



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**  
**AT NAIROBI**  
**CAUSE NO.1676 OF 2016**

**LIU CHING LIANG.....CLAIMANT**

**VERSUS**

**WEBWAVE ELECTIC**

**MANUFACTURING (K) COMPANY LIMITED.....1<sup>ST</sup> RESPONDENT**

**WENG SHI FANG.....2<sup>ND</sup> RESPONDENT**

**PENG WAN NENG..... 3<sup>RD</sup> RESPONDENT**

**JUDGEMENT**

Issues in dispute –

- a. unlawful withholding of salary;
- b. Unprocedural and unfair termination of employment; and
- c. Failure end refusal to pay accrued salary and terminal dues

**Background**

1. The suit herein commenced by way of Memorandum of Claim filed on 22<sup>nd</sup> August, 2016 and together a Certificate of Urgency and Notice of Motion seeking urgent orders for the Respondents to furnish security for appearance in the suit or for the Respondents to show cause why they should not attend court to show cause as to why they should not furnish such security for appearance or a deposit of security as security pending judgement. The application was heard and ruling delivered on 18th November, 2016. The Respondents were ordered to deposit with the court as sum of Kshs.4, 296,580.00 the equivalent of 295,334.00 Yuan within 7 days. The Respondents did not comply and have since not attended court.

2. On 6<sup>th</sup> September, 2016 the Respondents entered appearance through M/S WAMBUGU & MURIUKI ADVOCATES and on 23<sup>rd</sup> September, 2016 filed application challenging the jurisdiction of the court. To this application, the 2<sup>nd</sup> respondent, Weng Shi Fang attached his affidavit and asserted that he is a Chinese national and the director of the 1<sup>st</sup> Respondent and that the Claimant was employed by a third party known as CITY I CITY EXCELLENT ELECTRICAL EQUIPMENT CO. LTD SHIJIAZHUANG

PROVINCE. The court delivered ruling on 3<sup>rd</sup> November, 2016 and held that the Respondents are liable for the employment of the Claimant in Kenya and the claims made for his employment are due and payable and the court has jurisdiction to hear and determine the dispute.

3. On subsequent dates, the respondents' advocates withdrew from acting and representing them for lack of instructions. The Respondents were served through substituted service allowed by the court. At the scheduled hearing, the Respondents were absent.

4. Going back to the ruling of 18<sup>th</sup> November, 2016 it is apparent that the Respondents challenged the jurisdiction of the court a matter that the court rendered itself. There is no appeal or application to review the ruling. As such, failure to attend court upon the dismissal of that application and further abandoning this proceeding forcing Respondent advocate to abandon the proceedings speak to Respondents as persons and an entity that are not law abiding. Failure to comply with the orders of 18<sup>th</sup> November, 2016 for a deposit with the court of a security further confirm that the Respondents are an entity and persons not keen to observe the rule of law.

5. The claim shall be considered on its merits.

### **Claim**

6. The Claimant is a Chinese national and bearing a Foreign Certificate No.814402 and on passport No.G57537561 and in Kenya on work permits No.0029934. The 1<sup>st</sup> Respondent is a limited liability company registered in Kenya under the Companies Act while the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are the sole shareholders of the 1<sup>st</sup> Respondent having 900 and 100 shares each respectively of the total 1000 shares.

7. The Claimant was employed by the 1<sup>st</sup> Respondent as the ales, Communication and Operations Manager and issued with a contract dated 12<sup>th</sup> August, 2015 which was signed by the 2<sup>nd</sup> respondent. The terms of the contract wee that the Claimant would be paid a monthly salary of 10,000.00 Yuan; a share of 10% shares as bonus; 3 months' notice for termination of contract; penalty of 50,000.00 Yuan for unilateral cancellation of the contract by the employer; and payment of vacation or one month's salary in lieu thereof. The Claimant worked under such terms and conditions and served diligently and faithfully even on weekends and public holidays. Once the business picked up the Claimant was not paid the salaries due after going out of his way to establish a client base and growth of business in Kisumu, Nakuru, Eldoret and Mombasa.

8. The claim is that on 28<sup>th</sup> April, 2016 the 2<sup>nd</sup> Respondent visited the claimant's residence with a notice of termination of his employment and wanted to sign the termination in acceptance. The Claimant pleaded with the 2<sup>nd</sup> Respondent not to terminate his employment as he had not been paid his salaries since 12<sup>th</sup> August, 2015 and that he would be rendered destitute as a foreigner with no money or a place to go to in Kenya. The 2<sup>nd</sup> Respondent refused to listen and insisted that the Claimant had no work with the Respondent and that he would be paid the accrued salary and terminal dues. The 2<sup>nd</sup> Respondent then proceeded to carry the termination notice with him.

