

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

ACEC SUIT NO. E019 OF 2024

ETHICS & ANTI-CORRUPTION COMMISSION.....PLAINTIFF

-VERSUS-

BONIFACE OLOO OTIATO.....DEFENDANT

JUDGMENT

The plaintiff, a statutory body established under Section 3 of the Ethics and Anti-Corruption Commission Act Chapter 7C of the Laws of Kenya and Article 79 of the Constitution has brought this suit seeking recovery of Kshs 5,808,056.90 from the defendant on behalf of the County Government of Homabay (hereinafter referred to as ‘the County’) as a restitution for irregular salaries paid to the defendant by the County between August 2017 and September 2020.

The defendant did not enter appearance or file defence and consequently, interlocutory judgment was entered against him on 30-09-2024. When the matter came for formal proof hearing on 10-02-2025, a Mr. Odindo appeared and told the court that he had been appointed to represent the defendant and asked the court to grant him time to file their appropriate papers. The court reluctantly granted the defendant conditional adjournment and fixed the matter for hearing on 23rd and 24th April 2025 on which date the defendant had not complied with the court’s conditions and made another attempt to adjourn which the court declined and the matter proceeded to the formal proof.

The plaintiff's first witness was one Augustine Mukwekwe an investigator with the plaintiff who told the court that on 24-06-2020, the plaintiff received information of irregular payments of salaries in the County where staff members would be paid multiple salaries leading to loss of public funds. Upon receipt of the information, the plaintiff proceeded to conduct investigations and a team which he was part of was formed. Upon investigations, it was revealed that the defendant was posted as a doctor to the County through a letter dated 2-06-2017 and reported on 8-06-2012 but left in August 2017 and joined Avenue Health Care where he was also drawing salary.

The witness added that the defendant's appointment was on permanent and pensionable terms under staff number 2014015852. He stated further that the defendant was earning salary of Kshs 227,540.00 per month up to August 2020 when the salary was stopped. The plaintiff moved to court vide Kisii Chief Magistrate's criminal miscellaneous application number E074 of 2021 and obtained warrants to investigate the defendant's bank account which they used to obtain details of payments to the defendant from Kenya Commercial Bank

The plaintiff also obtained documents from Avenue Health Care which established that the defendant was employed by the said hospital and deployed to Kisumu Healthcare clinic where he was later promoted to the branch manager. He added that the banks account statement the plaintiff obtained from KCB showed that the plaintiff received a total of Kshs 5,808,056.90 from the County from September 2017 to September 2020, a period he was not in employment.

The defendant was invited for interview and recording of statement by the plaintiff and was unable to give an explanation for the irregular payments. He however requested the

Commission to be given an opportunity to refund the money through a letter dated 28-08-2021 but has not to date paid any money.

The witness produced the following documents;

1. Letter 8-06-2015 confirming that the defendant had reported on duty upon appointment.
2. Letter from the Avenue Group dated 2-08-2021.
3. The defendant's NHIF membership information form.
4. The defendant's payslips for July 2015 to August 2020.
5. Certificate of electronic evidence.
6. Warrants in Kisii Chief Magistrate's court miscellaneous criminal application number E074 of 2021 dated 23rd July 2021.
7. Statement for the defendant's bank account number 115xxxxx83 for 1-08-2016 to 30-12-2020.
8. Certificate of electronic evidence dated 18-08-2021.
9. Letter of appointment from the Avenue Group dated 21-07-2017.
10. Promotion letter dated 11-12-2018.
11. Payslips from the Avenue Group for August 2017 to January 2023.
12. Certificate of electronic evidence dated 30-05-2024.
13. The defendant's letter dated 23-08-2021.
14. The plaintiff's letter dated 4-04-2024.

The second witness was Bob Collins Otieno who told the court that he was a former Chief Officer in the ministry of Blue Economy and Fisheries and also a former director of Human Recourses Management and Development in the County. He told the court that the defendant was an employee of the County having been posted on 2-06-2018 from the national government until August 2020 when his salary was stopped.

He added that he provided the plaintiff with payslips for the defendant for July 2015 to August 2020. He added that the defendant's salary was stopped in August 2020 as a result of an audit carried out in the County to weed out ghost workers. He added that when he was appointed by the Avenue Group, the defendant should have notified him that he had been engaged to enable him record it in the conflict of interest book and inform the Chief Officer to declare.

There was no evidence produced by the defendant to rebut the plaintiff's case. Despite that, the plaintiff had the burden to prove the case on a balance of probabilities. The position of the law as I understand it is that the fact that there is an interlocutory judgment against the defendant does not remove the plaintiff's duty to prove its case to the required standards. The plaintiff must produce enough evidence to convince the court to determine the case in its favour. In ***Gichinga Kibutha v Caroline Nduku (2018) KEELC 3981 (KLR)***, the court held that;

'It is not automatic that in instances where the evidence is not controverted, the claimant's claim shall have his way in Court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest.'

I have gone through the evidence produced by the plaintiff including the exhibits and the submissions. It is clear that the defendant was posted to the County on 2-06-2015 and reported on 8-06-2015. It is also clear to me that the defendant was employed by the Avenue Group on 21-07-2017 and started receiving salary from the said hospital in August 2017. I also take judicial notice that the work of a medical doctor would demand physical presence of the doctor at the place of work. I also note that the defendant was actually employed by

the Avenue Group and posted to Kisumu which is quite a distance from Homabay and in the circumstances, he could not have been working in two places at the same time.

There is a letter from the Avenue Group dated 2-08-2021 produced as plaintiff's exhibit 2 which confirms that the defendant has been an employee of the company from 1-08-2017 up to the date of the letter. This is enough evidence that the defendant was being paid for work not done which is in my opinion an abuse of office and actually outright theft of public resources. The payslip produced as plaintiff's exhibit 4 give the total of the pleaded amount. The plaintiff also produced the defendant's bank statement which shows that the defendant was paid the pleaded amount during the period in question.

The plaintiff also produced a letter dated 23-08-2023 in which the defendant was requesting to be given an opportunity to refund the money. The letter puts it clear that the defendant was acknowledging that the money was paid to him when he had left employment. Where a debtor writes a letter admitting the claim before a suit is filed, the court would be justified to enter judgement on admission. In ***Crown Health Care v Jamu Imaging Centre Limited (2021) KEHC 13346 (KLR)*** Honourable Justice J.M. Mativo while dealing with an issue of admission through correspondence, cited holding of Honourable Justice Chesoni in *Choitram v Nazari {1984} KLR 327* thus;

"Admissions of fact under Order XII rule 6 need not be on the pleadings. They may be in correspondence or documents which are admitted or they may even be oral. The rules used words "otherwise" which are words of general application and are wide enough to include admission made through letter, affidavits and other admitted documents and proved oral admissions ... It is settled that a judgment on admission is in the discretion of the court and not a matter of right that discretion must be exercised judicially."

Flowing from the above, it is my finding that the plaintiff has proved its case against the defendant on a balance of probabilities but before I give my final orders, I would wish to say the following. This is not the only case of this nature from the same County during the same period. There are several matters running into millions pending or concluded before this court involving the same issues. It is abhorring that those who were in positions of responsibility sat back and passively observed such shameful actions going on. The situation is worsened by treating the matters to the usual business of investigations by the plaintiff with little and in some cases no active role of the County government officers. This period must have been the worst in form of human resource and finance management in the County. It is either the officers in charge of these departments were overly negligent or accomplices in the business of fleecing the public funds. It is ironical that a medical doctor would do what the defendant did at the time the doctors and health workers unions were clamouring and agitating for pay rise and employment of more doctors and health workers.

It beats my understanding how an organ with a fully pledged departments of human resource and finance would fail to detect absence of a medical doctor for a period of three years when at the same time the citizens were crying out for insufficient medical personnel. It is obvious that the workers who were paid the multiple salaries were not actually ghost workers as such but real and available dishonest employees who collaborated and colluded with the responsible people for these selfish gains. I can only hope some criminal processes were commenced and carried out through the relevant authorities as that is the only way to curb these shameful actions.

In conclusion I hereby give the following orders;

- a. A declaration is hereby issued that the defendant illegally benefited from public funds in the sum of Kshs 5,808,056.90 paid as salary from the County Government of Homabay.
- b. Consequently, judgment is entered for the plaintiff against the defendant for Kshs 5,808,056.90 with interest at court rates from the time of filing this suit until payment in full.
- c. The plaintiff is awarded costs of the suit.

Dated, signed and delivered at Nairobi this 11th day of July 2025.


B.M. MUSYOKI
JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Mr. Makori for the plaintiff and in absence of the defendant.