



**Ole Kimanjoi v East African Portland Cement PLC (Cause
2216 of 2017) [2023] KEELRC 1749 (KLR) (12 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1749 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2216 OF 2017**

JK GAKERI, J

JULY 12, 2023

BETWEEN

JOHN OLE KIMANJOI CLAIMANT

AND

EAST AFRICAN PORTLAND CEMENT PLC RESPONDENT

JUDGMENT

1. The claimant initiated this suit by a Memorandum of Claim filed on November 7, 2017 alleging non-payment of salary in lieu of notice and refund of wrongly withheld and deducted salary.
2. The claimant alleges that he was employed by the respondent on May 3, 2012 as the Administration and Employee Manager and was subsequently promoted to the position of Head of Human Resource and Administration at Kshs.794,848/= per month.
3. That although his contract was due to lapse on September 17, 2017, he was released on May 12, 2017 (3 months earlier) and the respondent had agreed to pay salary in lieu of notice for the 3 months as well as other dues less liabilities but no payment was made.
4. The claimant further avers that he is claiming the sum of Kshs.2,384,544/= and 12 months compensation for breach of contract by the respondent.
5. The claimant prays for;
 - i. Salary in lieu of noticeKshs.2,384,544/=
 - ii. 12 months compensationKshs.9,538,176/=
 - TotalKshs.11,922,720/=
 - iii. Costs of this cause and interest.



respondent's case

6. In its Memorandum of Defence dated June 10, 2022, the respondent denies that it employed the claimant on May 3, 2012. It avers that he was employed as Head of Human Resources and Administration on September 17, 2012 for a 5 year fixed term contract of even date and the same came to an end by effluxion of time on September 17, 2017 and was earning a gross salary of Kshs.794,848/=.
7. That the claimant applied for renewal of his contract by letter dated February 28, 2017 and in its response by letter dated May 11, 2017, the respondent declined a renewal and informed the claimant that he need not attend the respondent's premises after May 12, 2017 but his rights and privileges were not compromised as his terminal dues and benefits including the salary and allowances for the period May 1, 2017 to September 17, 2017 was paid a total of Kshs.7,385,796.28, paid 3 months before expiry of the contract of employment and was thus paid yet he did not work for the respondent.
8. The respondent denies having agreed to pay the claimant 3 months salary in lieu of notice as the letter dated May 11, 2017 was explicit on the dues payable to the claimant and the contract lapsed on account of effluxion of time and all dues were paid on June 28, 2017.
9. The respondent denies having breached the contract of employment and prayed for dismissal of the claimant's suit with costs.

claimant's evidence

10. The claimant's written statement rehashes the contents of the Memorandum of Claim.
11. On cross-examination, the claimant confirmed that his claim was based on the letter of appointment dated September 17, 2012 and the contract was fixed term of 5 years.
12. The witness confirmed that he was paid for the entire period of the contract and worked for the entire period of the contract.
13. That he was paid gratuity for the duration served.
14. The witness confirmed that he was given a copy of the tabulation of his dues.
15. The witness contradicted himself by admitting that he did not work for 5 months having confirmed that he worked for the entire contractual period.
16. The witness indicated that he appealed to the board but had no evidence of the alleged appeal.
17. He admitted having received payment for the entire duration of his contract in June 2017.
18. On re-examination, the witness testified that he was only claiming 3 months salary as notice pay.

respondent's evidence

19. RWI, Mr. Joel Kemei admitted that the claimant was an employee of the respondent and had applied for renewal of his contract of employment due to expire on September 17, 2017 but was released earlier and the contract of employment lapsed as envisioned and he was paid for the remaining period of the contract.
20. On re-examination, the witness testified that the respondent's letter to the claimant dated May 11, 2017 did not envisage salary in lieu of notice as the letter from the claimant's counsel suggested.



claimant's submissions

21. Although no specific issues were isolated, counsel submitted on the contract of employment dated 17th September, 2017 as regards notice period to urge that the respondent computed the claimant's dues as per the contract of employment and the total sum was Kshs.9,148,714/= which was subsequently altered to Kshs.7,385,796.28 denying the claimant Kshs.2,384,544/=.
22. Counsel submitted that the letter releasing the claimant should have been for 3 months as per the letter of appointment, a fact the respondent was alive to.
23. According to counsel, the respondent misconstrued Clause 5(a) of the letter of appointment.
24. Counsel urged that Clause 5(a) was ambiguous and had to be construed contra proferentes, restrictively against the party relying on the clause and since the respondent drew the employment contract, it had to suffer the detriment.

