

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.200 OF 2012

JOHN ABUKO DIANGA..... CLAIMANT

- VERSUS -

FORAGE AUTO & ALLED SUPPLIERS (K) LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 2nd November, 2018)

JUDGMENT

The claimant filed the memorandum of claim on 09.02.2012 through Namada & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the respondent's summary dismissal of the claimant was arbitrary, unlawful and unfair and that the claimant is entitled to his terminal dues and damages.
- b) The respondent to pay the claimant terminal dues and damages in the sum of Kshs. 2, 730, 000.00 (being unpaid salary for 26 months from February 2009 to April 2011 at 70,000.00 per month Kshs. 1, 820, 000.00; one month salary in lieu of notice Kshs. 70,000.00; 12 months' salaries for compensation Kshs. 840, 000.00).
- c) An order for the respondent to release to the claimant all his retained tools of trade, materials and spare parts as per the schedule attached to the pleadings.
- d) An order for the respondent to pay claimant's costs of the suit.

The respondent filed the reply to the memorandum of claim on 21.09.2012 through Kimamo Kuria & Company Advocates. The respondent prayed that the suit be dismissed with costs.

The **1st issue** for determination is whether parties were in employment relationship. The respondent's witness Peter Kiare Muthungu (RW) was coherent in his evidence. RW was in the business of selling motor vehicle spare parts. He supplied such spare parts to the claimant who RW later learned operated his garage known as Jadi Motors. RW being desirous of expanding his business he employed the claimant at Kshs. 20,000.00 per month. Later complaints would be made against the claimant by customers. The claimant also opened his own cottage garage near the respondent's garage. In the process the respondent's guards found the claimant transferring the respondent's spare parts to his nearby cottage garage. The parties then agreed to separate by mutual agreement under which RW as respondent's director paid the claimant Kshs. 140, 000.00 with a balance of Kshs.70, 000.00. RW testified that he was willing to pay the **Kshs.70, 000.00** and which the Court awards accordingly.

While finding the respondent's evidence credible and coherent, the Court finds that the claimant was not coherent. He testified that Kshs. 70,000 was a stipend while the arrangement graduated into a partnership and then in a contradictory manner testified that Kshs. 70, 000.00 was a monthly salary. Further, while testifying that he was an employee, he again testified that he was a partner. Such contradictory evidence could not be trusted. In any event he did not sign documents as a partner but at the same time alleged he was such a partner only that the relevant partnership deed had not been concluded as was expected.

The Court having found that the termination was by mutual agreement and there being no finding for unfair termination, the claimant's case will collapse subject to the respondent paying the outstanding **Kshs.70, 000.00** under the separation agreement. Accordingly, judgment is hereby entered for the parties for the respondent to pay the claimant a sum of **Kshs.70, 000.00** by 15.12.2018 failing interest to run thereon at Court rates from the date of filing of the suit to the date of full payment; and each party to bear own costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday 2nd November, 2018.

BYRAM ONGAYA

JUDGE