IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU & MURGOR, JJA,)

CIVIL APPEAL NO. 49 of 2014

BETWEEN

UZIMA UNIVERSITY COLLEGE.....APPELLANT

AND

DR. ERASTO OMOLLO.....1ST RESPONDENT

CATHOLIC UNIVERSITY OF EAST AFRICA.....2ND RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Kisumu

(H. Wasilwa, J.) delivered on 1.4.2014.

in

INDUSTRIAL COURT CASE NO. 118 OF 2013)

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JUDGMENT OF THE COURT

1. The appellant is aggrieved by a judgment of the Industrial Court of Kenya at Kisumu (H. Wasilwa, J.) delivered on 1st April 2014 allowing the 1st respondent's claim for Kshs. 2,626,902.00 in respect of underpayment of salary when he was in the employment of the appellant between December 2012 and August 2013.

2. That judgment was based on the court's findings that the appellant employed the 1st respondent as an associate professor on terms and conditions set out in a letter dated 3rd June 2012; that the 1st respondent commenced employment on 3rd December 2012; that under the terms of employment the 1st respondent's monthly salary was agreed at Kshs. 356,823.00; and that the appellant did not remunerate the 1st respondent in accordance with the agreement; that for the entire duration of the nine months that the 1st respondent worked, the appellant paid him a total of Kshs. 584,505.00 leaving a balance of Kshs. 2,626,902.00 that the court awarded to the 1st respondent.

3. Learned counsel for the appellant Mr. A. O. Wasuna referred to the grounds of appeal set out in the memorandum of appeal and submitted that the judgment of the lower court should be quashed because it

had a condition precedent to taking up employment for the 1st respondent to have obtained sabbatical leave from Moi University; that the letter granting the 1st respondent sabbatical leave from that University, though dated 26th November 2012, was not received by the appellant until 22nd March 2013; that consequently when the 1st respondent reported for duty on 3rd December 2012, there was no indication that he had been granted sabbatical leave from Moi University; that as a result when the 1st respondent commenced work with the appellant on 3rd December 2012, it could only be on part time basis. Furthermore, counsel submitted, sabbatical leave granted to the 1st respondent was only for nine months and not for the full year that had been envisaged under the appellant's letter dated 3rd June, 2012 offering the 1st respondent employment. According to counsel, that cannot in those circumstances bind it.

4. Mr. Wasuna argued that the 1st respondent should have realized that the terms of his engagement had changed when he received the first salary that did not accord with the letter dated 3rd June 2012.

5. To support the contention, Counsel submitted that the letter dated 3rd June 2012 was conditional, that the appellant was not aware whether the 1st respondent had obtained sabbatical leave and that same should be construed from the perspective of the appellant's subjective meaning and state of knowledge, Counsel referred us to the case of **Wishart vs. National Association of Citizens Advice Bureaux Ltd [1990]**. He also cited **Total Gas Marketing Ltd vs. ARCO British Ltd and others [1998] UKHL22** for the argument that that letter cannot be binding as a condition precedent was not fulfilled and a failure to comply with a condition precedent at the time it is supposed to be complied with can vitiate an agreement.

6. Finally, counsel for the appellant submitted that the learned judge failed to consider that the 1st respondent needlessly withheld examination results.

7. Opposing the appeal, Mr. Angu Kitigin, learned counsel for the 1st respondent, submitted that the appellant offered the 1st respondent employment by the letter dated 3rd June 2012; that after obtaining sabbatical leave from Moi University, he executed the offer that signified his acceptance of the appointment on the terms and conditions set out there; that the appellant was experiencing difficulties in paying its staff; that the letter dated 3rd June 2012 contained the terms and conditions of employment including the salary payable and at no time did the parties enter into a part time contract; and that the learned judge was right to give effect to the terms of employment as set out in the letter dated 3rd June 2012.

8. Regarding the complaint that the 1st respondent withheld examination scripts, counsel maintained that the 1st respondent did so in exercise of a lien for unpaid salary.

9. Mr. James Okeyo, learned counsel for the 2nd respondent, submitted that the 2nd respondent supports the judgment of the lower court in which the suit against it was struck out.

10. We have considered the appeal and the submissions by counsel. Our duty as the first appellate court is to review the evidence and to draw our own conclusions. In the often quoted words of this Court in the case of **Selle and another versus Associated Motor Boat Company Limited & 2 others [1968] EA 123** :

> ***"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusion. Though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in this respect. In particular, this Court is not bound necessarily to allow the trial Judge's findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probability materially to estimate the evidence or if the impression based on the demeanor of the witness is inconsistent with the evidence in the case generally"***

11. The only issues that arise for determination in this appeal are; firstly, whether the learned judge was right in holding that the employment relationship between the appellant and the 1st respondent was governed by the letter dated 3rd June 2012 and whether under the terms and conditions of that employment the appellant underpaid the 1st respondent. Secondly, whether the judge erred in failing to hold that the 1st respondent was in breach of the terms of the contract by withholding examination results.

