



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 689 OF 2016

BETWEEN

CHARLES NZEKI MWANGA.....CLAIMANT

VERSUS

SENACA EAST AFRICA LIMITEDRESPONDENT

RULING

1. Judgment was delivered in this Claim, in favour of the Claimant, on 23rd June 2017. The Claimant was granted:-

§ 1 Month salary in lieu of notice at Kshs. 40,000.

§ Outstanding annual leave at Kshs. 34,307.

§ Unpaid house allowance at Kshs. 13,200.

§ Unpaid off days at Kshs. 335,991.

§ Unpaid public holidays at Kshs. 50,664.

§ Service pay at Kshs. 45,998.

§ Compensation for unfair termination equivalent to 12 months' salary at Kshs. 480,000.

§ Costs and interest.

2. Judgment followed ex parte proceedings, after the Respondent, who was at the time represented by a Law Firm, failed to file a Statement of Response, and/or in any other way oppose the Claim.

3. The Respondent filed an Application dated 30th October 2017, seeking to have Judgment set aside, and the Respondent granted leave to respond to the Claim.

4. The Application was rejected in a Ruling delivered on 15th December 2017, the Court having found no fault with service of the Notice of Summons and Statement of Claim, upon the Respondent.

5. The Respondent withdrew instructions from its Lawyers. Instructions were issued to Human Resource Manager Walter Musi, to act for the Respondent.

6. Musi promptly filed an Application dated 18th December 2017, seeking to have the Court review its ex parte Judgment of 23rd June 2017, and substitute the Judgment with the following orders, in favour of the Claimant:-

§ 1 month salary in lieu of notice at Kshs. 40,000.

§ Annual leave balance of 2.6 days based on a basic salary of Kshs. 26,500 at Kshs. 2,253.

§ 29 off days at Kshs. 51,223.

§ 19 public holidays' pay at Kshs. 33,566.

§ Traveling allowance at Kshs. 1,700.

§ Order for compensation is set aside and the Court finds termination was fair, or, is granted based on a monthly salary of Kshs. 30,000.

7. The Claimant filed Grounds of Opposition on 22nd December 2017. The Claimant also filed a Replying Affidavit, which he swore on 27th December 2017.

8. The gist of opposition is that Walter Musi lacks the capacity to sign and file Notice to Act in Person, and file the Application subject matter of this Ruling. He is not an Advocate instructed by the Respondent. He is not authorized to represent the Respondent. The Application has been filed with unreasonable delay. Delay has not been explained. There was no reason for failure to respond to the Claim. The issues raised by Musi have already been determined by the Court, and the Court is *functus Officio*.

9. On capacity to act for the Respondent, Musi replies that the Employment Act 2007 defines an Employer to include a Manager. The Human Resource Manager is an Employer, mandated to act for the Respondent. Section 22 of the Employment and Labour Relations Court Act, mandates an Employee of a Company [juristic person], to act for the Company. The Respondent can be represented by a Director, or Employee specially authorized. The Court granted the Respondent leave to act in person, relying on consent signed between the Respondent and its previous Advocates. Musi has the capacity.

10. Parties agreed on 20th March 2018 to have the Application considered and disposed of through written Submissions. They confirmed filing of Submissions on 27th July 2018.

The Court Finds:-

11. Before 18th December 2017, the Respondent, a registered limited liability Company, was represented by the Law Firm of Kimathi Wanjohi Muli Advocates.

12. On 18th December 2017, the Court allowed the Respondent to act in person, based on a consent letter filed in Court on the same date, signed by the Respondent and its Advocates.

13. The main law governing representation before the Employment and Labour Relations Court [E&LRC] is Section 22 of the E&LRC Act. It is worded as follows:

“ In any proceedings before the Court, or a Subordinate Industrial Court, a Party to the proceedings may act in person or be represented by an Advocate, or an Office-Bearer or Official of the Party’s Trade Union or Employer’s Organization, and If the Party is a juristic person, by the Director or an Employee specially authorized for purpose”.

14. This law requires an Employee who acts in Court on behalf of his Employer, to have special authorization to act. Authorization means official permission is granted by the Employer for the Employee to take up the responsibility of representing the Employer in Court.

15. Where the Employee claims to act for the Employer pursuant to Section 22 of the E&LRC Act, the Employee must be able to show the Court that he has special authorization given for the purpose of acting for the Employer.

16. Authorization under Section 22 of the E&LRC Act must be in form of writing. Juristic entities express themselves through writing. This authorization is a kin the one given under Section 2 of the Labour Relations Act No. 14 of 2007, which requires authorized representatives appointed to perform the functions of Trade Unions’ or Employer Organizations’ recognized Officers, are authorized to do so, in writing. There are responsibilities attaching to the actions of representatives. Without written authorization, it would be difficult to have such actions bind the Principal Officers and Organizations, on whose behalf representatives purport to act.

