Mtana v Sopa Lodges (Cause E177 of 2022)
[2024] KEELRC 1125 (KLR) (2 May 2024) (Judgment)

Neutral citation: [2024] KEELRC 1125 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E177 OF 2022

BOM MANANI, J

MAY 2, 2024

BETWEEN

MTANA MWAHUNGA MTANA ..... CLAIMANT

AND

SOPA LODGES ..... RESPONDENT

JUDGMENT

1. The parties to this action signed a contract on 14th February 2020 by which the Respondent offered and the Claimant accepted employment at the Respondent's establishment which was to commence on 15th April 2020. However, before the contract's effective date, the world was hit by the novel COVID – 19 virus which resulted in an unprecedented health crisis that saw countries impose travel restrictions and businesses close down.

2. Following this development, the Respondent wrote to the Claimant on 21st March 2020 intimating that it had decided to postpone their anticipated engagement pending review of the health crisis. By a return email of even date, the Claimant acknowledged the Respondent's email and signified his concurrence with the latter's proposal.

3. As the record shows, the engagement between the parties was not revived thereafter. Whilst the Claimant contends that the failure to revive the engagement constituted a breach of their contract, the Respondent argues that their relation was shuttered by the COVID – 19 pandemic. As such, it was frustrated resulting in the total discharge of the parties.

4. It is the Respondent's case that by the time that the arrangement was scuttled by the unprecedented virus in March 2020, the anticipated employment relation had not matured. The parties had only taken steps towards establishing this relation which was to have crystallized on 15th April 2020. As such, the Claimant is not entitled to claim for reliefs under the *Employment Act*.

Issues for Determination

5. Arising from the pleadings and evidence on record, it is apparent that the following are the issues for determination in the cause:-

    a. Whether the parties had an employment relation as at 21st March 2020 when the Respondent wrote to postpone commencement of the contract.

    b. Whether the relationship between the parties was frustrated by supervening events or whether the Respondent unfairly terminated it.

    c. Whether the Claimant is entitled to the reliefs that he seeks through his Statement of Claim.

Analysis

6. On 14th February 2020, the parties executed a contract between them. The contract specified that the parties had entered into an employment relation but postponed its effective date to 15th April 2020. There was therefore an employment relationship between them but whose commencement date was postponed to 15th April 2020.

7. The legal implication of the foregoing is that by the instrument dated 14th February 2020, the parties committed themselves to an employment relation which was to be operationalized as from 15th April 2020. This arrangement was binding on them. They could only terminate it either through mutual agreement or if supervening events rendered performance of the anticipated relation impracticable

8. By an email dated 21st March 2020, the Respondent wrote to the Claimant informing him that owing to the unforeseen outbreak of the COVID -19 pandemic which had triggered a worldwide health crisis, it had become unfeasible to honour the commencement date for their relation. As such, it (the Respondent) had decided to postpone the engagement. The Respondent's email stated verbatim as follows:-

    ''Dear Mtana,

    As you are aware there is a massive crisis presently worldwide by the unforeseen outbreak of COVID – 19 which triggered massive restrictions in regards to travel. Some countries are under complete lock down as at now and unfortunately nobody can foresee as to how long and how more severe the situation and the subsequent measures that must be taken will be in the future.

    It is with great concern and regret that I have to inform you that a decision was taken to postpone your engagement in order to allow the disruption to come to a reasonable level and to allow to continue with normal daily life. As you understand decisions must be made to mitigate the overall situation.

    It is our greatest hope that the situation will turn more favourable in the near future and in due course. Once this happens we will communicate accordingly and re-engage our discussion on the way forward accordingly.

    Hoping to be able to communicate soon with more positive news. I remain with my best regards.

    Stay safe and stay healthy during these trying times.

    Best regards'' Emphasis added by underlining.

9. On the same day, the Claimant wrote back to the Respondent acknowledging its email and expressing his understanding of the challenge. His email stated as follows:-

    ''Dear Andreas,

Thank you for the information. I really understand what it is and is on the ground.

We just praying that the virus will be contained and that the situation will return to normal as soon as possible.

Have a great weekend.