12. On the first issue, the 1st respondent, a psychiatric and a senior lecturer in mental health at Moi University, testified that by a letter dated 3rd June 2012 the appellant offered him "*appointment as an Associate Professor*" in the department of Behavioral and Social Sciences "*effective from the day you report on duty at Uzima*". He stated that having obtained sabbatical leave from Moi University in terms of a letter addressed to him from that university dated 26th November 2012, he commenced working for the appellant on 3rd December 2012; that he worked until August 2013 and received payment from the appellant of Kshs. 584,505.00 for the entire period. He denied the appellant's claims the he worked on part time basis or that he failed to discharge his responsibilities.

13. Reverend Charles K'Ochiel, the Principal of the appellant, testified on behalf of the appellant. He stated that an offer was made to the 1st respondent in terms of the appellant's letter dated 3rd June 2012; that as an employee of Moi University the 1st respondent was to obtain sabbatical leave which he did not do until six months later and the letter granting him the sabbatical leave was not received by the appellant until 22nd March 2013; that meanwhile the 1st respondent "*was given a contract to work from August 2012 on a part time basis and is paid up to date on an hourly rate"* and that the 1st respondent failed to live up to the appellant's expectations.

14. Based on our own review of the testimonies and the documents produced before the High Court, there can be no doubt that the appellant offered the 1st respondent employment as an Associate Professor at Uzima University in terms of the letter dated 3rd June 2012 and that the effective date of employment was to be the date on which the 1st respondent was to report on duty at Uzima. That letter set out the duties and responsibilities of the 1st respondent. As regards salary, the letter provided in express terms that the "*University will provide you with a consolidated compensation of Kshs. 356,823/-per month"*. The letter also provided that ***"the terms of service document together with this letter shall constitute the contract of employment***" between the parties. The 1st respondent was required to signify his acceptance of the appointment by signing on the space provided and returning a signed copy of the letter to the appellant. He did so on 29th November 2012, which coincidentally is three days after the letter from Moi University granting him sabbatical leave.

15. The appellant did not offer any evidence whatsoever in support its contention that the 1st respondent "*was given a contract to work from August 2012 on a part time basis"* and for the remuneration of the 1st respondent on *"an hourly rate"* that was not specified.

16. Based on our review and evaluation of the evidence, we therefore conclude, like the learned judge did, that "***the terms of engagement are as contained in the letter of appointment dated 3.6.2012-a salary of Kshs 356,823 all inclusive***…"

17. For the same reason, the 1st respondent is entitled to the award of Kshs. 2,626,902.00 for the underpayment of salary for the period worked, having only received Kshs. 584,505.00 instead of Kshs. 3,211,407.00 that he should have received over the period worked.

18. There is finally the issue that the learned judge erred in failing to hold that the withholding of student examination papers by the 1st respondent amounted to a fundamental breach of the contract that had the effect of bringing the contract to an end and disentitling the 1st respondent to any benefits under the contract.

19. The complaint was not raised or pleaded in the appellant's pleadings or alluded to in its witness statements. It arose for the first time in the course of cross-examination of the 1st respondent by counsel for the appellant when the 1st respondent maintained that he ***"acted within their code of conduct even by withholding [sic] the results."*** The appellant's witness Rev. Charles K'Ochiel also alluded to it when being cross examined by counsel for the 1st respondent when he stated; "*Dr. Omolo gave exams to students but didn't send results indicating in a letter he would send results on being paid*."

20. Indeed, although the appellant in its written submissions framed issues for determination by the court, those issues did not include the issue whether the withholding of examination results by the 1st respondent amounted to fundamental breach of the contract disentitling him to any benefits under the contract. The 1st respondent did not address the matter either in its submissions. Little wonder therefore that the learned judge did not deliberate on the issue as she was not called upon to do so. The court cannot therefore be faulted for not having adjudicated on an issue that neither party placed before her for determination.

21. The upshot of the foregoing is that there is no merit in the appeal and it is hereby dismissed in its entirety.

22. The appellant did not in this appeal complain about that part of the judgment by the lower court dismissing the 1st respondent's suit against the 2nd respondent, Catholic University of East Africa, which it considered to have been "*unprocedurally enjoined*" in the suit. It was therefore not necessary to join Catholic University of East Africa in this appeal.

23. The appellant will therefore bear the costs of the appeal for both respondents in this appeal.

Dated at Kisumu this 19th day of October, 2015.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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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.

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DEPUTY REGISTRAR