REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

APPEAL NO. 25 OF 2016

(*Formerly HCCA No. 590/2013*)

POWER BASE LIMITED.....APPELLANT

VERSUS

JOHN KAHIGU MAGU.....RESPONDENT

(Before Hon. Lady Justice Maureen Onyango)

Being an appeal from the decision of Hon. C. Obulutsa (Mr.). AG. Chief

Magistrate in Milimani Chief Magistrates, Civil Suit No. 7624 of 2005 delivered on 17th October 2013)

JUDGMENT

The Appellant, Power Base Limited, filed a Memorandum of Appeal dated 14th November 2013 appealing against the Judgment and Decree by Hon. C. Obulutsa Acting Chief Magistrate, (as he then was) delivered on 17th October 2013 in ***Milimani CMCC No. 7624 of 2005 (John Kahiga Magu -v- Power Base Limited.*** The appellant was the respodnet in the Chief Mmagistates Court case.The Respondent had sued the Appellant claiming a sum of Kshs.1,023,217/= for wrongful termination of employment. The Appellant filed a defence and Counterclaim for the sum of Kshs.1,022,295/= alleging negligence of the Respondent in discharging his duties culminating in hefty duties paid to the Government of Kenya. The Appellant being dissatisfied now seeks to have the said judgment set aside on the grounds that:

1. The Learned Magistrate erred both in law and fact in holding that the

Appellant was under a legal duty to pay the Respondent a sum of Kshs.407,055/= and Kshs.165,000/= being 96 days leave for and on behalf of SOSK Limited when there was no company resolution by the Appellant to take over the Assets and Liabilities of SOSK Limited.

2. The Learned Magistrate erred both in law and fact in holding that the Appellant had failed to prove that a sum of Kshs. 105,000/= being salary for the months of September, October and November 2003 together with the rent of Kshs. 80,000/= had been paid to the Respondent yet there was a letter dated 9th January 2004 written by the Respondent in which the Respondent was claiming a balance of Kshs. 25,000/= only was produced.

3. The Learned Magistrate erred both in law and fact in holding that the Appellant owed the Respondent a sum of 660 Dollars when there was no cogent evidence adduced in Court and in breach of the basic principles of company law under the Companies Act, Chapter 486 Laws of Kenya.

4. The Learned Magistrate erred both in law and fact in refusing to award the Appellant a sum of Kshs. 749,825/= as pleaded in the Counterclaim and proved to the required standard.

5. The Learned Magistrate erred both in law and fact in failing to appreciate company law and the Appellant's claim.

6. The Learned Magistrate erred both in law and fact in failing to award the Appellant costs of the suit.

Justice Onyancha granted the Appellant an interim stay of execution of the said judgment on 26th November 2013 on condition that the

decretal sum was deposited in court within 30 days. The stay was further extended on 16th April 2014 by Ougo J. after confirming that the Appellant had complied with the initial interim orders. The Record of Appeal was filed in court on 26th August 2014 and the court directed that the Appeal be disposed of through written submissions. The Appellant filed its submissions dated 15th December 2015 while the Respondent filed his submissions dated 26th July 2016.

The file was transferred to this court for disposal by an order of Njuguna J. made on 21st September 2016.

Appellant's Submissions

The Appellant submits that page 27 of the Record of Appeal shows the Respondent resigned on 07th January 2014 but indicated in the letter of resignation that the resignation had taken effect as from 31st December 2013 and that despite being paid all his dues, he instructed his advocate to demand from the Appellant a sum of Kshs.25,000/=. That therefore the claim for 3 months' salaries was an afterthought and that it was wrong for the trial court to award the same. That in reference to the claim for notice, the Learned Magistrate correctly pointed out that the Claimant/Respondent did not give notice as required in his contract of employment and was therefore required to pay 2 months' salary in lieu of notice to the Appellant.

It also submits that there was no resolution passed by the Appellant to pay the Respondent on the allegation that it had taken over the assets and liabilities of SOSK Limited and that a company makes their decisions through resolutions. Further, that there is no evidence tendered in Court that SOSK Limited had been wound up to make it impossible for the Respondent to recover his dues from his former employer and that therefore the allegation that Samuel Ndinguri was a Director of both SOSK Limited and the Appellant company together with the claim for Kshs.407,055/= have no legal basis. That further, no official search from the Registrar of companies was tendered to prove such directorship. It relies on the decision in ***Milimani HCC No. 524 of 2004, Affordable Homes Africa Limited –v- Henderson & Others*** wherein Justice Leonard Njagi cited with approval the decision in ***Shaw & Sons (Salford) Ltd –v- Shaw*** that:

> ***"****A company is an entity distinct from its shareholders and its directors even a majority shareholder therefore, is not and cannot purport to be the company. His votes alone may ensure the passing of an ordinary resolution, or even a special resolution, which would constitute an act of the company. But until then, the company cannot be said to have acted in a particular manner merely because that is the intention of the majority shareholder. His wishes remain wishes unless and until they are translated into an act of the company by an appropriate resolution at an appropriate forum."*

Further, that the letter written by the Directors only stated that the Directors were working on an agreement to see if the Respondent's final dues from the other company would be paid. It is further submitted that the Respondent did not prove his claim on a balance of probabilities as required by law.

It is submitted by the Appellant that it listed the particulars of the Respondent's negligence in the Counterclaim as shown on *page 18 of the Record of Appeal* and the Learned Magistrate held that even if the Appellant/Defendant paid penalty to the Kenya Revenue Authority, the same could not be charged to the Respondent/Plaintiff because it was a statutory obligation. That whether or not the money is a statutory obligation is not an issue and the issue is that the same was caused due to the negligence of the Respondent and that penalties are not statutory obligations. That it proved the Respondent's negligence on a balance of probabilities and that it cannot recover what had already been paid to KRA.

The Appellant prays that the Appeal be allowed, judgment delivered on 17th October 2013 be set aside, the Respondent's suit be dismissed with costs and the Counterclaim be allowed as prayed.

Respondent's Submissions

The Respondent submits that he claimed Kshs.407,055/= being balance due to him for work done for SOSK Limited where he worked for approximately 5 years. That he was wooed to join the Appellant Company by a director at SOSK Ltd, John Ndinguri, who issued him with a letter dated 26th January 2001 admitting the amount and committing to pay him all dues owed by SOSK Ltd. That his employment by the Appellant was therefore not predicated upon a company resolution and that the said letter from the director and his contract of employment were sufficient.

Further, that the Appellant did not plead the argument of there being no company resolution to take over the assets and liabilities of SOSK Ltd in its Statement of Defence as mandatorily required by Order 4 Rule 1 of the Civil Procedure Rules and that the principle enshrined in the said mandatory rule has been authoritatively affirmed by the Court in ***Nairobi Civil Appeal No. 264 of 1996, Nairobi City Council –v- Thabithi Enterprises Limited [1995-98] 2 E.A. 231 (CAK)*** which approved the holding in ***Sande –v- Co-operative Creameries Ltd [1992] LLR 314 (CAK)*** where the court held that a judge had no power or jurisdiction to decide an issue not raised before him and went on to emphasise that the legal position has always been that the only way to raise issues before a judge is through pleadings. He therefore urges this court to dismiss this belated defence of a lack of company resolution without being pleaded with the necessary proof as required by established procedure and law and that he is rightfully entitled to the award of Kshs.407,055/= and Kshs.165,000/= for 96 days Leave as held by the Learned Magistrate.

He submits that the Appellant did not prove in Court through documentary evidence that the sum of Kshs.105,000/= being salary for 3 months together with the Rent of Kshs.80,000/= had been paid to him. That the letter written by him claiming Kshs.25,000/= was in respect of only a small part of his claim as his full instructions to his lawyer was to demand over Kshs.1 Million which was not referred to in such letter and that his claim is otherwise correctly reflected in the Plaint filed on 15th July 2005. That in light of this, he is therefore entitled to the said claim as awarded by the Learned Magistrate.

It is submitted by the Respondent that the Appellant Company had cash flow problems and he was forced at some point to chip in his own

money. That he proved before the Learned Magistrate that the Appellant owed him USD 660 as per *Exhibit 2* which is the Receipt issued to him by John Ndinguri for the said USD 660. He also submits that the responsibility to pay Tax Amnesty Penalties cannot be placed on him and that the Appellant did not provide any evidence of his negligence or misconduct in form of any warning letters or even proof showing that the alleged amount was actually paid to KRA. That his testimony before the trial court was that his duty rested in presenting financial status reports in Management Meetings and all his actions had to be under instructions from his immediate supervisor. That he was not allowed to sign cheques as that was not part of his TOR. That the Directors were well aware of the company's financial position and the decision not to remit taxes was theirs and that the decision by the Learned Magistrate not to award the Appellant the sum of Kshs.749,825/= as pleaded in the counterclaim was therefore right.

It is the Respondent's submission that his testimony before the trial court was that John Ndinguri formed the appellant company, alongside his brother Samuel Ndinguri and that he has demonstrated the connection between the Appellant and John Ndinguri. That the said John Ndinguri is guilty of latches and it is too late in the day for the Appellant to introduce a company law issue so as to perpetrate fraud by unjustly avoiding a just debt rightfully due to the Respondent. That the Court should only be guided and look only at the documents tendered to the Respondent by the Appellant through its Director John Ndinguri.

The Respondent submits that the phrase 'costs follow the event' is appropriate because he succeeded in his claim against the Appellant as prayed in the Plaint and is thus entitled to costs as a successful party. He makes reference to ***page 96 of Judicial Hints of Civil Procedure by Kuloba J.*** on the law of costs and further cites the case of ***Orix Oil (Kenya) Limited –v- Paul Kabeu & 2 Others [2014] eKLR*** where the Court stated that:

> *"…the Court should have been guided by the law that costs follow the event, and the Plaintiff being the successful party should ordinarily be awarded costs unless its conduct is such that it would be denied the costs or the successful issue was not attracting costs. None of those deviant factors are present in this case and the court would still have awarded costs to the Plaintiff, which I do."*

Determination

The first issue for determination is whether the Learned Magistrate erred both in law and fact in awarding the Respondent his dues from SOSK Ltd and failed to appreciate Company Law. The second issue for determination is whether the claim for USD 660 was sufficiently proved before the Trial Court by the Respondent. The third issue for determination is whether the Appellant sufficiently proved before the Trial Court that it had paid the Respondent the claimed 3 months' salaries. The fourth issue for determination is whether the Learned Magistrate erred both in law and fact in failing to award the Appellant/Respondent their Counterclaim.

In the case of ***Ol Pejeta Ranching Limited v David Wanjau Muhoro [2017] eKLR,*** the Court observed that a first appeal behoves the court to re-evaluate, re-assess and reanalyze the evidence on record and then determine whether the conclusions reached by the learned trial Judge should hold. The Court in the ***Ol Pejeta case*** further cited the case of ***Kenya Ports Authority v Kuston (Kenya) Limited (2009) 2EA 212*** where this Court espoused that mandate or duty as follows:-

> *"On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."*

In the case of ***Patrick Lumumba Kimuyu v Prime Fuels (K) Limited [2018] eKLR*** the Court of Appeal at Mombasa held in paragraph 12 that:

> *"Except where expressly provided under statute, the burden of proof in civil cases is always cast on the party who alleges (see. Sections 107-109 of the Evidence Act Cap 80 Laws of Kenya). It is for the party that alleges a fact to be true to prove the existence and veracity of that fact. This is under the basic principle of Evidence that 'he who asserts must prove' (see.* ***Jennifer Nyambura Kamau v Humphrey Mbaka Nandi NYR CA Civil Appeal No. 342 of 2010 [2013] eKLR****)"*

Section 109 of the Evidence Act casts an evidential burden upon any party who alleges the existence of a fact. In this case, the Respondent tendered before the Trial Court the Letter from John Ndinguri on the letterhead of Power Base Limited, the appellant which was sufficient admission of the dues owed to the Respondent by SOSK, in which the appellant made and a commitment to pay the same. It was not for the respondent to doubt if or inquire whether the letter from SOSK was written after a resolution of Directors. Having come from the Managing Director, unless there was notice that he had no authority to write the letter, which was not either pleaded or submitted to the Trial Court, the appellant cannot now dispute the contents of the letter. It is my fining that there was therefore no need for a company resolution in this case as the issue before court was payment of dues and not a dispute of ownership of the appellant company or SOSK Limited. Further, I agree that the Appellant cannot raise the issue of a company resolution now which it did not raise in its pleadings in the trail court as was held in the ***Sande case*** above.

The Respondent also produced a Receipt issued to him by John Ndinguri for the USD 660 which he had loaned to the Appellant company. It is my finding that this was sufficient proof that he was owed the said amount by the appellant.

I therefore agree with the decision of the Trial Court that the respondent proved that he was owed both the awarded sum to him by the trial court.

The next issue for determination is whether the Trial Court erred in law and in fact that the appellant failed to prove that it paid the respondent salary arrears in the sum of Kshs.105,000 and that of Kshs.80,000. The only ground given by the appellant is support of the same

is that the respondent claimed Kshs.25,000 in his letter of 9th January 2004. The appellants made no effort to submit proof of payments made to the respondent. The letter dated 9th January 2004 in my understanding does not constitute an admission of Kshs.25,000 as the only terminal dues owed to the respondent. The opening paragraph of the letter reproduced at page 30 of the record of appeal is as follows –

> "*Please demand my final dues (details attached) from Powerbase Limited of P. O. Box 733 – 00200 Nairobi within 10 days."*

The attached list was not produced with regard to the Shs.25,000 referred to by the appellant, my understanding of the reference to the same is that it was the cause of the disagreement but not necessarily the amount that the respondent was instructing his advocate to demand. The full paragraph reads–

> "*This action has been taken in the light that my attempts to meet them has hit a cropper. Their failure to pay my dues since 18th October 2003 (note a mere Kshs.25,000) has resulted in a lot of financial difficulties. Their move firstly to register a new company indicates their attempt to transfer their core business and at the same time abdicate their financial obligations which include all statutory deductions since September 2000. Secondly, this company is not facing cash flow problems as they have continued to receive huge amounts of money. The money is selectively shared without consideration to the staff and the Kenya Government Authorities."*

The appellant made no attempt to submit to the Trial Court the details referred to in the first paragraph of the alleged admission.

In cross examination the respondent when asked about the admission of Kshs.25,000 stated " *My whole instruction to my lawyer was over Shs.1 million though it is not in the letter*." Further the appellant's witness when asked about the same stated "*I cannot comment about what happened in 2003. I do not know about SOSK. I cannot tell if it exists*." He therefore cannot dispute the letter written by Power Base Limited on 26th January 2001 admitting owing the respondent the sum of Kshs.407,055 and taking over the outstanding leave liability of 93 days owed to the respondent.

Even if this were so, the appellant had an obligation to disprove all the averments in the plaint, including the itemised salary arrears.

I find that the Trial Magistrate correctly found that the appellant failed to prove that it paid the respondent Kshs.105,000.

The final issue is whether the Trial Court erred in dismissing the counterclaim. The same is in respect of payments made to KRA and was dismissed on grounds that first, it was not proved that the money was paid to KRA and secondly, that it was a statutory obligation of the appellant.

In the written submissions in support of the appeal, it is stated that the reason the appellant seeks the reimbursement from the respondent is because it arose through the negligence of the respondent who failed to prepare VAT returns, remittance of VAT and failure to prepare NHIF returns leading to penalties. During the hearing, DW1 stated part of the money was paid to the auditors as professional fees while the rest was Tax Amnesty Penalties. The respondent however testified that the Directors failed to avail monies to make the statutory payments causing him to file NIL returns.

Under the Employment Act (1976) that was in force at the time, the only recourse for an employer where an employee was negligent of duty was to summarily dismiss the employer. Refer to Section 17 of repealed Employment Act –

> **17. Summary Dismissal**
>
> **Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal -**
>
> **(a) if, without leave or other lawful cause, an employee absents himself from the place proper and appointed for the performance of his work;**
>
> **(b) if, during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable properly to perform his work;**
>
> **(c) if an employee wilfully neglects to perform any work which it was his duty to have performed, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;**
>
> **(d) if an employee uses abusive or insulting language, or behaves in a manner insulting, to his employer or to a person placed in authority over him by his employer;**
>
> **(e) if an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer.**
>
> **(f) if, in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within ten days either released on bail or on bond or otherwise lawfully set at liberty;**

(g) if an employee commits, or on reasonable and sufficient grounds is suspected of having committed a criminal offence against or to the substantial detriment of his employer or his employer's property.

An employer could only recover from an employee under the circumstances set out in Section 6(1) as follows –

6. Deduction from wages.

(1) Notwithstanding subsection (1) of section 4, an employer may deduct from the wages of his employee -

(a) any amount due from the employee as a contribution to any provident fund or superannuation scheme or any other scheme approved by the Labour Commissioner to which the employee has agreed to contribute;

(b) a reasonable amount for any damage done to, or loss of , any property lawfully in the possession or custody of the employer occasioned by the wilful default of the employee;

(c) an amount not exceeding one day's wages in respect of each working day for the whole of which the employee, without leave or other lawful cause, absents himself from the premises of the employer or other place proper and appointed for the performance of his work;

(d) an amount equal to the amount of any shortage of money arising through the negligence or dishonesty of the employee whose contract of service provides specifically for his being entrusted with the receipt, custody and payment of money;

(e) any amount paid to the employee in error as wages in excess of the amount of wages due to him;

(f) any amount the deduction of which is authorized by any written law for the time being in force;

(g) any amount in which the employer has no beneficial interest, whether direct or indirect, and which the employee has requested the employer in writing to deduct from his wages;

(h) an amount due and payable by the employee under and in accordance with the terms of an agreement in writing, by way of repayment or part repayment of a loan of money made to him by the employer, not exceeding fifty per cent of the wages payable to that employee after the deduction of all such other amounts as may be due from him under this section;

(i) such other amounts as the Minister may prescribe.

The respondent's employment contract did not set out his responsibilities to include liability to make tax returns or impose on him the liability to reimburse the appellant for penalties arising from non-remittance of taxes arising from his negligence. Further from the record, there is no evidence that the penalties arising from non-remittance of statutory payments was the fault of the respondent.

I thus agree with the finding of the Trial Magistrate that the appellant cannot charge the respondent with its tax obligations and penalties

The upshot is that I find no merit in the appeal and dismiss it with costs to the respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6TH DAY OF MAY 2019

MAUREEN ONYANGO

JUDGE