



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Appeal 174 of 2007

LEISURE LODGES LIMITED..... APPELLANT

-AND-

BENSON MASINDE RESPONDENT

(An appeal from the judgment of Chief Magistrate Mr. B. N. Olao, dated and delivered on 4th September, 2007 in Civil Suit No. 880 of 2003 at Mombasa Law Courts)

JUDGMENT

The trial Court had found in favour of the plaintiff and had issued a declaration that the letter of summary dismissal dated 30th October, 2002 and addressed to him was a nullity, and another declaration that “having duly resigned from the defendant on 8th October, 2002 the plaintiff is entitled to payment of all his terminal benefits”; and the said benefits were calculated as amounting to Kshs. 1,047,000/=. The appellant herein was ordered to pay costs, and interest at Court rate.

The appellant contended in the memorandum of appeal that:

- (i) *the trial Court erred in law and fact by failing to appreciate that the plaintiff’s contract of employment dated 6th December, 1984 had been mutually varied by the parties from time to time and so could not be exclusively relied upon to determine the terms of employment, the administrative status and capacity of the respondent which were pertinent to the rights and obligations existing the parties;*
- (ii) *the trial Court erred in law and fact in failing to appreciate that all those serving in management positions are ineligible to be members of trade unions, and therefore the promotion of the respondent into management automatically terminated any existing membership in a trade union – and that this constituted a mutual variation of the terms of employment;*
- (iii) *the trial Court erred in law and fact in finding that the respondent was entitled to terminal benefits as prayed in the plaint even though the respondent failed to prove he was a member of the union;*
- (iv) *the trial Court erred in law and fact in failing to appreciate that the appellant was, in the circumstances, entitled to terminate the services of the respondent who served at the appellant’s pleasure, prior to the taking effect of the respondent’s resignation notice dated 8th October, 2002 – as the employer/employee relationship was still subsisting and would continue to subsist until the expiry of the period of notice;*
- (v) *that the trial Court erred in law and in fact in holding that the respondent resigned on 8th October, 2002 – by failing to appreciate that the resignation notice dated 8th October, 2002 was itself subject to acceptance by the appellant at its discretion, and was not expressed as intended to take immediate effect;*
- (vi) *that the trial Court erred in law and fact in finding that the respondent had proved his case, and in finding for him as the Court did, disregarding the evidence adduced by the appellant which was sufficient as a rebuttal of the respondent’s claim.*

Counsel for the appellant contested one of the foundations of the trial Court’s judgment: the respondent had

claimed in his further amended plaint that “it was an express term of the letter of employment ...that the plaintiff’s contract of employment was at all times to be read together with the Memorandum of Agreement existing between the Kenya Association of Hotelkeepers and Caterers and the Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA)...” The appellant denied that contention, in the pleadings and in the submissions; but the trial Court “came to the conclusion that the respondent [had] proved his case on a balance of probability and awarded him judgment”.

Counsel made reference to the respondent’s initial letter of appointment dated **6th December, 1984**; and urged that the terms of the said letter of appointment were mutually varied from time to time – and so the letter of appointment of 6th December, 1984 by itself, did not constitute the terms of employment.

Counsel urged that the letter of appointment dated 6th December, 1984, at para. 1, had confirmed the respondent’s–

“appointment as an employee of ‘South Beach Leisure Lodge’ on terms and conditions of service as contained in the current agreement between the Kenya Association of Hotelkeepers and Caterers and the Domestic and Hotel Workers Union, applicable to all workers”.

The foregoing statement shows, counsel submitted, that at the time the letter of appointment was written, the employer was a different company, known as “South Beach Leisure Lodge”, and not “Leisure Lodges Limited”, the appellant herein; but the suit in the Subordinate Court had been lodged against “Leisure Lodges Limited”; and in the suit, the respondent had asked that his appointment on **6th December, 1984** be regarded as being on the terms and conditions contained in the current agreement between two organizations which had been referred to in the appointment letter of 6th December, 1984.

Counsel submitted that in the trial Court, the respondent herein had produced a Memorandum of Agreement dated **5th February, 1999** between two organizations, namely The Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA) and the Kenya Association of Hotelkeepers and Caterers.

Counsel founded his client’s case also on paragraph 2 of the said letter of appointment; this carried the proviso that the respondent “could obtain a copy of the current Agreement from the Shop Steward”. Counsel urged that “current agreement” in the said letter of appointment, referred to the collective agreement operational as at **16th December, 1984** and not the later collective agreement dated **5th February, 1999**.

Counsel urged the same point by considering para. 3 of the said letter of appointment, which thus stated –

“.....this letter of appointment is to be read, at all times, together with the [collective] agreement existing between the Kenya Association of Hotelkeepers and Caterers and the Domestic and Hotel Workers Union, of which you are eligible for membership”.

From the foregoing paragraph in the letter of appointment, learned counsel submitted that at the time the respondent was employed, he was eligible to be a member of the Domestic and Hotel Workers Union – and not the Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA); and it was further urged that the respondent’s claim to have been a member of KUDHEIHA as at 6th December, 1984, this claim being made at the time of trial in 2007, had no basis.

On the question of changing terms of service over the years, learned counsel based his argument on para.4 of the appointment letter; this carried the proviso that while the respondent was appointed as “Chef Tournant”, his “functions and duties may be altered at the discretion of the Management without prejudice”.

Returning to para.3 of the letter of appointment, counsel noted that it specified the respondent’s wage as “Kshs. 2,500 per month plus accommodation”, but from the respondent’s evidence, “from the time he was employed in

1984 up to the time he ceased working for the defendant in 2002, his terms and conditions of employment, his functions and duties and emoluments were altered several times and he was promoted.....on various occasions by various letters..., and that at the time he left, he had risen to the Management position of Executive Chef”; and the respondent had testified that this was the highest position a chef can attain in his career.

Counsel contested the respondent’s contention, that “despite [the] promotions, because he was not given fresh letters of appointment, the relevant letter to be looked at for his terms and conditions of employment was the initial letter of appointment dated 6th December, 1984 which, according to [the respondent] was to be read together with the existing Memorandum of collective bargaining agreement involving KUDHEIHA.

Counsel urged that even though the respondent, as at 6th December, 1984 was eligible to be a member of the existing workers’ trade union, the Domestic and Hotel Workers Union, he produced no evidence to show that from 1984 when he was employed, he did join the Union and became a member, continuing to be such a member over the years and that, at the time he left employment in 2002 he was still a member of the said Union. It was contended that the respondent had also not produced the collective bargaining agreement (CBA) he was relying on, whereunder he became a member in 1984 – so as to show that the terms of that CBA still applied to him and his employer, even at the time he left employment in 2002.

Moreover, counsel submitted, the respondent had also not produced any proof that at the time he left employment (2002), he was a member of the workers’ trade union known as The Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA); and so there was no proof that he was eligible to be paid benefits as provided in the Memorandum of Agreement between KUDHEIHA and the appellant herein. In this regard, counsel further noted that the respondent had confirmed on cross-examination that he had not been paying trade union dues – which would be mandatory for one to be a member. In the same behalf, counsel observed that the respondent had not shown his membership card for the trade union he claimed membership of; and that even his pay-slips for April and May, 2002 did not show deductions for trade union dues.

Counsel submitted that the respondent could not seek to rely on the provisions of the CBA, and he could not benefit from the same.

Learned counsel submitted that the respondent had failed to show the connection between his initial employer, South Beach Leisure Lodge, and the appellant herein – and so he had no basis for bringing suit against the appellant.

Counsel submitted that the Memorandum of Agreement upon which the respondent relied was expressed to be effective as from January, 1999 and had a validity of only two years – and this expired in December, 2000, substantially ahead of the respondent’s cessation of employment with the appellant.

Still contesting the respondent’s claim to have been a member of KUDHEIHA at the time he left employment, counsel urged that any dispute between him and the appellant, if indeed he was a member of KUDHEIHA, would have been resolved “in terms of the Memorandum of Employment without first filing suit”.

Counsel submitted that the trial Court had erred in law and fact when it made the finding that it was for the appellant herein to rebut the respondent’s claim that he was a member of KUDHEIHA and the terms of the CBA governed his employment. The relevant finding by the trial Court appears at page 10 of the judgment, and reads as follows:

“The plaintiff did produce the Memorandum of Agreement between the Kenya Association of Hotelkeepers and Caterers and the Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA)....No other document of employment was produced by the defendant and therefore, in the absence of any other such documents, the Court is entitled to conclude, which I hereby do, that the parties intended that their relationship be governed by the letter of Appointment and the Agreement.....That is the contract that the parties made for themselves and the Court cannot purport to

make any such contract where none exists”.

Counsel submitted that it was the plaintiff’s case that his employment was governed by the two documents.....and it was his duty, not the defendant’s, to prove the claim.

What was the procedure of becoming a member of the workers’ trade Union? The trial Court, on this point, held:

“In my view, therefore, although the plaintiff’s letter of appointment talks of him being ‘eligible for membership’ of the Union, the tone of the letter of appointment in its plain and ordinary language shows that the plaintiff or any other employee for that matter became a union member upon signing the letter of appointment like the one [the] plaintiff signedI find as proved, therefore, that the plaintiff’s appointment with [the] defendant was governed solely by the letter of appointment and the Agreement....”

Counsel contested the foregoing holding by the trial Court.

Learned counsel urged, in the light of the submissions considered above, that the learned Chief Magistrate erred when he found that the respondent had proved his case, and when he gave judgment favouring him.

The effect of the submissions, counsel urged, was that the respondent was not a member of the workers’ trade union, and therefore he could not rely on the CBA; and so the terminal dues of Kshs. 1,047,000/= which he sought in the further amended plaint dated 12th July, 2004 were not payable.

Counsel submitted that the letters produced by the appellant as exhibits, had demonstrated that “the appellant was right in summarily dismissing the respondent before the respondent stopped working for it”. It was submitted that although the respondent, on 8th October, 2002 gave the appellant three months’ notice to resign from employment, the appellant did not accept the request – as acceptance would have meant that the respondent would continue working for three months. Counsel urged that the appellant was within its rights to decline the respondent’s notice of resignation; therefore, the respondent had not resigned, but was dismissed for misconduct.

Counsel submitted that the trial Court had erred when it found that the remedy of dismissal was not available to the appellant, and that the summary dismissal effected by the appellant was a nullity. The terminal dues thus payable to the respondent, counsel submitted, were correctly calculated at Kshs. 49,447/= which the respondent declined. Counsel urged that the appeal be allowed.

Learned counsel for the respondent submitted that the respondent, after working for the appellant for 18 years from 1984, decided on 8th October, 2002 to give three months’ notice of resignation, “as required under the terms of the contract”: and then the appellant herein sent the respondent on leave, and “subsequently on 30th October, 2002 purported to summarily dismiss [him].”

Counsel urged that the respondent’s letter of appointment, dated 6th December, 1984 was to be “read and interpreted with the agreement existing between the Kenya Hotel Workers Union [for] which the plaintiff was eligible for membership”.

The said letter of appointment thus reads:

“This letter confirms your appointment as an employee of South Beach Leisurelodge on terms and conditions of service as contained in the current agreement between the Kenya Association of Hotelkeepers and Caterers and the Domestic & Hotel Workers’ Union, applicable to all workers.

“A copy of the current agreement is in [the] possession of the Shop Steward and you are advised to acquaint yourself with its terms, before you sign this letter of appointment.

“This letter of appointment is to be read, at all times, together with the agreement existing between the Kenya Association of Hotelkeepers and Caterers and the Domestic and Hotel Workers’ Union of which you are eligible for membership.”

The version of the Memorandum of Agreement between the two organizations referred to, was the one of 5th

February, 1999: and no explanation was proffered on how this related to the version which was applicable at the time of the appointment letter (1984).

Counsel submitted that even though over the years the respondent's employment status changed, through promotions, "in all subsequent letters of promotion....all the other terms and conditions of service remained the same. In this regard counsel relied on a letter of promotion from the General Manager of **Leisure Lodges Limited** dated 13th October, 1997 which thus stated:

"In view of your good performance I have decided to upgrade your position from Deputy Executive Club to Executive Chef Club.

"All other terms and conditions of service remain the same for the time being."

An earlier letter from the Assistant Manager, Leisure Lodges Limited to the respondent, dated 24th December, 1986, had thus stated:

"In consideration of your good work performance, the management has decided to promote you to the position of sous-chef with effect from 1st January, 1987.

"At the same time your salary has been increased by ksh. 250 – to bring it to Kshs. 3,000 per month with effect from 1st October, 1986

"Other terms and conditions of service remain the same as at present, for the time being."

The General Manager of Leisure Lodges Limited wrote a letter of promotion dated 29th October, 1999 addressed to the respondent; this letter states:

"It is with great pleasure that we hereby confirm your promotion to the position of Senior Executive Chef with effect from 1st November, 1999.

"Your salary has been adjusted to Kshs. 95,000/= per month with all the other terms remaining the same as at present."

Counsel submitted that the finding of the trial Court should be upheld: that the original letter of appointment, and the collective bargaining agreement between the organization of workers and that of employers, were the two documents constantly governing the employment relationship even when the respondent was given a promotion. Counsel urged that since it was the appellant stating that the terms of employment for the respondent had changed, the task of proof rested with the appellant; and it was submitted that "the appellant failed to place before the Court such new terms and conditions".

On the question of the respondent's actual membership of the workers' trade Union, counsel urged that the respondent had not filed his claim on the basis that he was actually a member of the trade union and, indeed, "as at the time of signing the agreement the plaintiff was not a member of the union."

Counsel urged that it was immaterial whether or not the respondent was a contributing member of the workers' trade union, it was sufficient that his terms of employment were to be read together with the terms of the collective bargaining agreement between the organization of workers and that of employers. In this regard, counsel recalled the testimonies of the appellants' witnesses at the trial stage. DW1 on cross-examination, at the trial, thus said:

"I can see the letter of appointment of [the] plaintiff, it says the letter of appointment is to be read together with other agreements. When the plaintiff signed this letter....., he was a member of the union. He had not joined the union. There is no other letter of employment apart from this.....According to paragraph 1 of this letter....., the terms and conditions of employment are set out [on] [pages] 17 to 33 of the agreement....it is the hotel that forwards contributions to the union. I am not aware that the defendant wrote to the plaintiff about his union contributions. It is true that the plaintiff's letter of employment ...is to be

read with the agreement.”

On the several grounds of appeal which dealt with the manner in which the respondent's services had been terminated, counsel urged that the respondent had given his notice to resign on **8th October, 2002**; and the appellant upon receipt of that letter wrote to him, on 30th October, 2002 not only rejecting his request, but summarily terminating his services. Counsel urged that it was the notice of resignation given by respondent, that sparked the alleged summary dismissal.

Counsel urged that the alleged summary dismissal was contrary to the terms of the Memorandum of Agreement between the Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA) and the Kenya Association of Hotelkeepers & Caterers, para. 8 (iv) of which thus provided:

“if an employee with three warnings recorded on his/her file commits a fourth offence within 225 working days from the date of the third warning, then the employer shall be entitled to summarily dismiss the employee provided he/she has been in employment for less than ten years.”

In the case of the respondent, he had been in the appellant's employment for 18 years; and so, counsel urged, the respondent's service, by the said Memorandum of Agreement, could only be terminated in a manner that did not involve summary dismissal. Counsel urged that the finding of the learned Chief Magistrate on the question of summary dismissal should be upheld, for the appellant “never justified the alleged summary dismissal”.

On the contention that the trial Court had not accorded the appellant's case the consideration it merited, learned counsel contested this, and urged that the only evidence for the appellant, which had been duly evaluated by the learned Chief Magistrate, substantially stood in favour of the respondent herein.

In my assessment of the evidence, and in the light of submissions by counsel, I have found to be of merit the contention of the respondent that his letter of appointment of 6th December, 1984 was required to be read together with the provisions of the Memorandum of Agreement between the organization of workers and the organization of employers – and in this regard, it was beside the point whether at the time, the respondent was a subscribing member of the workers' trade union. Indeed, the responsibility for remitting subscriptions to the trade union belonged to the appellant herein; and whether or not the subscriptions were made, the Memorandum of Agreement remained part of the respondent's contract of employment.

Although it was contended for the appellant that the respondent's contract of employment did not remain constant, and periodically change in content, the evidence on record shows that the linkage of the terms of appointment to the terms of the said Memorandum of Agreement remained unchanged; and so, *prima facie*, the respondent's terms of employment, throughout, remained embedded in **both** the letter of appointment, and the Memorandum of Agreement between the trade union of employers and that of employees.

Although learned counsel for the appellant contended that the respondent had first been employed by “South Beach Leisure Lodge”, and that he could not show how his more recent employer had assumed liabilities under the terms of appointment of 1984, I have found in the evidence that there was, indeed, an orderly transition and a legal continuity from the description of the original employer to that of the appellant herein: each of the letters of promotion sent out to the respondent over the years had been from the appellant by its present identity, **Leisure Lodges Limited**. I hold, therefore, that the contract of employment between the appellant and the respondent remained as valid in 2002 as it had been in 1984.

Counsel for the appellant contended that the trade union Memorandum of Agreement being relied upon by the respondent is one of 1999 (and with only a two-year validity) and not that of 1984. Technically, this is a valid point; but I prefer to take a position of merits, on the basis of which I hereby take judicial notice that workers' and employers' trade unions on important spheres of economic activity such as hotel and catering work, will invariably renew their collective bargaining agreements; and that the Memorandum of Agreement between the two sets of stake-holders which was in

force in 1984, would have been renewed from time to time, to-date.

I hold, therefore, that the respondent had quite properly relied on the Memorandum of Agreement between the Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA) and the Kenya Association of Hotelkeepers & Caterers, of 1999.

It follows that the said Memorandum of Agreement was part of the law to be complied with if the appellant had to terminate the respondent's service; and it is clear that the attempt to dismiss him summarily was not in compliance with the said terms. I find and hold, therefore, in agreement with the learned Chief Magistrate, that the alleged summary dismissal of the respondent was a nullity.

It follows that the trial Court correctly assessed the evidence, and came to the right conclusion. I hereby dismiss the appeal, with costs to the respondent.

Orders accordingly.

DATED and **DELIVERED** at

MOMBASA this 26th day of March, 2010.

J. B. OJWANG

JUDGE

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