



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.281 OF 2017

MICHAEL MAGU MURIITHIA.....CLAIMANT

VERSUS

CRATER AUTOMOBILE NAIROBI LIMITED.....RESPONDENT

RULING

The claimant pleaded in his Memorandum of Claim that he was employed by the respondent and his employment terminated on 31st January, 2017. That his terminal dues were not paid.

The claimant testified on 18th December, 2019 and in his evidence in chief asserted that his employment was terminated on 31st January, 2017 and was then employed on contractual basis from February to May, 2017 but his wages were not paid. That he resigned from his employment.

Upon cross-examination, the claimant testified that after January, 2017 he was advised by Mr Njiru for the respondent that he would work and paid a commission his last day at work was on 29th May, 2017.

On the apparent contradiction on the date employment terminated, the claimant testified that paragraph 2 of his Memorandum of Claim is not true, employment did not terminate on 31st January, 2017 but 29th May, 2017. That his advocate did not read the Memorandum of Claim for him to confirm the details. He signed the Verifying Affidavit before his advocates and not before the stated advocate who commissioned his affidavit. He uses spectacles to read but when signing his Verifying Affidavit he did not have them and thus did not read it before he signed.

The claimant effectively denounced his claim and the Verifying Affidavit was done just as a matter of course. He did not read it to confirm the averments as he was not having his spectacles and more fundamentally he did not take his affidavit before the Commissioner for Oaths stated on the Verifying Affidavit. He signed his documents before his own advocates.

Section 4 (1) of the Oaths and Statutory Declarations Act, which provides as follows;

A commissioner for oaths may, by virtue of his commission, in any part of Kenya, administer any oath or take any affidavit for the purpose of any Court or matter in Kenya, including matters ecclesiastical and matters relating to the registration of any instrument, whether under an Act or otherwise, and take any bail or recognizance in or for the purpose of any civil proceeding in the High Court or any subordinate court:

Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding or matter in which he is the advocate for any of the parties to the proceeding or concerned in the matter, or clerk to any such advocate, or in which he is interested. [Underline added].

These provisions are mandatory. The import is to allow a party filing a claim with the court have the contents authenticated by a Commissioner for Oaths, one separate and different from the advocate attending to ensure there is truthfulness, there is verification of the contents and specifically to ensure there is no conflict of interest.

Where therefore a party files a claim and does not attend before the Commissioner of Oaths and only attends before his own advocate to take the Commission, the oath is thus not taken before the Commissioner but his own advocate. This raises serious questions on who witnessed the taking of the oath under the provisions of the **Oaths and Statutory Declarations Act**.

5. *Particulars to be stated in jurat or attestation clause*

Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or

attestation at what place and on what date the oath or affidavit is taken or made.

The jurant must therefore be truthful in his oath. That is the purpose of attending before a Commissioner for Oaths. To confirm the averments made therein are true and honest.

A Commissioner of Oaths is the one who was present when the deponent was signing the affidavit. This cannot legally be witnessed by the advocate representing the litigant in this case. The claimant executed his Verifying Affidavit before his own advocates. He does not know the Commissioner for Oaths who commissioned his affidavit because he simply did not attend before such Commissioner.

The claimant under oath, testified that he never attended before the Commissioner for Oaths to take oath and confirm the averments in his Memorandum of Claim. Here he was telling the truth. He was under oath and before the court. He was examined by the defence and the court and he confirmed his evidence and he stood as a truthful person. He further offered that he signed documents to support his Memorandum of Claim without wearing his spectacles. This confirms he never read any of the documents filed.

With such defects, there is no proper claim before the court as required under Rule 4(2) of the Employment and Labour Relations Court (Procedure) Rules, 2016;

(2) A statement of claim filed under paragraph (1) shall be accompanied by an affidavit verifying the facts relied on.

The pleadings thus contradicted by the claimant himself, the Verifying Affidavit made before his Advocate, the suit stands without foundation.

For these reasons set out above the Verifying Affidavit offends the mandatory provisions of the law, section 4 of the Oaths and Statutory Declarations Act, the claim is thus without a foundation and is hereby struck out.

Each party shall bear own costs.

Delivered at Nakuru this 23rd day of January, 2020.

M. MBARU

JUDGE

In the presence of:

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