



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL DIVISION – MILIMANI**

**Civil Case 784 of 1995**

**GITOBU M. M'MARETE ..... PLAINTIFF**

**VERSUS**

**NATIONAL HOUSING CORPORATION ..... DEFENDANT**

**JUDGMENT**

In a Complaint dated 10.3.1995 and amended on 20.11.2000 the Plaintiff pleaded that by a contract of employment dated 6.4.1990 the Defendant employed the Plaintiff as a Senior Building Supervisor for 3 years. It is further pleaded that on 29.3.1994, the said contract of employment was reviewed for a further period of 3 years. Two days thereafter on 31.3.1994 the Defendant unlawfully and without any or any reasonable explanation terminated the services of the Plaintiff summarily thereby subjecting the Plaintiff to severe damage and loss. It is further pleaded that during the period of employment the Defendant advanced KES5000 to the Plaintiff to enable the Plaintiff complete his house on the security of the Plaintiff's L.R. No. KIIRUA/NAARIMAITE/ 500. It is also pleaded that it was an express term of the loan agreement that the Defendant was to deduct the principal sum and interest from the monthly salary payable to the Plaintiff until payment in full. It is further pleaded that due to the unlawful termination of the Plaintiff's employment and the failure to pay the Plaintiff his dues the Defendant refused and or neglected to credit the Plaintiff's house loan account and the same has continued to accrue interest to date. The Plaintiff in the premises claims. Kshs

- (a) Gratuity of 71,700/=
- (b) Gratuity for the period April 1993 – 1994 - 36,714.35
- (c) Interest on (a) - 17,925.05
- (d) One Month's Salary in lieu of notice - 11,680.00
- (e) Salary for the period 1/4/94 – 13/4/94 - 5,661.35
- (f) Car Loan deductions not credited to the account - 5,048.00
- (g) Wananyumba Credit Society deductions not remitted - 1,978.00
- (h) Medical expenses not refunded - 2,250.00

(i) Proportionate passages as per Clause 9 of the conditions of the contract (13 years service) - 50,613.35 Total claims 202,970.10

It is further pleaded that the Plaintiff was entitled to the credit of all the sums that were payable to him at the time of termination of employment and hence does not owe the Defendant any money at all. In the premises the notification issued to sell the Plaintiff's L.R. No Kirua/Naari – Maite/500 is illegal and should be declared null and void.

It is also pleaded that, the Defendant ought to have paid the Plaintiff the said sum of Kshs 202,970.05 after deducting the following loan amounts: Car loan balance of Kshs 110,022.00 and Housing Loan balance of Kshs 87,366.00, leaving the sum of Kshs 5,582.02 payable to the Plaintiff.

The Defendant filed a defence to the Plaintiff's claim. It is interesting that the Defendant denies even the descriptive parts of the Plaintiff's claim. In paragraph 4 of the defence the Defendant pleaded that the alleged renewal of contract was indeed an act of formalization of the agreement of 6.4.90 and was retrospective and only applied to the contract period already covered. It was further averred that the contract of employment was lawfully terminated and further that the sum advanced was to be repaid as per the provisions of a duly registered charge over L.R. No. Kirua/Naari Maite/500. The Defendant further pleaded in the alternative that the said charge imposed a statutory duty on the Plaintiff distinct and separate from the contract of employment. It is further pleaded that the alleged accrual of arrears of interest on the loan account, was as a result of the Plaintiff's neglect to perform his contractual duty of repaying the principal and interest. The Defendant denied owing the Plaintiff any sums and averred that the Plaintiff had not remitted balance of the principal sum and interest and the Defendant's statutory right of sale under Section 74 of the Registered Land Act had crystallized.

When the suit came up for hearing on 24.11.2005, the Defendant did not appear by their officers or their Advocates. On being satisfied that the hearing date had been taken by consent I proceeded with the hearing of the Plaintiff's case. The Plaintiff testified that he had worked for the Defendant since 6.4.81 on a 3 year renewable contract up to 13.4.81 when the Defendant terminated his services. During his employment the Plaintiff rose from Clerk of Works to Senior Building Supervisor earning £4272 per annum. The Plaintiff further testified that the Defendant formalized the contract of employment for the period between 1990 to 1993 retrospectively by the Defendant's letter dated 29.3.1994. He continued working for the Defendant up to 13.4.1994 when he was served with a letter dated 31.3.1994 terminating his employment. By that time however, the Defendant had not formalized the Plaintiff's contract of employment for the period between 1993 to 1996 despite the Plaintiff having served the Defendant with the requisite notices in writing for the renewal of the contract.

On termination of the Plaintiff's employment, the Defendant informed the Plaintiff that it would pay the Plaintiff one month's salary in lieu of notice and salary up to the last date of working less liabilities. The liabilities included the said car loan balance and Rural Housing Loan balance. The Plaintiff appealed against his decision to terminate his employment but the appeal was rejected without giving the plaintiff an opportunity to appoint a member to the Appeals Board of the Defendant.

The Plaintiff produced the following documents in support of his claim for salary in lieu of notice and salary for the period between 1.4.94 to 13.4.94.

**1. Contract Agreement dated 15.6.1994**

**2. Defendant's letter dated 31.3.1994 terminating the Plaintiff's services.**

**3. Defendant's letter dated 28.4.1995 informing the Plaintiff of the result of his appeal against termination of service.**

**4. Pay slip for the month of March 1994.**

The Plaintiff further testified that he complied with clause 2 of the terms and conditions of his

employment for the period between 1990 – 1993 and notwithstanding that no formal contract was executed between the Plaintiff and the Defendant for the period between 1993 and 1996 the conditions of the contract for the period between 1990 to 1993 applied to the period between 1993 and 1996. The Plaintiff explained that it was the Defendant's practice to formalize contracts retrospectively. He had also continued to work and was paid previously in the absence of a formal contract.

