



REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS  
COURT AT MOMBASA  
CAUSE NUMBER 274 OF 2015

**BETWEEN**

COLLINS NYAWINDA ..... CLAIMANT

**VERSUS**

CEMTECK ENGINEERING LIMITED ..... RESPONDENT

*Rika J*

*Court Assistant: Benjamin Kombe*

*Ms. Kayata Advocate instructed by M.K. Mulei Advocates for the Claimant*

*No appearance for the Respondent*

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**RULING**

1. This Claim was initiated by Mr. Collins Nyawinda, through a Statement of Claim received by the Court on 28<sup>th</sup> April 2015. The Claim is against the Claimant's former Employer, Cemteck Engineering Company Limited. Nyawinda states he was employed as a Driver, in the year 2012. His contract was terminated by the Respondent, in circumstances he feels were unfair and unlawful. His last salary was Kshs. 10,000. He prays for the following orders against the Respondent:-

- a) 1 month salary in lieu of notice at Kshs. 10,000.
- b) Leave allowance of 2 years at Kshs. 20,000.
- c) Salary for days worked in the month of February 2015 at Kshs. 4,235.
- d) 12 months' salary in compensation for unfair termination at Kshs. 120,000.

e) Underpayment of salary from July 2012 to February 2015 at Kshs. 213,856.

f) 15 days' salary for every year completed in service at Kshs. 15,400

Total..... Kshs. 383,521

The Claimant also prays for general damages; certificate of service; costs; interest and any other award the Court may deem it fit to grant.

2. The Respondent did not file any Response or attend Court at any time. There are affidavits filed by Abelazo Mutua, authorized Court Process Server, indicating the Respondent was duly served. A close scrutiny by the Court of these affidavits shows service was defective. Paragraphs 5 of the affidavits which are in standard form, state:

*‘‘ That I therein met the said Respondent who was pointed out to me by the Claimant. I introduced myself and the purpose of my visit and tendered service of the mention/hearing notice upon **him**, **he** accepted service but refused to sign my copy hereof which I return to the Court duly served.’’*

3. The Respondent is described to be a Limited Liability Company at paragraph 3 of the Statement of Claim, and in the title to that Statement. It is not clear how the Process Server introduced himself or herself, to this juridical person. It is not clear why the Respondent assumes the male gender, with service made on **him**, and **he** accepting service. This affidavit of service does not demonstrate proper service on a corporate entity, as is required under the Industrial Court [Procedure] Rules 2010.

4. Rule 12 [1] of these Rules stipulates service on a corporate body may be effected –

a) On the secretary, the director, or any other principal officer of the corporate body;

b) Where the process server is unable to find any of the officers of the corporate body mentioned in subparagraph [a], by-

i. leaving the pleadings with an employee of the corporate body identified by the Process Server, or

ii. leaving the pleadings at the registered office of the corporate body; or

iii. sending the pleadings by prepaid registered post to the registered postal address of the corporate body; or

iv. leaving the pleadings at the place where the corporate business carries out business; or

v. sending the pleadings by registered post to the last known postal address of the corporate body if the corporate body does not have a registered office or postal address.

[2] Notwithstanding anything contained in this rule, a Party may, with the leave of the Court effect service of process by any other method of service.

5. The service of the notices to the Respondent did not conform to these Rules. It is difficult to tell who received the notices, if indeed the notices were served. It is not safe for the Court to proceed to write a decision based on this service. Such a decision would be open to review and setting aside. It is unfortunate this defect was not detected earlier, or brought to the attention of the Court by the Claimant's Advocate before the hearing. IT IS ORDERED:-

***[a] Proceedings of the Court of 24<sup>th</sup> February 2016 and 10<sup>th</sup> March 2016 and all the consequential orders are set aside.***

***[b] Summons to re-issue and service be effected in conformity with the Industrial Court [Procedure] Rules 2010.***

***[c] Once in compliance the Claimant shall move the Court for a hearing date on accelerated basis.***

Dated and delivered at Mombasa this 22<sup>nd</sup> day of June 2016

James Rika

Judge