



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Suit 40 of 2003

CHARLES AGINA PLAINTIFF

- Versus -

SHIPMARCH LTD.

**J.H. NIELSEN
DEFENDANTS**

Coram: Before Hon. Justice Mwera

Magolo for the Plaintiff/Applicant

Kinyua for the Defendant/Respondent

Court Clerk – Kazungu

J U D G M E N T

The plaintiff's claim against the two defendants herein a limited company (1st defendant) with its director (The 2nd defendant) springs from the services the plaintiff rendered to the defendants. The plaintiff pleaded that w.e.f. 14.5.1995 to 31.10.2002 the 1st defendant employed him as a marine engineer. From that then the 2nd defendant terminated that employment unlawfully and failed to pay the plaintiff his terminal dues. That the terms of employment agreed the plaintiff and the defendant(s) were only partly fulfilled. Then the plaintiff set out the benefits that were not paid at that time of his dismissal as:

- (a) Leave due - 46 days - Sh. 216,514/=
- (b) Leave due difference
Contract/actual 46 days - Sh. 103,388/=
- (c) Leave Travelling allowance - Sh. 10,000/=
- (d) Severance Pay for 75 years - Sh. 1,937,352/=
- (e) Severance of pay difference

contract/actual	-	Sh. 1,011,375/=
(f) Gratuity Pay for 75 years	-	Sh. 1,937,352/=
(g) Gratuity Pay difference		
Actual/contract	-	Sh. 1,011,375/=
(h) Severance pay 75 years		
(Overseas allotment)	-	US\$ 7,500
(i) Gratuity pay (Overseas allotment)		US\$ 7,500
(j) Salary Arrears		
(contract vs actual)	-	Sh. 1,252,800/=

There were other sums claimed but at the end of the day the plaintiff stated that the balance of terminal dues were Ksh. 6,772,356/= and US\$ 9,500. So the plaintiff prayed for these sums plus costs and interest. It should also be stated here that the exchange rate of the US dollar was put at Ksh. 80/=.

The defence filed herein was that the 2nd defendant was a director of the 1st defendant a registered limited liability company, which he did not own. Admitting that the plaintiff was employed in the capacity and during the period claimed, the defence denied that his dismissal was unlawful. Failure to pay terminal dues was also denied but that on 1.11.2002 a memorandum of the quantified dues was signed by the plaintiff and the 2nd defendant as director of the 1st defendant. The same memorandum was said to have contained a term that the plaintiff would work for the 1st defendant in the months of November and December 2002. That the plaintiff did not honour this term and so pay due to him of US \$ 3,218 was not finally paid by the defendants. It may be said here that when that memorandum of 1.11.2002 was exhibited during the trial it was not traced expressly or otherwise written in it that the plaintiff was supposed to work for those 2 months.

The defence however averred that the terms on which the plaintiff worked for the 1st defendant were mutually agreed and it was denied that terms of that agreement were partially agreed. Again, lest it be overlooked during the rest of this judgment, there was no written contract of service executed by the parties to this litigation. But the plaintiff did exhibit a draft contract, he himself drew but it was never signed/executed. Further that the claim was couched in some confusing terminology eg regarding dues called “difference contract/actual.” But that in any case the plaintiff was not entitled to or could not prove his claim because of the said memorandum signed by both parties on 1.11.2002. And that the 1st defendant never declined to settle the plaintiff’s claim for any reason.

Some twenty (20) agreed issues were filed on 13.5.2005 and the same will form the basis of the judgment herein – condensed or otherwise.

By the time of trial each side had prepared a bundle of documents and the respective single witnesses referred and produce them (Exh.P1, Exh.D1). After the trial each side submitted both in writing and verbally and the court rose to consider its decision. Briefly put while the plaintiff (P.W.1) claimed that his full dues were not paid, the defendants (see 2nd defendant, DW1) maintained that payment was effected according to the memorandum of agreement on this aspect agreed and signed on 1.11.2002. However the other relevant parts of the respective testimonies are incorporated on the answers to each or combined issues which the parties put forth for determination.

ISSUES 1, 2, 3: whether the 1st defendant was a limited liability company and whether the 2nd defendant was its director or proprietor: from the evidence placed before this court (Exh.D1 – 27, 42, 43)

the 1st defendant was incorporated on 5/7/1979 with the 2nd defendant holding one share and the each shareholder one Keith James Trainer both of Mombasa holding another share. Each share was of Sh. 20/= the two shareholders were also directors of the 1st defendant and thus it cannot be said in the well – known company law regime that the 2nd defendant owned the 1st defendant. The very regime of company law enunciates that a limited company is a separate entity from its shareholder and directors and it has the capacity to sue and be sued. According this court repeats what it said on 26.5.2004 while determining an application for summary judgment brought by the plaintiff, and Mr. Kinyua for the defendant’s resisted vigorously as to the suitability whereby the plaintiff had sued his employer, the 1st defendant as well as its director (the 2nd defendant):

“Mr. Magolo did not wish to respond to this line of argument whereupon the court concluded this his client’s claim against his employer and its director jointly and severally was misconceived. And it is indeed in the principles of company law being trite on such matters.”

That was during the hearing for an order of interlocutory judgment and in this final part, the court still maintains that as the proper position in law. The 2nd defendant a shareholder/director of the 1st defendant a limited liability was not properly sued along with the company.

ISSUES 4, 8, 9, 10: whether the plaintiff’s employment was unlawfully terminated, under what terms of employment and if he was entitled to gratuity: From the evidence of the plaintiff (P.W.1) and the defendants (DW1) the employment between them was by mutual understanding/or agreement. It was at best oral because there was nothing in writing. Accordingly alluding to this or that term not being fulfilled when evidence was being taken only leave the word of one witness against the other. That is what happened here – the plaintiff put forth such a claim but the defendants denied breach of any terms.

Further this court was given a draft contract titled “EMPLOYMENT AGREEMENT” (Exh.P1 – 3) it was never signed by the employer (Shipmarc, the 1st defendant) or the plaintiff. The court heard that the plaintiff prepared it, on the suggestion of the 2nd defendant on behalf of the 1st defendant. That the draft was prepared and delivered to the 2nd defendant who did not execute and return it. Yet the plaintiff appeared to have fashioned his claim here after what that draft contained. But that it was never signed so as to bind the litigants in that draft had no evidential value here. This is another indication that the parties did not have a written contract of employment and so what this court will deal with is what it was orally told to see if it carried the day or not. That includes the termination letter of 1.10.2002 (Exh.P1 – 2). The court heard that when the 1st defendant began to experience cash flow problems, the plaintiff and the 2nd defendant for the Company discussed it. The letter of termination issued. It was received and the plaintiff acted on it. The court cannot say that that termination was lawful or unjustified. There is nothing to hold the termination against e.g. a term of employment. However the court can, in the general law relating to employment, hold the view that the termination was fair: it gave one month notice. The plaintiff was told that “... as discussed ...” both sides would discuss “a fair solution” and “a reasonable settlement” that the plaintiff would look out his dues as far as the accounts were concerned ...” This led to the memorandum of 1.11.2002 which now features in the next set of issues. Otherwise the termination, looking at the whole thing was not unlawful. In my case the “unlawfulness” was not pleaded in the plaint and no prayer e.g. of general damages was raised.

ISSUES 5, 6, 7, 11, 13: whether plaintiff’s dues as per the memorandum of 1.11.2002 were payable, if the plaintiff was to work in November, December 2002 and failure to so work meant not paying ones for these months; and if that memorandum covered all claims relating to severance pay, payment in lieu of notice, salaries, leave & traveling allowances: The said Memorandum was written by hand on a sheet of paper headed CHARLES OGINA (the plaintiff). It bore his details as the date of birth, age, and the time he worked for the 1st defendant (see Exh.D1 – 9). It had typed in figures sums of money in Kenya Shillings covering leave due, Leave Travelling Allowance, Severance Pay for 7 years. It added “less outstanding in the current account” Sh. 396,196/15. Total dues were Ksh. 789,993/85. The court took this to constitute the computing of dues which the 1st defendant asked the plaintiff in the letter of termination (above). It does not contain gratuity and that the plaintiff can be said not to have been

entitled to this benefit. The court heard both witnesses testify that they sat down and discussed the payable dues as proposed by the plaintiff and on 1.11.2002 added on the proposal by hand the following in US dollars. This is an important part that should be reproduced.

