



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A.)

CIVIL APPEAL NO. 224 OF 2014

BETWEEN

MINNIE MBUE.....APPELLANT

AND

JAMII BORA BANK LIMITED.....RESPONDENT

(Appeal from the judgment of the Industrial Court of Kenya at Nairobi, (Nzioki Wa Makau, J.) dated 1st November, 2013

in

INDUSTRIAL COURT CIVIL CAUSE NO. 1837 OF 2011)

JUDGMENT OF THE COURT

INTRODUCTION

1. This is an appeal from the judgment of the Industrial Court (*now referred to as the Employment and Labour Relations Court*) where the appellant had sought payment of her terminal benefits, following the respondent's termination of her services as the respondent's Executive Director. The appellant claimed a total of **Kshs.112,594,570/=** but the trial court awarded her **Kshs.15,466,666.70**.

Being aggrieved by that decision, the appellant preferred an appeal to this Court.

THE APPELLANT'S CASE BEFORE THE TRIAL COURT

2. Prior to March, 2010, the appellant, an Accountant by profession, was employed by the Central Bank of Kenya, where she was a Manager in Bank Supervision Division. She was employed on permanent and pensionable terms. The appellant, while working at the Central Bank of Kenya, was involved in the merger of City Finance Bank and Jamii Bora Micro Finance to form Jamii Bora Bank.

3. The respondent requested the appellant to terminate her employment with the Central Bank of Kenya and join the respondent as the Executive Director.

4. The appellant accepted the said offer and the parties entered into a written contract dated 25th March, 2010 whereby the appellant was engaged by the respondent as its Executive Director for a period of five (5) years with effect from 15th April, 2010 and upon expiry thereof the contract was to be renewed for a further period of five years.

5. Regarding the term of the contract of employment, the letter of appointment stated as follows:

“2.1 Your employment commences on the 15th day of April, 2010 and shall unless otherwise terminated, in accordance with the provisions of this Letter of Appointment run for a contract period of five (5) years to be renewed for a further five (5) year period.”

6. The appellant stated that it was expressly provided in the said contract that in the event the said contract was terminated by the respondent for reasons other than the appellant’s resignation or a material breach by the appellant of any material obligation under the contract, the respondent would pay the appellant terminal dues being the balance of the appellant’s contractual salary and benefits under the said contract together with three (3) months’ salary in lieu of notice.

7. The appellant further stated that on 29th August, 2011, at the request of the respondent, the appellant agreed to terminate the contract of employment with the respondent with effect from 31st August, 2011 to enable the respondent to undertake major structural changes within its organization.

8. In view of the termination of her employment, the appellant sought payment of the following terminal dues:

- (i) Three months’ salary in lieu of notice Kshs.2,400,000.00
- (ii). Salary for the unexpired period of the contract period (104 month’s at Kshs.800,000.00 per month Kshs.83,200,000.00
- (iii). Salary in lieu of 10 days’ leave earned but not taken Kshs.346,570.00
- (iv). Telecommunication costs at the rate of Kshs.5,000.00 per month for 104 months Kshs.520,000.00
- (v). Fuel consumption costs at the rate of Kshs.15,000.00 per month for 104 months Kshs.1,560,000.00
- (vi). Basic Annual Club subscription at the rate of Kshs.21,000/= per year for 8 years Kshs.168,000.00
- (vii). Health Insurance Cover for the 8 years at Kshs.50,000.00 per year Kshs.400,000.00
- (viii). Gratuity pay at the rate of 25% of the total gross salary paid during the entire contract period Kshs.24,000,000.00

TOTAL = Kshs.112,594,570.00

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9. The appellant also prayed for a certificate of service under the Employment Act and costs of the suit together with interest on the financial claims.

THE RESPONDENT’S RESPONSE

10. The respondent contended that the parties entered into the contract of employment as equal contracting parties and in no way did it influence the appellant to terminate her employment with her previous employer.

11. The respondent stated that the appellant's contract of employment commenced on 15th April, 2010 for a contract period of 5 years renewable for a further period of 5 years unless otherwise terminated.

12. The respondent alleged that the appellant failed in her duties as set out in her appointment letter and her job description as a result of which it suffered massive financial losses, prompting it to mitigate its losses by, **inter alia**, terminating the contract of employment. The respondent set out the particulars of the appellant's failures and misdeeds.

13. The respondent added that the termination of the appellant's employment was mutually agreed upon between them because of the appellant's poor performance record. The respondent contended that the appellant's claims were unreasonable and lacked legal foundation.

THE TRIAL COURT'S FINDINGS

14. During the trial, the appellant testified but did not call any other witness. The respondent called two witnesses, **Dickson Muchira Njeru**, its Head of Credit, and **Ingrid Sofia Munro**, a Director. Thereafter parties filed written submissions.

15. The learned trial judge set out three issues for determination:

“1. What was the duration of the contract?”

2. Was the termination in terms of the contract?

3. What reliefs is the claimant entitled to in relation to the termination?

16. Regarding the first issue, the trial court held that the appellant's contract of employment was for 5 years and was terminable in accordance with its terms. Although it could be renewed for a similar period, it was not a contract for 10 years.

17. On the second issue, the trial court observed that following the party's mutual agreement to terminate the contract, the respondent offered to pay the appellant 24 months' salary but the offer was rejected by the appellant. The learned judge found and held that the termination of the contract was in accordance with the provisions of the contract of employment.

18. Regarding the reliefs that the appellant was entitled to, the trial court held as follows:

“The claimant had worked for 16 months. Her gratuity was 25% of gross salary for the contract period thereof. She was thus entitled to gratuity at the rate of 25% for 16 months. She was entitled to a 3 months' salary in lieu of notice. The bank made a generous offer of 2 years' salary. I would on my part grant 12 months' compensation available under the law. What had been offered was the best the Bank could have done was on the table but she rejected it. (sic). She is entitled to the 10 days leave earned but not taken. Her gross pay was 800,000/=, 10 days leave would be Kshs.266,666.70 which she is entitled to. In short, she succeeds to some degree in her claim.”

THE APPEAL

19. The appellant, being aggrieved by the trial court's judgment, preferred an appeal to this Court. In her memorandum of appeal filed through Shapley Barret & Company Advocates, the appellant faulted the learned trial judge for holding that the contract was not for a fixed term; for failing to uphold and enforce the employment contract; for failing to grant the remedies as sought; for wrongly applying the provisions

of **sections 49 and 56** of the **Employment Act, 2007** to determine the remedies due to the appellant; and generally for failing to uphold the principle of sanctity of contracts.

20. The appellant urged the Court to reverse the trial court's decision that the contract between the parties was not for a fixed term and grant her the agreed remedies for the lawful termination of the contract. The appellant further prayed for costs of the appeal and of the suit in the trial court.

21. The appellant's submissions were narrowed down to two main issues:

(a) That the learned judge erred in his determination of the term or period of the contract; and

(b) That the learned judge erred in his determination of the terminal dues payable to the appellant.

22. The respondent's submissions were that the term of the employment was five years; that the same was terminated by mutual consent after only 16 months of service; that the offer that had been made by the respondent to the appellant after termination of the contract of employment had rightly been withdrawn; and that the sum awarded by the trial court had already been paid to the appellant.

ANALYSIS OF THE PARTIES' ARGUMENTS

23. On the issue of the term of the contract of employment, our interpretation of **clause 2.1** of the letter of appointment which we reproduced at paragraph 5 of this judgment is that, although it stated that the employment was to "*run for a contract period of five (5) years to be renewed for a further five (5) year period*", it is a contract for a term of 5 years subject to **clause 19** thereof. It would be improper to construe that the contract of employment was for a period of ten (10) years split into two phases of five (5) years each as submitted by the appellant's learned counsel. Indeed, **clause 2.1** refers to "*a contract period of five (5) years ...*".

24. **Clause 2.1** cited above indicates that the contract could be terminated and therefore it would be erroneous to hold that the contract was for a fixed term of 10 years. **Clause 19** stipulates the grounds and how the contract could be terminated by either party. Renewal of the contract could only be upon expiry of the initial agreed period of 5 years and with mutual consent/approval of both parties.

25. Even though the words used in clause 2.1 regarding the five years contract are "*to be renewed for a further five (5) year period,*" the correct interpretation thereof ought to be "*renewable for a further five years period.*" If a contract of employment contains a termination clause exercisable by either party, it would be ridiculous to argue that the contract has to run for the anticipated period; it would be tantamount to holding at servitude a party who wishes to exercise his/her right of termination in terms of the contract.

26. That the contract of employment could not have been for a combined period of 10 years is given further credence by the provisions of **clause 6** of the letter of appointment on the issue of gratuity which states as follows:

"On completion of each contract term or any part thereof, you will be paid a gratuity equal to 25% the gross salary paid to you during the contract period or any period served."
(Emphasis added).

27. In view of the foregoing, we hold and find that the appellant's contract of employment with the respondent was for five (5) years, renewable for another five (5) years. She had worked for 16 months and the contract was terminated with 44 months left to go.

28. We now turn to the issue of termination of the contract and the consequences thereof. It is not in dispute that the termination of the appellant's employment was by mutual consent of the parties; though the process was evidently initiated by the respondent. The respondent wrote to the appellant on 9th

September, 2011. In a meeting held on 29th August, 2011, the respondent's Board of Directors had decided to pursue a negotiated disengagement with the appellant.

29. The Bank offered to pay the appellant 3 months' salary in lieu of notice as per termination **clause No. 19.6**.

The respondent's letter to the appellant also cited **clause 20.1** of the letter of appointment. It stated:

“This clause provides that upon termination of employment by the employer, the employer shall pay the salary due for the balance of the contract period. Accordingly, the Bank would be liable to pay your salary for the remaining 44 months, being the balance of your unspent contract period. This would amount to approximately Kshs.35.2 million.”

30. The respondent however stated that its financial position could not support such an outlay but instead proposed to pay 24 months' salary in full and final settlement in the following manner:

(i) By 31st January, 2012: 12 months' salary;

(ii) By 31st January, 2013: 12 months' salary;

(iii) Interest at the rate of 9% per annum with effect from 1st December, 2011 until settlement.

31. The appellant rejected that offer and demanded payment as set out in the statement of claim (see paragraph 8 of this Court's judgment). In return, the respondent withdrew its offer made on 9th September, 2011.

32. Having carefully perused the letter of appointment and the letter of termination of the appellant's employment, we are of the considered view that as a consequence of termination of the appellant's contract of employment, she is entitled to payment of the balance of the her contractual salary and benefits in terms of **clause 20.1** of the letter of employment. As regards the claim for three (3) month's salary in lieu of notice, considering that neither party invoked **clause 19.6** of the letter of appointment, the award by the trial judge of salary for 3 months being pay in lieu of notice should be discounted.

33. The amounts payable to the appellant are as follows:

(a) Balance of the appellant's salary

for 44 months: Kshs.800,000 x 44

= Kshs.35,200,000/=

(b) Gratuity at the rate of 25% of the gross salary for a period of 16 months:

$25/100 \times 800,000 \times 16$

= Kshs.3,200,000/=

(c) Salary in lieu of leave

for 10 days: $Kshs.10/30 \times 800,000$

= Kshs. 266,666

TOTAL = KSHS. 38,666,666

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34.**Clause 25** states that the letter of appointment sets out all the benefits that were payable to the appellant. That implies that any other benefit outside the letter of appointment that was being claimed by the appellant was not payable.

35.The appellant’s claims for annual club subscriptions; Health Insurance Cover, telecommunication cost and fuel consumption were not proved. Regarding Health Insurance Cover, the letter of appointment merely stated that the appellant was entitled to join a suitable medical scheme. There was therefore no basis of claiming payment of a yearly sum of Kshs.50,000/= for 8 years. As regards telecommunication and fuel consumption bills, the appellant was entitled to reimbursement of the amounts spent on the said expenses. The appellant did not prove that she had submitted any receipts of payment of the said expenses for reimbursement. In her evidence in cross examination by the respondent’s advocate, the appellant conceded that the amounts she had claimed were her own assessment.

36.In view of the foregoing, we hereby partially allow this appeal, set aside the trial court’s judgment and substitute therefor judgment in favour of the appellant in the sum of **Kshs.38,666,666/=** plus interest at court rates from the date of the trial court’s judgment, 1st November, 2013 until payment in full. Any amount that may have been paid to the appellant in terms of the trial court’s judgment shall be subtracted from the amount payable to her as ordered herein. The appellant shall also have costs of this appeal as well as costs before the trial court.

DATED and Delivered at Nairobi this 10th day of March, 2017.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.