



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

**Civil Appeal 9 of 2006**

**GATATATHA FARMERS CO. LTD ::::::::::::::::::::::::::::::::::::::: APPELLANT**

**VERSUS**

**FRANCIS NJUNGE :::::::::::::::::::::::::::::::::::::::RESPONDENT**

**JUDGMENT**

In the amended Plaintiff amended on 23<sup>rd</sup> March 2004 the respondent averred that he had been employed by the appellant at a monthly salary of Kshs 17,500.00 per month which employment was unlawfully terminated. In consequence of the said unlawful termination the Plaintiff claims from the defendant:-

- (i) Severance pay Kshs 52,500.00
  - (ii) Outstanding leave for 2 ½ years Kshs 43,750.00
  - (iii) Outstanding leave allowance for 3 years 17,500.00 x 3  
Kshs.52,500.00
  - (iv) Outstanding telephone allowance 18 months x 2000  
Kshs.36,000.00
  - (v) Outstanding house allowance for 3 years  
Kshs.15,100 x 17,500 x 42  
Months Kshs.110,250.00
  - (vi) Termination benefits gratuity 1 month's salary for every year worked 17,500 x 3 = 52,500
- Total Kshs.347,500.00**

He also prayed for costs of the suit, interest on a & b and any other remedy that this Honourable Court may deem fit and expectant to grant.

In their amended defence, the appellant admitted that indeed the Respondent/Plaintiff had been their employee, but denied that the terms of employment were as set out in paragraph 3 of the plaint. It denied that the Plaintiff was entitled to any housing/housing allowance or telephone allowance either as alleged or at all and puts him to strict proof thereof, asserted that the plaintiffs employment was valid and lawfully terminated by one months notice and the plaintiffs claim for wrongful termination of employment is accordingly misconceived and does not lie in law. Asserted that it had fully paid to the plaintiff what he was entitled to and denied liability to pay any termination benefits, severance pay or any outstanding allowance either as alleged in the Amended plaint or at all and puts the plaintiff to strict proof, further and without prejudice to the foregoing that they will contend that the plaintiffs suit is incompetent and will move the Court at an appropriate time to have the suit struck out.

In the alternative that even if the Plaintiffs employment was wrongfully terminated, he would only have been entitled to payment in lieu of notice and since notice was given he is not entitled to any payment and has no valid claim against the defendant and prayed for the same to be dismissed.

Parties were heard and the learned trial magistrate found for the plaintiff and made the following award.

Severance pay  $17,500 \div 30 \times 3 = 31,499$

Leave outstanding  $17,500 \times 2 + 8750 = 43,750.00$

Leave outstanding  $17,500 \times 15 \times 42 = 110,250$

**Total Kshs 229,249.00**

In addition a certificate (may be of service) costs and interest at Court rates from the date of termination till payment in full.

The appellant became aggrieved and appealed to this court citing three grounds of appeal namely that the Resident

(1) Magistrate erred in law in finding that the respondent was entitled to leave allowance amounting to Ksh s43,750/= equivalent to 2 ½ years pay after award the respondent a similar amount for leave due and not taken.

(2) Erred in law and fact in awarding the Respondent House allowance while there was sufficient evidence to prove that all the appellants' staff were housed and there was a house allocated to the respondent which he never utilized.

(3) Erred in law in awarding interest from the date of dismissal when no such claim was specified in the plaint.

On that account prayed for the appeal to be allowed, award on leave allowance, house allowance and interest from the date of termination of employment to be disallowed.

In his oral submissions to Court Counsel for the appellant reiterated the grounds of appeal and stressed the following points:-

(1) On leave allowance, the respondent was entitled to 880.00 when traveling on leave. He is not entitled to the same because (a) there is no prevision for entitlement of one month's salary in lien of leave for any worked year.

(b) It was not indicated that he had travelled and so there was no entitlement to the same

(ii) on house allowance it is the respondent who used to allocate houses to fellow staff, there was a

house available but he chose not to use the same and so he is not entitled to any payment.

On interest the learned Counsel submitted that the learned trial magistrate awarded interest from the date of termination something which had not been prayed for. It should have been ordered to run from the date of filing.

In response, Counsel for the Respondent opposed the appeal on the following grounds:-

- (1) Yearly leave allowance was an entitlement to an employee and one month's salary for one year was sufficient compensation. He is entitled to the same as it has not been argued that he was not entitled to leave allowance.
- (2) On house allowance no records were produced to show that the Respondent was provided with housing as the witness who testified was not in the employment of the appellant at the time and cannot confirm positively that housing was provided. In the absence of provision of housing, house allowance is payable. The fact that he was housing manager does not mean that he allocated himself a house allowance.
- (3) On interest Counsel submitted that this was awarded instead of damages which they had sought.

The Court has considered submission of each Counsel for and against the appeal. It is noted that there is no attack on the manner the figures were arrived at. The attack is on the award. That is the argument is that these heads should not have been provided for. The court will begin with the assessment on interest. This is provided for in section 26 of the Civil Procedure Act. It provides 26(1) *"where and in so far as a decree is for the payment of money, the Court may in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the Court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment in full or to such earlier date as the Court thinks fit."*

(2) where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the suit to the date of payment or other earlier date, the Court shall be deemed to have ordered interest at 6 per cent per annual. The central theme in Section 26(1) is found in the words *"order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the first to the date of the decree in addition to any interest adjudged on such principal sum"* There is therefore a discretion on the part of the Court to award interest before the filing of the suit. The provision does not say that such interest must be pleaded. As submitted by the Respondents Counsel even if it had not been pleaded it could have followed under such further or other relief as the Court may deem fit to grant as that is consequential to the main relief on interest. The only source of interference would perhaps arise where the period covered is lengthy thus making the resultant amount unconscionable. The termination as per paragraph 3 of the amended plaint is October 2002 where as the judgment was on 20.12.05 which is a period of 3 years and 1 ½ months at Court rates per annum cannot be said to be exorbitant. The appeal against the award of interest is dismissed.

On house, objection was raised because the Respondent was a housing manager, he allocated houses, to fellow staff, and there was a house available for him but he chose not to make use of it. As submitted by Counsel for the Respondent there is no proof of this as records were not produced. This court has perused the record of appeal presented to it, and squired through the lower court record and has found no proof of availability of such facilities.

Even if such facility were available but had not been utilized, then the employee is entitled to payment of allowance unless and until it can be shown that he breached an employment rule regarding housing where by all employees were compulsorily required to stay in housing provided by the employer and had no election of staying in houses of their own choice. Such evidence is lacking. The appeal against an award of housing allowance is also dismissed.

As for leave payable, the letter of employment is not exhibited. In the absence of a letter of employment all that the Court has is the tested evidence on record. In fact P.W.1 says that the letter of employment was asked for but none was given. The Respondent mentioned the figure in his evidence in cross examination he said he was to get leave allowance whether he went on leave or not. D.W.1 on the other hand talked of records which were not produced. D.W.1 confirms at line 11 from the bottom of page 7 that if he does not go on leave he is entitled to one month's salary which was 39,030.00. The defence having admitted that the entitlement existed and there being no proof that the Respondent went on leave the learned magistrate's finding and calculation of leave entitlement based on 2 months for each year plus one half cannot be faulted. The appeal on this ground is also dismissed.

The net result of the above assessment is that the entire appeal is dismissed with costs to the respondent both on appeal and the Court below. The lower court and judgment is confirmed.

**DATED, READ AND DELIVERED AT NAIROBI THIS 2<sup>ND</sup> DAY OF FEBRUARY 2008.**

**R.N. NAMBUYE**

**JUDGE**