



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

*(Before Hon. Lady Justice Maureen Onyango)*

**CAUSE NO. 2502 OF 2017**

**OCHIENG LUCAS ONUDI.....CLAIMANT**

**VERSUS**

**CORTEC SYSTEMS AN SOLUTIONS LIMITED.....RESPONDENT**

**CONSOLIDATED WITH CAUSE NO. 2503 OF 2017**

**MAURICE OBARE OYUNDI.....CLAIMANT**

**VERSUS**

**CORTEC SYSTEMS AN SOLUTIONS LIMITED.....RESPONDENT**

**JUDGMENT**

The Claimants filed two Statements of Claim on 21<sup>st</sup> December, 2017 being Cause 2502 of 2017 and Cause 2503 of 2017. By an order of the Court these claims were consolidated and were to be heard simultaneously, by way of written submission, with the Claimants’ application filed on 11<sup>th</sup> July, 2018.

**Cause 2502 of 2017 – Ochieng Lucas Onudi**

The Claimant was employed by the Respondent on 31<sup>st</sup> May 2003 as a Support Consultant and rose through the ranks to the position of General Manager – Businesses and Special Projects as at 15<sup>th</sup> May 2017 when he resigned. He avers that the Respondent accepted his resignation letter vide its letter dated 15<sup>th</sup> May 2017.

He avers that at the time of separation, the Respondent owed him his salary for the month of June 2017 and the 14 days worked in July 2017. Further, it owed him other benefits amounting to Kshs.457,282.15 that were agreed upon by the parties. He avers that at the time of leaving employment he was paid Kshs.420,000 plus other benefits. He contends that the Respondent did not remit his PAYE deductions from his salary for the year 2016 and 2017 for which he received a demand from Kenya Revenue Authority (KRA).

He seeks the following reliefs:

1. A declaration and finding that the Claimant is entitled to payment of his separation dues.
2. A declaration that the Claimant is entitled to compensation for loss of opportunity and income from incomplete rental house project
3. An order directing the Respondent to pay the Claimant all his outstanding dues as follows:

Unpaid balance of salary for June, 2017..... Kshs.75,925.20

Agreed separation dues..... Kshs.457,282.15

**Total** **Kshs.533,207.35**



Kshs.852,011.25 being interest on the loan of Kshs.5,680,075.00.

It therefore prays for judgment against the Claimant as follows:

- a) The Claimant's claim herein be dismissed with costs
- b) Judgment be entered as against the Claimant and in favour of the Respondent for the said Kshs.852,011.25
- c) Costs

In Cause 2503 of 2017 the respondent avers that the Claimant deliberately failed to give sufficient resignation notice and that in the acceptance dated 24<sup>th</sup> August 2015 it informed the Claimant of the requisite 3 months' notice or payment of salary in lieu of notice. It avers that the claimant's last working day was to be 21<sup>st</sup> November, 2017 and not 31<sup>st</sup> August, 2017. It therefore prays for:

- a. 3 months' salary in lieu of notice Kshs.120,000
- b. Costs of the suit
- c. Interest in (a) and (b) above
- d. Any other relief that the court deems fit in the circumstances

Neither of the Claimants filed a response to the Counter-claim.

In view that the facts of these cases were not disputed, the court directed that the claims are disposed of by way of written submissions.

#### **Claimants' Submissions**

The Claimants submitted that the Respondent in its letters dated 13<sup>th</sup> December, 2017 admitted that the Company owed the Claimants Kshs.533,207.15 and Kshs.845,922.27 respectively. They submitted that in its defence the Respondent only seeks to avoid payment of the claims in its claim that they owe it the sums stated therein. They submitted that the Respondent failed to provide evidence of having processed and paid their dues as stated in paragraphs 11 and 14 of the Respondent's Replying Affidavits. They submitted that the Respondent has not denied authoring the letters referred to in the applications filed by the claimants. The failure to make such admissions in its Memorandum of Reply shows the extent to which the Respondent wishes to deny the Claimants their dues.

The claimants relied on the case of **Agricultural Finance Corporation v Kenya National Assurance Company Limited (in receivership) (1997) eKLR** and submitted that in the correspondence between the parties the respondent intended to settle the amount it admitted as owing to the Claimants.

In respect of the claim by the respondent, the claimants submitted that Order 7 Rule 5(a) of the Civil Procedure Rules provides for an affidavit under Order 4 Rule 1(2) where there is a counter-claim. They submitted that Order 4 Rule 1(2) is equivalent to Rule 4 (2) of the Employment and Labour Relations Court (Procedure) Rules 2016 thus the counterclaim is defective. They relied on the case of **Trans Africa Portways Ltd v Postal Corporation of Kenya** where the Court held that the counterclaim lacked a supporting verifying affidavit therefore striking it out.

