



## **Mureithi v National Construction Corporation**

High Court, at Nairobi May 20, 1985

Porter J

Civil Case No 2656 of 1982

### **May 20, 1985, Porter J delivered the following Judgment.**

In this matter the plaintiff sues National Corporation for damages arising out of an alleged breach of contract.

The plaintiff saw an advertisement in the Daily Nation of August 14, 1981 which invited applications from Kenya Citizens for the post of Contracts Officer within the Corporation. The application was to be addressed to the General Manager and salary scale was on the Corporation's salary scale NC 13 which runs from Kenya £ 3373 to £4188 per annum. The entry point was negotiable depending on previous experience and the contract was to be for 3 years renewable with a 25% gratuity at the end of each contract. Subsidised housing or house allowance, free medical treatment and 30 days annual leave were also advertised. The plaintiff wrote by his letter of the August 19, 1981 EXH II applying for the post and including his curriculum vitae. He also said that his gross earnings then were Kshs 8,500 per month with free medical treatment and a yearly bonus. He was invited by a letter signed by the then general manager dated November 2, 1981 to attend an interview on the November 19. The plaintiff gave evidence that this interview was by the Board of the National Construction Corporation and after the interview he was asked to go away and wait for the decision of the board.

The evidence of the plaintiff was that the General Manager in person telephoned him and asked him to go and have a chat.

The plaintiff went and met and met the general manager with his deputy. He was told that he has succeeded with the interview and that meeting was to discuss salary. The plaintiff said that he was getting Kshs 8,500 per month plus bonus and he would not take less. The general manager offered him an entry point of £3,900 per annum together with other benefits mentioned in the advertisement. That left the plaintiff, according to evidence with Kshs 500 per month less than he was earning at the time and he said he would not accept. The general manager then had a discussion with his deputy and he said that he would recommend to the board an increase after the probation period. The plaintiff agreed and on the November 27, 1981 in the most uncompromising terms he was offered the position of Contracts Officer on salary scale NC13 with an entry point of £3,900. It was stated that a review upwards might be considered after a probation period. He was asked to convey his acceptance of the offer which he did on the December 7, 1981 by his letter stating that he had already resigned from his existing job and would be available to commence work on the January 1, 1982. He produced a letter from his former employers dated the November 29, 1981 accepting his notice. Up to this stage all the correspondence bears out evidence given by the plaintiff. Pausing there for a moment there is no doubt in my mind that the plaintiff had a firm and concluded contract with the National Construction Corporation. All that remained to be done was for him to report to work on the January 1, 1982 and indeed he said that he did that but he was told to report to the general manager who then said that he would have to wait until the matter had been resolved.

The reason for that is that on the December 14, 1981, a gentleman signing himself B A Okuom and expressing himself to be writing on behalf of the general manager stated that the board's attention had been drawn to paragraph 2 of what the letter, admitted to be the Corporation's letter of offer of employment dated November 27, 1981. I have already referred to that letter. The paragraph in question is one where the entry point and review after probation period were indicated, and it will be remembered that the plaintiff had said that he would not have taken the job unless this offer had been made.

The letter of the December 14, stated that the Board was satisfied 'that the minimum entry salary point offered and the promised upward review of salary after probation constituted a major diversion from the directions the Board had issued to the former general manager of the Corporation. The letter stated that the terms of the offer were therefore erroneous, misleading and invalid. The letter continued to offer the same position on the same salary scale at an entry point of £ 3,372 per annum. It was pointed out that the question of review of salary was not the subject of construction and did not further form part of the contract of the employment. He was asked to confirm very urgently his acceptance of the offer contained in that letter of the December 14, 1981.

Pausing once again I find this letter to be very difficult to understand. There had been an offer and an acceptance. The plaintiff clearly indicated in his letter of the December 7, that an upward review of salary was only a possibility. If his salary were to go under review and it were considered that it should not be increased, then he would have no recourse. He had already resigned from his place of work and had said so in his letter of the December 7.

Unfortunately in this case although the notice of hearing was served, there was no attendance by the National Construction Corporation at court and further, apart from the letter of the December 14, 1981 there is nothing to assist me as to what instructions were in fact given to the general manager. One thing that does appear from that letter is that the general manager was indeed deputed by the Board after the original interview with the Board to deal with this matter. It is acknowledged in that letter that he was given instructions. The advertisement is signed by the general manager. The invitation to the interview was signed by the general manager. The plaintiff clearly indicated right at the outset in his application that his existing salary amounted to Kshs 8,500 per month. He nevertheless was invited for interview and the entry point was negotiable because it says so in the advertisement. The actual interview was conducted in all that knowledge and the Board nevertheless selected the plaintiff to fill the post. It seems to me that in the circumstances they could hardly have expected to secure the services of the plaintiff at minimum entry point. The plaintiff said that he was approached on the question of salary by the then general manager. There was every reason for him to believe that the entry point was negotiable. He was right to believe that the general manager was to deal with question of salary. The letter of the December 14, 1981 confirms that the general manager had instructions in that regard. There may have been communications between the Board and the general manager about the entry point but none appears to have passed these instructions on to the plaintiff until it was too late. Nor looked at in a practical manner as I have already pointed out was it is likely that the company was going to secure the services of the plaintiff at the minimum entry point and further negotiations as to salary had to proceed. Clearly on the correspondence the general manager was held out by the company to have authority in the matter and clearly the plaintiff did not know that there were limitations on negotiations such as were pointed out in the letter of the December 14, 1981. Indeed he had every reason to believe otherwise. In all those circumstances the plaintiff was right when he wrote in his letter of the December 19, 1981 in saying that the first offer he had which he had accepted was a binding contract upon which indeed he acted in giving his resignation in his former job. He pointed out in that letter that that contract had not yet been determined therefore he was unable to accept any other offers. In that he was entirely right. Then on the January 1, 1982 he was said he reported to work to take up his contract and in effect was denied the right to work until this matter had been sorted out. As far as I can see there was nothing to sort out. The National Construction Corporation had entered into contract but by its letter of the January 4, 1982 the corporation showed that it was not prepared to abide by that contract and was still presenting the reduced offer. This was a clear denial of the original contract and there was therefore a breach of the original contract in respect of which the plaintiff is entitled to damages.

He has set out in the plaint the amount of his loss of salary arising from the breach and shows it as a net loss of Kshs 89,486 per annum that is Kshs 7,457.16 per month and he has claimed as special damages the whole period of the contract being 3 years, a claim in excess of Kshs 250,000. The plaintiff is a Quantity Surveyor: it is his duty to mitigate his loss. In the years up to the date of claim and on to the date of trial he appears to have worked as a Quantity Surveyor on a freelance basis and taken his payment in cash which he says amounts to Kshs 1,000 per month. He did not go back to his former employers to see if they would take him on again despite the pleasant comments in the letter in reply to his letter of resignation. He later hoped that the Minister was going to intervene in his behalf so that he would get the

job. He says that he stayed doing very little for the year. In the time he has made, according to his evidence, two applications during 1983 and 1984 to other firms for jobs but without success. He was unable to remember the names of the firms or getting any reply.

The plaintiff has a duty to mitigate this loss. The evidence of his attempts to do so arose only at the end of his evidence when I was asking him questions. It is clear to me that his duty to mitigate has not occurred to him and he has done little if anything to get himself work. The fact that he has not got a job once the original contract had been breached which occurred on the January 4 1982.has arisen very much from his own inaction. He is not entitled to sit back for 3 years and do nothing in the hope that the defendants would pay him for that period.

Quantity Surveyors are in demand. Doing the best I can, in my view is that he should be given damages for 3 months together with general damages for breach of contract in sum of Kshs 10,000 a total of Kshs 32,371.40. Judgement is given for the plaintiff in that sum with interest and costs.