9. The Claimant made effort to follow the 2<sup>nd</sup> Respondent to have his dues paid but he would not oblige. At some point the 2<sup>nd</sup> Respondent assaulted him when he went to their offices to seek payment of his dues as his father was critically ill back at home in china and he needed to assist him.

10. The claim is also that the Respondent never served the Claimant with a redundancy notice before his termination of employment. By dint of his work permit in Kenya, the Respondent did not follow the applicable law in terminating the employment. This court has jurisdiction to hear and award the claims made by the claimant.

11. The Claimant is seeking for a declaration that his termination by the Respondent was unprocedural and unfair; make an order for payment of 295,334.00 Yuan and such comprising;

- a. Salary for 8 months and 16 days all at 85,334.00 Yuan;
- b. 3 months' notice pay 30,000.00 Yuan;
- c. Penalty for unilateral cancellation of contract 50,000.00 Yuan;
- d. One month pay in lieu of vacation 10,000.00 Yuan; and
- e. Compensation at 12 months gross pays 120,000.00 Yuan.

12. In evidence, the Claimant testified in court to support his case and also filed a witness statement to affirm such testimony. The Claimant was recruited to work in Kenya by the Respondents and under his contract it was agreed the applicable law would be Kenya law. He travelled from his home country china to take up employment with the Respondents and proceeded to get a work permit in Kenya. Due to diligence and dedication to the job, the Claimant was able to increase the respondents' business base but his salaries were not paid and eventually the 2<sup>nd</sup> Respondent terminated his employment on the grounds that there was no work for him at the Respondent business. The Claimant believes that his position was declared redundant but the applicable law was not followed and thus seek the claims set out in the memorandum of claim.

### **Defence**

13. In defence, the Respondents filed Response to Memorandum of Claim on 23<sup>rd</sup> September, 2016 and aver that there was no employment relationship between the Respondent and the Claimant as he was an employee of a third party known as *City Xi City Excellent Electrical Equipment Co. Ltd Shijiazhuang Province*. That the contract of employment was created by parties in the People's Republic of China and the court has no jurisdiction. That the Respondents are not privy to the contract of employment between the Claimant and the third party and the claims made are denied.

14. There was no evidence called by the Respondents.

### **Determination**

15. The claimant, a Chinese national has an employment contract with the 1<sup>st</sup> Respondent company and for such purpose was issued with a Work Permit No.0029934 and his passport No.G57537561 was endorsed with the same for work with *Webwave Electric Manufacturing (K) Co. Ltd*, the 1<sup>st</sup> respondent. Such company as registered in Kenya under the Companies Act is solely owned by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents as shareholders.

16. In the court ruling herein on 18<sup>th</sup> November, 2016 the court held;

*The contract of employment submitted by the parties and availed to the Court in English translation is clear as to the intentions of the parties. The Claimant is employed overseas in Kenya in Webwave Electric Manufacturing (K) Co. Ltd, the 1<sup>st</sup> Respondent. The contract further sets out that;*

*... The work place is Kenya, main responsibilities include;*

*...*

*1. The second party [the claimant] shall be the sales branch manager of the overseas Company Branch; the second Party shall work in the branch office for three years since day of signing of the contract. In the normal business operation of the branch, the First Party ["City xi city Excellent Electrical Equipment Co. Ltd Shijiazhuang Province"] shall guarantee the second party [the claimant] monthly salary amounting to 10 thousand RV,*

plus 10% reward. The salary shall be implemented according to the company's wage payment system.

2. ...

9. During the term of this contract, if the two parties cannot reach consensus, the matter shall be settled in a local Court of law.

...

11. The signing and the place of contract: Kenya, Webwave Electric Manufacturing (K) Co. Ltd.

As such, the contract of employment is made in Kenya and the place of work is in Kenya. The Claimant was sourced by the third party solely for the benefit of the 1<sup>st</sup> Respondent and a company registered and or domiciled in Kenya.

As such, the Claimant being in the territory of Kenya, his work being within the borders of Kenya, on labour and employment matters, recourse is before this court. In **Stephen Kabuonji case**, the Court went on to hold;

... the constitution of Kenya, 2010 with the right to fair labour relations being part of the Bill of Rights and further creating all international treaties that Kenya has ratified automatically applicable as under article 2(5) and (6) of the constitution thus;

(5) The general rules of international law shall form part of the law of Kenya.

(6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.

17. The jurisdiction of the court thus affirmed, it is trite that before termination of employment for any employee working within the borders and territory of Kenya is subject to the provisions of the Employment Act and an employee is entitled to a notice, reasons for the same and a hearing. Such is provided under section 35, 43 and 41 of the Employment Act. Even where the employee's role with the employer has become obsolete, phased out or the employer is faced with a redundancy, reorganisation or need to restructure the business, section 40 of the Employment Act apply.

18. In **Hesbon Ngaruiya Waigi v Equatorial Commercial Bank Limited [2013] eKLR** the court held that;

*Where redundancy is declared by an employer, the procedure to follow is as set out under the provisions of section 40 of the employment Act and where not followed, any termination as a result will be deemed unprocedural and unfair. Any termination of an employee following a declaration of redundancy must be based on the law otherwise the same becomes wrong and if the grounds used to identify the affected employees are not as per the law, the same becomes unfair:*

**40. (1) an employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—**

**2. where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;**

**3. Where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;**

**4. The employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;**

**5. Where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;**

**6. The employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;**

**7. the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and**

**8. The employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days' pay for each completed year of service.**

18. There is no evidence to controvert the evidence submitted by the claimant. He was an employee of the respondents, he was not paid his due salaries and the same was terminated without notice, without a reason or hearing. Section 43 of the Employment Act provides that;

**43. Proof of reason for termination**

*(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.*

*(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.*

19. Termination of employment must be based on substantive reasons that are genuine, valid and fair. For an employer to issue a termination notice, whether verbal or written, the same must be procedural and based on justifiable and substantive reasons. I find no justifiable reasons given to the Claimant for his termination of employment by the Respondents and procedures set out under section 40 in the event of a redundancy or the procedures set out under section 41 where the Respondent wished to terminate the employment were not followed.

20. The termination of the Claimant was procedurally and substantively unfair. Section 45 of the Employment Act read together with section 49 allow for compensation for unfair termination. The Claimant is hereby awarded maximum compensation noting the circumstances of his termination and the fact of the Respondent failing to comply with the fair procedures in effecting the termination.

**Remedies**

21. On the finding that the Claimant was unfairly terminated from his employment, compensation is hereby awarded at 12 months. Such amounts to 120,000.00 Yuan.

22. On the claim for unpaid salaries for 8 months and 16 days, section 18(2) of the Employment Act requires an employer to pay an employee for work done whatever the reason for termination;

*(2) Subject to subsection (1), wages or salaries shall be deemed to be due—*

*(a) ...*

*(c) In the case of an employee employed for a period exceeding one month, at the end of each*

*month or part thereof;*

23. The due salary is therefore awarded at 85,334.00 Yuan.

24. On the claim for notice pay, it was a term of the claimant's contract that any termination was to be by notice of payment of 3 months in lieu thereof. The Claimant had no notice of termination and his due salaries were not paid. Notice pay is hereby awarded at 30,000.00 Yuan.

25. The parties agreed in the contract that a termination of the same where unilateral would attract a penalty of 50,000.00 Yuan. Noting the Claimant was made to travel from his home country to work in Kenya under a work permit sourced and paid for by the respondent, I find such a provision reasonable and fair to go by as upon undertaking such an expensive process, to unilaterally terminate the contract would affect either party in a substantial way. The termination was effected at the instance of the employer. The Respondents shall pay the Claimant a sum of 50,000.00 Yuan.

26. The Claimant was entitled to a vacation or one month's salary in lieu thereof. Such vacation was not taken and no payment was made. The Claimant is awarded 10,000.00 Yuan.

27. On the claim for 10% shares bonus by the Respondents to the claimant, with the absence of the Respondent and the non-attendance, there were no financial records submitted for the court to assess this aspect of the claim. The court is not without power to award as appropriate. Section 88 of the Employment Act gives the court power to punish a party that has not complied with the law and its provisions. The sanction payment of a fine of Kshs.50, 000.00; 3 months imprisonment; or both. In this case the respondents shall each pay the Claimant a sum of Kshs.50, 000.00 all being Kshs.150, 000.00 and which translates to 10,033.00 Yuan.

28. A certificate of service shall issue in terms of section 51 of the Employment Act.

29. The parties herein transacted under the contract in terms of Yuan and the judgement amounts are thus computed.

**Judgement is hereby entered for the Claimant against the Respondents jointly and severally in the following terms;**

**a. I declare the Claimant was unfairly terminated by the respondents;**

**b. Compensation is awarded at 120,000.00 Yuan;**

**c. Salary arrears 30,000.00 Yuan;**

**d. Notice pay 30,000.00 Yuan;**

**e. Penalty due for contract cancellation 50,000.00 Yuan;**

**f. Vacation pay 10,000.00 Yuan;**

**g. Sanction of 10,033.00 Yuan;**

**h. The Claimant shall be issued with a Certificate of Service;**

**i. Costs of the suit.**

**Orders accordingly.**

**Dated, delivered in open court at Nairobi this 23<sup>rd</sup> day of March, 2017.**

**M. MBARU**

**JUDGE**

In the presence of:

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