



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 132 OF 2008

UNIVERSITY OF NAIROBI.....PLAINTIFF

VERSUS

LEONARD LISANZA MUAKA.....DEFENDANT

JUDGMENT

BACKGROUND

The Plaintiff (herein “University of Nairobi”) instituted a suit against the Defendant (herein “Leonard Lisanza Muaka”) vide a Plaint dated 12th March 2008. The statement of claim is on 1st April 1999 or thereabouts, at the instance and request of the Defendant, the Plaintiff granted the Defendant study leave to pursue postgraduate studies in El Colegio de Mexico in Mexico.

Pursuant to the said agreement, the Defendant was to receive, from the Plaintiff, eighty percent (80%) of his salary during the study leave period. Further the Plaintiff was to cover any other expenses that the Defendant may incur on the Defendant while he was on the said study leave, and in consideration, the Defendant was on completion of the studies rejoin the Plaintiff for at least three (3) years.

The Plaintiff’s claim against the Defendant was/is for the sum of Ksh 3,315,615.40, being monies had and received by the Plaintiff during the study leave period on account of salary expenses the Plaintiff incurred on the Defendant, the consideration having wholly failed.

STATEMENT OF DEFENCE

The Defendant in his statement of defense filed on 25th July 2008, admitted that he applied and was granted study leave by the Plaintiff, and further that the Defendant was to receive 80% of his salary while on study leave. The Plaintiff was to cover expenses the Defendant may incur while on the said study leave, and inconsideration, the Defendant was on completion of the studies to rejoin the Plaintiff for at least 3 years.

In 2000, the Defendant joined Ohio University in USA to pursue Masters of Arts in Linguistics where he graduated in 2002 and was admitted in PHD program at University of ILLINOIS in 2002. The said PHD program took a maximum of 7 years and the Defendant had not completed the PHD in 2009.

The Defendant stated he was still willing to rejoin the Plaintiff University and serve for 3 years upon completion of his studies as previously mentioned.

The Defendant avers that the Plaintiff did not sponsor his studies although the Plaintiff granted study leave and the Plaintiff failed to pay his tuition, Medical Insurance and Airfare in breach of his entitlement as a Lecturer.

The defendant averred that all the money paid was his *bona fide* salary for 5 years in accordance with the Plaintiff and Defendant’s employment contract.

HEARING

PW1 Michael Omondi Adala in his testimony said that he was an employee of University of Nairobi, working as Senior Accountant. He stated that the University paid the Defendant Salary and emoluments while on study leave and that the Defendant did not come back to serve

the employer for 3 years as agreed.

PW2 Dr. Dismus M. Bulinda testified that he was working as a Senior Lecturer in the University of Nairobi. He added that at the time of filing his witness statement he was the Deputy Registrar. He stated that the Defendant was granted study leave in 1999 and was subject to review and the Defendant accepted the terms therein. Page 2(a) and 5 of the Plaintiff's List of documents were the terms and conditions of the study leave.

Page 2(a) is a letter dated 1st April 1999 addressed to the Defendant as reproduced here below;

“subject to the approval of the University of Nairobi Council, I am pleased to offer you study leave for a period of one year from 1st April 1999 upto 31st March 2000 to enable you participate in a special programme of Teaching and Investigation of Swahili Language and Culture at El Colegio de Mexico on sponsorship from the Government of Mexico and El Colegio de Mexico.

You will receive 80% of your basic salary during the study leave period. The study leave, salary and any other expenses that may be incurred by the University on you while on this study leave are granted on condition that you agree to serve the University for a minimum period of three years on completion of your studies. Should you default in this requirement, the University shall at its sole discretion take steps to recover all monies or part thereof expended on you during the study leave period.

You are required to authorize your supervisor(s) at the El Colegio de Mexico to send me your progress and attendance reports at the end of every term. This authorization should be in writing with a copy to me. If your reports are not received, payment of your salary will cease without prior notice to you. Reinstatement of the salary will only be considered subject to receipt of satisfactory reports and explanation.”

Page 5 is a letter dated 25th April 2000, addressed to the Defendant as hereunder;

“TERMINAL EXTENSION OF STUDY LEAVE

Subject to the approval of the University of Nairobi Council, I am pleased to offer you terminal extension of your study leave by a period of six months from 1st April 2000 upto 30th September 2000 to enable you complete your research project on Swahili Language and Culture at El Colegio de Mexico in Mexico.

You will continue to receive 80% of your salary during the study leave period. All other terms and conditions of your study leave remains as outlined in our letter to you dated 1st April 1999.

If you accept the extension of study leave on these terms, please sign two copies of this letter and return them to me.

Yours sincerely

PROF. C.M. KIAMBA

DEPUTY VICE-CHANCELLOR

(ADMINISTRATION & FINANCE)

I accept the terminal extension of study leave on these terms.

Signed on 9th June 2000”

The witness stated that the study leave was renewed annually based on the reports from the University. The University of Nairobi reminded the Defendant that he was to come back and execute a bond of 3 years which he agreed to report back but he did not.

The witness made reference to page 14 of the Plaintiff's Bundle of documents, where the Defendant wrote a letter dated 26th June 2003 and addressed the Deputy Vice Chancellor (administration and Finance) of University Nairobi, at paragraph 4 he stated that;

“what the above arrangements mean is that I need adequate time in order to satisfy the requirements set by the Department of Linguistics at the University of ILLINOIS. I am however optimistic that I will complete my studies on time and be able to meaningfully contribute to the development of my department at home.”

DETERMINATION

The court considered the pleadings, submissions and documents produced and the issue for determination is whether the Plaintiff proved the claim on a balance of probabilities against the Defendant.

SERVICE

The Court record confirms that the Defendant was served with hearing Notice through service to the advocates representing him on record Ashimosi Shitambasi & Associates Advocates on 24th May 2019 at their offices and the Secretary signed on the front of the Hearing Notice.

The Plaintiff filed Affidavit of Service on 27th May 2019.

PLAINTIFF'S CASE

The Hearing proceeded *ex parte* on 10th July 2019 with PW1 Michael Omondi Adala; Senior Accountant testimony and on 17th September 2019 with PW 2 Dr Dismus M Bulinda Deputy Registrar Administration Department evidence.

The Court established through Witness testimonies and documents filed that the Defendant was employed by the Plaintiff as Lecturer on 1st April 1997. The Plaintiff approved study leave for the Defendant to pursue further studies abroad and approved 3 year study leave which terms the Defendant agreed to on 25th August 1999.

The Study leave was approved on a yearly basis until 9th September 2005.

Between 1999 - 2005, 7 years, the Plaintiff paid the defendant salary and emoluments amounting to 80% of his salary while on approved study leave which amounted to Ksh 3,395,599.40/- as per the annexed copies of the Defendant's payslips in Plaintiff's bundle.

The Defendant failed to honor the terms of study leave and return to serve at the plaintiff institution for 3 years and his employment was terminated on 27th October 2007.

The Plaintiff attached List of Documents the Defendant's application for study leave of 11/3/1999 and Plaintiff's approval of 1/4/1999. The letters from Defendant to Plaintiff while in University in Mexico and later University in Illinois between 2000-2007. The Plaintiff's demand letter of 7th February 2007 through Inhouse Counsel and 17th September 2007 by the Plaintiff's advocates on record. The Defendant's payslips and Statements of account confirm payments made to the Defendant during authorized study leave subject to the bonding agreement and prove the Plaintiff's claim.

DEFENDANT'S DEFENCE

The Defendant's defense consists of admission vide paragraph 5 that he was sponsored for further studies by the plaintiff with a bonding agreement for 3 years.

At paragraph 7 he admitted that he pursued PHD studies in USA from 2002

Due to complete in 7 years. The suit was filed in 2008 when the Defendant ought to have successfully completed studies and resumed duty. There is no evidence on record if and why he did not resume duties at the Plaintiff's institution to serve the 3 year bonding period. The Defendant failed to attend proceedings and/or send representative or Legal Counsel of even file and serve any document (s) for the Court to consider reasons, circumstances and/or absence from Court proceedings.

