



IN THE COURT OF THE APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, J.J.A)

CIVIL APPEAL NO 21 OF 2017

BETWEEN

COASTAL BOTTLERS LIMITED.....APPELLANT

AND

KIMATHI MITHIKA..... RESPONDENT

(An appeal from the Judgment of the Employment and Labour Relations Court (Makau, J.) dated 29th July, 2016

in

Cause No. 24 of 2015)

JUDGMENT OF THE COURT

1. On 9th December, 2013 **Coastal Bottlers Limited** (the appellant), engaged **Kimathi Mithika** (the respondent), as a General Sales Manager on a 2 year contract. Upon completion of 6 months' probation the respondent was confirmed on 9th July, 2014. It seems at that point the appellant was satisfied with the respondent's performance as evidenced by the tone of the confirmation letter which read in part:-

“We take this opportunity to congratulate you for this well deserved confirmation and hope that you will continue to render your services to the organization with even greater devotion.”

2. However, a couple of months later, the respondent was served with a letter dated 4th November, 2014 under the hand of the appellant's Executive Director, Sachit Shah terminating his services. The relevant excerpt of the said letter is set out herein below:

“RE: OPERATIONAL AND STRATEGIC RESTRUCTURING OF THE BUSINESS

As you are aware, the company's performance over the last year (YTD) is on an unprecedented decline...

This position is well documented in the Coca Cola business performance report availed to the board and Management dated October, 21, 2014. The report had highlighted (inter alia), the following efficiency and performance gaps in your area of jurisdiction as the General Sales Manager.

...

Against the foregoing, I regret to inform you that your services with the company will be terminated with effect from 7th November, 2014.

Please note you will be paid three months' salary in lieu of notice in line with the terms of your employment contract with the company...”

Thereafter, by a certificate of payment, which the appellant refers to as a settlement agreement, the appellant assessed the respondent's

terminal dues after statutory deductions as Kshs.1,516,281. Apparently, the respondent acknowledged receipt of the amount therein.

3. Be that as it may, the respondent believed that the termination was unjustified since he had performed his duties diligently. Moreover, prior to the termination letter, the alleged shortcomings enumerated thereunder had never been brought to his attention. He was also not given an opportunity to defend himself prior to the decision in question being made by the appellant. As far as he was concerned, the underperformance alluded to was wholly attributable to the appellant who failed to facilitate his department in achieving the set targets. It is on that basis that he challenged his termination in the Employment and Labour Relations Court (ELRC) in line with **Section 35(4)** of the **Employment Act**. He sought the following orders:-

i. **A declaration that the claimant's (the respondent herein) termination was unlawful and unfair.**

ii. **Compensation for unfair termination calculated at Kshs.**

700,000 x 12months **Kshs. 8,400,000**

iii. **Underpayment on Notice** **Kshs. 150,000**

iv. **Deducted but unremitted pension (Oct-Nov '14)** **Kshs. 65,000**

v. **Lost sales Commissions due to unlawful**

Termination (5.8M cases x Kshs. 0.15) **Kshs. 870, 000**

vi. **Damages/ payment for remainder of contract due**

to unlawful termination (13 months) **Kshs. 9,100,000**

Total **Kshs.18, 585,000**

4. In its statement of defence, the appellant denied the averments made by the respondent. According to the appellant, the respondent's termination was neither unlawful nor unfair. In the first instance, the respondent had obtained confirmation through misrepresentation and/or falsification of sales. As per the appellant's Chief Executive Officer, Ibrahim El Khoury, even after his confirmation the respondent continued inflating sales with the aim of benefitting from the commission payable. In real sense, there had been a decline in sales between the years 2013 and 2014. This state of affairs had been brought to the respondent's attention who failed to improve, leaving the appellant with no choice but to terminate his services. It was common ground that the respondent's employment was conditional on satisfactory performance.

5. Besides, the respondent had acknowledged receiving the amount indicated on the settlement agreement as full and final payment of his dues. He had also indicated in the said agreement that he had no further claim against the appellant. It followed therefore that the respondent's suit could not be entertained by the ELRC. Furthermore, the respondent had only been in the appellant's employment for a period of 11 months hence was precluded from bringing a suit for unfair termination by virtue of **Section 45 (3)** of the **Employment Act**.

6. The trial court (**Makau, J.**) weighed the evidence before it and entered a judgment dated 29th July, 2016 in favour of the respondent. In doing so, the learned Judge found that the respondent's services were terminated on grounds of redundancy; the appellant had not followed the procedure for declaring an employee redundant as stipulated under **Section 40** of the **Employment Act** thus the termination was unfair and unlawful. Relying on the High Court's decision in **Samuel G. Momanyi vs. Ag & Another [2012] eKLR (Momanyi case)**, the learned Judge held that **Section 45(3)** of the **Employment Act** was unconstitutional and inapplicable in the case at hand.

7. He was also of the view that the settlement agreement did not extinguish the appellant's statutory obligations. In the end, the learned Judge was of the view that the salary which the respondent would have earned in respect of the unexpired contract period of 13 months less the amount already paid by the appellant was sufficient compensation for the unfair termination. In that regard, he granted the respondent Kshs.7,010,000 plus costs and interest.

8. It is that decision that is the subject of this appeal which is predicated on the grounds that the learned Judge erred in law and fact by:-

a) **Holding that the settlement agreement between the appellant and respondent did not absolve the appellant from further liabilities to the respondent arising from the contract of employment.**

b) **Concluding that Section 45(3) is non-existent and inapplicable.**

c) **Finding that the respondent was unfairly terminated.**

d) **Assessing damages in the manner he did.**

9. Mr. Obura, learned counsel for the appellant, begun by submitting that it was not in dispute that the respondent had acknowledged payment of Kshs.1,516,281 as being the full and final settlement. Equally, there was no evidence to suggest that he made the aforesaid declaration involuntarily or through a mistaken belief. To that extent, he faulted the learned Judge for not only ignoring the said declaration

but also **Section 49(4) (a)** of the **Employment Act** which called upon him to give effect to the employees' wishes in determining the appropriate relief.

10. It was clear from the settlement agreement that the respondent's right to pursue further claims against the appellant had been extinguished. Consequently, the respondent was estopped from filing suit in the ELRC. Buttressing that line of argument, counsel made reference to the ELRC decision in ***Kyengano vs. Kenya Commercial Bank Limited & Another* [2002] 1 KLR 126**. He added that the learned Judge misconstrued this Court's decision in ***Thomas De La Rue (K) Ltd v David Opondo Omutelema* [2013] eKLR**. All factors taken into consideration, the settlement agreement was binding upon the parties.

11. Mr. Obura took issue with the learned Judge's reliance on the ***Momanyi Case*** which found the provisions of **Section 45(3)** of the **Employment Act** unconstitutional. He argued that the decision was made *per incuriam* and before the establishment of the ELRC. Since then, the ELRC has held divergent views on the same. This Court in ***Nation Media Group Limited vs. Onesmus Kilonzo* [2017] eKLR** held that the ELRC was not bound by the aforementioned decision. What is more, this Court in ***Kenfreight (E.A) Limited vs. Benson K. Nguti* [2016] eKLR** had taken cognisance of that subsection and expressed itself on its application as follows:-

“According to Section 45(3) only an employee who has been in continuous employment for a period not less than thirteen months immediately before the date of termination has the right to complain that he has been unfairly terminated.”

Accordingly, the learned Judge failed to appreciate that the respondent could not maintain a claim based on unfair termination.

12. Mr. Obura contended that the issue in dispute was whether the respondent's termination was unfair hence the learned Judge erred by finding that termination was based on redundancy. Citing this Court decision in ***Nairobi City Council vs. Thabiti Enterprises Limited* [1995-98] EA 231**, counsel urged that in making such a finding the learned Judge went against the general principle that parties are bound by their pleadings. He attacked the quantum of damages on the ground that **Section 49** of the **Employment Act** stipulates a maximum compensation of 12 months yet the learned Judge issued 13 months' salary as compensation.

13. On his part, Mr. Njeru, learned counsel for the respondent, submitted that the learned Judge properly set out and resolved the issues in dispute. He reiterated the grounds for affirming the impugned decision which were on record. In his opinion, whenever an employee approaches the court on allegations of unfair or wrongful termination, it is the court's obligation to determine whether fair process and the law was followed by an employer.

14. An employer cannot escape his obligation by simply stating that the employee signed away his right to further claims. The rationale being that once an employee is terminated he/she loses bargaining power and the employer ends up dictating its terms. Also relying on the ***Thomas De La Rue Case***, counsel contended that the settlement agreement did not bar the respondent from filing the claim in question.

15. He supported the learned Judge's finding on the unconstitutionality of **Section 45(3)** of the **Employment Act**. Mr. Njeru further submitted that the appellant's Chief Executive Officer admitted that the respondent was not given notice of the allegations against him let alone an opportunity to be heard. Additionally, there was no valid reason for the respondent's termination. In conclusion, he stated that there was no reason to interfere with the quantum of damages and urged us to dismiss the appeal.

16. We have considered the record, submissions by counsel and the law. It is paramount to first consider the standing of the suit in the ELRC which may very well dispose of the entire appeal.

17. Firstly, the competency of the suit was attacked on the basis of the settlement agreement which the appellant believed took away the respondent's right to make further claims. While considering the said agreement, we bear in mind that employment contracts are governed by the general law of contracts. This much was restated by this Court in ***Krystalline Salt Limited vs. Kwekwe Mwakele & 67 others* [2017] :-**

“... it is important to bear in mind that in Kenya, employment is governed by the general law of contract as much as by the principles of common law now enacted and regulated by the Employment Act and other related statutes. In that sense employment is seen as an individual relationship negotiated between the employee and the employer according to their needs.”
[Emphasis added]

18. Whether or not a settlement agreement or a discharge voucher bars a party thereto from making further claims depends on the circumstances of each case. A court faced with such an issue, in our view, should address its mind firstly, on the import of such a discharge/agreement; and secondly, whether the same was voluntarily executed by the concerned parties.

19. As such, we respectfully disagree with the submissions made on behalf of the respondent to the effect that this Court in the ***Thomas De La Rue Case*** found such agreements could not bar further claims. Our understanding of that decision is that the Court simply stated that the answer lay with the facts of each case. In its own words, this Court in the aforementioned case expressed:

“We would agree with the trial court that a discharge voucher per se cannot absolve an employer from statutory obligation and that it cannot preclude the Industrial Court from enquiring into the fairness of a termination. That is however, as far as we are prepared to go. The court has, in each and every case, to make a determination, if the issue is raised, whether the discharge voucher was freely and willingly executed when the employee was seized of all the relevant information and knowledge.”
[Emphasis added]

20. Apart from tabulating the respondent's entitlement, the settlement agreement also read in part:

“I Kimathi Mithika of ID No... certify having received the sum of Kenya Shillings one million five Hundred Sixteen Thousand, Two Hundred and Eighty One (Kshs. 1,516,281) being my full and final payment due to me from Coastal Bottlers Limited as follows:

...

I confirm that, I have no further claim against the Company whatsoever.”

21. In our minds, it is clear that the parties had agreed that payment of the amount stated in the settlement agreement would absolve the appellant from any further claims under the contract of employment and even in relation to the respondent’s termination. It is instructive to note that the respondent never denied signing the said agreement or questioned the veracity of the agreement. Further, from the record, we do not discern any misrepresentation on the import of the said agreement or incapacity on the respondent’s part at the time he executed the same. It did not matter that the amount thereunder would be deemed as inadequate. As it stood, the agreement was a binding contract between the parties. In ***Trinity Prime Investment Limited vs. Lion of Kenya Insurance Company Limited [2015] eKLR*** this Court, while discussing the import of a discharge voucher which is more or less similar as the agreement in question observed:

“The execution of the discharge voucher, we agree with the learned judge, constituted a complete contract. Even if payment by it was less than the total loss sum, the appellant accepted it because he wanted payment quickly and execution of the voucher was free of misrepresentation, fraud or other. The appellant was thus fully discharged.”

22. All the ELRC was required to do was to give effect to the intention of the parties as discerned from the settlement agreement. Our position is fortified by the sentiments of Sir Charles Newbold P in ***Damondar Jihabhai & Co Ltd and another vs. Eustace Sisal Estates Ltd [1967] EA 153*** that:-

“The function of courts is to enforce and give effect to the intention of the parties as expressed in their agreement. In the English Court of Appeal case above - Globe Motors Inc & Others vs TRW Lucas Electric Steering Ltd & Others (supra) – Lord Justice Beatson stated as follows:-

'Absent statutory or common law restrictions, the general principle of the English law of contract is [that parties to a contract are free to determine for themselves what obligations they will accept]. The parties have the freedom to agree whatever terms they choose to undertake, and can do so in a document, by word of mouth, or by conduct.'

23. Giving effect to the parties’ intention meant that the ELRC could not entertain the suit filed by the respondent. This is because the respondent had waived his rights to make any further claim in relation to his relationship with the appellant.

24. Having expressed ourselves as herein above, we see no reason to delve into the other grounds of appeal. In the end, we find that the appeal has merit and is hereby allowed with costs. We set aside the judgment dated 29th July, 2016 in its entirety and substitute the same with an order dismissing the respondent’s suit with costs.

Dated and delivered at Mombasa this 7th day of June, 2018.

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

M. K. KOOME

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR