



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)
CIVIL CASE 2205 OF 2000

HARRISON C. KARIUKIPLAINTIFF

V E R S U S

BLUE SHIELD INSURANCE COMPANY LIMITEDDEFENDANT

J U D G M E N T

The Plaintiff herein sought by plaint dated 14th December, 2000 judgment against the Defendant for:-

- (a) A declaration that the Plaintiff is entitled to a 3 month or other reasonable notice to vacate the Defendant's house occupied by him.
- (b) An injunction to restrain the Defendant from evicting him from the house after 15th December, 2000 until a reasonable notice is issued.
- (c) Terminal dues as follows:-
 - (i) salary in lieu of 3 months notice of termination of employment;
 - (ii) pension contributions; and
 - (iii) severance pay calculated at the rate of 2 months of the latest salary for every year of service completed.
- (d) Costs of the suit.

The Plaintiff's case as set out in the plaint is that at all material times he worked for the Defendant and that at the time of termination of his employment he acted in the capacity of principal and chief executive officer of the Defendant; that he was sent on compulsory leave from 9th October, 2000 and his employment subsequently terminated on 6th December 2000; that he was then not paid his benefits; that on termination of his services he was required to hand over various properties of the Defendant in his possession on or before 15th December 2000, including a house in Lang'ata; that he had lived in the house for 10 years and his social life revolved around the house. He Plaintiff further pleaded that the

notice given to vacate the house was too short in light of the fact that he had not yet been paid his terminal dues to enable him to get alternative accommodation.

The Defendant duly entered appearance and filed a statement of defence and counter-claim dated 16th January, 2000. It admitted sending the Plaintiff on compulsory leave and subsequently terminating his employment. It pleaded, *inter alia*, that the Plaintiff's terminal benefits were to be calculated upon the Plaintiff returning to the Defendant its properties in his possession, which properties the Plaintiff had not returned at the time of filing suit. The Defendant counter-claimed for possession of its house occupied by the Defendant, damages or mense profits at the rate of KShs. 85,000/00 per month from 16th December 2000 until delivery of possession, interest on the same and costs of the counter-claim. Regarding the Plaintiff's claim for terminal benefits, the Defendant averred that the same is bad for want of particulars.

On 8th May, 2001 the Plaintiff filed a reply to defence and defence to the counter-claim; he joined issue with the Defendant upon its defence. He also pleaded that the issue of the Defendant's house had been determined. Indeed that was so. Together with the plaint the Plaintiff had filed an application by chamber summons dated 14th December, 2000. He sought a temporary injunction to restrain the Defendant from evicting him from the aforesaid house pending hearing of the suit. When the application came up for hearing on 30th January, 2001 a consent order was entered as follows:-

“By consent-

The Plaintiff do vacate the suit premises on or before 15th February, 2001 upon the following conditions:-

- (i) The Defendant do pay to the Plaintiff the admitted terminal benefits in the sum of KShs. 1,480,168/55 less KShs. 170,000/00 on or before 15th February, 2001.
- (ii) The Defendant do deposit the sum of KShs. 170,000/00 (in an interest-earning account) in the joint names of counsel for the parties on or before 15th February, 2001 pending determination of the suit.
- (iii) (There be) liberty to apply to both parties.
- (iv) Costs of the said application to abide the outcome of the main suit.”

It is common ground that the Defendant duly vacated the Defendant's house and the Defendant in its turn eventually paid to the Plaintiff KShs. 1,480,168/55, though it took a further order of the court to compel it to do so. No deposit of KShs. 170,000/00 was made, apparently by consent of the parties.

When the suit came up for hearing on 16th September, 2004 the learned counsels agreed that the following are the outstanding issues for determination:-

1. Whether the Plaintiff's dues as computed by the Defendant and resulting in the payment of KShs. 1,480,168/55 as per the consent recorded on 30th January, 2001 were correct.
2. Whether there are any further dues payable to the Plaintiff.
3. Whether the Defendant paid to the Plaintiff his due pension, and if so, whether the Defendant was entitled to deduct the Plaintiff's debts to the Defendant from that pension.
4. Whether the Plaintiff is entitled to severance pay under section 16A of the Employment Act, Cap. 226.

The following facts were also admitted by both parties by consent:-

1. That the Plaintiff was the Defendant's employee from 28th November, 1986 to 5th December, 2000.
2. That the Defendant paid to the Plaintiff the admitted sum of KShs. 1,480,168/55.
3. That the Defendant terminated the Plaintiff's employment without due notice on 6th December, 2000.
4. That the Defendant is entitled to terminal dues, the question being only the quantum thereof.
5. That the Plaintiff is entitled to the following:_
 - (i) 3 months salary in lieu of notice;
 - (ii) cash in lieu of leave for the year 2000;
 - (iii) leave allowance for the year 2000;
 - (iv) 6 days leave for the year 1999; and
 - (v) pension.
6. That the Plaintiff owed to the Defendant Kshs. 415,339/00, the same being outstanding car loan, which sum the Defendant recovered before paying to the Plaintiff Kshs. 1,480,168/55.

With the above facts admitted by both parties, issue No. 2 has been answered; so, only issues No. 1, 3 and 4 need to be considered in this judgment. Just before hearing commenced on 13th October, 2004 a bundle of documents was by consent admitted in evidence as Exhibit A. On the Plaintiff's side, only the Plaintiff testified. Two witnesses testified for the defence. They are **JOYCE MUGURE KIKUNZE (DW1)** and **HILLAM NJARI NGATIA (DW2)**.

I finished hearing the witnesses on 17th May, 2005. The learned counsels appearing chose to put in written submissions. On 21st June, 2006 when the matter came up for mention in order to take a date for judgment, neither party had filed submissions. On 6th July 2005 the Defendant had filed its submissions; the Plaintiff had not. On 20th July 2005, again the Plaintiff had not filed his submissions; the court was informed that he had filed an application to amend the plaint.

That application (by chamber summons dated 19th July, 2005) was subsequently heard and ultimately dismissed on 3rd February, 2006. The Plaintiff was then accorded an opportunity to file his submissions; judgment was reserved for 28th April, 2006. However, on 2nd March, 2006 the Plaintiff filed another application (by notice of motion of the same date), this time for leave to discontinue the suit in order to file a fresh one. That application was eventually heard and was dismissed on 9th November 2006. The Plaintiff was allowed time to file his submissions; he did so on 7th December, 2006. Judgment could not be delivered sooner because of my serious illness and long recuperation in the meantime.

I have considered the testimonies of the Plaintiff and the two witnesses for the defence and the written submissions of the learned counsels, including the authorities cited. The Defendant suggests in its submissions that, by the Plaintiff accepting the sum of KShs. 1,480,168/55 in exchange for vacating the Defendant's house, the entire suit was compromised and settled. This is not so. The fact that issues were subsequently framed, certain facts admitted by both parties, a bundle of documents admitted into evidence by consent, and the suit heard belies this. By accepting the admitted sum of KShs. 1,480,168/57, the Plaintiff did not fully settle the suit; only partially. He did not agree with the Defendant's calculations to arrive at that sum.

I will now look at the issues.

Issue No. 1 : Whether the Plaintiff's dues as computed by the Defendant and resulting in the payment of KShs. 1,480,168/55 as per the consent recorded on 30th January, 2001 were correct.

The Defendant calculated the Plaintiff's dues as set out in paragraph 12 of the replying affidavit of JOYCE KIKUNZE, the Defendant's personnel manager, sworn on 17th and filed on 18th January, 2001. The affidavit was filed in response to the Plaintiff's application for temporary injunction (chamber summons dated 14th December, 2000) already mentioned. The said paragraph works out the Plaintiff's terminal benefits as follows:-

(i) Pension	KShs. 1,763,363.57
(ii) 3 months salary in lieu of notice	Kshs. 225,000.00
(iii) Unpaid leave allowance	KShs. 37,000.00
(iv) Pay in lieu of accrued leave for 1999	KShs. 15,000.00
(v) Same for 2000	<u>KShs. 75,000.00</u>
Sub-total	<u>KShs. 2,115,863.57</u>

Less

(i) P. A. Y. E.	KShs. 101,190.00
(ii) Company loan	KShs. 409,231.00
(iii) Insurance	KShs. 6,108.00
(iv) Blue Shield Insurance staff welfare Society loan	<u>KShs. 119,166.00</u>
Net due	<u>KShs. 1,480,168.57</u>

This is the sum that the Defendant paid to the Plaintiff under the consent order of 30th January, 2001.