Africa Nazarene University vs Henry Kinya [2019] eKLR; a similar case where the Court observed;

“The Respondent consented to these terms.....the terms of the bonding agreement were clear that the Respondent was to work for a period of not less than 3 years....The Claimant seeks that the Respondent does reimburse it the entire expenses incurred in the course of study. It was a condition of bonding agreement that should the Respondent fail to undertake work for a period of not less than 3 years he would indemnify the University for the entire expenses incurred in the course of study.”

The Defendant also failed to provide evidence of completion of studies, any indication of resumption of lecturing duties at the Plaintiff any time before he was terminated on 26th October 2006.

The Defendant stated in paragraph 9 that he was willing to rejoin the plaintiff and serve for 3 years upon completion of his studies. This promise and condition of his contract with the plaintiff was not effected nor any explanation offered to the Plaintiff or even proof of successful completion of studies.

The Defendant averred in paragraph 10 and 12 of his defense, that the claim by the Plaintiff to seek judgment for refund for monies paid to him at 80% salary and emoluments was contested. The Plaintiff was put to strict proof thereof. The Defendant averred the Plaintiff did not sponsor his studies and failed to pay his tuition medical insurance and airfare in breach of his entitlement as a Lecturer.

The Defendant failed to attend the proceedings and put to test these claims. He did not produce the Contract of employment that entitled him to salary and these claimed benefits. He did not challenge the terms of agreement /conditions of study leave which included payment of 80% salary while on study leave and bonding for 3 years after successful completion of studies to resume duties at the Plaintiff's institution.

The Plaintiff granted the Defendant study leave to pursue studies in Mexico on a scholarship, which was extended for 6 months. This is confirmed by Plaintiff's letter of 1st April 1999 and from University of Mexico dated 20th March 2000. The plaintiff extended the study leave for further 6 months vide letter of 25th April 2000. On 1st June 2000, the Defendant sought from the plaintiff approval and extension of study leave to enable him embark on 2 year Masters program and PHD studies at Ohio University and they offered him a scholarship.

These correspondences confirm the Plaintiff's continuous support of the Defendant's studies in the hope he would comply with bonding terms.

In Gateway Insurance Co Ltd vs Jamila Suleiman & Anor [2018] eKLR the Trial Court held with regard to lack of evidence with reference to the following cases;

Kenya Akiba Micro Financing Ltd vs Ezekiel Chebii & 14 Others [2012] eKLR thus;

“In my view, a statement made on oath should as a matter of fact be expressly denied on oath. If not challenged, it remains a fact and the truth for that matter.”

Trust Bank Ltd vs Paramount Universal Bank Ltd & 2 Others HCC1243

“It was held that it is trite law that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged.”

Edward Muriga thro Stanley Muriga vs Nathaniel D. Schulter C.A. 23 of 1997 held;

“In this matter, apart from filing its statement of Defence, the Defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st Plaintiff and that of the witness remain uncontroverted and statement of Defence therefore remains mere allegations.... Section 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence.”

The Defendant was duly served through advocates on record and he failed to appear send representative or explain any challenge or circumstances for his absence or tendering evidence for this Court to consider. The Court relied on the plaintiff's evidence on record and bundle of documents produced which in the absence of evidence to controvert is true.

DISPOSITION

In the absence of any evidence tendered by the Defendant to controvert the Plaintiff's claim and evidence, this Court finds that the Plaintiff has proved its claim against the Defendant as pleaded in the plaint on a balance of probability. Judgment is accordingly entered for the Plaintiff against the Defendant for Ksh. 3,315,615.40 cts with interest and costs at Court rates.

DELIVERED SIGNED & DATED IN OPEN COURT ON 29TH MAY 2020

(VIDEO CONFERENCE)

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

KIPKORIR TITOO & KIARA ADVOCATES -PLAINTIFF

AHIMOSI SHITAMBISI & ASSOCIATES -DEFENDANT