Regards

Mtana"

10. By this email, the Respondent expressed its view that the employment relation between them which was scheduled to commence on 15th April 2020 was not going to be practicable due to the outbreak of the COVID – 19 pandemic. The Respondent informed the Claimant of its decision to hold the matter in abeyance pending further communication at a future date depending on how the crisis evolved.

11. The Claimant's response acknowledged the crisis. By this response, the Claimant implicitly acceded to the Respondent's proposal as he did not raise any objections to it.

12. In effect, although the parties had initially agreed to commence the employment relation as from 15th April 2020, this was rendered impracticable by the emergence of the COVID – 19 pandemic. Through their email exchanges on 21st March 2020, the parties were in tacit agreement that the pandemic had rendered commencement of the relation on 15th April 2020 unfeasible. As a consequence, they agreed to postpone the matter and revisit it on a future date depending on how the virus behaved.

13. Although the parties signed a contract of service on 14th February 2020, they agreed to push the commencement date for the contract to 15th April 2020. As such, there was an employment relation created between them on 14th February 2020 but the obligations attendant to it were postponed to 15th April 2020.

14. The above position is anchored on the basic principles that undergird formation of contracts. First, there must be an offer. Second, there must be consideration. Finally, there must be unconditional acceptance of the offer.

15. In my view, the above ingredients for a valid contract are all present in the agreement which the parties entered into on 14th February 2020. By an instrument of even date, the Respondent offered the Claimant employment in the position of Human Resource Manager. In turn, the Claimant signified his unconditional acceptance of the offer by appending his signature on the instrument.

16. The consideration for the arrangement on the part of the Respondent was the service that the Claimant was to render. And for the Claimant, the consideration for the arrangement were the emoluments that were to accrue to him under the contract. As such, upon the parties executing the agreement dated 14th February 2020, they entered into a binding employment contract whose effective date was agreed as 15th April 2020.

17. A similar scenario presented in Keith Wright v Kentegra Biotechnology (Epz) Ltd [2021] eKLR. In that case, the prospective employer offered employment to the prospective employee on 6th June 2019. However, execution of the employment relation was to commence on 1st July 2020, more than one year down the line. The prospective employee accepted the offer on 31st May 2020.

18. Subsequently on 16th June 2020, the prospective employer purported to repudiate the contract. The prospective employer argued that at the time of the repudiation, there was no employment relation between the parties since the relation was to commence on 1st July 2020. As such, the prospective employee could not pray for the reliefs provided for under the *Employment Act*.

19. Rejecting the argument, the court held that the employment contract between the parties came into existence the moment the prospective employee accepted the offer to employ by the prospective employer. Thus, the employment relation between them was deemed to have commenced on 31st May 2020 even though the date for performance of obligations under the relation had been postponed to 1st July 2020.

20. In Tom Omondi Ngoko v Bank of Africa [2015] eKLR, the prospective employee was successfully interviewed for the position of Branch Manager on 4th October 2011. However, the parties did not agree on the date that he was to report for work.

21. According to the prospective employer, the contract between them was to commence after the prospective employee had completed serving his notice period with his present employer. On the other hand, the prospective employee believed that he was to have reported on duty immediately.

22. The prospective employee intimated his desire to commence work immediately. However, the prospective employer turned down the request arguing that it was yet to make arrangement for him to report. As such, the prospective employee was asked to await notification of the reporting date.

23. In the interceding period, the prospective employer conducted an investigation on the prospective employee and discovered that he had been less than candid during the interview. As such it terminated the contract.

24. In an action for damages, the prospective employer argued that at the time the decision to rescind the contract was taken, there was no employment relation between the two since the parties had not agreed on the date on which the contract was to commence. Rejecting the argument, the court expressed itself on the matter as follows:-

    ''In the South African case of Wyeth SA (Pty) Ltd Vs Manqele and Others (JA 50/03)[2005] ZALAC 1 (23 March 2005) the Labour Appeal Court of South Africa held that a contract of employment duly signed and executed creates an employment relationship capable of enforcement. The South African Court went further to hold that the definition of an employee includes a person who has signed a contract of employment with an employer and it matters not that the employee is not actually deployed.''

