



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL SUIT NO. 342 OF 1997

AZAD GULAMHUSSEIN ESMAILPLAINTIFF

VERSUS

SPICERS (EASTERN AFRICA) LIMITEDDEFENDANT

JUDGMENT

The Plaintiff filed this suit against the Defendant seeking Judgment as follows:

- “(a) The said sum of Shs. 3,500,000/= being the principal sum claimed herein as stated in paragraph five and six of the Plaintiff*
- (b) (Interest)*
- (c) (Costs)*
- (d) (Other Relief)”*

At paragraph five of his Plaintiff, the Plaintiff pleaded as follows:

“The Defendant unlawfully and illegally and contrary to the Agreement and or company rules and practice has refused and/or neglected to pay the said service pay and/or terminal benefits and (sic)/or severance pay for the period the Plaintiff worked or at all and in the premises the Plaintiff (sic) claim is for the sum of Shs. 2,300,000/= for 23 years of service as agreed at the rate of Shs. 100,000/= per month (23 years x 100,000/= p.m . = Shs. 2,300,000/=)”

At paragraph six of the same Plaintiff, it was pleaded as follows:

“Further and in addition to the claim outlined in paragraph five above, in or around the year 1985, the Defendant further engaged the Plaintiff to work as a Company Secretary for ... (four named companies said to be sister companies of the Defendant). The Plaintiff states that this work for the sister Companies was agreed to be additional assignment. The Plaintiff agreed with the Defendant to expressly and/or impliedly pay the Plaintiff reasonable remuneration for work done and services rendered and the Plaintiff duly worked and rendered services to the said four Companies at the behest of the Plaintiff during the year 1985 up to the time of filing suit but the Defendant has refused and/or neglected to pay the Plaintiff any remuneration as agreed or payment which is reasonable and/or payment on the

basis of quantum meruit and the Plaintiff's claim therefore is for the period of six years preceeding the filing of suit ... at the rate of Shs. 50,000/= per Company per year thereby totaling Shs. 1,200,000/= ...”

Essentially, therefore, the Plaintiff's claims are (1) for severance pay (Kshs. 2.3 million); and (2) for remuneration for work done for the Defendant's sister Companies (Kshs. 1.2 million).

The Plaintiff gave evidence that payment of severance pay was part of his contract with the Defendant. This, he said, was governed by the practice, rules and regulations of the Defendant. The Defendant's only witness, on the other hand, admitted that severance pay was indeed paid when an employee's services were terminated by the Defendant Company or he became redundant. According to him, severance pay was not payable when an employee left work on his own volition. This position was also accepted by the Defendant's Counsel in the Written Submissions filed in this Court. However, the Defendant's case is that the Plaintiff left work on his own volition for “greener pastures”.

The issue before the Court is whether the Plaintiff's contract was terminated by the Defendant, and if so, at what point in time it was so terminated.

According to the Defendant, the Plaintiff terminated his services on his own volition in 1991 to emigrate to Canada. The Plaintiff maintained that he was an employee of the Defendant until 1995 when his services were terminated. I have carefully considered the material placed before the Court and I am of the view that the decision of this case depends substantially on the construction of the Memo dated August 28, 1991 from the Managing Director of the Defendant to the Plaintiff (See PEX 9). That Memo stated as follows:

“Dear Azad,

This Memo serves to confirm the various points discussed between us over the past few weeks

- 1.) It is acknowledged that you wish to depart to Canada for approximately one year period, be ginning in early September and in consideration of this and the fact that your duties within the Company have become somewhat specialised we agree the following:*
- 2.) You shall depart for Canada during September 1991 having first made sure that all outstanding jobs currently being handled by you are brought to a satisfactory conclusion*
- 3.) The Company will pay your air fare to Canada in consideration of your 1991 leave*
- 4.) Before departure you shall leave with us your address/phone and fax contact numbers in Canada*
- 5.) The Company will pay for you to return to Kenya for an approximate two months period during March/April 1992 to carry out your duties ...*
- 6.) Contact will be maintained throughout the year on Monthly Accounting and any other Items that may occur*
- 7.) In consideration of the above mentioned duties, it is agreed that you shall be paid £1,000 Sterling per month, at half year interval starting September 1991 and in addition to further payment of £ 200 per month, quarterly in arrears starting November 1991, instead of pensi on payments made locally as previously discussed. This arrangement will be reviewed after one year and it supercedes all other previous financial arrangements between yourself and the Company.”*

This document speaks for itself. As the Plaintiff said in his testimony, his work had become specialised and that he was not required to be physically present at the Defendant's premises at all times. He was required to be physically present at least two months per year. A careful perusal of that document does not show, as the Defendant wanted this Court to believe, that it is the Plaintiff who opted to leave the employment. The general evidence on record shows clearly that the Plaintiff was an exemplary employee, that his services were indeed needed throughout the year, but that he was physically required at the Company's premises only two months in a year. In my view, the conduct of the parties would indicate that the Plaintiff's services were terminated by the Defendant. Now, the next issue is – when was this done?

The Plaintiff said that this was done by the Defendant's letter of March 30, 1995 (see PEX 2) which was in the following words:

“I am sorry that I have not been able to call you earlier regarding the possibility of your visit to Nairobi this year. [T]he fact of the matter is that we have now completed the audit etc. and it would appear we do not require your services for the time being.”

Upon receipt of that letter, the Plaintiff wrote to the Defendant on June 26, 1995 in the following words:

“I refer to your fax ... of March 30, 1995 and note that my services are not required. [H]aving worked for more than 20 years with the Company, I am entitled to a severance package like any other staff whose services have been terminated at Spicers.”

Having found that the Plaintiff did not terminate his services with the Defendant in 1991 as alleged by the Defendant, the effect of the Defendant's letter of March 30, 1995 as read with that of the Plaintiff's dated June 26, 1995 is that the relationship between the parties had been terminated on March 30, 1995.

The termination was initiated by the Defendant for the reason that the Plaintiff's services were no longer required by the Defendant. This fits in with the conditions admitted by the Defendant's own witness for payment of severance pay, and I accordingly find that the Plaintiff was entitled to be so paid. The payment must be computed on the basis of the Plaintiff's last monthly pay immediately prior to his termination. That, according to evidence presented by the Plaintiff, was Kshs. 100,000/= per month. This evidence was not controverted by the Defendant. I, therefore, accept and find that the plaintiff's last monthly pay, immediately prior to his termination, was Kshs. 100,000/= per month and I apply that figure in computing the severance pay payable to him. It is also not in dispute that the Plaintiff was first engaged in 1972, bringing the period of his employment to 23 years before his termination in 1995. There was no testimony to controvert the multiplicand of one month's salary for every year worked and I apply the same accordingly. In the result, the Plaintiff is entitled to severance pay of Kshs. 2,300,000.

As to the claim for remuneration for work done to the Defendant's sister Companies as claimed, the same must fail for two reasons. Firstly, the said Companies are independent legal entities and if the Plaintiff sought to claim anything from them, nothing would have been easier than to sue them on their own account. Secondly, the Plaintiff himself admitted that he worked for the said sister Companies in the course of his employment with the Defendant. He thus lost nothing as the Defendant paid him for the time he expended while working for the said sister Companies. I find that there was no agreement to pay the Plaintiff for work done for the Defendant's sister Companies.

I, therefore, enter Judgment for the Plaintiff for Kshs. 2,300,000/= and award him the costs of the suit, and interest as prayed.

Dated and Delivered at Nakuru this 3rd day of July, 2003.

ALNASHIR VISRAM

JUDGE

