REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A)

CIVIL APPEAL NO. 223 OF 2015

BETWEEN

KENPIPE CO-OPERATIVE SAVINGS & CREDIT SOCIETY LIMITED....APPELLANT

AND

DANIEL GITHINJI WAIGANJO.....RESPONDENT

(*Being an appeal against the judgment of the Industrial Court of Kenya at Nairobi (Maureen Onyango, J.)dated 30th September, 2014*

in

I.C.C. No. 1088 of 2011 (originally HCC No. 92 of 2008).)

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JUDGMENT OF THE COURT

By virtue of a renewable fixed term employment contract entered into on 10thMarch, 1992 between the respondent and the appellant, the respondent was employed by the appellant as an Accounts Assistant. The term of the contract was 3 years, and aside from a basic salary of Kshs.37,320/-, the respondent was entitled to house allowance of Kshs.1,000/-, 30 days annual leave, leave allowance of Kshs.900/-, medical allowance of Kshs.6,000/- and gratuity at the rate of 25% of basic salary upon successful completion of the contract. It was also a term of the contract that save for summary dismissal, termination of the same would be by either party giving 3 months' notice or 3 months' pay in lieu thereof. The contract also provided for service pay at the rate of 3 months' basic salary for every year worked if the contract was terminated by the respondent on grounds other than gross misconduct. On this premise, the respondent commenced work in earnest and upon satisfactory completion of his first term, the contract was renewed on 9th April, 1995, and thereafter every subsequent 3 years; the last of which was in 2004. It is common ground that the respondent was paid gratuity at the expiry of each contractual period.

According to the respondent, problems with the appellant began on 4th April, 2007, when he received a letterform the latter requiring him to proceed on forced leave until further notice on account of irregular financial payments through the appellant's bank account with the Co-operative Bank that had been detected. The forced leave was to allow investigations to be carried out into the anomaly. In compliance,

the respondent proceeded on forced leave and was later summoned to appear before a disciplinary committee hearing on 14th April, 2007 constituted by the appellant. Following the hearing, the respondent was exonerated of any wrongdoing and by the appellant's letter dated 1st August, 2007, was required to report back on duty on 6th August, 2007.

However, in a surprise turn of events, when the respondent turned up for duty as required, the appellant directed him to proceed on 30 days annual leave to which the respondent acceded, albeit reluctantly. It was while on leave that he was further informed by a letter dated 8th August, 2007, that the appellant had commenced the process of restructuring its organizational structure with the intention of improving internal control and efficiency in service delivery to members and that he would be accommodated in the new structure but he would be required to apply for whatever position he deemed himself qualified when advertised. When the positions were eventually advertised, the respondent did not apply for any including the one he was serving at the material time, in the belief that his contract had yet to lapse, and that in any event, no indication was given as to which job he should apply.

On 17th September, 2007 and a day before he was to report back on duty, he received a letter from the appellant, terminating his employment with immediate effect for his failure to apply for any of the positions he considered himself qualified following the restructuring and advertisement amongst other reasons. At the time of the dismissal, the respondent had risen through the ranks to the position of deputy manager with the following emoluments:-

i) Basic pay Kshs.78,815.00

ii) House allowance Kshs.35,000.00

iii) Fuel allowance Kshs.33,810.00

iv) Responsibility allowance Kshs. 4,000.00

Total **Kshs.151,625.00/-**

The dismissal provoked the respondent to lodge a suit in the High Court which was later transferred to the Industrial Court, the precursor to the current Employment and Labour Relations Court claiming: a declaration that the termination of his services by the respondent was wrongful, irregular and unlawful; payment of his emoluments and entitlements amounting to Kshs.12,397,413/-, general damages, costs of the suit, interest and any other relief.

In response thereto, the appellant filed a statement of defence, set-off and counter-claim dated 25th April, 2008 disputing the respondent's claims. Following the promulgation of the 2010 Constitution, the case was however, by consent of the parties transferred to the Industrial Court on 15th June, 2011. This was on account of **Articles 162 (2)** and **165(5)** of the Constitution, which vested exclusive jurisdiction in all employment and labour matters in that court. Upon transfer, the parties were directed to file fresh pleadings in conformity with the Industrial Court (Procedure) Rules 2010.

The respondent filed his statement of claim on 16th March 2012, in which he reiterated what we have already set out herein above. Suffice to add that the respondent now claimed that the termination was malicious, unlawful, unilateral, injurious, punitive and in bad faith. The particulars he gave were that though sent on forced leave to pave way for investigations, he was eventually exonerated; despite being exonerated he was suspended; during suspension, he was recalled after the bank had fully compensated the appellant; when he reported on duty, he was directed to apply for annual leave; while on leave he was directed to apply for a new position while his contract was still in force; one day before resuming his duties, his services were terminated. That the termination in any event was not due to misconduct on his part, and he was not given any notice before termination. In terms of prayers, the respondent added one for punitive, exemplary and aggravated damages.

In the memorandum of reply to the claim, the appellant denied the respondent's claim, stating that the termination was lawful, that no dues were outstanding in respect of gratuity for the previous contracts, the last having elapsed in March 2007, as the respondent was paid gratuity at the expiry of every contractual period. That the termination was necessitated by the restructuring of the appellant. As a result, the appellant had duly advised the respondent to apply for some new positions it would soon advertise following the restructuring but the respondent failed to do so, leaving the appellant with no alternative but to terminate his services. Lastly, that following the termination, the appellant was willing to pay the respondent one (1) month's salary in lieu of notice based on **clause 26** of its employee handbook of 2007, accrued gratuity up to and including the date of termination and the balance of emoluments owed up to the date of termination subject to a set off against what the respondent owed the appellant in loans and other financial advances.

Following a hearing by way of oral testimony, the proceedings were ultimately reserved for Judgment on 30th September, 2014. Finding for the respondent, **Onyango J.**, declared the termination wrongful, irregular and unlawful and awarded the following:

a) 3 months' salary in lieu of notice Kshs 469,729.00

b) Days worked but not paid Kshs 93, 945.00

c) Leave earned but not utilized Kshs 541,196.00

d) Gratuity Kshs 86,134.13

e) Severance pay for 15 years Kshs 1,174,312.50.

f) Costs and interest Total **Kshs 2,363,325.63**; plus

Unhappy with this outcome, the appellant lodged this appeal, premised on the grounds that the learned Judge erred when: she anchored her judgment on the false premise that the claim was unopposed since no reply to the claim had been filed by the appellant; on gratuity, she failed to recognize that any alleged breach would have been with regard to the last term of service and not for the entire period of 14 years, given that all dues including gratuity for the previous terms had been paid; that she erroneously held that the respondent had been unlawfully declared redundant and in so doing, ignored the fact that he had been offered an alternative opportunity which he declined to take up; erroneously awarded compensation for leave days on the basis of fraudulent evidence; and lastly, that she failed to consider arguments and authorities placed before her by the appellant and instead took into account irrelevant considerations thereby arriving at a wrong decision.

The appellant relied on both written submissions as well as oral highlights at the hearing of the appeal. The respondent however, chose to ventilate his response purely by way of oral submissions though during case management conference held on 11th October, 2010, parties had agreed to proceed with the appeal by way of written submissions. As it turned out, only the appellant had however filed its written submissions.

Highlighting, **Ms. Luvila**, teaming up with **Mr. Simiyu**, learned counsel for the appellant, reiterated that the Judge made a serious error of judgment in finding that no reply to the respondent's claim had been filed by the appellant. This determination, according to counsel, denied and or infringed on the appellant's right to be heard fairly, contrary to **Article 50** of the **Constitution**. In this regard, counsel called in aid the following authorities; **Independent Electoral & Boundaries Commission & Another v. Godfrey Masaba & Another [2014] eKLR, Savings & Loan Kenya Ltd v. Odongo [1987] KLR 294, Pashito Holdings Limited & Another v. Paul Nderitu Ndungu & 2 Others [1997] eKLR** and **Kiai Mbaki & 2 Others v. Gichuhi Macharia & Another [2005] eKLR.** Counsel further submitted that by awarding 14 years worth of severance pay, the Judge made an error of law by failing to recognize that the parties had discharged their contractual obligations in respect of the previous contracts and the severance so awarded amounted to double payment. To the appellant, it was the last contract of service

that formed the bone of contention and not the entire period of employment as held by the Judge. In awarding severance pay for the entire 14 years, the Judge in effect altered the terms of the contract between the parties by converting it from a 3 year term to a 14 year term contract. Reliance was placed on the case of **National Bank of Kenya Ltd v. Pipeplastic Samkolit (K) Ltd & Another, Civil Appeal No. 95 of 1999**, to illustrate the fact that a court of law cannot re-write a valid contract between parties. In any event, the appellant added, severance pay was not available to the respondent as the appellant had neither declared the respondent redundant, nor did the evidence point towards such redundancy.

Opposing the appeal, **Mr. Ombati,** learned counsel for the respondent, submitted that no point of law had been raised in the appeal. Accordingly, he contended, the appeal was incompetent. He added that the memorandum of reply was never ignored as alleged and that to the contrary, the Judge even alluded to the testimony of the appellant's witnesses in her judgment. On severance pay, counsel submitted that the letter of appointment dated 27th February, 1992 provided for severance pay where the termination was at the instance of the employer and not due to misconduct of the respondent. Accordingly, he submitted, the appellant was bound to pay severance pay for the 14 years of service. Lastly, on the issue of redundancy, counsel submitted that the positions offered by the appellant did not require the respondent's skill and hence the reason for his failure to apply.

As a first appellate court, we have a legal duty to re-evaluate, re-assess and re-analyze the evidence that was placed before the trial court and reach our own conclusions. See **Sumaria and Another v Allied Industries Limited [2007] 2 KLR 1**. In doing so, however, we can be alive to the fact that we should only interfere with the findings of the trial court when the decision is based on no evidence or on a misapprehension of the evidence or where the trial court is demonstrably shown to have acted on wrong principles in reaching the findings. (See **Mwanasokoni v Kenya Bus Services [1985] KLR 931**).

To our mind, though there are other important issues raised in the appeal, this determination of this appeal should turn whether or not the Judge disregarded the appellant's memorandum of reply to the claim and thereby violated the appellant's right to a fair trial. The pertinent part of the judgment reads:

> **"When the case was transferred to this court the parties were directed to file fresh pleadings in conformity with the Industrial Court (Procedure) Rules 2010. The Claimant filed his statement of claim on 16th March 2012. <u>There is no</u> <u>copy of the reply to the statement of claim.</u> The issues constituting the response to the claim are however summarized in the Respondent's submissions."**(Emphasis added)

The appellant's contention is that failure by the Judge to address her mind to the memorandum of reply to the claim is apparent from the excerpt, which in turn denied it a fair trial as the judgment was arrived at without consideration of its reply. From the record, the court's directions to the parties to file fresh pleadings were fully complied with. Besides and contrary to the finding of the learned judge, when this matter was filed in the High Court, the appellant entered appearance and filed a statement of defence, set-off and counterclaim. Thereafter, the claim was transferred to the Employment and Labour Relations Court, formerly the Industrial Court. It was then that the parties were directed to align their pleadings accordingly. The respondent filed a fresh statement of claim as well as bundle of documents. In response to the claim, the appellant also filed a comprehensive memorandum of response and attached thereon a bundle of supporting documents. Subsequently, the appellant filed a supplementary list and yet another bundle of documents. There is no doubt at all that the aforesaid pleadings and or documents were received by the court registry as an official receipt was issued in respect thereof. As correctly pointed out by counsel for the appellant, as if the foregoing was not enough, there were other incidences, which confirm that the appellant's reply to the respondent's claim and the documents in support thereof were on record when hearing of the claim commenced and indeed during the entire hearing. For instance, during the examination in chief of the appellant's first witness, **Joyce Owuor**, there is reference to some documents in the appellant's bundle of documents. During her cross-examination and re-examination, there is further reference to the appellant's reply. Similarly, when the appellant's second witness**, Shadrack Tieng Ouma** testified, there was further reference to the appellant's reply. It is therefore self-evident that the appellant's memorandum of reply and supporting documents were on record at the time of hearing the claim.

In the premises, for the learned judge to hold that there was no copy of the appellant's reply was a very grave misdirection. We can only think of two possibilities for that error. One, either the judge did not painstakingly peruse the file before she commenced the crafting of the judgment, or two, she and or the court registry misplaced the appellant's reply. Either way, the learned judge ought not to have proceeded to write her judgment without first ascertaining the whereabouts of the appellant's pleadings. If the same were not on record, she should at least have requested the appellant and or its lawyers to avail the same. By ignoring the appellant's pleadings, the learned judge ended up crafting the judgment without the benefit of the appellant's pleadings, hence the possibility that she arrived at an erroneous decision cannot wholly be ruled out. Had the learned judge considered the merits of the reply with the attachments thereto, perhaps her decision would have been different.

A similar position more or less obtained in the case of **Independent Electoral & Boundaries Commission & Another v Godfrey Masaba & Another [2014] eKLR**, where the Court of Appeal faulted the trial judge for failing to take cognizance of the appellant's petition. The Court of Appeal concluded thus:-

> **"……it was for the learned judge to ask her staff to explain how the receipt was issued a day after the documents had been stamped. With respect to the learned judge, shifting that burden to the 1st and 2nd respondent was improper. Additionally even assuming that the documents had been misplaced at the registry just to reappear after her ruling, the said "misplacement" could only be attributed to the court registry and the 1st and 2nd respondent should not have been penalized for it……...we do find that the learned judge misdirected herself on that issue as a result of which she arrived at an erroneous decision. ……"**

By ignoring the appellant's critical evidence as contained in the reply and the accompanying bundle of documents, it cannot be said that the appellant had his day in court. The possibility that it was prejudiced as a result can also not be wholly eliminated.

In the case of **Savings & Loan Kenya Ltd v Odongo [1987] KLR 294,** one of the key holdings by the Court of Appeal was that:-

> **"……the very foundation upon which any judicial system rests is that a party who comes to court shall be heard fairly and fully. The court is duty bound to hear all parties to a case and failure to do so is an error……."**

In the case of **Galaxy Paints Company Ltd v Falcon Guards Ltd [2000] eKLR** the Court of Appeal held as follows:-

> **"It is trite law, and the provisions of O.XIV of the Civil Procedure Rules, are clear that issues for determination in a suit generally flow from the pleadings, and unless pleadings are amended in accordance with the provisions of the Civil Procedure Rules, the trial court, by dint of the provisions of O.XX rule 4 of the aforesaid rules, may only pronounce judgment on the issues arising from the pleadings or such issue as the parties have framed for the court's determination."**

Similarly the Court of Appeal in the case of **D E N** vs **P N N [2015] eKLR** held as follows:-

> **"Generally, the law is that the courts would determine a case on the issues that flow from the pleadings and judgment would be pronounced on the issues arising from the pleadings or from issues framed for courts' determination by the parties. It is also a principle of law that parties are generally confined to their pleadings unless pleadings were amended during the hearing of a case."**

And lastly in the case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR**, this Court held thus with regard to the essence of pleadings:-

> **"……We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude *ex ante* is to miss the point…...**
>
> **Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru *(supra)* that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle."**

Failure to revert to the appellant's pleadings meant that the trial court proceeded as though the claim was undefended or unopposed. Indeed, it is quite evident that in the body of the judgment, little regard seems to have been had of the appellant's response. Only a tangential mention was made on some of the issues raised by the appellant allegedly through its written submissions. However, written submissions are not pleadings.

By extension, though the appellant may have called witnesses, evidence is not the same thing as pleadings. Pleadings form the basis upon which evidence is led. It is trite law that evidence follows pleadings and pleadings are binding not only on the parties, but on the court as well **(**see **Independent Electoral and Boundaries Commission &Another v Stephen Mutinda Mule & 3 Others [2014] eKLR).**

By virtue of the foregoing, it is manifestly evident that despite the appellants' case being placed before court, the same was never considered properly or at all, as a result of which the appellants was not heard fairly. The right to a fair hearing being a valued right, it offends all notions of justice if the rights of a party were to be prejudiced or affected without a party being afforded an opportunity to be heard fairly. We have no doubt ourselves that the appellant was prejudiced when in crafting the judgment, the learned judge did not advert to its reply.

It is on this account that the appeal must succeed. The upshot is that the appeal is allowed, the judgment and decree dated 30th September of the Employment and Labour Relations Court, Nairobi, is set aside. In lieu thereof, we order that the claim be remitted back to the same court for re- hearing by any other judge in that division other than **Justice Maureen Onyango J.** We make no orders as to costs.

Dated and delivered at Nairobi this 24th day of March, 2017

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR