



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NUMBER 383 OF 2015

BETWEEN

LIVINGSTONE

ABUTA.....CLAIMANT

VERSUS

1. DR. CHARLES GEKONDE OTARA

[CHAIRMAN]

2. DR. CHRISTIAN OTARA [DIRECTOR]

3. KASKAZI BEACH HOTEL [OPERATING AS LTI KISII SAFARI INNS LTD].....RESPONDENTS

RULING

1. The Claimant filed his Statement of Claim on the 10th June 2015. He prays for the following Orders against the Respondents, in the Substantive Claim:-

- a. The Respondents be ordered to pay the Claimant herein, his 7 months' unpaid salary arrears and 6 days worked in January 2015, together with interest, at Kshs. 350,044.
- b. The Respondents be ordered to remit N.S.S.F, N.H.I.F and P.A.Y.E to respective Statutory Bodies.
- c. The Respondents be ordered to pay the specific sum within a specific period.
- d. Any other Order the Court deems fit to grant.
- e. Costs.

2. Simultaneous with the Claim is filed an Application under Certificate of Urgency, in which the Claimant seeks the same Orders as contained in the Claim shown in paragraph 1 above. The only difference between the Application and the Substantive Claim is that the Application states the money to be paid by the Respondents, should be paid in the Claimant's specified Bank Account.

3. On 14th July 2015 the Court directed the Respondents to file and serve their Replying Affidavits and/or

Grounds of Opposition within 7 days. Hearing of the Application, and Preliminary Objection raised by the Respondents, was set for the 27th July 2015.

4. The Respondents had not complied with the Orders on the filing of their Reply to the Application, when the matter came before the Court on the 27th July 2015. They sought more time, which request the Court rejected, directing hearing to proceed as scheduled. Counsel instructed to hold brief on behalf of the Counsel for the Respondents was unprepared to reply to the Application, or prosecute the Preliminary Objection. The Claimant therefore argued the Application *ex parte*.

5. His position is that he was employed by the Respondents as a Human Resources Manager effective from 6th January 2014, at the Respondent's Hotel. He was not paid his salary as contracted, accumulated to Kshs. 350,044 as of the date he filed his Claim. He claims the Respondents issued him several dud cheques.

6. The Respondents' Preliminary Objection revolves around the argument that the Claimant has sued entities unknown in law, and his Claim is misconceived and incurably defective.

The Court Finds:-

7. The Respondent failed to argue its Preliminary Objection. On the face it, the Objection seems to this Court frivolous, and aimed at obstructing the Claimant from prosecuting his Claim without delay. *The Preliminary Objection has no merit and the Respondent's prayer for summary rejection of the Claim is declined.*

8. The prayers sought in the Application are substantive prayers. The Respondents have not been served with the Summons and had the opportunity to file their Statements of Response, in answer to the Substantive Claim. The Claimant seeks arrears of salary. The Court cannot presume that he was employed by the Respondents, and sustained the arrears of salary, without granting the Respondents the opportunity allowed by the law, to answer to the Claim. If the Court grants the Claimant his Application, what happens to his Substantive Claim, and the Respondents' right to be heard on that Claim? Parties should avoid seeking interim measures of a substantive nature, as grant or rejection of such measures, would likely compromise the Main Claim and compromise the right of other Parties to a fair hearing. The apprehension by the Claimant that the Respondents intend to delay hearing and disposal of the Claim, does not justify shortcuts. What the Claimant should do is serve the Summons and fix the dispute for full hearing on an accelerated basis. There is reason to believe from the Pleadings received so far, that the Claimant merits to be heard in full at the earliest.

9. The Court is of the view that the Application, like the Preliminary Objection, is misconceived and rejected.

IT IS ORDERED: -

a. The Application dated 9th June 2015, and the Preliminary Objection notified on 4th July 2015 are rejected.

b. Summons to be served, Response to the Claim filed, and Hearing Date thereafter be obtained in the Open Court on an accelerated basis.

c. Costs in the Cause.

Dated and delivered at Mombasa this 31st day of July 2015

James Rika

Judge