



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**  
**AT NAIROBI**  
**Civil Appeal 221 of 2003**

**SPICERS EASTERN AFRICA LIMITED ..... APPELLANT**

**AND**

**AZAD G. ESMAIL .....RESPONDENT**

*(An appeal from the judgment and decree of the High Court  
of Kenya at Nakuru (Mr. Justice Alnashir Visram) dated*

*3<sup>rd</sup> July, 2003*

**in**

**H.C.C.C. NO. 342 OF 1997)**

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**JUDGMENT OF THE COURT**

This is an appeal from the judgment of the superior court (A.Visram J) dated 3<sup>rd</sup> July 2003 in relation to a dispute between Azad Gulam Hussein Esmail (hereinafter “**Azad**”) who was the plaintiff in the High Court and is the respondent in the appeal and Spicers (Eastern Africa) Limited (hereinafter “**Spicers**”) which was the defendant in the High Court and is the appellant in this appeal.

It was not disputed that Azad had been employed by Spicers which employment began on 19<sup>th</sup> June 1972. It was pleaded in paragraph 6 of the plaint that “**...in or around the year 1985 defendant further engaged the plaintiff to work as a company secretary for the following sister companies:**

- 1. Spicers Argos EA Ltd.**
- 2. Spicers Kenya Ltd.**
- 3. Archers Cabs Ltd.**
- 4. Spicers International Ltd.”**

***The plaintiff states that the work for the sister companies was agreed to be additional work and was indeed additional assignment (sic). The plaintiff agreed with the defendant to expressly or impliedly pay (sic) the plaintiff reasonable remuneration for work done and services rendered and the plaintiff duly worked and rendered services to the said four companies at the behest of the plaintiff (sic? should***

*be defendant) during the year 1985 up to the time of filing the suit but the defendant has refused and/or neglected to pay the plaintiff any remuneration as agreed or payment which is reasonable and/or payment on the basis of quantum meruit and the plaintiff's claim therefore is for the period of six years preceding the filing of the suit being years 1992, 1993, 1994, 1995, 1996 and 1997 at the rate of Shs.50,000 per company per year totaling Shs.1.2 million."*

This part of the claim was dismissed by Visram J. in his Judgment on the basis that the four companies were independent entities which could have been sued separately but were not and secondly on the basis that the plaintiff himself admitted that he worked for the said sister companies in the course of his employment with the defendant **Spicers**. There was no cross appeal by **Azad** against this finding.

We therefore need not consider this aspect of **Azad's** claim

The main issue at the heart of the appeal is whether **Azad** was entitled to his claim, allowed by Visram J., for shs. 2.3 million claimed as severance pay at the end of his employment by **Spicers**.

**Azad's** claim to this sum is pleaded in paragraphs 3, 4 and 5 of the plaint dated 28<sup>th</sup> July 1997 which are as follows:-

**3. The plaintiff was an employee of the defendant from 19<sup>th</sup> June 1972 to 30<sup>th</sup> March 1995 and at the termination of his employment the plaintiff was receiving a monthly salary package of Shs.100,000/=. The plaintiff worked for the defendant for 22 years 9 months and 12 days.**

**4. The defendant under its terms of employment and rules and employment practice and/or express and/or implied terms and conditions of employment all its employees termination benefits also called a service pay or severance pay on the termination of employment on any grounds at the agreed rate with all employees of one months salary package per one year or part worked. The defendant agreed with the plaintiff at the time of employment and also thereafter made it out to the plaintiff that he was so entitled to the said termination benefits/service pay and/or severance pay, the plaintiff relying on the said agreements and conditions implied and otherwise throughout his working life with the defendant.**

**5. The defendant unlawfully and illegally and contrary to the Agreement and or the company rules and practice has refused and/or neglected to pay the said service pay and/or terminal benefits and/or severance pay for the period the plaintiff worked or at all and in the premises the plaintiffs claim is for the sum of Shs. 2,300,000/= for 23 years of service as agreed at the rate of Shs. 100,000/= per month (23 years x 100,000/= p.m. = Shs. 2,300,000/=.**

The defence denied these allegations in detail and the relevant issues arising from the pleadings were agreed and stated in the Agreed Issues dated 26<sup>th</sup> May 1998 as follows:-

**1. Whether the plaintiff worked for the defendant for 22 years and 9 months and 12 days with effect from 19<sup>th</sup> June 1972 to 30<sup>th</sup> March, 1995.**

**2. Whether the plaintiff terminated his employment with the defendant voluntarily.**

**3. Were there any rules, terms and or practice whether express or implied governing the defendant's employees on termination of employment.**

**4. Was the plaintiff entitled to one month's salary per one year worked or part thereof at his termination of employment with the defendant?**

The learned Judge was of the view, and we agree with him, that the decision of this case depends substantially upon the construction of the Memo dated 28<sup>th</sup> August 1991 from the Managing Director of **Spicers**, Mr. Gordon Weston to **Azad**. This was in the form of a hand written letter. We set it out in full:-

*“Dear Azad,*

*This Memo serves to confirm the various points discussed between us over the past few weeks.*

