



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI
(NAIROBI LAW COURTS)

Civil Appeal 726 of 2006

STEPHEN MULEWA.....APPELLANT

VERSUS

AIR KENYA AVIATION LIMITEDRESPONDENT

J U D G M E N T

1. This is an appeal arising from the judgment of an Acting Senior Principal Magistrate delivered on 17th October, 2006 in Milimani CMCC No.8085 of 2005. The appellant Stephen Mulewa, who was the plaintiff, had sued the respondent Air Kenya Aviation Limited, who was his former employer. The appellant claimed that the respondent wrongfully and unlawfully terminated his employment. The appellant therefore claimed 3 months' salary in lieu of notice as well as unpaid salary for May and June all totaling the sum of Kshs.759,042/=.

2. The respondent filed a defence in which it conceded that the appellant was employed by it on the 1st December, 2003, as a Management Accountant. The respondent contended that the appellant was summarily dismissed in June 2005 in accordance with his contract of employment. This was following the appellant's suspension in May, 2005 and investigations carried out by the respondent, which indicated that the appellant was in breach of clause 12 of his terms of employment. The respondent claimed that it paid the appellant the sum of Kshs.280,102/= being salary for May, 2005 and leave due up to May 2005, less statutory deductions. The respondent therefore claimed that the appellant was not entitled to any further payment.

3. During the trial before the lower court, only the appellant testified. He produced his letter of appointment and his payslip for May, 2005 which showed that as at the time of termination, his basic salary was Kshs.225,000/=. The appellant also produced a letter of suspension which was served upon him. The appellant maintained that he was not given any opportunity to defend himself, but was consequently served with a letter terminating his employment. The appellant claimed that he was not paid 3 months salary in lieu of notice as provided by his contract. He claimed that he was not paid for 6 days worked. He admitted having been paid for the month of May, and for the leave days due.

4. The respondent did not call any witness, Nonetheless, written submissions were filed by its counsel, in which it was contended that the exhibits produced by the appellant showed that he was paid Kshs.280.102/=, being salary for May, 2005 and leave due as at May, 2005, and that the appellant accepted this payment as his final due. It was submitted that circumstances leading to the appellant's dismissal as set out in the two letters, written to the appellant by the respondent, and produced in evidence, showed that the appellant did not carry out his work properly. It was maintained that the respondent had reasonable grounds to suspect that the appellant had taken advances which he did not

account for.

5. Relying on Section 17(c) and (g) of the Employment Act, it was submitted that the appellant's conduct amounted to gross misconduct and therefore, the respondent was justified in dismissing him summarily. Relying on ***Muthuri vs National Industrial Credit Bank Ltd (2003) KLR 154***, it was argued that the termination of the appellant's contract was not unlawful, as it was in accordance with clause 12 of the agreement of employment. It was further submitted that the appellant was paid all his dues.

6. Counsel for the appellant also filed written submissions in which he argued that the appellant's termination was against the rules of natural justice, as the appellant was not given any opportunity to defend himself. Counsel submitted that the respondent did not offer any evidence to show that the dismissal of the appellant was justified. It was also maintained that the discharge signed by the appellant was qualified, as it was subject to the appellant's outstanding claim.

7. The gist of the trial magistrate's judgment is contained in the following extract:

“The issues that need to be determined is the effect that receivership has on the case and, whether taking in account the circumstances of the loss of his job, the plaintiff is entitled to the orders he seeks.

The organization that the plaintiff has sued is under receivership. Can the plaintiff successfully sue the same?

There is a receiver manager from the communication on the court record which the court cannot simply ignore. The appointment of the receiver general is on the strength of a debenture. The appointment having been done means the debenture has crystallized. This court is of the opinion therefore, that the defendant cannot be sued in the manner that it has been sued. That being the case this suit is not sustainable; the same is struck off. Each party to bear its own costs.”

8. The appellant is dissatisfied with the judgment of the trial magistrate. He has raised 5 grounds of appeal as follows:

(i) The learned magistrate erred in law and in fact by finding that the defendant was under receivership when the purported receivership was neither pleaded nor proved.

(ii) The learned magistrate erred in law by finding that there was a debenture over the defendant's property and that the said debenture had crystallized which was neither pleaded nor proved.

(iii) The learned magistrate erred in law by basing her judgment on matters that were neither pleaded nor proved.

(iv) The learned magistrate erred in law by holding that an organization under receivership cannot be sued.

(v) The learned magistrate erred in law by striking out the plaintiff's suit.

9. In arguing the appeal before me, Mr. Kabaru Ndegwa counsel for the appellant citing ***Civil Appeal No.179 of 1995 Provincial Insurance Company East Africa Ltd vs Mordecai Mwangi Nandwa***, submitted that the trial magistrate was wrong in dismissing the appellant's suit relying on matters which were neither pleaded nor canvassed before her. Mr. Kabaru Ndegwa further argued that the trial magistrate made a fundamental error in holding that a company under receivership cannot be sued. In support of that contention, counsel relied on ***Republic vs Registrar of Companies Ex-parte Githungo*** [2001] KLR 299 wherein it was held *inter-alia* that a receivership does not necessarily bring about the termination of the company's activities or its liquidation. Counsel submitted that the company's activities could only be brought to an end by a winding up order.

10. Mrs. Efendi who appeared for the respondent, submitted that the issue of receivership of the

company was brought to the court's attention through a letter from the defence counsel to which was attached a deed of replacement of receivers and managers dated 8th October, 2005. Mrs. Efendi submitted that under Section 59 of the Evidence Act, the trial magistrate having taken judicial notice of the document, she had a right to consider it in her judgment. Relying on **HCCA No.92 of 1999 (Eldoret) Automobile Association of Kenya vs James Jagunga**, Mrs Efendi maintained that the court can base its decisions on an unpleaded issue. Citing **Mbogo and Another vs Shah [1968] EA 93**, Mrs. Efendi maintained that the trial magistrate based her decision on evidence which was on record and that the appellate court can only interfere with the trial magistrate's discretion on strong grounds.

11. I have carefully reconsidered and evaluated the pleadings and the evidence which was adduced before the trial magistrate. It is clear to me that the issue of the respondent being in receivership was never raised in the pleadings. It is only on 12th July, 2006, which was a day to the hearing of the suit, that the respondent's advocate communicated the information through a copy of a letter which was filed in court. In the letter which was addressed to the appellant's advocate, and copied to the court, counsel for the respondent informed the appellant's counsel that the respondent was in receivership. Also forwarded to the appellant's counsel was a deed of replacement of receivers and managers dated 8th October, 2005. During the hearing, the issue was casually alluded to by the respondent's counsel when she mentioned that she did not have a witness to call, explaining that "they were in receivership".

12. It is evident that the issue of the respondent's receivership was never properly pleaded nor was the evidence relating thereto properly produced before the court. Further, none of the parties addressed the court on the issue. In the case of **Odd Jobs vs Mubia [1970] EA 476**, (which was followed by Dulu J. in **Automobile Association of Kenya vs James Jagunga**), the Court of Appeal for Eastern Africa held that:

"A court may base its decision on an unpleaded issue if it appears from the cause followed at the trial that the issue had been left to the court for decision."

13. In this case, the receivership of the respondent was not an issue alluded to by the parties in their pleadings or evidence, nor did the counsel make any submissions thereon. It cannot therefore be said that the issue was left to the court for determination. The trial magistrate was therefore wrong in basing her decision on the unpleaded issue of receivership. Further, even assuming that the issue was either pleaded or left to the court for decision, the trial magistrate did not consider the date when the appellant's suit was filed, *vis a vis* the date the respondent was placed under receivership. Had she done so, the trial magistrate would have noted that the appellant's suit was filed on 26th July, 2005, which was long before the respondent was placed under receivership on 30th September, 2005.

14. Moreover, the appointment of the receivers only placed a restriction on dealings with the respondent's assets. It did not however bring the life of the respondent to an end. The respondent remained a legal entity which could sue and be sued. The trial magistrate appears to have confused the appointment of receivers with the appointment of a liquidator for winding up of the company. That was not the position herein. The appellant's suit would only have been affected by the receivership at the execution stage assuming the debenture had crystallized on the respondent's assets. The trial magistrate's judgment cannot therefore stand as the trial magistrate failed to address the evidence before her and based the dismissal of the appellant's suit on a misapprehension of the law.

15. During the trial, it was not disputed that the appellant's services were summarily terminated by the respondent. The main issue for determination was whether the appellant's employment was lawfully or wrongfully terminated and whether the appellant was entitled to the sum of Kshs.795,042/= which he claimed.

16. According to clause 12 of the appellant's letter of employment which was produced in evidence as P.exh.1, the appellant's employment could be terminated:

"By either party giving the other party three calendar months' notice in writing".

The respondent had also the right to summarily dismiss any employee:

“Who is guilty of theft, dishonest or dangerous practices, is drunk or commits acts of physical aggression whilst on duty or otherwise behaves in such a manner as to prejudice the good name of the company.”

17. In this case, the respondent did not give the appellant any notice prior to his termination, but purported to summarily dismiss him. In paragraph 3 of the defence, it was contended that the appellant was summarily dismissed under Section 12 of his contract of employment. However, the appellant’s letter of summary dismissal indicated that he was dismissed under Section 17(c) and (g) of the Employment Act.

18. Section 17(c) and (g) of the Employment Act provides for summary dismissal on grounds of gross misconduct as follows:

“17(c) If an employee willfully neglects to perform any work which it was his duty to have performed or if he carelessly and improperly performs any work which from its nature it was his duty under his contract to have performed carefully and properly...”

“17(g) If an employee commits or on reasonable and sufficient grounds is suspected of having committed a criminal offence against or to the substantial detriment of his employer...”

19. Under Section 109 of the Evidence Act, it was for the respondent who was alleging that the appellant was guilty of gross misconduct to prove this fact by establishing circumstances which brought the appellant’s conduct either under Section 17(c) or 17(g) of the Employment Act as above quoted, or under Clause 12 of the appellant’s contract of Employment. The respondent did not call any evidence at the trial, but purported to rely on the appellant’s letter of suspension and letter of summary dismissal produced in evidence as P.exh.3 & 4.

20. Nevertheless, the two letters contained only unsubstantiated allegations. No evidence was adduced to demonstrate the investigations carried out. No company records were produced to show how the appellant had manipulated them or failed to account for any entries, nor was there any evidence to show that the appellant had willfully neglected to perform, or carelessly performed any work allocated to him, or evidence of a criminal offence having been perpetrated against the respondent.

21. I find that the respondent totally failed to show that the appellant was guilty of gross misconduct either under Section 17(c) & (g) of the Employment act or Clause 12 of the appellant’s contract of employment. His purported summary dismissal was therefore unlawful.

22. In the absence of any evidence of gross misconduct, the respondent had the right under Clause 12 of the Contract of Employment, to lawfully terminate the appellant’s employment, by giving the appellant either 3 months’ notice or 3 months’ salary in lieu of notice. It is evident from DMF1 that the appellant was not paid any salary in lieu of notice and therefore his purported summary dismissal was in actual fact unlawful termination of services.

23. Although the appellant signed the discharge voucher, it is evident that the appellant qualified his acceptance of the dues he was paid by endorsing on the voucher that he was still pursuing his salary for 6 days for June, 2005 and 3 months’ salary in lieu of notice. The respondent cannot therefore rely on the voucher as providing a compromise of the appellant’s claim. No explanation was given as to why the appellant was not paid his salary for June, 2005. Although the appellant was under suspension he was in actual fact in employment until 6th June, 2005 when he was served with the letter of dismissal. He was therefore entitled to payment for the 6 days in addition to 3 months salary in lieu of notice.

24. I find that there was sufficient evidence establishing the appellant’s claim as follows:

- 3 months’ salary in lieu of notice

@ 225,000/= per month - 675,000

- Salary for 6 days i.e. 1st June to

6th June 2005 - 45,000

Total **720,000**

25. Accordingly, I allow this appeal, set aside the judgment of the lower court and substitute thereof judgment for the appellant in the sum of Kshs.720,000/= together with costs and interest thereon from the date of filing suit. The respondent shall further pay the appellant costs of the appeal.

Those shall be the orders of this court.

Dated and delivered this 25th day of May, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Mr. Ombati H/B for Kabarú for the appellant

Advocate for the respondent absent

Erick – Court clerk