REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: BOSIRE, GITHINJI & WAKI JJ.A)

CIVIL APPEAL NO. 191 OF 2005

BETWEEN

MUKAWA HOTELS HOLDING LTD.....APPELLANT

AND

BEAT KOCH.....RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Nairobi (Milimani) (Ibrahim, J.) dated 2nd March, 2004

in

H.C.C.A. NO. 868 OF 2001)

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JUDGMENT OF THE COURT

By his plaint dated and filed in the High Court Commercial Division, Nairobi on 13th June 2001, Beat Koch, as the plaintiff prayed for judgment in the sum of Kshs. 2,815,000 against Mukawa Hotels Holding Limited, as defendant in the suit, made up as follows:

(1) Three months salary in lieu of notice USD 12,000 (Kshs. 948,000).

(2) Agreed incentive compensation. USD18,000 (Kshs.1,422,000).

(3) School fees re-imbursement Kshs. 145,000/=.

(4) Three months house rent Kshs. 300,000/=.

He also prayed for costs and interest on both the sums claimed and costs at commercial rates.

By a contract of service entered into between the parties sometime in October, 1999, Mukawa Hotels Holdings Limited, the appellant, agreed to engage Beat Koch, the respondent, as General Manager of its operations for two years, on agreed terms, among them, the following:

(a) A basic salary of US$4,000 per month payable in arrears and free from local taxes.

(b) House rent on reimbursement basis payable monthly in arrears.

(c) Education fees not exceeding Kshs.145,000 per annum on a reimbursable basis.

(d) 30 days paid leave on the basis of monthly basic salary, on completion of each year of the contracted term of service.

(e) Return Economy Class air fare to the respondent's point of hire which was Germany, for himself, his wife and one son.

(f) Incentive compensation, at a maximum of US$18,000 and a minimum of US$10,000 per completed year of contract, computed to specific goals to be set and performance level attainable.

It is not clear from the contract document who was to set the goals and performance levels. There were other terms, but for purposes of this judgment they are not material. It was mutually agreed that the respondent would commence work on *15th November 1999, " subject to grant of work permit and Hotel General Manager's Licence."* These must have been obtained as the respondent did commence his work soon thereafter and continued until *30th August, 2000,* when a letter was addressed to him in the following terms:

" Dear Mr. Koch,

We refer to your Goals which were set to assess your performance in improving both the revenues and profitability of the club. It is now 9 months that you have been managing the club and, we regret to advise you that those Goals have simply not been met. In light of that we therefore have no alternative but to give you three months notice to improve appropriate to those set Goals, failing which we shall be forced to replace you, as General Manager.

In addition to above, we feel duty bound to impress on you that the recognized management office hours should not be interrupted by frequent personal visit of family members, or friends.

Kindly, note that the three months notice is without prejudice to our right to terminate your Employment with us, as provided in the concluding paragraph of your contract.

We trust you understand our position as a measure of fairness to you, in the firm hope that you will improve during that period."

The letter was signed by S.M. Githunguri, as Chairman of the appellant.

We have set out the above letter in full because both at the hearing of the case before the superior court and before us an issue arose as to whether or not the letter constituted a notice of termination of the respondent's engagement with the appellant. The appellant's case before the superior court and before us is that the letter was the termination notice envisaged by the contract of service. The respondent on the other hand has treated it as a warning letter.

M.K. Ibrahim J. who heard the case agreed with the respondent that the letter was in the nature of a warning in view of its conditional nature.

Whether or not the aforesaid letter was a termination notice was the main issue argued in the appeal before us. Mr. Owang, who prosecuted the appellant's appeal before us submitted that even if the respondent had improved in performance before the end of the three months stated in the letter he would still have lost his job in view of the wording of paragraph 5 of that letter.

A notice of termination of employment must of necessity be categorical and certain. It should not be capable of more than one interpretation. The purpose of a termination notice is to warn the party receiving the notice of the impending change so that he or it may prepare for the change. It is a requirement

intended to obviate surprise and sudden hardship. For instance in the case of an employee he would need to look for alternative employment so that at the end of the notice he might not find himself without income. In the case of the employer he or it might want to look for a replacement.

Whether or not a notice given is intended to terminate employment is a question of fact. The intention of the party giving the notice must of necessity be gathered from the language of the notice. In our case what was the intention of the appellant in giving the notice which we reproduced earlier?. A careful reading of the notice shows that the appellant was not happy with the respondent's performance. The notice advised him as much. He had not attained the expected goals. The notice required him to pull up his socks failing which he would be replaced. The notice was not categorical that the respondent would certainly be replaced at the expiry of three months from the date of the letter. It would have not been necessary to ask the respondent to improve his performance if the appellant had indeed wanted to replace him at the expiry of the notice. Paragraph 5 of the notice which Mr. Owang referred us to, contrary to what learned counsel suggested, does not say the respondent would be replaced at the expiry of the notice. The paragraph reads as follows:-

"… We therefore have no alternative but to give you notice to improve appropriate to those set goals, failing which we shall be forced to replace you as General Manager."

From that paragraph it is clear that the respondent had a chance to continue after the expiry of the notice if he attained the set goals within the period of the notice. His replacement was conditional and depended on a failure to meet the set goals which the appellant would advise him of.

We have no evidence that the appellant notified the respondent thereafter that he had failed to improve in his performance. The letter to the respondent dated 29th November 2000 effectively terminated the respondent's employment with the appellant. That letter, in pertinent part, reads as follows:

"We write to inform you that following our letter of 30th August this year, we have decided to replace you with effect from 1st December, this year.

You are to hand over to Mr. Smith on 30th November, and he will officiate in acting capacity, until further notice.

We thank you for the time that you have worked for Nairobi Safari Club, and wish you well in your future endeavours."

It is instructive that the letter is silent on whether or not the respondent had met the set goals on performance. If the appellant had intended that the letter of 30th August 2000 be a termination notice, then it means that in the letter of 29th November 2000, the appellant was in effect telling the respondent that he had not improved in his performance, and he was therefore being replaced. The letter of 30th August 2000, was not, to our mind a termination notice, and we so hold. In the result we affirm the decision of the superior court on that score.

Having come to the foregoing conclusion, it follows that the termination of the respondent's employment with the appellant was without the requisite three months notice. In paragraph 5 of his plaint the respondent averred, *inter alia,* that the appellant wrongfully and unlawfully terminated his employment without the requisite termination notice and without paying three months salary in lieu of notice, amounting to USD. 12,000. In paragraph 6 he sets out the basis of the other sums he claimed.

In its written statement of defence the appellant averred that it gave the requisite three months notice and paid the respondent all monies he was entitled to receive from it. It therefore denied the respondent's clam in its entirety.

Ibrahim J. as we stated earlier, heard the suit. He was satisfied that the termination of the respondent's

employment was without the requisite three months, and was summary in nature. We have already held that the learned Judge came to the correct decision on that issue, and affirmed his decision. We do not wish to say more on the issue of notice.

The learned Judge also allowed the respondent's claim on the head of incentive compensation. Incentive compensation was one of the terms of the contract of service. It was expressed thus:
"At maximum of US$18,000.00 and minimum of US$10,000.00 per completed year of contract, computed to specific goals to be set and performance level attainable".

In his judgment Ibrahim J. found as fact that the specific goals and performance level attainable were not agreed between the parties before the termination of the respondent's employment with the appellant. He also found as fact that the termination was not strictly due to non-performance or misconduct, but pursuant to the appellant's right under the contract of service to do so. He then expressed himself further thus:

" If it give the required 3 months notice which is a right and gave reasons as to the justification, then the employer could use its discretion in setting the amount of incentive compensation either upwards to a maximum of the US$18,000 or downwards to a minimum of US$10,000 using any set criteria of assessment."

The learned Judge, in exercise of his discretion, decided to fix the compensation payable at the very minimum of US$10,000 arguing that the appellant was obliged to pay at least the minimum payable.

On the heads of school fees and house rent, the learned Judge did not think the respondent was entitled to them as no evidence was tendered before him to show the respondent had paid any as to be entitled to reimbursement. It was the learned Judge's view, that according to the contract of service these two items would only become due if the respondent had adduced evidence to show he had made payment of the same. We agree. The respondent would only seek reimbursement of what he had already incurred on the two heads. In the end the learned Judge gave judgment in favour of the respondent in the sum of US$22,000 together with costs and interest at court rates, which amount comprised three months salary in lieu of notice and US$10,000 as incentive compensation.

In this appeal, the appellant complains that the superior court erred, inter alia in holding that the letter of 30th August 2000 was not a termination notice, it erred in awarding the respondent US$10,000 as incentive compensation, it erred in holding that the termination of the respondent's employment was contractual and not on the basis that he had not met certain set goals, and that the court erred in giving judgment in foreign currency.

We have already held that the respondent's dismissal was summary in nature. The only outstanding issues, are twofold. First, whether the respondent was entitled to incentive compensation. Second, whether judgment was properly given in foreign currency.

On the first issue, Ibrahim J. awarded US$ 10,000 as incentive compensation. It was payable to the respondent upon completion of one year of service. The appellant's case before the trial court was that it would not be paid if the respondent failed to achieve certain set goals. It was its case that the goals were mutually agreed upon but the respondent failed to meet them. In its view, therefore, incentive compensation was not payable even assuming the respondent had served for at least one year. It did not however, think the respondent had served for at least one year to be entitled to payment.

The respondent on the other hand testified that the commencement date of his contract was *15th October, 1999*. He was dismissed on *30th November 2010*, after working for at least one year. In his view, therefore he was entitled to incentive compensation. He did not think payment of that compensation was pegged on good performance.

The clause in the contract of service dealing with incentive compensation stipulates that the said compensation would be computed on the basis of specific goals and performance levels attainable. We

think that in view of the wording of that clause the exact amount to be paid is the one which was dependent of performance. The discretion on how much to pay was however circumscribed. As stated by the trial Judge, the minimum payable was fixed in the contract document. If the respondent wanted to be paid an amount higher than the minimum it was incumbent upon him to show that his performance, on the basis of the agreed specific goals, had improved. In his evidence he did not so demonstrate. We do not agree with the appellant that the respondent would not be entitled to any payment on that head unless he showed his performance had improved. Had that been the case there would have been no basis for fixing a minimum amount payable. We agree with the trial Judge that in absence of evidence to show improvement in performance, he had a discretion to award the respondent what, in the circumstances of the case was justifiable. He considered the minimum payable as a proper yardstick. We find no basis for faulting him on that score.

The second and last point we need to consider is the issue as to the propriety of the judgment being given in foreign currency, namely US dollars. In his judgment Ibrahim J. gave judgment in favour of the respondent for " *a total of USD.22,000 together with costs and interest at court rates."* In its memorandum of appeal the appellant complains that:

"…the learned Judge erred in law and fact in failing to appreciate the fact that the decretal amount in dollars and Kenya Shillings was different and the award of 33% per annum on the decretal amount was harsh, punitive, excessive, unconsciousable and unreasonable".

The contract of service between the parties on the two heads of the respondent's claim were expressed in foreign currency. We do not understand why this was so, but we believe it is because the respondent was a foreigner and wanted payment in an easily convertible currency. It is however, noteworthy that although in the body of his plaint the respondent expressed his claim on the two heads in foreign currency, the final prayer is in Kenya Shillings. At the trial there was no argument on the currency the final decree would be expressed in. We find no basis for the appellant's complaint. The parties in their agreement expressed the money payable in foreign currency. The trial Judge on the basis of that agreement expressed his judgment in foreign currency. He was entitled to do so. He could also have expressed the judgment in local currency because the respondent did a conversion on part of the money he was claiming.

As regards interest we do not understand how the appellant arrived at 33% interest. The trial Judge decreed interest to be at court rates. As far as we are aware the court rate of interest is not 33% but 12% per annum. To the extent that the appellant has not shown how the interest of 33% came about as to be the subject of an appeal, we have no basis for expressing our view as to its propriety or not. All we would want to say is that the trial court ordered interest to be at court rate and not otherwise.

In the foregoing circumstances this appeal lacks merit. It is accordingly dismissed with costs.

Dated at Nairobi this 8th day of April 2011.

S.E.O. BOSIRE
.....
JUDGE OF APPEAL

E.M. GITHINJI
.....
JUDGE OF APPEAL

P.N. WAKI
.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR