



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 1356 of 2011**

**LEODIP LEMUSE.....CLAIMANT**

**VS**

**THE DIRECTORS WADIA CONSTRUCTION COMPANY.....1ST RESPONDENT**

**WADIA CONSTRUCTION COMPANY.....2ND RESPONDENT**

**AWARD**

**Introduction**

By a Memorandum of Claim dated 3rd August and filed in Court on 18th August 2011, the Claimant sued the Respondents for failure to pay terminal benefits. The Respondents filed a Memorandum of Reply on 1st March 2012 but made no appearance at the hearing. The case therefore proceeded *ex parte* on 21st January 2013 with Mr. Waiganjo instructed by Gathii & Co Advocates appearing for the Claimant.

**The Claimant's Case**

The Claimant was employed by the Respondents by verbal agreement on or about 11th July 2008 in the position of night watchman at a consolidated salary of Kshs. 7,500. He was deployed to guard the Respondents' construction site along Lusaka Road in Nairobi's Industrial Area.

The Claimant claimed that during the entire period of his employment by the Respondent, he worked for seven days per week without any off day or leave. He worked on public holidays with no compensation. Further, the Claimant was not provided with uniform nor protective clothing.

Following completion of construction on 1st February 2011, the Respondents moved from the site and terminated the Claimant's employment. The Claimant stated that he was not paid his terminal dues. Before filing this case, the Claimant referred his case to KUDHEIHA Workers Union who sought audience with the Respondents. The Respondents eventually agreed to pay the Claimant Kshs. 60,000 in settlement of his claim. An agreement was drawn and executed but no payment was made to the Claimant. In his sworn testimony the Claimant denied refusing to collect this payment as alleged by the Respondents in their Memorandum of Reply.

The Claimant therefore claimed the following:

- a) One month's salary in lieu of notice.....Kshs. 7,500
- b) Service pay @ 15 days pay for 2 years.....7,500

c) Off days worked but not compensated (4x34 monthsx7,500 )	30.....34,000
d) Salary underpayment (8,051-7,500x32).....	17,632
e) Overtime worked but not compensated (4.30 pm-7.00 am less 8 hoursx7,500 x30 daysx34 months).....	102,800
f) Uniform valued @ 6,000x2x 3 years.....	36,000
g) Compensation for unfair termination (12 months x 7,500.....	90,000
h) House allowance ( 15x7,500x34 months).....	38,250

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### **The Respondent's Case**

In their Memorandum of Reply filed on 1st March 2012, the Respondents admitted having employed the Claimant but denied that he worked for seven days per week. The Respondents further averred that the Claimant was issued with uniform, protective clothing and attendant security apparatus and was paid for any public holiday worked.

With regard to the Claimant's terminal benefits, it was the Respondents' case that the Claimant was given adequate termination notice and that he was paid all his terminal benefits save for Kshs. 60,000 which was agreed upon and documented in an agreement dated 20th April 2011 (marked Appendix L-5 in the Claimant's documents). The Respondents claimed that the Claimant had refused to collect the said payment from the Respondents' office.

The Respondents denied terminating the Claimant's employment. Rather, the Claimant having been employed on contract to guard a specific construction site, once the construction was completed, the Claimant's services were no longer required and the contract lapsed upon completion of the assignment.

The Respondent took issue with joinder of the parties in this case and threatened to take a preliminary objection *in limine* for striking out of the Claimant's claim.

### **Findings and Determination**

Before proceeding to determine the Claimant's claim in this case, I find it necessary to deal with the issue of joinder of parties raised in paragraph 10 of the Respondents' Memorandum of Reply. In my considered view, what the Respondents have raised in this paragraph falls within the realm of a preliminary objection which raises a pure point of law as defined in the famous case of **Mukisa Biscuits Vs. West End Distributors Limited (1969 EALR)**. Whenever such a point is raised, the Court is obligated to dispense with it before proceeding any further. I will therefore proceed to do so.

In his Memorandum of Claim the Claimant names the ***Directors of Wadia Construction Company*** as the 1st Respondent and ***Wadia Construction Company*** as the 2nd Respondent.

Rule 4 of the Industrial Court (Procedure) Rules on Institution of Claim provides that :

***A party who wishes to refer a dispute to the Court under any written law shall file a statement of claim setting out—***

(a) .....

***(b) the name, the physical and mailing address and the description of the respondent;***

The Claimant's Memorandum of Claim describes the 1st Respondent as "the Directors of Wadia Construction Company." No names have been assigned to these Directors and even if they were to be named, I find no reason why they would be enjoined in these proceedings. Directors of a company may only be enjoined, with leave of the court, in cases where it has been demonstrated that the corporate veil is being used to defeat the ends of justice. In such cases, the Court may allow lifting of the corporate veil. No such argument has been advanced in this case. Consequently, I find that the 1st Respondent is wrongly enjoined and hereby strike the said 1st Respondent from these proceedings with leave to the Claimant to amend his pleadings accordingly.

**DELIVERED IN OPEN COURT AT NAIROBI THIS 6TH DAY OF MARCH 2013**

**LINNET NDOLO  
JUDGE**

**In the Presence of:**

.....**Claimant**

.....**Respondent**