*1. It is acknowledged that you wish to depart for Canada for approximately one year period, beginning in early September 1991 and in consideration of this and the fact that your duties within the company have become somewhat specialised we agree the following:*

*2. You will depart for Canada during September 1991 having first made sure that all outstanding jobs currently being handled by you are brought to a satisfactory conclusion. i.e.*

*Bank O/D approvals*

*Cheque and Bank release signatures.*

*Taxation*

*Monthly accounts*

*Computer Programmes, etc*

*3. The company will pay for your airfare in consideration for your 1991 leave.*

*4. Before departure you shall leave with us your address/ phone and fax contact numbers in Canada.*

*5. The company will pay for you to return to Kenya for an Approx. 2 month period during March/April 1992 to carry out your duties of:*

*Audit completion*

*Secretarial*

*Bank reporting Budgeting*

*Monthly accounts*

*Taxation ETC*

*6. Contact will be maintained through out the year on monthly accounting & any other items that may occur.*

*7. In consideration of the above mentioned duties it is agreed that you shall be paid £ 1,000 STG per month, at a half year interval starting September 1991 and in addition a further payment of ?200 per month quarterly in arrears starting in November 1991, instead of pension payments made locally as previously discussed.*

***This arrangement will be reviewed after one year and it supersedes (sic) all other financial arrangements between yourself and the company.***

*(emphasis added)*

*Your sincerely,*

*Gordon Western M. D.*

Signed 28/8/91

*I acknowledge and agree to all of the above mentioned points.*

A.G. Esmail

Signed 11/9/91.”

We consider that if the original agreement between Spicers and Azad covering the period before Azad’s decision to leave Kenya did include an obligation upon Spicers to pay to Azad, on the termination of his employment, severance pay at the rate of one months salary package per one year or part worked, as to which the evidence is far from compelling, then such an obligation was clearly one of the financial arrangements between Azad and Spicers which arrangement ceased to have effect as a result of the agreement, above set out, which was reached in August/September 1991. This was a fresh agreement to cover the radically changed circumstances resulting from the decision of Azad to emigrate to Canada leading to his employment by Spicers being of a part time nature.

Subsequent to Azad deciding to go and live in Canada, Spicers decided to invite Azad back to Kenya in 1992, 1993, 1994 and 1995 for short visits. It is clear that Azad was under no compulsion to make these visits subsequent to that agreed to be made in the 11<sup>th</sup> September 1991 Agreement. For each subsequent visit Spicers and Azad reached agreement as to timing, length of visit to Kenya and remuneration for the visit. Spicers were under no obligation to invite Azad but chose to do so. Azad was under no obligation to make such visits but chose to do so in return for the remuneration agreed to be paid for each such visit. These yearly short visits continued until 1995.

If Azad believed that he was entitled to severance pay as claimed resulting from the previous financial arrangements he should have raised the issue before agreeing to all earlier financial arrangements being superseded.

In fact he did not raise this claim until, for the first time, it was raised in his letter dated 26<sup>th</sup> June 1995 nearly four years after the August September, 1991 agreement. This letter from Azad was in response to a faxed letter dated 30<sup>th</sup> March 1995 from Spicers to Azad which is referred to in the List of Exhibits as Exhibit 2. That letter of 30<sup>th</sup> March, 1995 does not seem to be in the record of appeal but its contents are quoted in the Judgment of Visram J. as follows:-

***“I am sorry that I have not been able to call you earlier regarding the possibility of your visit to Nairobi this year. The fact of the matter is that we have now completed the audit etc. and it would appear that we do not require your services for the time being.”***

Azad’s response to this letter was nearly three months later when he wrote the letter dated 26<sup>th</sup> June 1995 making his claim for severance pay for the first time. This is what he wrote to Spicers.

***“I refer to your fax .....mg 30<sup>th</sup> March 1995 and note that my services are not required.***

***Having worked for more than 20 years with the company, I am entitled to a severance package like any other staff whose services have been terminated at Spicers.”***

***“In keeping with the company’s practice to pay severance of one month salary package for every year of service completed, my severance package comes to Kshs. 2,000,000/= (based on my monthly salary package of Kshs. 100,000 and 20 years service.***

***I would appreciate if you will kindly arrange payment of above amount as soon as possible.”***

Azad is treating the indication from Spicers that there is no requirement for the time being for a visit to Kenya by Azad as termination of his contract of employment whereas his original contract which required

him to be in Kenya had come to an end as a result of his decision to leave Kenya for greener pastures in Canada. That contract was superseded and fresh separate contracts were made for visits by Azad to Kenya on a yearly basis.

We do not consider that in these somewhat unusual circumstances any right to severance pay has arisen as a result of Spicers deciding that it did not require a visit in 1995. If the right to severance pay ever existed, which has not been proved in our view, it was expressly superseded by the express wording of the 11<sup>th</sup> September 1991 agreement.

For these reasons we consider that the appeal should be allowed with costs and it is hereby so ordered.

*Dated and delivered at Nairobi this 13<sup>th</sup> day of October, 2006.*

**E. O. O’KUBASU**

.....

**JUDGE OF APPEAL**

**J. W. ONYANGO OTIENO**

.....

**JUDGE OF APPEAL**

**W. S. DEVERELL**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**