“ _____ US \$ 10,064

O/S J – D 02 US \$ 3,000

Severance 7.5 @ 500 US \$ 3,750

TOTAL US \$ 16,814

November salary 126,300 1,609

December salary 126,300 1,609

US \$ 20,032

Payments as follows

US \$ 4,200 in four instalments – 15.11.2002,

30.11.2002, 15.12.2002 and 31.12.2002 in addition to salaries

(US \$ 1609 in November and December)

This is full and final settlement of terminal dues.

Signed (by 1st Defendant) Signed (by plaintiff)

01.11.2002

01.11.2002

This became a contract after it was signed by both sides and had to be effected as agreed to fully and finally settle whatever the plaintiff or as sued by the 1st defendant. It is said by the parties that the plaintiff would get November and December 2002 salaries. It can be assumed as is generally known that a salary is paid for work done. Otherwise one cannot get salary if he did not work. The evidence from the 2nd defendant was that it was implied (not written) that the plaintiff would be called upon in November and December 2002 to do any work that the 1st defendant would have over that period. That the plaintiff agreed to that proposal but he did not show up to work in those two months. For this bit the plaintiff said in examination-in-chief of that memorandum of 1.11.2002.

“The schedule bears November and December Salary. In course of our discussion pay in lieu of notice cropped up. So November and December salary represented notice to terminate.”

And as regards that November and December 2002 salaries the 2nd defendant said in his evidence-in-chief.

“The 1st defendant declined to pay November and December salaries because the plaintiff wanted 3 months notice. I agreed but adding that if in November and December, I would need Mr. Ogina, he could come and help out. I called the plaintiff but he declined to come until I paid him that were outstanding then.”

Then further to the above the 1st defendant (DW1) answered in cross-examination.

“So the November and December 2002 salary was not paid US\$ 3218 in all.”

From the above this court concludes that the salaries for November and December 2002 were in corporate on the memorandum/schedule of 1.11.2002 to represent notice to terminate. If in their friendly manner the 2nd defendant got the plaintiff to accept to do some work during that period, it was not a condition to pay the 2 months salary. It should be paid (US \$ 3218) – if it has not been paid. Indeed Mr. Magolo told the court that any dues to his client following the summary judgment were fully paid as per the evidence of 2001 on vouchers duly signed by the plaintiff and other evidence of acknowledgement. It is no matter that part of the payment was against the 2nd's defendants' account with his wife. He said that that was as per arrangement with the 1st defendant.

ISSUE 12: Demand notice: From Exh.P1 (with 30 pages) this court was unable to locate any such notice sent to the defendants. Thus no demand to pay was made. The 2nd defendant maintained so and the plaintiff did not prove service of such notice.

ISSUE 14, 15, If plaintiff was entitled either to Ksh. 6,722,356/= or US \$ 9,500: This court does not think so because no evidence was led to support either.

ISSUES 16, 17, 18 to 20: Who should pay costs to the 2nd defendant, if the plaintiff is entitled to costs and the fate of this suit: The 2nd defendant as a director of the 1st defendant a limited company ought now have been sued along with it. The 1st defendant has the capacity to sue and be sued on its own for whatever claim and not along with its directors. So the plaintiff will pay the costs to the 2nd defendant here.

The court has found that all the sums agreed on 1.11.2002 were paid except US \$ 3218 representing salaries for November and December 2004. This sum ought to be paid and the plaintiff gets judgment for that. To some extent this court was left with the impression that from the way the litigants dealt with each other here and notwithstanding the cash flow problem that the 1st defendant experienced, it was at all times intended to pay the whole sum of US 20, 032 without being pushed to court. It paid it all same the salaries bit that has now been ordered due to the plaintiff. But the plaintiff was not entitled to the colossal sums he put in his plaint. They had no basis. He did not serve a demand notice either.

In sum this suit is dismissed with limited to US \$ 3218 computed at the current shilling rates from the Central Bank of Kenya. He will also get 5% costs plus interest on the lower court scales. But he will pay full costs to the 2nd defendant whom the plaintiff ought not have sued here in the first place.

Order:

- 1) Judgment for the plaintiff limited to the 2 total salaries of November and December 2002 (\$ 3218) with costs up to 5%.
- 2) Interest payable on the judgment sum to be on lower court scales.
- 3) The plaintiff to pay costs in this suit to the 2nd defendant.

Judgment accordingly.

Dated this 16th day of September 2005.

J.W. MWERA

JUDGE