



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1643 OF 2012

**PATRICK KAMAU KARIRU.....
.....CLAIMANT**

VERSUS

**GEOFARTHOM DRILLING CO. LIMITED.....1ST
RESPONDENT**

**EGOSKARM (EAST AFRICA) LIMITED.....2ND
RESPONDENT**

JUDGMENT

Introduction

1. By a Memorandum of Claim dated 12th September 2012 and filed in Court on 14th September 2012, the Claimant has sued the Respondents for unlawful termination of employment and failure to pay terminal benefits. The 1st and 2nd Respondents filed separate responses and counterclaims on 19th April 2013 and 28th March 2013 respectively to which the Claimant replied on 25th April 2013.

2. The Respondents did not attend the hearing nor did they file final submissions in spite of due notification.

The Claimant’s Case

3. The Claimant states that he was employed by the 1st Respondent on 1st November 2006 in the position of Assistant Manager in charge of the 1st Respondent’s borehole drilling projects. He was to be paid a monthly salary of Kshs. 75,000 plus 4,000 as incentive for every borehole completed.

4. The Claimant avers that his salary fell into arrears in the months of November 2006, December 2006 and January to June 2007 to the tune of Kshs. 395,000. Further the Claimant was not paid incentive for fifteen (15) completed boreholes totaling Kshs. 60,000.

5. The Claimant goes on to state that the 1st Respondent through the 2nd Respondent issued him with two cheques for Kshs. 35,000 and 40,000 being pay in lieu of leave. The cheque for Kshs. 35,000 was dishonoured upon presentation.

6. The Claimant claims that the 1st Respondent failed to remit the sum of Kshs. 32,862.80 deducted from his salary as Pay as You Earn (PAYE) tax. He adds that his contract was terminated without notice.

7. The Claimant's claim is as follows:

- a) Kshs. 395,000 being unpaid salary arrears;
- b) Kshs. 60,000 being unpaid borehole incentives;
- c) Kshs. 32,862.80 being unremitted PAYE tax;
- d) Kshs. 75,000 being one month's pay in lieu of notice;
- e) Kshs. 75,000 being amount of dishonoured cheque issued by the 2nd Respondent;
- f) Kshs. 2,000 being bank charges on account of dishonoured cheque;
- g) Costs plus interest.

The Respondents' Case

8. In its Response filed on 19th April 2013, the 1st Respondent denies having employed the Claimant and states that if indeed the Claimant was in its employment, he was employed for a period of one year for which he was paid all accrued dues.

9. The 1st Respondent denies the Claimant's entire claim and states that if the Claimant is owed any money then it is owed by the 2nd Respondent which is a separate legal entity.

10. By way of counterclaim the 1st Respondent claims the sum of Kshs. 415,000 being project losses incurred as a result of the Claimant's poor performance.

11. The 2nd Respondent filed a response on 28th March 2013 denying any employment relationship with the Claimant and stating that the cheques issued to the Claimant were in respect of other independent arrangements. The 2nd Respondent adds that all services arising out of these arrangements were fully paid for.

12. By way of counterclaim the 2nd Respondent claims from the Claimant for loss of user of motor vehicle registration number KAM 226Q and Kshs. 220,000 being repair costs.

Findings and Determination

13. From the pleadings and evidence adduced before the Court the following issues have emerged for determination:

- a) Whether there was an employment relationship between the Claimant and the Respondents;
- b) Whether the Claimant is entitled to the remedies sought;
- c) Whether the Respondents have proved valid counterclaims against the Claimant.

Employment Relationship

14. The relationship between the Claimant and the 1st Respondent is evidenced by a letter of appointment dated 30th October 2006. Section 2 of the Employment Act defines an employee as:

“a person employed for wages or a salary and includes an apprentice and indentured learner”

15. The same section defines an employer as:

“any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual”

16. A contract of service is itself defined as:

“an agreement, whether oral or in writing, and whether expressed or implied, to employ or serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership”

17. I have looked at the letter dated 30th October 2006 issued to the Claimant by the 1st Respondent whose terms the Claimant accepted on 31st October 2006 and have formed the opinion that it created an employment relationship capable of enforcement by this Court.

18. Regarding the 2nd Respondent, the Claimant cited two cheques drawn by the 2nd Respondent as evidence of an employment relationship. I do not think that evidence of payment by one party to another without more creates an employment relationship.

19. As held by this Court in ***John Kamau Mburu v Program for Appropriate Technology in Health (PATH) and another [2015] eKLR*** an employment relationship is not the same as a work relationship. The Claimant himself admitted being an employee of the 1st Respondent and the Court was unable to see how he could have been employed by two employers at the same time. Further, the Claimant told the Court that he did not know the relationship between the 1st and 2nd Respondents.

20. Consequently, the Court finds that there was no employment relationship between the Claimant and the 2nd Respondent and this being a specialized court for employment and labour relations matters, this determination terminates the Claimant's claim as against the 2nd Respondent. Logically, the 2nd Respondent's counterclaim against the Claimant must also dissipate.

Remedies

21. The Claimant did not pursue a claim for unlawful termination and I will therefore proceed to consider his specific prayers. He claims salary arrears for the months of November 2006, December 2006 and January to June 2007 all totaling Kshs. 395,000. The Claimant also claims the sum of Kshs. 60,000 being incentive for fifteen (15) completed boreholes.

22. The 1st Respondent filed a general defence first denying the existence of an employment relationship and second stating that the Claimant was paid all his dues. I have already ruled on the first issue in the Claimant's favour. On the second issue, the law places the burden of keeping employment records on the employer. It was therefore incumbent upon the 1st Respondent to produce records to show that the Claimant was indeed paid all his dues. In the absence of any such records the Claimant's claims for salary arrears and borehole incentives succeed and are allowed.

23. No basis was laid for the claims for notice pay and unremitted tax which therefore fail and are dismissed.

24. In light of my finding that there was no employment relationship between the Claimant and the 2nd Respondent, the claims on account of the cheques issued by the 2nd Respondent are without basis and are dismissed.

Counterclaim

25. The 1st Respondent did not adduce any evidence to support its counterclaim against the Claimant

which therefore fails and is dismissed.

Disposition

26. Ultimately I enter judgment in favour of the Claimant as against the 1st Respondent in the following terms:

a) Salary arrears.....	Kshs. 395,000
b) Borehole incentives.....	<u>60,000</u>
Total.....	455,000

27. This amount will interest at court rates from the date of judgment until payment in full.

28. Since the Claimant’s claim succeeds only in part I direct that each party will bear their own costs.

29. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI

THIS 13TH DAY OF APRIL 2017

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JUDGE

Appearance:

Mr. Maina for the Claimant

No appearance for the Respondent