



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 114 OF 2020

(Before Hon. Justice Hellen S. Wasilwa on 17th September, 2020)

DIOUS EMANUEL.....1ST CLAIMANT

MANOJ SKARIA.....2ND CLAIMANT

VERSUS

ISON TECHNOLOGIES KENYA LIMITED.....1ST RESPONDENT

ISON TECHNOLOGIES FZ LLC.....2ND RESPONDENT

RULING

1. Pending for determination before this Court is the Claimant's Notice of Motion Application dated 18th June, 2020. The same is filed under certificate of urgency and is brought under Article 40 (1) and (2) (a) of the Constitution of Kenya, 2010, Order 40 Rule 1, 2, 4 & 5 and Order 51 Rule 1 of the Civil Procedure Rules, 2010, Section 3A of the Civil Procedure Act and all enabling provisions of the law including the Judicature Act. Seeking orders that:-

- 1) This application be certified urgent, and thereof be dispensed with in the first instance (Spent);**
- 2) Pending hearing and determination of the main suit, this Honourable Court be pleased to grant an order compelling the Respondents to release the Applicants' salaries and allowances;**
- 3) Pending hearing and determination of the main suit, this Honourable Court be pleased to grant an order compelling the Respondents to issue the Applicants' Certificates of service; and**
- 4) The costs of this application be awarded to the Applicants.**

2. The Application which is premised on the grounds that:-

- a) At all material times to this suit, the 1st and 2nd Applicants were employed under a contract of employment by the Respondent as a General Manager - Sales and Manager - Technical Sales with effect from 27th May 2015 and 16th September 2013 respectively;**
- b) The 1st Applicant received a monthly salary and allowances totalling to USD 8,188 while the 2nd Applicant received a monthly salary of USD 5,272;**
- c) As from October 2019 to 8th January 2020, the 1st and 2nd Applicants did not receive their salaries and allowances to allow them survive financially in this country;**
- d) The Respondents remitted the PAYEE for both the 1st Claimant and 2nd Claimant PAYEE till last date of employment, 8th Jan 2020.**
- e) Further, the T1 Applicant did not receive:**

i. Reimbursement of claimed expenses incurred in line of duty totalling to USD 1,407;

ii. Family visa expenses of USD 700;

iii. Annual performance incentive arrears as follows:-

for the year 2018 - USD 26,100

for the year 2019 - USD 26,100

iv. September 2019 salary allowance arrears of USD 2,900;

f) The total salary, performance incentives and claims owed to the Applicants were USD 84,748 and USD 17,733.09 respectively.

g) Despite several demands, the Respondents failed to remit the above sums leading to immense financial distress and frustration.

h) After issuance of demand letters the 1st Applicant received a part payment of USD 5,000 on 24 Jan 2020 and USD 5,576 on 25th Feb 2020 while the 2nd Applicant received a part payment of USD 10,544.*

i) The Respondents still owe the 1st and 2nd Applicants salaries and allowances totalling to USD 74,172 and USD 7,189.09 respectively.

j) The Respondents have no justifiable cause to withhold the Applicants' salary, allowances and certificates of service.

k) It is in the interest of justice that this application be certified urgent and heard on a priority basis.

l) It is in the interest of justice that this application be allowed as prayed.

3. The Application further supported by the Affidavit of **DIOUS EMMANUEL** and **MANOJ SKARIA** both sworn on 18th June, 2020, in which they reiterate the averments made on the face of the Application.

4. In response to the Application the Respondents filed its grounds of opposition dated 1st July, 2020 raising the following grounds:-

a) As admitted by the Applicants, the Respondents did pay undisputed salary arrears to the Claimants.

b) The Salary arrears claimed in the Application are the subject of the main claim and are vehemently contested/ disputed. The Respondents shall in this regard rely on paragraphs 28 and 29 of the Statement of Response at the hearing thereof.

c) The full and conclusive determination of the Claimant's claim to the disputed amounts including discretionary bonuses, allowances and salaries can only be determined after proper consideration of relevant evidence at the full hearing of the main suit.

d) Granting the prayers sought shall be tantamount to granting final orders in the main claim and will render the Respondents' defence and counterclaim otiose.

e) The Application is ambivalent and/or lacking in material particulars and is otherwise frivolous and an abuse of the Court process.

5. Parties thereafter agreed to dispose of the Application by way of written submissions.

Submissions by the Parties

6. The Claimants'/Applicants submitted that they are entitled to the salary arrears as claimed in their Application from the months of September 2019 to 8th January, 2020 when their employments were terminated by dint of the provisions of Section 25 of the Employment Act, 2007.

7. They further submitted that the continued withholding of such arrears is tantamount to unfair labour practice and that this Court has the power to Order the immediate payment of the withheld salary arrears as pleaded. To buttress this argument the Claimants cited and relied on the cases of **Ezekiel Nyangoya Okemwa Vs Kenya Marine & Fisheries Research Institute (2016) eKLR** and **Samuel Kipchumba Kaptoge Vs Moi Teaching & Referral Hospital (2015) eKLR** where the respective Courts ordered the Respondents to pay the Claimants wrongfully withheld salaries.

8. The Claimants further submitted that they are entitled to be issued with their respective Certificates of Service by dint of the provisions of Section 51 of the Employment Act, 2007. They further contend that they have been unable to secure any gainful employment due to the fact that no Certificate was issued by the Respondent and therefore urged this Court to Order the Respondents to issue them with the said

certificates.

9. The Claimants argued that it is in the interest of justice that the Court allows their Application as they are expatriates with no relatives or friends to depend on and therefore risk eviction if the instant Application is not allowed.

10. The Claimants further argued that the issue of accrued salary arrears cannot be left until determination of the main claim as by law they are entitled to payment of salary at the end of every month and that the same ought not to be delayed or withheld without valid reasons.

11. It is on this basis that the Claimants/Applicants urged this Honourable Court to find merit in their Application and allow the same as prayed.

Respondents' Submissions

12. The Respondent on the other hand maintains that the Applicants seek substantially the same prayers as those sought in their Claim as against it. It further maintained that the said orders can only be granted at the full hearing and not at this stage.

13. The Respondents further submitted that allowing the orders sought in the instant Application would be akin to summary Judgment and/or Judgment on admission which is only done where circumstances are clear and in instances the Defence as filed fails to raise any triable issues. To buttress this argument the Respondents cited and relied on the Court of Appeal decision in the case of **Isaac Awuondo Vs Surgipharm Limited & Another (2011) eKLR** and **Top In Town Dry Cleaner Services Limited Vs Aegis Kenya Limited T/A Leopard Beach Resort5 & Spa Hotel (2020)** on principles of summary judgments and Judgments on admission.

14. The Respondents further submitted that the issues raised by the Applicants herein are substantial issues of law that can only be determined after full trial and after being proved.

15. They further submitted that the instant Application as filed is pre-emptuous, misconceived and is made in bad faith and therefore urged this Honourable Court to dismiss it with costs to the Respondents.

16. I have considered the averment of the Parties herein. I note that the prayers being sought by the Applicant are similar to those sought in the Main Claim.

17. The orders sought can only be resolved after hearing the Parties conclusively in the Main Claim or if Parties agree to the prayers sought. I therefore find that the orders cannot be granted at the current time.

18. Costs in the cause.

Dated and delivered in Chambers via zoom this 17th day of September, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Awele for Respondent – Present

Kageha for the Applicant – Present