshs.150,000, House Rent Allowance computed at 15% of basic pay, personal Shopping and Entertainment Allowance computed at 7.5% of her salary, Fuel Allowance computed at 6% of the salary and a Transport Allowance of Kshs.20,000.

40. The Claimant maintained that for a total of 18 months running from August 2012 to January 2014 the Respondent failed to pay her any of the agreed allowances only paying her basic salary.

41. From the Association agreement, it is evident that parties agreed to the payment of the aforementioned allowances and therefore the claimant is entitled to an order of specific performance of terms in the contract.

42. House Allowance besides being provided for in the Partnership Agreement is provided for expressly under the provisions of Section 31 of the Employment Act wherein an employer is charged with providing reasonable housing accommodation for each employee or in the alternative to pay house allowance in addition to the salary or wages.

43. In view of the foregoing, I find that the Claimant is entitled to payment of the allowances sought in her Claim. She is therefore entitled to payment of Kshs.1,129,500 as pleaded in her statement of Claim.

44. In conclusion, judgment is entered in favour of the Claimant against the Respondent herein in the sum of Kshs.1,129,500. The Claimant is also awarded costs of the suit and interest shall accrue from the date of this Judgment until settlement in full.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 12TH DAY OF NOVEMBER 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