



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT 237 OF 1996

PHILIP NDOLOPLAINTIFF

VERSUS

KENYA CROCODILE FARM LTD.DEFENDANT

J U D G M E N T

In a plaint dated 2.5.1996 and amended on 17th June 1996, Philip, sued Kenya Crocodile Farm Ltd, the defendant herein, claiming for the following from the defendant:

- (a) Payment of Kshs.7,578,000/.
- (b) An order for account of Food and Beverage Complex operation.
- (c) Director's remuneration and benefits for the period between August 1995 and December 1995 based on Mamba Holdings Limited.
- (d) 2% of Gross Profit made from Food and Beverage Complex operations.
- (e) Costs and interest thereon at court rates.

When served with the plaint, the defendant defended the suit by filing a defence with a counter-claim dated 31st May 1996. the entire suit proceeded for hearing before Mrs. Pamela Tutui, Commissioner of Assize. Unfortunately the Honourable Commissioner of Assize was retired before she could finalize the matter. By an order of consent recorded by the parties and approved by this court on 24th February 2006 the parties were allowed to file written submissions and this court proceeded to write the judgment on the basis of the evidence recorded before the learned Commissioner of Assize.

The typed proceedings indicate that the plaintiff testified alone whereas the defendant summoned the evidence of two witnesses. In his evidence the plaintiff told the court at hearing that he was employed by the defendant as a personnel officer on 1st December 1984 earning a salary of Kshs.4,000/-. He produced a letter of employment dated 25th October 1985 as an exhibit in evidence. The aforesaid contained the terms of service which included inter alia how the contract of employment could be terminated by either party. Clause 10(a) indicated that either party could terminate the contract by giving a notice of one month or pay the other the equivalent of the month's salary in lieu of notice. The plaintiff's engagement

with the defendant blossomed until 2.11.93 when the defendant promoted the plaintiff to the post of Personnel Administration and Operations Manager in a letter dated 2.11.93 which was produced by the plaintiff in evidence. In a letter dated 24.12.93 the defendant adjusted the plaintiff's gross salary to Kshs.30,000/- per month. In the same letter the plaintiff was to receive incentive bonuses on horse/camel riding of 10% of the net profit or in the alternative a flat rate of Kshs.10,000/- per month with effect from 1st September 1993.

The plaintiff was also to receive disco bonus of 1% of the total gate collection or in the alternative a bonus of Kshs.10,000/- per month with effect from 1st November 1993. the plaintiff was to further get bar allowance of Kshs.5,000/- per month as from 1st December 1993.

The plaintiff was promoted to the position of the Defendant's Deputy Managing Director with effect from 1st august 1995 in a letter dated 4th September 1995 and produced in evidence before this court. Before earning the promotion, the plaintiff produced a letter dated 28.12.94 showing that his salary had been adjusted upwards from Kshs.30,000/- to a gross pay of Kshs. 90,000/-. It is admitted by the plaintiff that their promoting him to the position of the Defendant's Deputy Managing Director did not contain the terms of service. It is the evidence of the plaintiff that he and the defendant verbally agreed that the entry point of the newly created position of Deputy Managing Director is difference between his salary and that of the Managing Director which is calculated as Kshs.200,000/- – Kshs.70,000/- making a total of Kshs.130,000/- per month. The plaintiff also told this court that he was entitled to receive an annual increment of 30% basic salary. The plaintiff claimed that he was entitled to claim 2% of the gross profit from Food and Beverage Complex with effect from March 1989. The plaintiff produced a letter dated 12/1/1996 giving him 1 month's notice to terminate his employment with the defendant. It is evident from the aforesaid letter that the defendant was willing to extend the period of notice from 1 month to three months. This act prompted the plaintiff to file this action. The plaintiff told this court that when he rose to the position of Deputy Managing Director he was entitled to be given 3 months notice or 3 months pay in lieu of notice before his employment could be legally terminated.

The plaintiff also claimed he was entitled to gratuity of 2 months every year for 11 years at a rate of Kshs.90,000/- per month. The plaintiff further claimed for night allowances, director's/shareholder's benefits and leave allowance.

I have already stated that the defendant tendered the evidence of two witnesses to resist the plaintiff's claim and to support the counterclaim.

Shlomo Ranot (D.W.1) the defendant's Managing Director told this court that the plaintiff's employment was terminated with notice. He said that the plaintiff was not entitled to the incentives and overtime payments. D.W.1 also denied that the plaintiff was entitled to any benefits due to shareholders because he held no shares with defendant's company. He claimed that the plaintiff owed the defendant a total of Kshs.135,271/- which he should now be condemned to pay hence the counter-claim.

D.W.1 also claimed that the plaintiff was not entitled to gratuity. Joseph Mululu (D.W.2) an accountant with the defendant told this court that he attended a meeting on 22.9.95 presided by the plaintiff urged the defendant's employees not co co-operate with the defendant's new Managing Director, Ronnie Moses. D.W.2 confirmed that when Ronnie Moses took over the defendant's Management the plaintiff was sent on compulsory leave and finally sacked.

The learned advocates for the parties filed their written submissions. I have considered the evidence tendered plus the written submissions. Fortunately in this suit the parties filed the agreed issues which I intend to consider right away. The first issue is whether or not the contract of employment was in writing and whether or not notice to terminate was given. The evidence clearly shows that the contract of employment between the plaintiff and the defendant was in writing and notice before that either party to the agreement was required to give the other one month's notice before terminating the contract. According to the plaintiff, the defendant was required to give 3 months' notice or pay 3 months salary in lieu of notice when he attained the position of a deputy Managing Director. I have carefully examined the letter of appointment and that promoting the plaintiff. I am unable to find a provision which requires the

defendant to give the plaintiff 3 months notice. The letter of appointment clearly shows that either party to the contract could terminate the same upon giving notice of one month or paying one month's notice in lieu of notice. Even if it were true that either party was to give 3 months notice, then it is crystal clear that the defendant gave the plaintiff the appropriate notice vide its letter dated 12th January 1996. Consequently the claim for Kshs.390,000/- must be paid.

