



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO.723 OF 2016**

**GEORGE KIARIE KIBOCHI ..... CLAIMANT**

**VERSUS**

**RESOLUTION INSURANCE COMPANY LIMITED ..... RESPONDENT**

**RULING**

1. On 3<sup>rd</sup> May 2016, the claimant filed application through Notice of Motion seeking payments of his salary arrears of Kshs.1, 120,000.00 and that his medical cover be reinstated and his employment position be defined pending hearing of the suit. The application is based on the annexed affidavit of the claimant and on the grounds that the respondent stopped paying the claimant his salaries without notice or due process in October 2015. The claimant has not been dismissed, suspended, interdicted or been taken through any disciplinary process and thus his employment status should be defined. The respondent HRM informed the claimant to go back and wait they sort out his salary and duties and that he would be recalled back to work but no formal communication has been issued. The claimant as a family man with children and wife cannot meet his obligations due to the employment predicament. He is in rent arrears of kshs.210, 000.00 and about to be evicted. The claimant cannot pay school fees for his children and also has loan arrears of Kshs.394, 989.00 and has been listed on the CRB as a loan defaulter and the bank is about to commence recovery proceedings.

2. Further grounds to the application are that the claimant stands to suffer irreparable loss and damage if the orders sought are not granted as he risks being thrown out of his rental house and committed to civil jail and at worst declared bankrupt if the bank commences recovery proceedings. The respondent shall not suffer any prejudice by paying the due salaries.

3. In his affidavit, the claimant avers that he is an employee of the respondent since March 2007 and in October 2015 his salaries were stopped without notice. No information was given. On 15<sup>th</sup> December 2015 the respondent HRM informed him that they were reviewing new postings and the issue would be resolved. The respondent also cancelled his medical cover without notice and this caused him great embarrassment when he took his son to the Nairobi hospital and was informed that he could not be treated at the facility.

4. That the failure by the respondent to inform him of his employment status has caused him great anguish and confusion. The failure to pay salaries has put him in rent arrears, loan arrears and is now at risk of court proceedings. The damage caused is huge hence the application should be allowed.

5. In reply, the respondent filed Replying Affidavit sworn by Maureen Osiche on 24<sup>th</sup> May 2016. She avers that she is Assistant HRM of the respondent and conversant with the claimant's case. That the claimant has been an employee of the respondent since 2007 but without leave or due cause he absconded

duty since December 2015. Such absence from work is a just cause in itself a ground for summary dismissal and a breach of contract.

6. That due to the claimant's absence from work, he owes the respondent one (91) month pay in lieu of notice as required under his contract and the Employment Act. His salaries were stopped after due process in December 2015 and not October 2015 due to extended absence from duty. The claim for salaries at Kshs.1, 120,000.00 is unfounded as his remuneration was on commission basis based upon new and renewed business. The claimant agreed to be remunerated on commission in a letter dated 2<sup>nd</sup> February 2013 and 5<sup>th</sup> May 2015 and where the terms were not followed, no commission was payable. That the claimant drew remuneration illegally without following agreed terms and now owes the respondent Kshs.930, 905.00 for which there will be a counter-claim.

7. That the failure by the claimant to pay his rent, repay his loan cannot be visited upon the employer. The medical cover was cancelled upon the claimant absconding duty. By his own actions, the claimant terminated his employment.

8. On the prayer seeking to know his employment status and or the same be defined, the parties have an agreement guiding their relationship. The application is therefore frivolous and should be dismissed with costs.

### **Submissions**

9. The claimant submit that since his employment with the respondent he has been diligent with his employment but on 15<sup>th</sup> December 2015 the HRM informed him that the respondent was reviewing his salary and duties and would be informed. There was no communication in January 2016. The respondent has remained evasive on the grounds that the claimant absconded duty. It has been impossible for the claimant to work as he has no duties or a salary as held in **Emmanuel Mutisya Solomon versus Agility Logistics, Cause No.1448 of 2011** that where an employer creates a situation in the work place and makes the continuation of employment of an employee untenable, such is deemed as constructive dismissal.

10. The claimant's salary was stopped from October 2015 when his supervisor directed the account office to stop salary payments from 22<sup>nd</sup> October 2015. This court has power to issue temporary reliefs pending hearing of the main suit. The non-payment of salaries is meant to frustrate the claimant and cause him loss and damage. A salary supports the livelihood of an employee as held in **Kaskazi Beach versus KUDHEIHA, Court of Appeal [2016] eKLR**.

