



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**  
**CAUSE NO 26 OF 2013**

**DONALD ORICHO.....CLAIMANT**

**VS**

**THE NATIONAL VISION PARTY.....1ST RESPONDENT**

**NICHOLAS K. BIWOTT.....2ND RESPONDENT**

**BENTER AKINYI OPANDE.....3RD RESPONDENT**

**AWARD**

**Introduction**

1. By a Statement of Claim dated 9<sup>th</sup> January 2013 and filed in Court on even date the Claimant sued the Respondents for failure to pay his salary. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed a joint Statement of Response dated 4<sup>th</sup> February 2013 and the 3<sup>rd</sup> Respondent filed her own Memorandum of Defence dated 8<sup>th</sup> November 2013. The Claimant and the 3<sup>rd</sup> Respondent testified on their own behalf while Allan Juma Masika testified on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. All the parties filed written submissions.

**The Claimant's Case**

2. By letter dated 23<sup>rd</sup> January 2012, the Claimant was employed to manage the 1<sup>st</sup> Respondent's Nairobi County Office situated at Bharvesh Centre, Murang'a Road, Nairobi. He was engaged on a five year contract at a salary of Kshs. 18,000 per month. However, save for Kshs. 20,000 paid to the Claimant by the 2<sup>nd</sup> Respondent, the Claimant was not paid his salary as agreed.

3. The Claimant claims the following:

- a. Kshs. 188,000 being salary arrears as at 31<sup>st</sup> October 2012
- b. Pay for the remainder of his contract
- c. Costs

**The 1<sup>st</sup> and 2<sup>nd</sup> Respondent's Case**

4. In their Statement of Response, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents deny the existence of an employment relationship between the Claimant and the 1<sup>st</sup> Respondent. Further, the 1<sup>st</sup> and 2<sup>nd</sup>

Respondents deny the existence of an office known as Nairobi County Office where the Claimant claims to have been stationed. They also disown the Claimant's letter of appointment dated 23<sup>rd</sup> January 2012.

### **The 3<sup>rd</sup> Respondent's Case**

5. In her Memorandum of Defence, the 3<sup>rd</sup> Respondent states that she is the National Vice Chairman of the 1<sup>st</sup> Respondent. She further states that pursuant to the Constitution of Kenya 2010, the 1<sup>st</sup> Respondent appointed ten (10) officials in over twenty four (24) counties, in an acting capacity. The 3<sup>rd</sup> Respondent was thus appointed acting Chairman for Nairobi County in January 2011, a position she held until the election of Allan Masika on 15<sup>th</sup> December 2012.

6. The 3<sup>rd</sup> Respondent goes on to state that in compliance with the Political Parties Act, the 1<sup>st</sup> Respondent opened offices in more than 24 counties, including an office for Nairobi County situated at Bharvesh Centre along Murang'a Road, Nairobi. In a meeting held on 7<sup>th</sup> February 2012, all interim chairmen of the 1<sup>st</sup> Respondent were given authority to recruit minimal staff to manage and maintain the party offices.

7. It was within this context that the 3<sup>rd</sup> Respondent in her capacity as interim Chairman for Nairobi County recruited the Claimant on 23<sup>rd</sup> January 2012. The 3<sup>rd</sup> Respondent agrees with the Claimant's claim that save for Kshs. 20,000 paid to the Claimant by the 2<sup>nd</sup> Respondent, no further payment was made. In her Memorandum of Defence, she sets out her attempts to have the Claimant's claim settled to no avail.

### **Findings and Determination**

8. The issues pending determination before this Court are as follows:

- a. Was there a valid employment relationship between the Claimant and the 1st Respondent?
- b. Is the Claimant entitled to the reliefs sought?

### **Employment Relationship**

9. The Claimant's claim is based on a letter of appointment dated 23<sup>rd</sup> January 2012 which states *inter alia*:

***“We are writing to inform you that the National Vision Party (N.V.P) has appointed you, on contract for 5 years with effect from 1<sup>st</sup> Feb 2012 up to 31<sup>st</sup> Jan 2017 at the National Vision Party Nairobi county office.*”**

***Please note that your responsibilities during your 5 year contract will include among others: Managing the county office on a day to day basis and vigorous recruitment and retention of members into N.V.P membership register.***

***The salary attached to this contract shall be Kshs. 18,000 per month. Any taxes arising from this salary shall be your responsibility. You will be expected to work under the supervision of the county chairperson of the party and any other elected national officials if need may arise.***

***Further note that the contract can be terminated by either party giving a one month notice or payment of two months salary in lieu of notice.***

***Yours faithfully***

## ***Nairobi County Chairperson”***

10. The 3<sup>rd</sup> Respondent admits being the author of this letter but the 1<sup>st</sup> and 2<sup>nd</sup> Respondents state that the 3<sup>rd</sup> Respondent had no authority to issue such a letter. It is the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's case that the authority to hire employees was vested in the National Executive Council of the 1<sup>st</sup> Respondent and not any party official.

11. In this regard, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents took issue with the date appearing on the letter of appointment being 23<sup>rd</sup> January 2012 and the date of the special meeting of the National Executive Council being 7<sup>th</sup> February 2012 which the 3<sup>rd</sup> Respondent relied on as authorisation to employ the Claimant. Explanations offered by the Claimant on the apparent discrepancy were not useful to the Court.

12. However, in determining whether there exists an employment relationship between a claimant and a respondent, the Court is to be guided by the question whether in the mind of a reasonable man, the person offering employment can, in the ordinary course of business, commit the organisation they represent.

13. The internal operations of an organisation to which a claimant has no access cannot be used to deny the existence of an employment relationship to the detriment of a claimant. In the case of ***Michael Mwalo Vs Board of Trustees National Social Security Fund (Cause No 1093 of 2012)*** this Court held that an employee dealing with a senior official of an organisation is not expected to go into the corporate boardroom to confirm whether the official in fact has authority to do what he seeks to do.

14. It is not in contest that the 3<sup>rd</sup> Respondent was a very senior official of the 1<sup>st</sup> Respondent and the Claimant had no reason to doubt the authenticity of a letter of appointment issued by her. If the 3<sup>rd</sup> Respondent exceeded her powers, recourse does not lie against the Claimant but against the 3<sup>rd</sup> Respondent. I therefore find that there indeed existed a valid employment relationship between the Claimant and the 1<sup>st</sup> Respondent upon which the Claimant can lay a claim.

### **Reliefs**

15. The Claimant seeks salary arrears for 7 months less Kshs. 20,000 paid in cash by the 2<sup>nd</sup> Respondent. From the testimony of Allan Juma Masika which was confirmed by the 3<sup>rd</sup> Respondent, the 1<sup>st</sup> Respondent's Nairobi County office had a bank account but no money was deposited therein. The 3<sup>rd</sup> Respondent also testified that it was usual for the 2<sup>nd</sup> Respondent to make payments on behalf of the 1<sup>st</sup> Respondent in cash. In the absence of any evidence of any further payments made to the Claimant, I award him the sum of Kshs. 106,000 being salary arrears for 7 months less Kshs. 20,000 paid to him by the 2<sup>nd</sup> Respondent.

16. The Claimant also claims pay for the remainder of his contract. The Court was however told that the 1<sup>st</sup> Respondent's Nairobi County office where the Claimant was working, was closed in December 2012. It therefore follows that Claimant did not work for the 1<sup>st</sup> Respondent beyond December 2012. Additionally, the prayer for salary for the remainder of the contract falls within the province of an order for specific performance which is to be made in very exceptional circumstances which have not been made out in this case. The only award I will make on this limb therefore is the Claimant's salary up to December 2012 when the office was closed.

17. Ultimately, I make an award in favour of the Claimant as follows:

- a) Salary for February-August 2012 less amount paid.....Kshs. 106,000

b) Salary for September-December 2012.....Kshs. 72,000

**Total.....Kshs. 178,000**

17. I award the costs of this case to the Claimant. The award amount will attract interest at court rates from the date of the award until payment in full. From the evidence on record, it seems to me that the officials of the 1<sup>st</sup> Respondent, including the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents ran the affairs of the 1<sup>st</sup> Respondent as a personal venture. Moreover, no objection was made to joinder of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in this case and the award is therefore made against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents jointly and severally.

Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 17<sup>TH</sup> DAY OF JUNE 2014**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Oduor for the Claimant

Mr. Wachira for the 1st and 2nd Respondent

Ms. Benter Akinyi Opande (3rd Respondent in person)