25. In Du Preez v South African Local Government Bargaining Council (SALGBC) and Others (C147/15) [2017] ZALCCT 11 (29 March 2017), the prospective employer sought to withdraw an offer for employment which had been accepted by the prospective employee before the commencement date of the employment relation. In an action to challenge the decision, the prospective employer objected to the court's jurisdiction on the grounds that at the time of withdrawal of the offer, the employment relation between the parties had not crystalized since the commencement date for the relation had not come to pass. As such and at the time, there was no employment relation between the parties.

26. The court rejected the prospective employer's argument finding, instead that at the time of the purported withdrawal of the offer, the employment relation had crystalized. The court expressed itself on the matter as follows:-

    > ''In the circumstances, I am inclined to agree with the applicant that it was his employment which was terminated, even though he had not started to render services. The Labour Appeal Court has held that common sense, justice and the values of *the Constitution* would be best served by extending the literal construction of the definition of an employee in

section 213 of the [Act] to include someone who had concluded a contract of employment which would commence at a future date.''

27. My understanding of the foregoing is that once parties to an employment contract execute it to signify offer and acceptance, the contract becomes valid and enforceable notwithstanding that the date for its implementation is postponed. As such and having regard to the foregoing, it is apparent that the parties to the instant action had a valid employment contract as from 14th February 2020 when they executed the instrument notwithstanding that they postponed the date for implementation of the agreement to 15th April 2020.

28. The Respondent has argued that what the parties entered into on 14th February 2020 was not a contract of employment. Rather, it was a contract to enter into a contract of employment as from 15th April 2020.

29. As such, the Respondent contends that when it called off the arrangement on 21st March 2020, there was no employment relation between them that was amenable to regulation by the *Employment Act*. It (the Respondent) refers to the arrangement as an inchoate employment relation.

30. Black's Law Dictionary defines the term ''inchoate'' to denote something that is partially completed or imperfectly performed. It describes an inchoate right as one which is not fully developed or matured.

31. An inchoate contract is a contract which is still under negotiation. Generally, the parties to such contract are yet to arrive at consensus ad idem on all aspects of their agreement. As such, the rights that flow from such contract are incapable of enforcement.

32. Commenting on the foregoing, Justice Otieno Odek (now deceased) stated as follows in the case of Teachers Service Commission (TSC) v Kenya Union of Teachers (KNUT) & 3 Others [2015] eKLR:-

> ''Between 9th September 2014 and 30th June 2015 when the trial court delivered its judgment and award, the teachers' claim was for increment in basic salary and other allowances. Between these two dates, the teachers did not have any vested and crystallized contractual right or entitlement to increment in basic salary and allowances; all that the teachers had was an inchoate claim for increment in basic salary and other allowances. In law, an inchoate claim is a right or entitlement that is in progress and is neither ripe nor vested nor crystallized – it is a future claim which is in preliminary stage and is yet to develop into a full right.

Inchoate rights are unenforceable since they have neither crystallized nor vested. It is only vested rights, acquired rights or rights under legitimate expectation that are enforceable. The trial court by backdating the 50% to 60% basic salary award was enforcing an inchoate right for a period when the rights had neither crystallized nor vested. If the award by the trial court is to stand, the same can only be prospective from the date of judgment because it is from this date that the inchoate claim by the teachers crystallized, vested and became enforceable.''

33. I have looked at the contract executed between the parties in the instant case in the context of the foregoing. It is clear to me that at the time that the parties signed the contract, they had agreed on all the terms including the commencement date for the contract. As a matter of fact, they had agreed to post-date the commencement date to 15th April 2020.

34. There is no evidence that was tendered to demonstrate that any term of the contract was still under negotiation. The fact that the commencement date for the contract had been postponed to 15th April 2020 does not mean that there were terms of the contract that were yet to be agreed. As such, the suggestion by the Respondent that the contract was inchoate is inaccurate.

35. By describing the contract as inchoate, the Respondent has conflated inchoate contracts with contracts which have both an execution and effective date. The two are distinct. Whilst the first comprises of contracts which are still under negotiation, the latter comprises of contracts which are complete but have a future commencement date which is different from the date on which they were executed.

36. A contract with both an execution and effective date is valid as from the execution date. However, the obligation to implement the terms of such contract is postponed to the effective date.

37. In essence, although such contract cannot be enforced between the execution and effective date, the parties signify their intention to be bound by it by appending their signatures on it on the execution date. In effect, once a contract with both an execution and effective date is signed on the execution date, the parties to such contract are entitled to legitimately expect that it will be implemented on the effective date.

38. As such, these latter contracts are valid and enforceable. Indeed, this position is confirmed in Teachers Service Commission (TSC) v Kenya Union of Teachers (KNUT) & 3 Others (supra) when Otieno Odek J (deceased) affirmed that rights that are founded on legitimate expectation are enforceable.

39. As such, when the parties in the instant case were exchanging email correspondences on 21st March 2020 to postpone commencement of their engagement, they already had an existing employment relation whose effective date had only been post-dated to 15th April 2020. They had an employment contract which contained both an execution and effective date.

40. Although the parties had signified their intention to enter into an employment relation as at the execution date (14th February 2020), they agreed to postpone the implementation date for the relation to 15th April 2020. This explains why even though the two had a subsisting employment relation, they nevertheless could not enforce terms under it until 15th April 2020. As such, the Claimant was under no obligation to report to work until 15th April 2020. Conversely, the Respondent was under no obligation to pay salary to the Claimant until after 15th April 2020.

41. The fact that an employment relation does not necessarily accrue from the date of the actual deployment of an employee is also recognized by the *Employment Act*. The Act recognizes both prospective and actual employees as amenable to the protections that are offered under it (see sections 5 (8) (a) and 9 (9) of the Act for instance). Under section 9 (9) of the Act, the term ''employee'' includes applicants for employment at the recruitment stage.

42. I understand the Respondent's case to be that the Claimant's engagement was still at the recruitment stage. As such, he could only have become an employee after reporting to work on 15th April 2020. If this is what the Respondent suggests, then the Claimant was covered by section 9(9) of the *Employment Act* as at 21st March 2020. By virtue of this provision, the Claimant became entitled to the protections that are granted by the Act when he signed the contract dated 14th February 2020.

43. The Respondent states that the arrangement between the parties which was to commence on 15th April 2020 was rendered impracticable due to the emergence of the COVID – 19 pandemic. As a result, it notified the Claimant of this impossibility through its email of 21st March 2020 and the Claimant wrote back concurring about the challenge and expressing acceptance of the decision to suspend commencement of the employment relation between them. In effect, it is the Respondent's case that the anticipated employment relation between the parties was frustrated by a supervening event which was beyond the control of the parties and which had not been foreseen by either of them.

44. Frustration of a contract occurs when an unforeseen event which is beyond the control of the parties to a contract occurs rendering performance of the contract in the manner that had been intended impossible. This development has the effect of discharging the parties from their obligations under the contract. In effect, the contract is deemed as discharged by no fault of either of the parties (Five Forty Aviation Limited v Erwan Lanoe [2019] eKLR).

45. In my view, the COVID – 19 pandemic which both parties acknowledge was a health crisis of immense magnitude rendered performance of the employment relation between them which was set to commence on 15th April 2020 impracticable. As such, this development relieved the parties of the obligation to commence execution of the contract as had been earlier agreed. It is in this context that the Respondent wrote to the Claimant on 21st March 2020 advising that the engagement between them had been postponed pending review of their position at a future date.

46. The Respondent's aforesaid email did not say that the engagement had been abandoned altogether. Rather, it stated that it (the engagement) had been postponed pending communication to the Claimant regarding the way forward.

47. The plain meaning of the foresaid email which the Claimant acceded to through his email of even date was that commencement of the employment relation between the parties which had been proposed for 15th April 2020 was suspended owing to the pandemic. The parties were to re-engage on the way forward on the matter if and when the pandemic slowed down.

48. There is evidence of subsequent email correspondence between the parties through which the Claimant asked to know the status of his employment. In response, the Respondent indicated that the relation expired on 15th April 2020 through effluxion of time when the Claimant failed to report on duty due to the effects of the pandemic. In my view, these latter emails affirm the fact that the parties subsequently tried to review the matter following which the Respondent took the position that the relation could not be revived owing to the damage which the virus had inflicted on its operations.

49. As such, the issue for determination in this case is how the parties ought to have disengaged from the contract after it was deemed as having been frustrated by the COVID – 19 pandemic. Can the Claimant legitimately argue that the relation ought to have been closed in the manner that is prescribed under the *Employment Act*?

50. In the case of Five Forty Aviation Limited v Erwan Lanoe (supra), the Court of Appeal stated that where performance of an employment contract is frustrated by supervening events, the parties to the contract may close it by either invoking the notice clause in the contract or the procedure for disengagement that is provided under sections 41, 43 and 45 of the *Employment Act*. As such, failure by the employer to follow either of these avenues would render his decision to release an employee unfair.

51. As seen earlier, once the parties to this action executed the contract of service on 14th February 2020, they entered into an enforceable employment contract notwithstanding that they postponed its effective date to 15th April 2020. As such this relation could only have been terminated in the manner contemplated by law for closure of employment contracts. Therefore and in terms of the decision in the Five Forty Aviation Limited v Erwan Lanoe case (supra), once the Respondent came to the realization that it was not feasible to get the Claimant on board following the ravaging effects of the pandemic, it ought to have invoked either the notice clause in the contract of 14th February 2020 or the procedure under sections 41, 43 and 45 of the *Employment Act* to terminate the relation.

52. The Respondent has argued that even if the parties had a valid employment relation, the law precludes the Claimant from claiming compensation for unfair termination of the contract. The Respondent

relies on section 45(3) of the *Employment Act* to advance this argument. This provision states as follows:-

> ''An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.''

53. This provision was intended to preclude employees who have not served for more than thirteen months from bringing actions for unfair termination of their contracts. However, the provision was declared unconstitutional and therefore invalid through the decision of Samuel G. Momanyi v. The Hon. Attorney General and Another [2012] eKLR. Consequently, it cannot be of assistance to the Respondent's case.

54. The foregoing notwithstanding, it is not lost to the court that although the parties had an employment relation, the Claimant did not report to work because of the prevailing health conditions which were beyond the control of the Respondent. As such, it will be unjust for the court to turn a blind eye to this reality and purport to punish the Respondent for events that were beyond its control (seeHelen Mary Aluoch Ilavonga v Spire Properties Kenya Ltd t/a Diani Reef Beach Resort & SPA [2022] eKLR).

55. Having regard to the foregoing, I reckon that all that the Respondent ought to have done in the circumstances was to have invoked the notice clause in the contract between them to bring the relation to a close (see the case of Five Forty Aviation Limited v Erwan Lanoe). Since it (the Respondent) did not do so, it ought to pay the Claimant damages that are equivalent to the notice period under the contract. However, the notice provision under clause VII of the contract was inapplicable at the time the contract was terminated since the parties parted ways during the probationary period of the contract.

56. Under clause V of the contract, either party to the arrangement was at liberty to terminate it during the probation period by either giving notice of this intention which was to run for a period of one (1) month or paying an amount that was equivalent to salary in lieu thereof. Thus, the Claimant is awarded compensation that is equivalent to his salary for one month, that is to say Ksh. 500,000.00.

Determination

57. For the foregoing reasons, I arrive at the following conclusions and determination:-

    a. That the parties had a valid employment contract once they executed the agreement dated 14th February 2020. However, implementation of obligations under the contract was postponed to 15th April 2020.

    b. The contract between the parties was frustrated by unforeseen events which were outside their control.

    c. That once the Respondent came to the realization that performance of the contract was not going to be feasible come the effective date, it ought to have either invoked the notice clause in the contract or sections 41, 43 and 45 of the *Employment Act* to bring the relation between them to a close.

    d. Since the Respondent did not close the relation in the manner aforesaid, it is ordered to pay the Claimant damages that are equivalent to the notice period under clause V of the contract, that is to say Ksh. 500,000.00.

    e. The aforesaid sum attracts interest at court rates from the date of this decision.

f. The Claimant is awarded costs of the case.

g. All other reliefs which were sought in the claim but which have not been expressly granted are deemed as having been declined.

DATED, SIGNED AND DELIVERED ON THE 2ND DAY OF MAY, 2024

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

.....for the Respondent

Order

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI