



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**CAUSE NO. 44 OF 2014**

*(Before Hon. Lady Justice Maureen Onyango)*

**HEZEKIAH NELSON OTIENO ..... CLAIMANT**

*VERSUS*

**LAWRENCE MWANGI KARANJA ..... 1<sup>ST</sup> RESPONDENT**

**JOSHUA TURMAN ONGWARA T/A**

**LAKE INSTITUTE OF TROPICAL MEDICINE ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

By statement of claim dated 3<sup>rd</sup> and filed on 5<sup>th</sup> March 2014 the claimant seeks the following orders against the respondent –

- (a) Unpaid salaries Kshs.175,000.00/=
- (b) Leave earned but not taken Kshs.63,809.70/=
- (c) Gratuity/service pay Kshs.18,000.00/=
- (d) HELB loan penalty Kshs.80,000.00/=
- TOTAL Kshs.336,809.70/=**
- (e) Certificate of service
- (f) Costs of the suit
- (g) Interest on (1), (b), (c), (d) and (f) above

The claimant avers that the respondents who were his employers from January 2010 failed to pay his salary for the months of December 2012, January, February, March and April 2013. He avers that he resigned from employment on 9<sup>th</sup> May 2013 pursuant to resignation notice of the same date.

The respondents filed a memorandum of response to the claim and amended memorandum of claim denying that they traded in the name and style stated in the description paragraphs of the claim. The respondents further denied owing the claimant any money in respect of leave and avers that the claimant did not apply for any leave and cannot claim for the same. The respondents further aver the claimant is not entitled to gratuity as the same was payable at the discretion of the directors.

The respondents however admit that the claimant was an employee of the respondents as pleaded in paragraphs 3, 4, 5 and 6 of the claim.

At the hearing of the case the claimant called two witnesses but the respondent did not call any witness. Parties thereafter filed and exchanged written submissions.

The respondents having admitted in the memorandum of response that the claimant was the employee of Lake Institute of Tropical Medicine and having failed to call any evidence, the evidence of the claimant and his witness have not been controverted.

The only issues for determination are therefore whether the respondents have been properly sued and if the claimant is entitled to the prayers sought.

On the first issue, the claimant has filed a certificate of registration of business name in which LAWRENCE MWANGI KARANJA and JOSHUA TURMAN ONGWARA are registered as carrying on business under the name LAKE INSTITUTE OF TROPICAL MEDICINE, the respondents herein. The respondents have on their part filed a certificate of incorporation of LAKE INSTITUTE OF TROPICAL MEDICINE KISUMU LIMITED.

It is apparent that these two names relate to two different entities. The names are not the same; the dates of incorporation/registration are different. The former is registered on 26<sup>th</sup> March 2004 while the latter is registered on 28<sup>th</sup> May 2013.

The claimant's employment which is admitted by the respondents in the defence commenced in January 2010 before the registration of LAKE INSTITUTE OF TROPICAL MEDICINE KISUMU LIMITED. There is no evidence of change of name or transfer of the respondents' business herein to the latter company. There is no evidence that the two names refer to the same entity.

I find that the respondents are properly sued based on the admission of paragraphs 4, 5 and 7 of the statement of claim in the respondent's memorandum of defence.

The next issue is whether the claimant is entitled to the prayers sought. The respondents having not called any evidence, they have not controverted the averments in the statement of claim. It is the duty of the employer to produce employment records. The respondents having admitted that the claimant was their employee are by virtue of Section 10 and 74 of the Employment Act under obligation to produce employment records. Having failed to do so, the court must find in favour of the claimant as provided in Section 10(7) of the Employment Act.

For these reasons I find that the respondent has not proved that the claimant was paid salaries for the months claimed that is the months of December 2012, January, February, March and April 2013 in the sum of Kshs.175,000.

I further find that the respondent has not proved that the claimant took annual leave in 2010, 2011 and 2013 and that the respondent did not pay HELB for 16 months as set out in the statement of account that was produced by the claimant.

I therefore enter judgment in favour of the claimant on the prayers for unpaid salary, annual leave and HELB penalties.

On gratuity, the respondent's Staff Rules and Regulations provide at clause L13 that employees on contract are eligible for payment of gratuity upon expiry of their contracts. For these reasons I find that the claimant is entitled to gratuity at the rate of 2.5% of basic salary as endorsed on the said document which endorsement the respondents did not deny.

The claimant is entitled to certificate of service in terms of section 51 of the Employment Act.

## **Conclusion**

For the foregoing reasons I enter judgment for the claimant against the respondents as follows –

- (i) Unpaid salaries Kshs.175,000.00/=
- (ii) Leave earned but not taken Kshs.63,809.70/=
- (iii) Gratuity/service pay Kshs.18,000.00/=
- (iv) HELB loan penalty Kshs.80,000.00/=

**TOTAL Kshs.336,809.70/=**

The respondent shall pay claimant's costs for the claim. The decretal sum shall attract interest at court rates from date of judgment.

**DATED AND SIGNED AT NAIROBI ON THIS 20<sup>TH</sup> DAY OF JUNE 2018**

**MAUREEN ONYANGO**

**JUDGE**

**DATED AND DELIVERED AT KISUMU ON THIS 12<sup>TH</sup> DAY OF JULY 2018**

**MATHEWS NDERI NDUMA**

**JUDGE**