The Plaintiff's testimony was that he was paid his emoluments by the Defendant upon two pay-slips, one for purposes of taxation and the other one showing the net salary. Examples of the former are the pay-slips for May and August 2000 at pages 11 and 14 of Exhibit A; pages 12 and 13 are examples of the latter. The former pay-slip disclosed only the basic salary of KShs. 75,000/00 and "int/benefit" (?) of KShs. 3,198/00, making a total gross income of KShs. 78,198.10. The latter pay-slip disclosed travelling, entertainment and utilities allowances of KShs. 35,000/00 each, making a total of KShs. 105,000/00 per month. No house allowance was indicated in either payslip because the Defendant was housing the Plaintiff.

It is obvious to me that the purpose of paying the Plaintiff using two payslips was to enable him to evade paying taxes on some of his emoluments. It was stated by one of the Defendant's witnesses that this was at the initiative of the Defendant, not the Plaintiff; however, that does not remove anything at all from the illegality of the arrangement. The arrangement was geared towards denying the Republic of Kenya due taxes from the Plaintiff upon some of his emoluments and benefits. It was illegal and will not be countenanced by the court.

The Plaintiff's complaint is that the Defendant worked out his terminal benefits using the taxable pay-slip instead of using the total of both pay-slips. Indeed this is so. That was the correct thing for the Defendant to do; what the Plaintiff was paid "**under the table**" must remain "**under the table**". The court will not cloth with legality an arrangement that was patently illegal. I therefore hold that the calculation of the Plaintiff's terminal benefits by the Defendant were correct.

Issue No. 2: Whether there are any further dues payable to the Plaintiff.

The Plaintiff claimed in the plaint terminal dues as follows:-

- (i) salary in lieu of 3 months notice;
- (ii) pension contributions; and
- (iii) severance pay calculated at the rate of 2 months of the latest salary for every year of service completed.

Ordinarily, a plaintiff should get, if proved, only what he claims in the plaint. In the present case, however, parties agreed, *inter alia*, that the Plaintiff is entitled to the following:-

- (i) 3 months salary in lieu of notice;
- (ii) cash in lieu of leave for the year 2000;
- (iii) leave allowance for the year 2000;
- (iv) 6 days leave for the year 1999; and
- (v) pension.

Cash in lieu of leave for the year 2000, leave allowance for the year 2000 and 6 days leave for the year 1999 were not pleaded; but because it was agreed by the parties that the Plaintiff was entitled to them, he should get them in the interests of justice.

In answer to this issue, therefore, I hold that the Plaintiff is entitled to payment in lieu of leave for the year 2000, leave allowance for the year 2000 and cash in lieu of 6 days leave for the year 1999. It will, however, be noted that the Defendant included these items in its calculations to be found in paragraph 12 of the replying affidavit already referred to.

Issue No. 3: Whether the Defendant paid to the Plaintiff his due pension, and if so, whether the Defendant was entitled to deduct the Plaintiff's debts to it from that pension.

The Defendant calculated the Defendant's pension as set out at page 24 of Exhibit A. The Plaintiff's main complaint regarding this calculation is the tax element in the sum of KShs. 594,927/24. DW2 explained, and I accept that explanation, that the tax in question was withholding tax, and that the same was paid to the Kenya Revenue Authority. The Defendant was legally obliged to collect that tax on behalf of the revenue authority before paying the Plaintiff his pension, and it did so. I am satisfied that the Defendant properly calculated the Plaintiff's pension. It is to be noted that the calculation included interest due to the Plaintiff.

It was the Plaintiff's case that the Defendant was not entitled to recover monies owed to it by the Plaintiff from the pension due to him. No provision of the Retirement Benefits Act or the Retirement Benefits (Individual Retirement Benefits Scheme) Regulations, 2000 prevented the Defendant from recovering from the Plaintiff's pension what was due to it from him was brought to the attention of the court. Regulation 100 was quoted in the Plaintiff's submissions; but it does not exist. Learned counsel must have meant regulation 10. That regulation provides:-

“10. Where a member of a scheme gives notice to the scheme of intention to transfer benefits, the scheme shall within sixty days from the date of the notice transfer to another scheme specified in writing by such member all benefits of such member:

Provided that a member opting to transfer his benefits from the scheme shall not be penalized financially or otherwise by such scheme.”

It has been submitted for the Plaintiff, in effect, that the deduction by the Defendant was a penalty that was contrary to the above quoted regulation. I do not accept that deduction by the Defendant of what was owed to it by the Plaintiff from his total entitlements (which merely incidentally included his pension) was such a penalty. A penalty, as defined by the **Concise Oxford English Dictionary, 11th Edition, Revised**, is a punishment imposed for breaking a law, rule, or contract. The Plaintiff was not being punished; the Defendant was merely recovering what the Plaintiff owed it, a debt that is not disputed. In any case, the deduction made by the Defendant was from the total due to the Plaintiff which, apart from the pension, also included other entitlements.

Issue No. 4: Whether the Plaintiff was entitled to severance pay under section 16A of the Employment Act, Cap. 226.

Section 16A of the Employment Act provides for redundancy. Subsection (1) thereof provides that a contract of service shall not be terminated on account of redundancy unless certain conditions have been complied with; one of these conditions (paragraph (f)) is that an employee declared redundant shall be entitled to severance pay at the rate of not less than 15 days pay for each completed year of service. In this regard, the Plaintiff's case is that about a year or two after his employment was terminated the position that he had held in the Defendant was abolished to pave way for the managing director of the company to take the responsibilities of that office. There was evidence that after the Plaintiff was dismissed someone else was employed to perform the duties of his office for about a year or two before a managing director may have taken over the responsibilities of that office. There is no evidence at all that the Plaintiff's contract of employment was terminated on account of redundancy. He was not entitled to any severance pay, and I so hold.

Having determined as above the four issues framed by the learned counsels for the parties, the result is that the Plaintiff has proved his case on a balance of probabilities only to the extent that at the termination of his employment he was entitled to terminal benefits, as calculated by the Defendant, of KShs. 2,115,863/57. From this sum the Defendant lawfully deducted KShs. 635,695/00 owed to it by the Plaintiff, leaving a balance of KShs. 1,480,168/57. I will therefore enter judgment for the Plaintiff for this sum. It will be noted that the Defendant has already paid this sum to the Plaintiff pursuant to orders entered herein already referred to. The Plaintiff is not entitled to anything else. All the other claims he raised in his testimony (including house allowance and interest) were not pleaded and cannot be granted.

Regarding the Defendant's counterclaim, the same was settled by the consent order of 30th January, 2001. It will be so marked with no order as to costs.

That leaves only the issue of costs of the Plaintiff's suit. The Plaintiff rushed to court after the Defendant instructed him to return all its properties held by him so that his terminal dues could be calculated. The Defendant, after being brought to court, calculated what was due to the Plaintiff and admitted the same. It has already paid him the admitted amount. Costs are at the discretion of the court; they will normally follow the event unless the court or judge shall, for good reason, otherwise order. A party should not be penalized with regard to costs unless there was no good reason for him to rush to court. Given the danger of losing his abode that the Plaintiff was then facing, he cannot be faulted for rushing to court to seek protection, which protection he got, albeit on a temporary basis. He has succeeded in his suit to the extent already indicated. I find no good reason to deny him costs. I will therefore award costs of the suit to the Plaintiff (of course not including costs of the counterclaim).

In summary, there will be judgment for the Plaintiff for the sum of KShs. 1,480,168/57 (which has already been paid to him by the Defendant) plus costs of the suit. The Defendant's counterclaim is marked as settled with no order as to costs. There will be orders accordingly.

DATED, SIGNED AND PRONOUNCED IN OPEN COURT

THIS 28TH DAY OF SEPTEMBER, 2007

H. P. G. WAWERU

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