



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Civil Case 292 of 2005

JULIUS K. CHEMJOR.....PLAINTIFF

VERSUS

POSTAL CORPORATION OF KENYA.....1ST DEFENDANT

F. O. OKELLO.....2ND DEFENDANT

JUDGMENT

This is a claim for both general and special damages for unlawful dismissal. The claim is denied. The first defendant avers in its defence that it was justified to dismiss the plaintiff for fraud and dishonesty.

The facts of the case are that on 18th June, 1979, the plaintiff was employed by the first defendant as a Postal Assistant. In the course of the years he rose through the ranks to the post of Head Postmaster “C” on 1st March 2001.

In or about 1991 the plaintiff bought a piece of land in Kabarnet Town known as **Title No. Baringo/ Kewamoi “A”/1490** (Plot No. 1490) in the same locality. At about the same time his younger brother, Paulo Kibett Chemnjor bought **Title No. Baringo/ Kewamoi “A” 1468** (Plot No.1468). Between 1991 and 1993 the plaintiff, by mistake, constructed a residential house on Plot No.1468. Both he and his said brother thought he had constructed on his Plot No. 1490. On completion he went into the house and started claiming owner- occupier allowance from his employer, the first defendant.

In 30th November 1993, one H.A.K. Cheburet wrote to the first defendant that the plaintiff was fraudulently drawing owner occupier allowance on the basis of his brother, Paulo Kibett Chemnjor’s, house. The first defendant suspended payment to the plaintiff of that allowance but after investigations that allegation was found to be baseless and the allowance was re-instated.

On 11th October 2004 the plaintiff’s other brother, Michael K. Chemnjor (Michael), made the same allegation. After investigation the first defendant believed the allegation and dismissed the plaintiff on 1st March 2005 “on grounds of gross dishonesty and loss of confidence” in him. The plaintiff thereafter filed this suit alleging that the second defendant leaked to Michael information from his personal file as a result of which Michael made the allegation of the plaintiff’s alleged fraudulent claim of owner occupier allowance and claimed from both defendants special and general damages for unlawful dismissal.

As I have said the defendants denied the claim. The first defendant counter-claimed for a sum of Kshs. 516,032.60 being the total sum it had paid to the plaintiff as owner occupier allowance.

At the hearing, the plaintiff testified and called his said brother, Paulo, who confirmed that they both believed the plaintiff had built on his Plot No. 1490. The two testified that it was the first defendant who actually brought to their attention in 2004 their mutual mistake and that they soon thereafter swapped the plots. The plaintiff also called the contractor, Stephen Kipserson Chelimo, who built the house for him.

On its part the first defendant called its Assistant Manager Investigation Services, Joseph Njiru Kamau DW1, who investigated the second allegation by Michael and filed a report on the basis of which the plaintiff was dismissed and its Assistant Manager Welfare, Anne Chepkemboi Koech DW2. The second defendant did not testify or call any evidence.

It was the evidence of Anne Chepkemboi Koech DW2 that the criterion for payment of owner occupier allowance was one's ownership of the house. One would be entitled to the allowance even if the house was a gift to one or one built it on someone else's land as long as one had that other person's authority to build on his land.

In their written submissions, counsel for the plaintiff submitted that the plaintiff has proved his claim against both the defendants and prayed for Kshs. 12, 390, 535/= being salary and allowances the plaintiff could have earned from the date of dismissal to retirement age of 60 years.

On their part counsel for the defendants cited the Court of Appeal decision in **Langat Vs K.P & T. C., [2000] 1 EA 147** and contended that the plaintiff's claim is statute barred under **Section 24** of the **Postal Corporation Act No. 3 of 1998**. They also submitted that the first defendant was entitled to dismiss the plaintiff under **Section 17(g)** of the **Employment Act** for fraud and dishonesty. They dismissed the claim for reinstatement and contended that the first defendant having lost confidence in the plaintiff, he cannot be imposed on it. They also dismissed the plaintiff's claim for general damages as not awardable in employment contracts. Save for payment of one month's salary in lieu of notice as stated in the letter of appointment, they also dismissed the plaintiff's claim for terminal benefits for failure to plead them.

That was the evidence and submissions made in this case. I would like to dispose of the plaintiff's claim against the second defendant. As I have said it is based on the allegation that the second defendant leaked information from the plaintiff's personal file to the plaintiff's brother Michael. The plaintiff having not adduced any evidence to prove that allegation, I hereby dismiss his claim against the second defendant but I award the second defendant no costs as he did not testify at the hearing.

It is trite law that parties are bound by their pleadings. Counsel for the defendants' contention that the plaintiff's claim is time barred under **Section 24** of the **Postal Corporation Act No. 3 of 1998** must be rejected on the ground that the same is not raised in either of the two defendants' defences.

The allegation that the plaintiff was fraudulently drawing owner occupier allowance on the basis of his brother, Paulo Kibett Chemnjor's, house was first made on 30th November 1993, by one H.A.K. Cheburet. The first defendant's own staff investigated it and found it baseless and re-instated the allowance which it had suspended. As DW1 has stated in his report, he was aware of the allegation when he commenced his investigations after the allegation was made for the second time by Michael. His report also makes it clear that when he interviewed both the plaintiff and his brother Paulo, they told him that they both genuinely believed that the plaintiff had built his house on his own Plot No. 1490. He was obviously also aware of the criterion for payment of the owner occupier allowance as stated by DW2.

DW1 was also well aware that Michael, the so called whistle blower, had a long standing ancestral land dispute, not only with the plaintiff but also with his other brothers. He ignored all that and instead of investigating the plaintiff's claim that the house on Plot No. 1468 is his, he directed his investigations to the ownership of the two plots.

The plaintiff's evidence that he genuinely believed that he built on his Plot No. 1490 cannot be doubted.

It was amply corroborated by that of his brother Paulo PW2 who was also in that mistaken belief. That he is the one who put up the house on Plot No. 1468 is also not in doubt. His evidence and that of his witnesses, PW2 and PW3 on that was not shaken.

Having considered the evidence on record and the written submissions filed by counsel for the parties, I have no doubt in my mind that the defendant's fraud charge against the plaintiff had no basis. He was occupying his own house in respect of which occupation he was entitled to the owner occupier allowance he was paid. I therefore find that his dismissal was unlawful. That disposes the first defendant's counterclaim which I hereby dismiss with costs.

With that finding, it follows that the plaintiff is entitled to the prayer for re-instatement. However, contracts of employment being personal, except in special circumstances, it is not advisable to impose an employee on an employer with whom he has differed. In the circumstances the option I am left with is to award him damages in lieu of re-instatement. The question is: what are those damages?

The Court of Appeal decision in **Southern Highlands Tobacco Vs McQueen [1960] EA 490** answers that question for me. In that case the Court stated:

“A person wrongfully dismissed is entitled be compensated fully for the financial loss he suffers as a result of his dismissal, subject to the qualification that it is his duty to do what he can to mitigate his loss. The amount of the loss is not necessarily the sum of emoluments which the plaintiff would have received (it may be more or less) but that sum will generally form the basis of the calculation.”

On the basis of this authority the Plaintiff is entitled to payment of the salary he would have earned up to retirement age had he not unlawfully been dismissed. But I cannot order the payment to him of the entire salary he would have earned up to retirement age. This is because as was stated by the Court of Appeal in **Kenya Ports Authority Vs Silas Obengele, [2008] eKLR**, there are several imponderables which affect an award of damages in such cases. Quoting from Law Ag. P's judgment in **East African Airways Vs Knight, [1975] EA 165** it stated:

“In assessing damages to be awarded, the Judge used, as a basis for his calculations, the difference between Mr. Knight's probable earnings from the corporation, had he not been dismissed, and his earnings from Cassman Brown Ltd. He then deducted a substantial proportion on account of accelerated receipt of damages, and such contingencies as sickness, death and redundancy. In my opinion the Judge proceeded on a correct principle in this respect, and in accordance with what was said by this Court in Southern Highlands Tobacco Vs McQueen [1960] EA 490.”

The plaintiff said he was 45 years old when he was dismissed. He was therefore left with 15 years before he could retire. But as I have stated, due to accelerated payment, I cannot award him salary for the whole of that period. I think a period of ten years would in the circumstances be reasonable.

At the time of dismissal, the plaintiff's salary, as is clear from the pay slip **Ex.13**, was Kshs.28,470/= and house allowance of Kshs.22,000/=. That adds up to Kshs.50,470/= per month less P.A.Y.E. of Kshs.8450/= leaving a net salary of Kshs.42,020/=. For ten years that works to Kshs.5,042,400/=. I award him this sum.

In the upshot I find that the plaintiff's dismissal by the first defendant was wrongful and in lieu of re-instatement, I award him ten years salary of Kshs. 5,042,400/= together with costs and interest on both this award and costs. The plaintiff having failed to prove his claim against the second defendant the same is hereby dismissed with no costs for the reasons already stated. The first defendant's counterclaim is hereby dismissed with costs and interest thereon also at court rates.

DATED and delivered this 25th day of June, 2009.

D.K. MARAGA

JUDGE.