OCHIENG LUCAS ONUDI, the Claimant in Cause 2502 submitted that paragraph 11 of his employment contract provided that the relationship could be terminated by either party giving 2 months' written notice. He submitted that in his letter dated 15<sup>th</sup> May, 2017 he gave the Respondent 2 months' notice with the last working day being 14<sup>th</sup> July, 2017. He submitted that the respondent in its letter dated 15<sup>th</sup> May 2017 accepted that the notice served was proper. It was his submission that the Court should find that he resigned in accordance with the terms of his contract of employment.

MAURICE OBARE OYUNDI the Claimant in Cause 2503 submitted that his resignation letter states that he gave 2 months' resignation notice and that his notice was received by the Respondent. He submitted that the Respondent even issued him with a Certificate of Service as required under the Employment Act thus the court should find that he resigned in terms of his employment contract. He further submitted that he is entitled to 20% Commission for Kisumu Project as per the agreement and the letter dated 24<sup>th</sup> August 2017 in which the respondent accepted resignation discussions in respect of commissions.

In respect of Sacco deductions, the Claimant submitted that in the letter dated 13<sup>th</sup> December, 2017 the Respondent agreed that monthly deductions were to be made to Stima Sacco. He submitted that the Respondent has not challenged the figure of Kshs.355,656 as pleaded and that he had annexed his member statement from the Sacco which indicates his last contribution was on 30<sup>th</sup> April 2017.

The claimants submitted that the Respondent deducted sums from their payslip but these amounts were not remitted to Kenya Revenue Authority hence they could not get tax clearance. The claimants submitted that the Respondent has not demonstrated that it had remitted the deducted amounts. They submitted that the Court in **SBI International Holdings AG (Kenya) v Amos Hadar & Others [2015] eKLR** ordered that the Commissioner for Domestic Taxes does make enquiries and investigate the Claimant's payroll with a view of determining tax compliance.

They submitted that even if the respondent's claim was proper the same would not have been allowed as there is no evidence to back it. They urged the Court to allow the prayers in their claims.

### **Respondent's submissions**

The Respondent submitted that the Claimants voluntarily resigned from the Respondent's employment and jointed its competitors in the market. It therefore submitted that the Claimants were not terminated to warrant any claim for compensation against the Respondent.

It submitted that in its Memorandum of response and Counterclaim filed on 26<sup>th</sup> January 2018 it stated that the Claimant Cause 2502 of 2017 owes it Kshs.852,011.25 in loan arrears. While the Claimant in Cause 2503 of 2017 owes it Kshs.873,306 in loan arrears and unpaid 3 months' notice.

It relied on Order 13 of the Civil Procedure Rules and Rule 13(2)(c) of the Employment and Labour Relations Court (Procedure) Rules, 2016 and submitted that an admission should be clear and unequivocal as held in **Mercy Karimi Njeru and Another v Kisima Real Estate Limited [2015] eKLR**. It submitted that it did not in any way admit or insinuate in its pleadings that it owes the Claimants any money in its Memorandum of Response and Counter-claim. It averred that it denied the claim and filed a counter-claim refuting that the claimants are owed by the Respondent.

It relied on the case of **Lucy Momanyi T/A L. N Momanyi and Company v Nurein M.A Hatimy & Another [2003] eKLR** where the Court cited the case of **Choitram v Nazari [1984] KLR 327** that admissions have to be plain and obvious and clearly readable.

It submitted that the Claimants have not denied its claims in the Counter-claim and no rebuttal and/or response to the Counter-claim was filed therefore it is unopposed. It urged the Court that should it determine that any money is owed to the Claimants the amount should be subjected to a set off and the amounts must be settled from such amount owed. It submitted that a set off and counterclaim are defences under the Order 7 Rule 3 of the Civil Procedure Rules and Rule 13(2)(g) of the Employment and Labour Relations Court (Procedure) Rules. It relied on the case of **Twiga Chemicals Industries Limited v Rotam Agrochemicals Co Limited [2019] eKLR**.

It submitted that employees, such as the Claimants, who voluntarily resign without giving the contractual notice are not entitled to any employment benefits arising from such separation. It was its submission that the Claimants are not deserving of the exercise of the Court's discretion since their conduct demonstrates that they resigned without issuing a notice.

It urged the Court to consider the fact that the Claimants never raised any complaint during their employment period and that the matters herein are mere afterthoughts. It urged the Court to dismiss the claim and allow the Counter-claim.

