



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 409 OF 2014**

**JAMES MUHIA NDUNGU.....CLAIMANT**

**v**

**FLAMINGO TILES KENYA LTD.....RESPONDENT**

**JUDGMENT**

1. James Muhia Ndungu (Claimant) was engaged by Jay Ceramic Ltd around 1 March 2009 to carry out electrical related fittings for a period of 2 months.
2. According to the Claimant's un rebutted testimony, Jay Ceramics Ltd changed name to Flamingo Tiles Kenya Ltd (Respondent), and he continued to serve it until 25 February 2013 when he tendered his resignation.
3. On 18 March 2014, the Claimant instituted legal proceedings against the Respondent and he stated the Issues in dispute as *unpaid leave and unpaid statutory allowances*.
4. In a Response filed on 6 August 2014, the Respondent contended that the Claimant had absconded from work and was thus summarily dismissed, and was not entitled to the remedies sought.
5. The Cause was heard on 14 May 2018 when the Claimant's evidence was taken.
6. The Respondent closed its case without calling any witness because the witness who was expected in Court did not attend.
7. The Claimant filed his submissions on 11 June 2018 (should have been filed by 28 May 2018) and the Respondent filed its submissions on 26 June 2018.
8. The Court has considered the pleadings, evidence and submissions and identified the Issues for determination as, *whether there was breach of contract in respect to house allowance and leave*.
9. The question of fairness of separation is not a relevant or material issue in this Cause as the Claimant did not seek any remedy therefrom.

**House allowance**

10. In terms of section 31 of the Employment Act, 2007, an employer is under a statutory obligation to provide housing accommodation to every employee, and in lieu of the housing to pay an allowance to cover rent.

11. The requirement to provide housing or pay an allowance to cover rent does not apply where an employee's contract provide for a consolidated salary.

12. The 2 month contract the Claimant was issued with provided for a basic salary. It did not provide that the salary was consolidated as contended by the Respondent in the Response and submissions.

13. The Claimant's un rebutted testimony was that after the expiry of the initial contract, he continued to serve on the same terms and conditions of service. He was not provided with housing accommodation.

14. He further stated that the salary increased to Kshs 28,600/- from the initial Kshs 20,000/- but did not disclose when the increment was effected.

15. Although the Claimant admitted that he was being paid fortnightly, considering the nature of his work and period of service, the Respondent should have reduced the contract into writing.

16. Considering that failure and the provisions of sections 9(1),(2) and 10(7) of the Employment Act, 2007 the Court concludes that the salary paid to the Claimant did not include house allowance.

17. The Claimant sought Kshs 237,600/- on account of house allowance, computed on the basis of 15% of Kshs 33,000/- that he earned for 4 years of service.

18. However, the Claimant did not prove that was the salary he earned throughout the tenure of the employment. He stated that at the time of separation the salary was Kshs 28,600/- without stating when the salary was increased.

19. Consequently, the rate/formula used by the Claimant was erroneous.

20. It is unfortunate that the Respondent did not interrogate the formula/computations by the Claimant on this head of claim.

21. But considering the provisions of the Employment Act, 2007 cited in paragraph 16 above, the Court will allow the head of claim.

### **Leave**

22. Each employee is entitled to at least 21 annual leave days pursuant to the provisions of section 28 of the Employment Act, 2007.

23. The Claimant admitted in cross examination that he did not apply for annual leave. He did not suggest that he was denied leave.

24. The Court is, in the circumstances unable to find any breach of contract/statute on the part of the Respondent warranting a relief as sought.

25. In any case, in terms of section 28(4) of the Employment Act, 2007, it is doubtful whether the Claimant would be entitled to untaken leave beyond the last 18 months to the separation.

### **Conclusion and Orders**

26. The Court finds and holds that the Respondent was in breach of the law in failing to pay the Claimant house allowance.

27. The Claimant is awarded

(a) Accrued house allowance           **Kshs 237,600/-**

28. Each party to bear own costs.

**Delivered, dated and signed in Nairobi on this 6<sup>th</sup> day of July 2018.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant                           Mr. Mwariri instructed by Carol Mburugu Advocate, Kituo cha Sheria

For Respondent                       Ms. Kanyiri, Federation of Kenya Employers

Court Assistant                       Lindsey



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