



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1329 OF 2018

SAEED MALEKI.....CLAIMANT

-VERSUS-

SOMEHR GROUP LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 26th June, 2020)

JUDGMENT

The claimant filed the memorandum of claim on 23.08.2018 through Alex Kibunja & Associates Advocates. The claimant prayed for judgment against the respondent for:

- a) An order directing the respondent to pay the salary arrears owed to the claimant and reimburse him the money he spent on the business trip to Dubai all amounting to USD 72,408.
- b) The said amount be paid to his advocates on record.
- c) The cost of the suit be provided for by the respondent.

The claimant's case is that he is an employee of the respondent working as a General Manager since 12.02.2017. The respondent obtained a work permit for the claimant since he is not a Kenyan citizen (being an Iranian national). The letter of appointment provided for monthly salary of USD 5,000. The claimant's further case is that he worked since 12.02.2017 but he has never been paid the agreed monthly salary. Further he was sent by the respondent on a business trip to Dubai on 30.05.2017 and the respondent promised to reimburse the cost of the trip amounting to USD.380 and the respondent has failed to reimburse. The claimant has demanded payment of the amount claimed but the respondent has refused or declined or neglected to pay the claimant.

The respondent filed on 11.09.2018 the memorandum of reply through Coulson Harney LLP. The respondent's case is as follows. It collaborates with Solico Group Food Industries (hereafter referred to as Solico) and Sameer Group of Companies to, among other undertakings, invest in foods, beverages and animal feed. The claimant was seconded to the respondent by Solico on 12.12.2017 and according to his return ticket he would leave Kenya on 12.05.2017. During the secondment period the claimant was and remained the Business Development Manager at Kalleh Dairy Company Export Department (hereinafter "Kalleh"), a company related to Solico. From February 2017 to May 2017 the claimant spent time undertaking relevant studies and understanding the Kenyan market as well as evaluating what the respondent could venture into. During his stay in Kenya his salary was paid by Kalleh. The respondent's contract with the claimant was entered into from 01.06.2017 and not 12.02.2017 and the letter of appointment dated 27.06.2017 was for purposes of meeting perquisites in applying for a work permit and even after the letter of appointment, Solico continued to pay the claimant's monthly salary. The respondent denied that it assigned the claimant on a business trip to Dubai and never approved the claimant's expenses on such alleged trip. The respondent denied that it owed the claimant the amount claimed in the memorandum of claim. The respondent therefore prayed that the claimant's statement of claim be dismissed with costs to the respondent.

The claimant testified to support his case. The respondent's witness (RW) was Sheba Mohamed, the respondent's Group Secretary.

The Court has considered the pleadings, the evidence and the written submissions filed for the parties. The only issue for determination is whether the claimant is entitled to the payment as prayed for. The Court makes findings as follows:

- 1) It is trite law that parties are bound by their pleadings. The claimant alleges that he was employed by the respondent from 12.02.2017 but has exhibited a letter of appointment dated 27.06.2017 stating that the employment commenced on 01.06.2017. The Court finds that the claimant is bound by the letter of appointment and has failed to establish that he was indeed employed by the respondent from 12.02.2017.
- 2) The claimant has claimed a sum of USD.72,028. The particulars of the claim are not pleaded except USD.380 claimed as alleged

expenses on a business trip to Dubai. The claimant testified thus, **“I worked January 217, 2017 and left 19.10.2017. So I claim pay for 17.01.2017 to 19.10.2017.”** The Court finds that that period would amount to an aggregate of 9 complete months making a sum of USD.45,000 at USD.5000 per month and which has no consistency with the amount claimed. Further the Court has already found that the claimant was not in a contract of service with the respondent until the letter of appointment dated 27.06.2017. During cross-examination the claimant testified, **“I never demanded my salary until I left. I left on 19.10.2017. I claim pay from January 2017 to October 2018 when I filed the suit. Until May 2018 I was in touch with Sameer. Contract says my place of work was Kenya, Nairobi. I was to work in Nairobi. I was not redeployed away from Nairobi or elsewhere officially.”** By that evidence the Court finds that the claimant’s evidence contradicts his earlier quoted evidence on the period of unpaid salary and the evidence in cross-examination gives about 22 months thus at USD.5000 per month is a sum of USD.110, 000 and which the Court finds to be inconsistent with the claimant’s pleadings, claims and prayer for payment. The Court further finds that the claimant’s contradictory evidence cannot be trusted in that regard. In any event, the claimant having established that his place of work was Nairobi and he left Nairobi on 19.10.2017, the claimant would not be justified to be paid for no work performed after he left Nairobi.

3) The Court further finds that there is no reason to doubt the respondent’s case and evidence that during his stay and work in Nairobi, the claimant was to be and was fully paid by a subsidiary of Solico, namely Kalleh, including all salaries and emoluments and as per the letter dated 10.02.2017 being exhibit WM4 filed on 18.09.2018. Further, the letter dated 30.08.2018 to the respondent and by Kalleh being exhibit WM12 confirms that the claimant was employed by Kalleh from when he was seconded to Kenya in February 2017 until 22.05.2018 when his services were terminated. The letter further confirms that as agreed between the respondent and Solico, all the claimant’s salaries and emoluments were paid by Kalleh. Further, the letter confirms that the respondent was not to pay the salary but only cover his accommodation and local travel costs. The Court finds that the contents of the letter on accommodation and local travel costs is consistent with the claimant’s evidence in cross-examination thus, **“I was provided a car and a housing. Rent was paid. Pg. R.9 is about my rent. Building was owned by Respondent. I was given a debit card for my use in Nairobi....”** In view of that evidence and as submitted for the respondent, the respondent was not under a duty to pay the claimant’s salary as alleged and the claimant was fully paid by Kalleh for the work done during his stay in Nairobi.

4) As for alleged expenses on an alleged business trip to Dubai, the claimant has not pleaded and provided evidence of the particulars of the trip. He also testified thus, **“Prior written approval was required to incur on trips. I have no written approval on the trips.”** Accordingly, the Court finds that the claimant has failed to establish the claim and the prayer will be declined.

5) As submitted for the respondent the Court finds that the claimant has failed to discharge the evidentiary burden of proof and the prayers will be declined as not established at all. The suit is liable to dismissal with costs.

In conclusion judgment is hereby entered for the respondent against the claimant for dismissal of the memorandum of claim with costs.

Signed, dated and delivered in court at Nairobi this Friday, 26th June, 2020.

BYRAM ONGAYA

JUDGE