### **Determination**

Upon consideration of the pleadings and submissions by the parties,

the undisputed facts are that the Claimants tendered their resignation on 15<sup>th</sup> May, 2017 and 21<sup>st</sup> August, 2017. The issues for determination are –

- a. Whether the Claimants are entitled to the reliefs sought in the claim.
- b. Whether the respondent's claim has merit.
- c. Whether this Court should award the orders sought in the application.

### **WHETHER THE CLAIMANTS ARE ENTITLED TO THE RELIEFS SOUGHT**

#### **Cause No. 2502 of 2017**

- i. A declaration and finding that the Claimant is entitled to payment of his separation dues and order directing that the Respondent to pay the Claimant all his outstanding dues of Kshs.533,207.35**

The Respondent in the letter dated 13<sup>th</sup> December, 2017 in response to the Claimant's advocates demand letters stated:

“ ...

*We acknowledge receipt of your letters dated 18<sup>th</sup> December, 2017 where you act for your client Ochieng Lucas Onudi*

*Following the completion of audit as earlier advised, we would like to clarify and confirm that:*

- (a) The company owes your client a total of Kshs.533,207.15 that is salary arrears for June, July 2017 following his resignation*

...

*As instructed by yourselves, we are unable to settle the amounts in full as demanded in your letters however, as a business, we propose a realistic payment plan in line with our scheduled revenues as detailed below;...*

That is an express admission that the Claimant was not paid any dues as the Respondent in the letter acknowledged that it was indebted to the Claimant and intended to pay his dues in instalments. The Respondent did not produce any evidence showing that it subsequently paid the dues to the Claimant. Consequently, prayers (a) and (c) of the Claim succeeds as follows:

Unpaid balance of salary for June, 2017..... Kshs.75,925.20

Agreed separation dues..... Kshs.457,282.15

**Kshs. 533,207.35**

**ii. A declaration that the Claimant is entitled to compensation for loss of opportunity and income from**

**incomplete rental house project**

This claim fails not only for the reason that it was not proved but also the Claimant's financial ventures did not have any link to the employment relationship between the parties.

**iii. An order that the Respondent settles the payroll taxes and all other charges and/or penalties levied by the Kenya Revenue Authority on the unpaid taxes and on the Claimants PIN.**

Rule 4 of the Income Tax (P.A.Y.E) Rules states that an employer who makes a payment of emoluments during a month to an employee of his who is liable to payment of tax shall deduct tax from those emoluments.

In the email dated 8<sup>th</sup> October, 2017 by KRA the Claimant was informed that he had not paid his tax of Kshs.57,026.97 for obligation Income Tax-Resident Individual for the period 1<sup>st</sup> January 2016 to 31<sup>st</sup> December 2016 by 30<sup>th</sup> June 2017. The Claimant was employed by the Respondent from 15<sup>th</sup> July, 2011. As at the date of tax default notice dated 8<sup>th</sup> October, 2017 he was an employee of the Respondent. He produced several payslips for the year 2017 all of which indicate that PAYE was deducted. He is thus entitled to the refund of **Kshs.57,026.97** as tax deducted and not remitted

for KRA.

**iv. An order that the Respondent pays the Claimant compensation for loss of opportunity and loss of income at the rate of Kshs.63,000 per month from July 2017 till payment in full**

This claim fails as it was not proved.

**v. An order that the Respondent to provide the correct P9 form based on the Claimant's contract and monthly payslip for the period January, 2017 to 14<sup>th</sup> July, 2017**

The provision of P9 forms is for all employers. The respondent is thus under obligation to provide the same to the claimant to enable him file his tax returns.

**Cause No. 2503 of 2017**

**i. A declaration and finding that the Claimant is entitled to payment of his separation dues and order directing that the Respondent to pay the Claimant all his outstanding dues of Kshs.1,201,578.27**

The Claimant alleged that the Respondent in its letter admitted that it owed him Kshs.845,922.27. The Respondent denies owing the Claimant any amount. The Respondent's letter dated 13<sup>th</sup> December 2017 addressed to the Claimant's advocates stated:

*"... We acknowledge receipt of your letters dated 8<sup>th</sup> December, 2017 where you act for your client Maurice Obare Oyundi. Following the completion of Audit as earlier advised, we would like to clarify and confirm that;*

*The company owes your client a total of Kshs.845,922.27 i.e Kshs.132,284.87 salary arrears for July 2017 and Kshs.713,637.40 final dues following his resignation.*

*Stima Sacco monthly deductions are scheduled for payment by Stima Sacco from the project funds agreed between ourselves and client (Stima Sacco). The Schedule for payment had been sent to Stima who will be settling the same.*

*Certificate of service issued was out of human error. Please find attached the correct Certificate of Service.*

...

*As instructed by ourselves, we are unable to settle the amounts in full as demanded in your letters however, as a business, we propose a realistic plan in line with our scheduled revenues”*

As explained herein above with respect to Cause No. 2502 of 2017, I find that the claimant is entitled to prayer a and b of his Memorandum of Claim. To this extent he is awarded **Kshs.845,922.27**.

In respect of the Claim for the Kisumu Project Commission, none of the letters of appointment stated that the Claimant was entitled to any commission for the Respondent’s projects. The letter dated 24<sup>th</sup> August 2017 stated that the Claimants final dues were to include salary, pay in lieu of notice, accrued leave and commissions (if any) while his payslip for the month of August 2017 indicate that he was paid project commissions. I do not find these to mean that he was specifically entitled to Kisumu Project Commissions thus this claim is dismissed. I thus find no proof of the same and dismiss the claim.

On the unremitted Sacco deductions, from the letter dated 13<sup>th</sup> December, 2017 the Respondent states that the deductions were to be made from project funds agreed between itself and the Sacco. The Claimant’s July 2017 payslip indicates that deductions were made from his salary as “*Stima deductions*”. From his Sacco Statement, his last contribution was in April 2017.

Having deducted the Sacco contributions in July 2017 and August 2017, I find that it was the Respondent’s responsibility to prove that it remitted the deductions which it has not. Therefore, this prayer succeeds in the sum of **Kshs.355,656** as claimed.

**ii. An order that the Respondent settles the payroll taxes for the year and all other charges and/or penalties levied by the Kenya Revenue Authority on the unpaid taxes and on the Claimants PIN**

The Claimant did not prove which of his taxes were owing or unremitted. Therefore, this prayer fails.

**iii. An order that the Respondent to provide the correct P9 form based on the Claimant’s contract and monthly payslip for the period January, 2017 to 14<sup>th</sup> July, 2017**

This claim succeeds for reason that it is a responsibility of every employer and the Respondent did not prove it provided the claimant with the P9 Form.

**WHETHER THE COUNTER-CLAIM HAS MERIT**

The Respondent filed a counterclaim against both Claims. Rule 13(2)(g) of the Employment and Labour Relations Court (Procedure) Rules 2016 provides that a Statement of Response shall contain a counter-claim.

Order 7 Rule 5 of the Civil Procedure Rules provides:

***“The defence and counterclaim filed under Rule 1 and 2 shall be accompanied by —***

***(a) an affidavit under Order 4 rule 1(2) where there is a counterclaim;***

***(b) a list of witnesses to be called at the trial;***

***(c) written statements signed by the witnesses except expert witnesses; and***

***(d) copies of documents to be relied on at the trial.***

***Provided that statements under sub-rule (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under Order 11.”***

Such counter-claim by its nature is a claim and under Rule 4(2) of the Employment and Labour Relations Court (Procedure) Rules it ought to be accompanied by an affidavit verifying the facts. As a statement of claim would ordinarily be accompanied by a verifying affidavit so should a counter-claim which is a cross-suit.

I find that the failure to have the verifying affidavit accompany the counter-claim was fatal as there was no document verifying the correctness of the facts as averred. In addition, rules of procedure have to strictly adhered and Article 159 of the Constitution cannot cure some failures.

In **John Muya Ndugire v Anderson Njue and Another [2019] eKLR** the Court held:

***“Turning to the lack of verifying Affidavit attached to the Counter-claim, this court had due regard to the provisions of Order 7 Rule 5 of Civil Procedure Rules. The same states as follows:...***

***The provision is couched in mandatory terms. However, it does not mean that an omission cannot be regularised. Having said so, where a matter proceeds to conclusion without a pleading being accompanied by a verifying Affidavit, it only lends to such matter being struck out.”***

Further, the respondent did not demand the notice in its letter of admission. It is evident that the prayers are an afterthought. I therefore dismiss the Respondent's counter-claim.

**Conclusion**

In conclusion I enter judgment for the claimants against the respondent as follows –

**Ochieng Lucas Onudi**

1.. Unpaid balance of salary for June, 2017.....	Kshs.75,925.20
2.. Agreed separation dues.....	Kshs.457,282.15
3. Unremitted tax.....	<u>Kshs.57,026.97</u>
<b>Total</b>	<b>Kshs.590,234.32</b>

**Maurice Obare Oyundi**

1.. Unpaid balance of salary for June, 2017...	Kshs.132,284.87
2.. Agreed separation dues.....	Kshs.713,637.40
3. Unremitted Sacco deduction.....	<u>Kshs.355,656.00</u>
<b>Total</b>	<b>Kshs.1,201,578.27</b>

The claimants are awarded costs of the suits and interest shall accrue at court rates.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6<sup>TH</sup> DAY OF MARCH 2020**

**MAUREEN ONYANGO**

**JUDGE**