respondent's submissions

25. According to counsel, the letter dated May 11, 2017 to the claimant was intended to facilitate transition since the board had resolved not to renew the claimant's contract of employment and no prejudice was occasioned.
26. As regards the notice period, counsel urged that although the claimant was released early, he was paid for the entire duration of the contract and was deemed to have served the entire contractual term and there was no justification for the claim as the claimant suffered no quantified loss and an award would amount to unjust enrichment.
27. That the claimant did not serve the respondent for 4 months yet he was paid full salary and gratuity for the entire period which according to counsel would disentitle him the other payments.
28. Reference was made to the decision in *Alfred Ogenche Nchore V Kenya Kazi Services Ltd* (2022) eKLR where the court addressed a claim for the unexpired duration of a fixed term contract.
29. Counsel urged that the claimant was released in good faith prior to expiry of his contract of employment to allow a smooth transition and all dues were paid. That it was a positive gesture.
30. Finally, counsel submitted that the claim herein was brought in bad faith by a disgruntled employee for more money after a lawful separation and having been paid all dues.

Findings and determination

31. The issues for determination are;
 - i. Whether the claimant's employment was unfairly terminated and
 - ii. Whether the respondent promised to pay the claimant 3 months salary in lieu of notice.
32. It is not in contest that the Claimant was an employee of the respondent under a 5 year fixed term contract dated September 17, 2023.



33. Clause 3 of the contract provided that;
- “This contract of employment will be for five (5) years commencing from September 17, 2012 and shall expire on September 17, 2017.”
34. Renewal of the contract was by agreement on terms and conditions agreed upon in writing and a written request had to be made at least six (6) months before expiry date of the contract.
35. Termination was three (3) month’s notice or pay in lieu by either party and gratuity at 31% of basic salary.
36. It is also not in dispute that by letter dated May 11, 2017, the respondent in response to the claimant’s letter dated February 28, 2017 on renewal of contract notified the claimant that he would be released from employment effective May 12, 2017 as the request for renewal of contract had been unsuccessful.
37. The letter stated inter alia;
- “In accordance with your terms and conditions of service as enshrined in your letter of appointment and contractual obligations, you will be paid salary in lieu of the remaining period of your current contract as well as other dues less any company liabilities. All other contractual obligations pertaining to your terms and conditions of service shall prevail and be fully honoured.”
38. Equally, it is common ground that the claimant did not serve the remaining period of his contract and was paid all dues including gratuity sometime in June 2017 long before his contract of employment lapsed on September 17, 2017 allegedly to facilitate a smooth transition in the office.
39. What begs the question is whether the respondent’s letter dated May 11, 2017 was a notice of termination of the claimant’s employment and/or promised pay in lieu of notice.
40. Instructively, the claimant’s claim is not squarely hinged on unlawful termination of employment as evidenced by the issues in dispute itemised in the Memorandum of Claim. The only issue in dispute is non-payment of salary in lieu of notice.
41. The claimant tendered no evidence to prove that his employment was terminated before expiry as the letter dated May 11, 2017 by which he was released was clear as to the terms of the release and the claimant did not contest the release nor decline the dues amounting to Kshs.7,385,796.23.
42. Although there is no indication that the claimant questioned the respondent’s letter and dues were paid, the respondent’s letter dated May 11, 2017 was emphatic that;
- “Accordingly, your last date of duty and service is May 12, 2017”.
43. Clearly, the letter was neither a proposal nor request but a firm decision of the respondent’s board of directors. It has the hall mark of a letter of termination of employment. For unexplained reasons, the respondent found it unwise not to engage the claimant prior to proceeding in the manner it did.
44. It cannot be gainsaid that the claimant had a legally binding and enforceable contract of employment due to lapse on September 17, 2017 and the same could only be terminated in accordance with its terms and the provisions of the *Employment Act*, 2007.



45. The respondent's letter gave the claimant no option but to leave on the following day never to return. The letter provided no reason for the rather drastic step which may have caught the claimant off-guard, the absence of a response or objection notwithstanding.
46. It is also puzzling that the respondent did not care to respond to the claimant counsel's letter dated September 14, 2017.
47. In the court's view, a meeting with the claimant on the proposal would have culminated in a mutual separation and possibly obviated the current suit.
48. The fact that the respondent opted not to engage the claimant before or after the decision was communicated to him is sufficient evidence that due process was not followed.
49. The alleged gesture by the respondent is not manifest in its conduct towards the claimant.
50. In determining this issue, the court is guided by the sentiments of Abuodha J. In *Nicholus Kipkemoi Korir v Hatari Security Guards Ltd* (2016) eKLR, where the judge stated as follows with reference to the provisions of section 47(5) of the *Employment Act*, 2007;
- “ This burden of proof does not become any less on the employee simply because the employer has not defended the claim or absent at the trial. The claimant must still prove his or her case. It is therefore not enough for the employee to simply make allegations on oath or in the pleadings, which are not backed by any evidence and expect the court to find in his or her favour.”
51. These sentiments apply on all fours to the circumstances in the instant case.
52. Although the respondent defended the suit, the respondent's letter dated May 11, 2017 is sufficient to demonstrate that the claimant's employment contract was terminated before expiry on September 17, 2017.
53. In sum, it is the finding of the court that the claimant has demonstrated on a balance of probabilities that his employment contract was unfairly or unlawfully terminated by the respondent.
54. The foregoing notwithstanding, the claimant has not demonstrated that he suffered any loss or damage as he was paid the salary due to him till the end of the contract. In the court's view, awarding compensation to the claimant would not be justified in the circumstances of this case.
55. As to whether the respondent's letter dated May 11, 2017 promised the claimant pay in lieu of notice, the court proceeds as follows;
56. Paragraph 6 of the claimant's Memorandum of Claim states that “the respondent agreed to pay the claimant salary in lieu of notice for the remaining three months period as well as other dues . . .”
57. The claimant's statement makes reference to promise to pay salary in lieu of notice and other dues.
58. As adverted to elsewhere in this judgement, the respondent's letter stated inter alia;
- “ . . . You will be paid salary in lieu of the remaining period of your current contract as well as other dues . . .”
59. A cursory reading of the letter reveals that the paragraph made no direct promise or reference to pay salary in lieu of notice as alleged.



60. The salary being referred to, in the court's considered view was in lieu of actively serving the remaining period of the contract. In other words, the promise to pay the claimant salary for the unserved period of the employment contract, a promise the claimant appear to have been comfortable with as he did not respond to the letter or raise any objection.
61. The claimant's counsel submission that the respondent made the correct computation but subsequently altered the same was not backed by evidence as the documents relied upon to urge the same were not testified about and lack authenticity. Similarly, the claimant's evidence made no reference to altered figures or computations and by whom.
62. Finally, the claimant's counsels argument that clause 5(a) of the employment contract was unambiguous and ought to be interpreted using the contra proferentem rule is interesting.
63. The relevant paragraph states as follows;
- “This contract may be terminated by either party giving a three month's notice or salary in lieu thereof.”
64. In the court's view, the foregoing paragraph lacks ambiguity and the contra proferentem rule of construction of contractual clauses need not be invoked in this instance.
65. More significantly, however, paragraph 4 of the respondent's letter dated May 11, 2017 was emphatic that;
- “All other contractual obligations pertaining to your terms and conditions of service shall prevail and be fully honoured.”
66. In the court's view, since the payments due to the claimant under paragraph 4 were premised on the claimant's terms and conditions of service contained in the letter of appointment, the court is persuaded that the respondent promised to pay the claimant all dues payable to him under the contract of employment and the claimant is thus entitled to the 3 months salary in lieu of notice.
67. This finding is consistent with the previous finding that the respondent's letter of May 11, 2017 was indeed a termination letter and no notice was given. The claimant was directed to cease reporting to the work place for unexplained reasons but assuaged by the promise to pay for the remaining period of the contract.

Reliefs

68. Having found that the claimant was paid the salary for the unexpired duration of the contract, the court is not persuaded that the claimant is entitled to further compensation.
69. Having further found that the prayer for pay in lieu of notice is merited by reason of the unfair termination and respondent's promise, judgement is entered in favour of the claimant against the respondent in the following terms;
- a. Three (3) month's salary in lieu of notice.
 - b. Costs of this suit.
 - c. Interest at court rates till payment in full.

It is so ordered.



DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 12TH DAY OF JULY 2023

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