The second issue relates to the amount the plaintiff was entitled to earn as a deputy Managing director. The plaintiff concedes that the letter appointing him to that position did not specify the remuneration going with the promotion. He claimed that he was entitled to earn a sum of Kshs.130,000/- per month being the difference between what he previously earned and what the Managing Director earned. He alluded to the existence of a verbal agreement which was flatly rejected by the defendant. I have considered the evidence and the submissions over this issue. It is incumbent upon the plaintiff to prove his claim on a balance of probabilities. I regret to find that on this issue he failed. There was also no evidence on that there was an agreement on the annual percentage of salary increment. In the absence of such crucial evidence, then I find the proposed claim of 30% annual increment unproved hence not available to the plaintiff. The plaintiff has further claimed gratuity of 2 months of each completed for 11 years covering a period between 1985 and 1996 on the basis of Kshs.90,000/- which is the sum of Kshs.1,980,000/=. I have considered this ground. What has emerged from the evidence and submissions is that the plaintiff was terminated with notice. The defendant attempted to state that the plaintiff was terminated from the defendant's employment for gross-misconduct. I am unable to agree to that. The fact is the plaintiff's employment was properly terminated. In such a case the law requires that the plaintiff be paid service gratuity 2 months for each year completed on the basis of the last gross monthly pay. In this case the last gross monthly pay is Kshs.90,000/-. The plaintiff produced in evidence a letter dated 16.9.1994 written to the plaintiff by the defendant's director called Yural Reger. In the end I find the claim for service gratuity proved. I award a sum of Kshs.1,800,000/- on such head calculated as follows $90,000 \times 10 \times 2 = 1,800,000/-$.

Issues 3, 4 and 5 relate to a claim of shares held by the defendant and a company called Mamba Holdings Ltd. It is admitted by the plaintiff that he was not a paid up shareholder of the defendant. Even if he was, it was necessary for him to tender cogent evidence to establish such a claim. What is clear is that the plaintiff held some shares with Mamba Holdings Ltd which is a separate and distinct company from the defendant. The end result is that the plaintiff claim of Kshs.1,500,000/- as share value has no merit.

The other issue is whether or not the plaintiff was entitled to 2% incentive on food and beverages. A careful perusal of evidence shows that the plaintiff was to be paid an incentive of 2% of the gross profit of Food and Beverage with effect from March 1989. In fact, the defendant credited the plaintiff's account with a sum of Kshs.15,133/00 on 30/6/89 as the incentive for the year 1989. the defendant has claimed that such a claim was payable at the discretion of the defendant as a privilege and not as a matter of right. My considered opinion over this issue is that this is a right accruable to the plaintiff. The same stopped being a privilege when it was reduced into writing and acted upon. I allow this prayer as sought in the plaint between 1990 and 1995.

Issues 7 and 8 relate to a claim in respect of double shifts. I have perused the entire evidence and I have not seen any cogent and credible evidence to prove that the plaintiff is entitled to be paid double shifts. The schedule produced in evidence is a self-generated document, which is of probative value. In the end I find this issue unproved.

The issue touching on annual bonuses in my view is a matter, which was at the discretion of the defendant hence it is not claimed as a matter of right.

By a letter dated 2/12/93 the plaintiff was entitled to leave allowance equivalent to a full salary with effect from January 1994. I am convinced the plaintiff is entitled to claim leave allowance for 1995 in the sum of Kshs.90,000/- He is also entitled to salary for the month of January 1996 and 12 days for February 1996 i.e. Kshs.90,000/- and Kshs.36,000/- respectively.

The defendant's counter-claim is in respect of Kshs.135,271/-. It was incumbent upon the defendant to tender evidence proving the counter-claim. It is not just enough to state that the plaintiff did not file a defence. I have perused the record and noticed that the plaintiff indeed filed a defence to the counter claim dated 21st January 1997. In the entire evidence tendered by DW1 and DW2, there was no mention of how the plaintiff incurred the sum of Kshs.135,271/-. In the end I find the counter-claim unproved. The same is dismissed with costs.

In the final analysis I make the following orders in this judgment:

Judgment is awarded to the plaintiff in the following heads:

- (i) Kshs.1,800,000/- being service gratuity for 10 years from 1985 to 1995.
- (ii) Kshs.90,000/- being leave allowance for the year 1995.**
- (iii) Kshs.90,000/- salary for January 1995.**
- (iv) Kshs.36,000/- being salary for 12 days in the month of February 1996.**

Total = Ksh.2,016,000/-

(v) An order for the taking of accounts on the gross profit made from Food and Beverage Complex operation from July 1989 to Dec. 1995.

(vi) Upon receipt of the accounts (v) above 2% of the gross profit be paid to the plaintiff.

(vii) Costs of the suit.

Otherwise the rest of the plaintiff's claim is treated as claim

dismissed. The Counter-claim is dismissed with costs to the plaintiff.

Dated and delivered at Mombasa this 9th day of February 2007.

J.K. SERGON

J U D G E

In open court in the presence of Mr. Asige for the Defendant and Mrs. Makone h/b Munyithia for the plaintiff.