



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 1557 OF 1997

MOHAMMED GHIAS QUERESHI & ANOTHER.....PLAINTIFF

-VERSUS-

PARAMOUNT BANK LIMITED.....DEFENDANT

JUDGEMENT

Background

The 1st Plaintiff was employed by Combined Finance Limited as its Executive Director/General Manager under an Agreement of Employment with effect from 1st August, 1993. The employer, Combined Finance Limited was eventually converted into Paramount Bank Limited, the present

Defendant.

The 1st Plaintiff's employment continued with the present Defendant under the same terms as contained in the Agreement of 1st August, 1993. The precise terms are to be found in the Agreement. The 1st Plaintiff's employment was according to him terminated on 31.3.1997 to enable the Chairman's son take over his position and it is this termination the 1st Plaintiff is challenging. The 2nd Plaintiff is a Company which is owned by the 1st Plaintiff and his wife. The 2nd Plaintiff had been advanced some financial facilities by the Defendant of Kshs.2,300,000/- in form of a loan. This money was to be repaid by the Plaintiffs from the 1st Plaintiff's salary but the Defendant demanded the repayment of the whole amount when the 1st Plaintiff left the Defendant's employment. The Plaintiffs are therefore asking that the Defendant be restrained from demanding the money until this suit be heard and determined.

Evidence

The 1st Plaintiff gave evidence on how he was employed by Combined Finance Company Limited. He produced the Employment Agreement which contained the terms of his employment. He said that officially, he was getting Shs.40,000/- p.m. less taxes but unofficially he was being paid Shs.200,000/- cash. The new company the defendant continued the same practice. His employment was terminated on 31.3.1997 verbally when he was told by the Chairman of the defendant not to report to work on 1.4.1997. He did not resign and he had no other job to go to. He wrote to the defendant on 8.5.1997 about his salary but no reply on the issue of the salary. Eventually he was prevailed upon to resign as a Director which he did since he was no longer the Chief Executive of the Defendant.

He said he was kicked out of the Company house he was staying in and the keys for the car he was driving was taken without notice.

The Defendant gave evidence through Mr. Merally as PW1. He denied that they made any underpayment to the 1st Plaintiff and further said that he was not told of such payment by the previous owners of the Bank, Mr. Battessa. He said that the 1st Plaintiff resigned on his own accord and was not evicted from the

premises he was living in.

The 1st Plaintiff returned the keys for the car on his own.

The parties had framed the issues arising from the pleadings and I will base my judgement on these issues applying this evidence given during the hearing.

The first issue is whether the contract of employment was subject to termination under the Agreement.

The contract of employment provides that the Agreement may be terminated.

- (1) By the death of the employee
- (2) By sickness or incapacity that prevents the employee from performing his functions.
- (3) For any gross default, misconduct or breach or non-observance of any of the conditions herein contained by the employee.

The parties clearly meant these to be the only grounds for which the employment could be terminated.

On the face of it this would appear to be a permanent employment. It is however to be accepted that this would not disentitle the employer from terminating the employee's contract on reasonable notice. This would mean that notwithstanding the provision of this contract the employer could still terminate the contract on reasonable notice.

The second issue is whether the 1st plaintiff resigned on his own or whether his employment was terminated by the employer. This is what this case is all about. According to the Defendant the Plaintiff resigned. It is not in doubt that the 1st Plaintiff was the General Manager of the Defendant as well as the Executive Director. The Contract of Employment dated 1.8.1993 does not state so but the covering letter of the same date and signed by the Chairman. Mr. Bhattessa in the 1st paragraph refers to the employment in the capacity of "General Manager".

In his evidence the 1st Plaintiff said that DWI asked him to leave the Bank on 31.3.1997 on the account he was too costly for the bank. He said that when he went back the following day he found that his office had been taken by the Chairman. He had attempted to give a suggestion of how the matter could be handled through his memo of 1.4.1997. The suggestions in this memo are an attempt to find a way of reducing the bank expenses without getting rid of the plaintiff. I would not see why the plaintiff would go into the trouble of making these suggestions if the issue of his removal had not been raised by DW1 with the plaintiff on 31.3.1997 as PW1 said.

The 1st Plaintiff was a banker of 35 years experience and the explanation by the defendant that he resigned as per the letter of 4.4.1997 is against any reasoning and cannot be correct in the face of the explanation given by the 1st Plaintiff. This letter was written on 4.4.1997. The DW1 said that this letter was handed to him on 1.4.1997. This again cannot be correct and this assertion agrees with the Plaintiffs evidence that the Chairman told him not to report to work on 1.4.1997. The explanation by the Plaintiff as to why he wrote the letter of resignation makes sense. First of all the resignation is from being Executive Director. It is not referring to the post of the General Manager. Having been forced out as the General Manager on 31.3.1997 he had to resign as a director a position he held by virtue of the Banking Act and the Company's Act.

It is also inconceivable that the 1st Plaintiff would resign, as the defendant would have the court believe without any other employment. Why would the Plaintiff write to the Defendant the letter dated 20.5.1997 "that God willing he would within June/July get a reasonable employment. On 4.4.1997 he had written a letter to the Chairman complaining that

"Your decision to do away with my services was sudden and unexpected...."

Then on 24.4.1997 he writes to the Chairman about the car “I am sending herewith car No. KYB 156.....This car is too heavy on petrol and I could not afford to ply it being rendered unemployed”

Surely these are not the words of a person who has resigned voluntarily. From the 1st Plaintiffs evidence and the subsequent happenings, I find that the 1st Plaintiff did not resign as alleged but that he was dismissed on 31.3.1997. By the time he wrote the letter of 4.4.1997 in which he resigned as Executive Director he had already been fired and he was not working as a General Manager between 31st March, 1997 and 4th April, 1997 It was contended on behalf of the Defendant that the 1st Plaintiff is estopped by deed and conduct from alleging that his contract of employment was unlawfully terminated.

The Defendant relies on the letter written by the 1st Plaintiff dated the 4th April, 1997 in which the 1st Plaintiff says in part:

“Due to circumstances beyond my control I hereby tender my resignation from the Executive Directorship of the bank with effect from 1st April, 1997”

I have found that the 1st Plaintiff had effectively ceased to be a General Manager of the Bank by 31.3.1997. This letter refers to resignation from the Executive Directorship, which was a necessary appointment when he was an employee of the Bank. This is an appointment he had to resign immediately he ceased to be an employee and that was the reason the letter stated that the resignation was from 1.4.1997. As a result therefore this letter does not in anyway contradict the plaintiffs assertion that he had been forced out of the bank on 31.3.1997. Besides, the wording of the letter is quite telling and it clearly shows that the plaintiff was not voluntarily resigning but because he had been fired as a General Manager.

The other issue taken up was the Plaintiffs salary. This would be of importance in determining what is payable to the 1st Plaintiff. The Defendant denied that he was not paying the 1st Plaintiff the Shs.200,000/- cash payment in addition to the Shs.40,000/-. I did not accept the Defendants evidence on this.

First it is to be noted that the first plaintiff was employed as General Manager and Executive director of the Bank. He was quite Senior in banking with a 35 years experience and as he said in his evidence, which was not contradicted, he played a major role in setting up the Bank. Is it possible that his salary would be a mere Kshs.40,000/- per month? Secondly, the 1st Plaintiff was accommodated in residence where the monthly rent was Kshs.110,000/-. It is against all reasoning that an officer with a salary of Kshs.40,000 per month would enjoy housing facility of Kshs.110,000/-.

On the strength of his salary the bank advanced the 1st Plaintiff a loan of Kshs.600,000/- at 30% interest p.a. and according to the defendant this loan was to repaid from the salary of Kshs.40,000/-

Thirdly when the 1st Plaintiff left the Bank he writes to the bank on 8.5.1997 as follows:

The cash of over Kshs.200,000/-, which is lying with you, may please be deposited as follows.

- (1) Kshs.100,000/- to my personal loan account.
- (2) A little over kshs.100,000 in the La Glacerie Account

This letter was followed by the Defendants letter in which he is told:

“Your balance with us will only be applied to your personal loan account – as this is completely unsecured. We will not apply anything to your business account.....”

DW1 attempted to explain that the amount referred to was money due to the Plaintiffs for La Glacerie for food supplied at the opening of the Parklands Branch of the bank. This could not be correct because if it were so there would have been such reference to it in the letter. The clear understanding from this correspondence is that the Kshs.200,000/- held by the defendant was the sum paid to the 1st Plaintiff in

addition to his official salary. Further more in the 1st Plaintiffs exhibit 1 at page 21 paragraph 64 it is stated that:

“Mr. Mohamed Ghias Qureshi a current Executive Director and General Manager, shall continue in the same capacity and under the same terms and conditions and understandings subject to the approval of the Board”.

The defendant explained the words “understanding” as not referring to cash claimed by the Plaintiff by terming them as vague and tenuous. The quoted words were meant to explain the terms he was going to be under in the new establishment. The words are not vague. They are easily understandable as referring to the cash claim by the 1st plaintiff when you take into account these other circumstances. I found that DW1 was not telling the court the truth on this issue and the truth was that the defendants were paying the 1st Plaintiff the cash sum of kshs.200,000/- which they are now seeking to avoid. As to who was paying him the cash and from which account is immaterial.

The other issue to be determined was whether the 1st Plaintiff was entitled to enjoy the provision of accommodation and what the parties are terming as ancillary facilities. In the contract of employment in paragraph 7 the other benefits the 1st Plaintiff is entitled are all listed. In the defence filed the Defendant acknowledges that the 1st Plaintiff is entitled to these facilities. It follows therefore that the 1st Plaintiff will be entitled to be compensated for these facilities in addition to what he would be entitled to for a reasonable notice. It is at this stage I should consider what the 1st Plaintiff can claim from the defendant. In the plaint the 1st Plaintiff is asking for Special damages and general damages for loss of career.

He is also asking for costs of the suit and interest at 14% per annum. Having found that the contract of employment was terminable on a reasonable notice, it will be necessary to establish what would be a reasonable notice. In deciding what notice is reasonable, I have to take into account the position held by the 1st plaintiff in the Bank. It is also relevant to consider the age of the 1st plaintiff as this would determine whether he is able to get another employment. The age of 1st Plaintiff was given as 55 years. Taking into account the state of the Banking Industry which seem to be at its lowest, judging by the number of banks which have gone under, the chances of the plaintiff getting another employment are minimal. Indeed the 1st plaintiff is still unemployed since he left this employment and there was no evidence that this was due to lack of trying to get employment. Under these circumstances I consider that a reasonable notice would be 36 months. What then is payable to the 1st plaintiff?

It will be the salary per month for the period of the reasonable notice plus the equivalent of the accommodation and ancillary benefits.

The 1st Plaintiff salary in accordance with the contract of employment was kshs.40,000/- per month plus the cash Kshs.200,000/-. The sum of Kshs.200,000 was being paid under what normally is termed as ‘payment under the table’. This payment was done in this manner possibly to avoid the payment of taxes. The 1st plaintiff admitted as much in the cross - examination when he accepted that he did not pay taxes on this amount. He did not give any explanation as to why this amount was not included in his salary in the contract of employment!

Although I found that he was being paid this amount in addition to the kshs.40,000/- such a contract where he was being paid Kshs.200,000/- in a manner to enable him avoid the payment of taxes would be against public policy. Such a contract is not enforceable when challenged. The 1st plaintiff can not therefore enforce this part of the payment.

He is entitled to enforce the payment of the salary as contained in the contract of employment as this is a distinct contract from the arrangement for the payment of cash of the kshs.200,000/-

In all the 1st Plaintiff will therefore be entitled to:

(1) Salary at kshs.40,000/- per month

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| 40,000 x 36 | =Kshs.1,440,000 |
| (3) Salary for 30 days leave for each year 40,000 x 1 ½ = | = Ksh. 60,000 |
| (3) 5 return air-tickets to Karachi | = Kshs.679,320 |
| (4) Medical Bills submitted | = Kshs. 15,935 |
| (5) Accommodation 3 months | = Kshs. 70,000 |
| | =Kshs. 2,265,255 |

There will be judgement for the 1st plaintiff for Kshs.2,265,255/-

The Plaintiff shall be entitled to the cost of the suit and interest.

Dated and delivered this 5th day of December, 2000.

KASANGA MULWA

JUDGE

Court:

I thank both Counsels for the assistance they gave to the Court in the presentation of the submissions and in the conduct of the case.

KASANGA MULWA

JUDGE