11. The respondent submit that the orders sought in the application are replicated in the main suit and cannot issue in the interim. The claimant seeks to dispose the suit through his application.

12. The respondent also submit that the parties have a contract and it is the duty of the court to uphold the same as held in **Tom otieno Odongo versus Cabinet Secretary Ministry of Labour Social Security and Services & Another, Cause No.1174 of 2013**. It is not the duty of the court to redraw contracts, but look at the facts of the case and circumstances of the contract. Substantive issues cannot be addressed in the interim.

### **Determination**

13. The court in **Esther Mbinya Musau versus National Bank of Kenya Limited** did set out the parameters within which interlocutory orders in employment and labour relations matters are to be considered. The facts of each case must be put into account but the applicant must establish that there exists a right which right has been infringed and where there is no restraining order, the substance of the right will abet.

14. Has the claimant met this threshold?

15. The claimant avers that he was employed by the respondent in March 2007 and his last salary was kshs.160, 000.00. The employment contract/agreement has not been attached by either party for the court to assess the terms therein. The claimant has attached his pay slip, annexure "E" to his affidavit in support of his application which show his earnings as *override commissions New Bus*. I also note from the pay slip that the deductions effected on the same relate to;

*Withholding tax*

*CBA check off*

*Taxi deduction*

16. Without going into the merits of the main claim, this nature of pay slip and or statement is telling on the nature of employment between the parties. The deductions do not relate to dues stipulated under Part four (IV) of the Employment Act. To therefore appreciate the nature of the relationship between the parties and the rights that flow from the same so as to attribute the benefits due, the employment contract or the agreement between the parties is relevant for the court to be seized of. To go further and hold otherwise would be to leave the court exposed in a material way without a critical document that regulate the relationship between the parties.

17. Despite the respondent admission at paragraph 4 of the Memorandum of Reply that the claimant was their employee, the employment contract is not submitted.

18. In response the respondent avers that the claimant absconded duty and that he was in breach of his contract and or agreement and thus effectively terminated his own employment. That salaries were stopped in December 2015 after due process. However there is no record of the process undertaken by the respondent in the even the claimant absconded duty. It is imperative to note that even where the claimant is alleged to have committed serious breaches to his contract in terms and section 44(3) and (4) of the Employment Act, section 42 of the Employment Act apply.

*(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.*

19. Whatever misconduct an employee has committed, even in the serious case that warrant summary dismissal, the minimum procedure is ensure a hearing even where the required notice is short. That gives an employee too make his representations. Further, a termination is a serious occurrence to an employee, such a decision by the employer should not be left at large. A written notice of termination giving reasons for the same is what constitution the provisions of section 35 read together with section 43 of the Employment Act. Without any notice and reasons for termination, the claimant remains the employee of the respondent as the respondent has opted to leave the relationship open, no communication of decision to terminate even where there is an alleged reason of absconding, this has not been brought to the attention of the claimant, notice has not issued or a letter of termination been issued.

20. For the respondent to leave the claimant hanging on the balance, such is to invite claims such as this one.

21. However, as noted above, the court has been denied a vital record, the letter of employment, the employment contract and or agreement to be able to assess the viability of the orders sought in the interim and the justice to be achieved in granting the same in the interim. As he claimant is the one seeking to invoke the powers of the court in this regard, I find not merit in the grant of the orders sought in the interim.

22. What is however apparent is that there is an urgent need to have the parties address an underlying issue(s) the termination or lack of it with regard to the claimant's employment status with the respondent.

I find various matters of fact that must be established and this cannot be achieved within this application. Such would be to deny the court vital evidence that would facilitate the effective arbitration of the matter.

**The application filed on 3<sup>rd</sup> May 2016 is declined save that, as the parties have exchanged their pleadings, a hearing date shall be allocated on priority basis. Parties shall attend before the court Deputy Registrar, ELRC for allocation of a mutually agreed hearing date.**

**Orders accordingly.**

**Delivered in open court at Nairobi this 29<sup>th</sup> day of September 2016.**

**M. MBARU**

**JUDGE**

In the presence of:

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