It was the Plaintiff's further testimony that the gratuity for the contract period between 1990 and 1993 and for the year 1994 together with interest was Kshs 126,339.40. Yet the Defendant gave the figure of Kshs 42,834/=. To illustrate that the Defendant's computation of his gratuity was erroneous, the Plaintiff testified that for the period between 1987 and 1990 he had been paid gratuity of Kshs 59,109.95 when his salary was only 6,860/=. He had subsequently been promoted and by the time of his termination he was earning Kshs 10,930/=. He produced his pay slip for the month of March 1994 in support of his argument. He explained that he could therefore not be paid the said sum of Kshs 42,834/= as the Defendant had wrongly computed his gratuity. In support of this evidence the Plaintiff produced a payment voucher dated 20.4.90 vide which he had been paid Kshs 59,109.95 as gratuity for the period between 1987 and 1990.

The Plaintiff further testified that during the currency of his employment with the Defendant, he was advanced a car loan and at the time his employment was terminated the Defendant claimed that the balance payable was Kshs 115,070.00. The Plaintiff disputed this figure on the basis that the Defendant did not credit the car loan account with Kshs 5,048/= which had been deducted from his salary. It was the Plaintiff's evidence that the balance of the car loan was Kshs 110,022.00. The Plaintiff produced a payment voucher dated 3.5.1993 which shows that a sum of Kshs 50,480/= was deducted from his salary.

The Plaintiff also testified that in the same month the Defendant deducted from his salary Kshs 1978/= purportedly for remittance to his Cooperative Society called Wananyumba Credit and Savings Cooperative Society. The Plaintiff stated that this was never remitted to the said society.

The Plaintiff further gave evidence that he was entitled to refund of medical expenses he had incurred of Kshs 2,250/-. He produced copies of documents from M.P. Shah Hospital, Nairobi West Hospital, Dr. V.S. Patel and Church House Diagnostic Laboratory in support of this claim.

It was also the Plaintiff's testimony that he was entitled to Kshs 50,613.35 in respect of proportionate passages in terms of clause 9(ii) of the conditions of the contract for the entire period he was in the employment of the Defendant. The Plaintiff referred me to the conditions of employment and specifically to Clauses 6 (ii) and 9(ii) thereof. [www.kenyalaw.org](http://www.kenyalaw.org) Gitobu M M'Marete v National Housing Corporation [2006] eKLR 7 In total the Plaintiff testified that he was entitled to terminal dues amounting to Kshs 202,970.10.

With respect to the Rural Housing Loan the Plaintiff admitted that the Defendant advanced him Kshs 100,000/= in the year 1987 which was repayable in 10 years with effect from December 1987 at the rate of Kshs 1240/= per month which sum was deducted from his salary. The Plaintiff deposited his L.R. No. Kirua/Naari – Maite/500 with the Defendant. He testified that on termination of his employment, the Defendant sought to exercise its purported power of sale. This, according to the Plaintiff, was unlawful as the loan repayment period of 10 years had not elapsed and the loan balance was not Kshs 91,086/= as demanded by the Defendant but Kshs 87,366/=. It was the Plaintiff's testimony that all his liabilities with the defendant were to be deducted from his terminal dues. He referred me to the Defendant's letter dated 31.3.1994 terminating his services in which the Defendant clearly stated that he would be paid his dues less any liabilities he owed the Defendant.

The Plaintiff further testified that his dues exceeded his liabilities by Kshs 5,582.05 to which sum the Plaintiff was entitled. The Plaintiff further testified that he never executed any charge in favour of the Defendant. There could therefore be no question of the Defendant purporting to exercise a statutory power of sale. In any event, so the Plaintiff testified, even if a charge had been created over his piece of land, by the time of termination of his services the statutory power of sale had not arisen and no valid or any statutory notice of sale had been served.

The Plaintiff also testified that the termination of his employment was unlawful and irregular. He stated that the date the Defendant formalized the employment contract for the period of between 1990 and 1993 was the same date the Defendant terminated the Plaintiff's employment. The Plaintiff read malice in the Defendant's action and sates that he is entitled to general damages for unlawful dismissal.

At the conclusion of his testimony the Plaintiff urged me to allow his claim as particularized in the amended plaint dated 20th November 2000 and filed on 4th December, 2000.

The Plaintiff's detailed evidence was not contradicted. I accept the same. On the basis thereof I find that the Plaintiff was on termination of his employment with the Defendant entitled to the terminal dues of Kshs 202,970.00. This sum was in excess of the Plaintiff's indebtedness to the Defendant which indebtedness amounted to Kshs 197,388.00. The excess due to the Plaintiff is Kshs 5,582.05. I enter judgment for the Plaintiff against the Defendant in the said sum of Kshs 5,582.05 with interest thereon at Court rates.

Having found that the Plaintiff's dues were more than sufficient to settle his indebtedness with the Defendant I find and hold that the intended sale of L.R. No. Kirua/Naari – Maite/500 is unlawful. Accordingly I grant an injunction restraining the Defendant, its agents and/or servants from selling and/or in any manner interfering with the said property. I also grant an injunction restraining the Defendant, its agents, and/or servants from repossessing, selling and/or in any manner interfering with Motor Vehicle Registration No. KYE 393.

With regard to general damages for unlawful dismissal, I find that the Plaintiff having incorporated an element of salary in lieu of notice in his terminal dues, he is not entitled to general damages at large. I dismiss the Plaintiff's claim of general damages for unlawful dismissal.

The Defendant is condemned in the costs of this suit. Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JANUARY 2006.**

**F. AZANGALALA**

**JUDGE**