17. It is not enough for an Employee to allege he is the Human Resource Manager, and authorized to draw and file Court Pleadings, and appear in Court to represent his Employer; he must in terms of Section 22 of the E&LRC Act, file a written authorization, clearly showing he has been specially authorized for the purpose of acting in a role similar to that ordinarily discharged by Lawyers.

18. The Respondent is a juristic person. The Court allowed the Respondent to act in person. A line must be drawn between the Respondent and its Human Resource Manager. The Court did not state that the Respondent is allowed to act through Musi. It merely stated the Respondent is allowed to act in person. To enable the Human Resource Manager become the face of the Respondent in Court, the law requires the Human Resource Manager is first identified through documentation as an Employee of the Respondent, and two, that he is shown to have special authorization.

19. Musi did not file anything showing he is the Human Resource Manager of the Respondent. He did not file an Affidavit or any letter from the Respondent, identifying him as the Human Resource Manager. The Respondent filed a Supporting Affidavit sworn by its General

Manager John Sanga. It does not identify Musi as Human Resource Manager. There is no written authority filed, or mentioned by the General Manager in his Affidavit, given to Musi, enabling Musi to act for the Respondent. There is no resolution by Respondent's Directors exhibited in Court, specially authorizing Musi to file documents in Court, and act for the Respondent.

20. Musi did not come to Court merely as a Witness for the Respondent. A distinction must be made, between a situation where Human Resource Managers and other Company Employees appear in Court as Witnesses on behalf of their Employers, and a situation where Human Resource Managers purport to act as Advocates for their Employers. A Witness is subject to the general rules applicable to Witnesses under the E&LRC Act and Rules, as well as the Evidence Act. He needs no special authorization to appear as a Witness. The law does not allow the Court to presume any Employee's capacity to act for an Employer in Court. Representation in a Court of law, is serious legal business, imposing on the represented Party and its Representative certain legal obligations. Musi filled the shoes left by Kimathi Wanjohi Muli Advocates, filing documents in the name of Human Resources Manager, and appearing in Court for the Respondent. Special authorization would include disclosure on the Human Resource Manager's professional competence. Section 29 of the Human Resource Management Professionals Act No. 52 of 2012, requires Human Resource Professionals, to have valid practicing certificates. Practicing Professionals must be registered, and have valid practicing certificates. Human resource management has evolved into a profession, which like the legal profession, must be regulated and shielded from the intrusion of quacks. For the Human Resource Manager to validly take over from the Law Firm previously on record for the Respondent, he needs to show that he is specially authorized; he is a registered Human Resource Management Professional; and holds a valid practicing certificate. Musi has not done this.

21. The contract subject matter of this litigation was concluded between the Claimant and the Respondent. There would be no need to deem Musi to be an Employer, within the definition of Section 2 of the Employment Act. There are no circumstances requiring the Court to explore whether Musi, the Human Resources Manager, was Claimant's Employer. There is a clearly known Employer in the Claim, and there would be no need to extend the definition of the term 'Employer' to include the Human Resource Manager. The Court agrees a Human Resource Manager can be deemed to be an Employer under Section 2 of the Employment Act. This would only be necessary however, if the real contracting Employer is unknown or untraceable. It may be necessary to make the presumption, where the Human Resource Manager has held himself out as the actual Employer, paying the Employee's salary, defining the terms and conditions of employment, and having exclusive control of the Employee, in the Employee's daily discharge of duties. The field of the persons who may be deemed Employers is broad under Section 2 of the Employment Act 2007, not so much as to allow all manner or persons assume the legal responsibilities and rights of the actual Employer; it is made broad, to ensure Employees' claims against Employers are not defeated by a narrow characterization of the term 'Employer.' Managers can therefore be deemed as Employers, from the perspective of enforcement of Employees' rights. They cannot randomly be deemed as Employers, for purposes of exercising Employer's managerial power. Where Human Resource Managers act as Employers there must be shown to exist, some authorization to act as, or in place, of the actual Employers. There must be circumstances, leading to the presumption that a Manager is an Employer. The Employer in this Claim is clearly known, and at no time was Musi to be taken as Claimant's Employer, so as to have authority to file the Application in question. He is not in any case, a Party to the Claim.

22. The Court saw no reason to set aside the ex parte Judgment in its earlier Ruling. The Respondent was given adequate facility to respond to the Claim, and failed to respond. There is no ground to warrant the Court revisits its Judgment. The Court does not see any substantive grounds in law and fact, which would warrant review, even had the drawer of the Application, shown he has special authorization to file the Application. The Respondent prays the Court to grant the Claimant notice pay at Kshs. 40,000. Why should compensation be based on a monthly salary of Kshs. 30,000? The current Application is made by an Employee who has no special authorization under Section 22 of the E&LRC Act, to file documents and appear in Court on behalf of the Employer. He is not disclosed to be a registered Human Resource Management Professional, holding a valid practicing certificate. ***The Application must therefore be struck off with no order on the costs. The Claimant is at liberty to execute Judgment granted on 23rd June 2017.***

Dated and delivered at Mombasa this 25th day of October 2018

James Rika

Judge