Livoi v Macnaughton Limited (Employment and Labour Relations Cause E410 of 2021) [2023] KEELRC 2630 (KLR) (26 October 2023) (Judgment)

Neutral citation: [2023] KEELRC 2630 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS CAUSE E410 OF 2021

BOM MANANI, J

OCTOBER 26, 2023

BETWEEN

CLIFFORD OTWERE LIVOI ..... CLAIMANT

AND

MACNAUGHTON LIMITED ..... RESPONDENT

JUDGMENT

1. Until termination of his contract of service on 30th November 2018, the Claimant was serving as an employee of the Respondent having been hired in the position of Medical Representative in June 2012. On 1st November 2018, the Respondent issued him with notice of termination of the employment relation effective the close of that month.

2. According to the Claimant, the Respondent had engaged his services on indefinite and or permanent terms. The Claimant states that he served uneventfully until 1st November 2018 when he was served with a letter intimating that his services were no longer required.

3. The Claimant states that the Respondent cited closure of the marketing contract between it and Pfizer Laboratories Ltd as the reason for the decision to terminate his contract. According to the Claimant, the Respondent's position was that he (the Claimant) was employed solely to market the products of Pfizer Laboratories Ltd. As such, the closure of the marketing contract between the said company and the Respondent necessarily meant that the contract of service between the Claimant and the Respondent also came to a close.

4. However, the Claimant argues that his contract with the Respondent was independent of the contract between the Respondent and Pfizer Laboratories Ltd. Therefore, closure of the contract between the two companies ought not to have affected his employment.

5. Alternately, the Claimant avers that if the collapse of the marketing contract between the Respondent and Pfizer Laboratories Ltd impacted on his contract, then he ought to have been released from

employment in accordance with the applicable law on redundancy. It is the Claimant's case that the Respondent did not follow this procedure.

6. The Claimant further contends that during the currency of his employment, the Respondent did not provide him with physical housing. Neither was he paid house allowance. Therefore, he claims for the arrears of this allowance.

7. On its part, the Respondent contends that the Claimant's contract was not permanent. The Respondent avers that continuity of the aforesaid contract was dependent upon survival of the marketing contract between it (the Respondent) and Pfizer Laboratories Ltd. Therefore, when Pfizer Laboratories Ltd terminated the marketing contract, the Claimant's employment necessarily came to a close.

8. The Respondent denies that the contract of service between the parties was terminated on account of redundancy. According to the Respondent, closure of the Claimant's employment contract was the direct result of closure of the marketing contract with Pfizer Laboratories Ltd.

9. The Respondent asserts that the Claimant was issued with the requisite termination notice in terms of the contract between the parties. It is the Respondent's contention that the Claimant was paid his terminal dues and was therefore lawfully discharged from employment.

Issues for Determination

10. Having scrutinized the pleadings and evidence on record, I am of the view that the following are the issues for determination: -

    a. Whether the contract of service between the parties was lawfully terminated.

    b. Whether the parties are entitled to the reliefs that they seek through their respective pleadings.

Analysis

11. Upon phasing out of the previous statutory framework on employment in Kenya in 2007, the doctrine of employment at will in the country's laws was done away with. In effect, an employer is no longer entitled to terminate an employee's contract of service at will.

12. Except where an employee agrees to mutual separation, the employer can only terminate a contract of service with cause. In addition, the employer must ensure due process in releasing the employee.

13. Even in instances where the letter of appointment provides for notice to terminate the contract, this does not absolve the employer of the twin responsibilities of ensuring that: there is a valid reason to terminate the contract; and the procedure for release of the employee that is inscribed in law is adhered to.

14. Under the current statutory framework on employment in Kenya, the employer may terminate an employee's contract on account of: redundancy under section 40 of the *Employment Act*; or gross misconduct or physical incapacity or poor performance under section 41 of the *Act*. An employment contract may also be closed on account of insolvency or death of either of the parties to the contract, frustration of the contract or illegality of the employment relation occasioned by subsequent events (*Kenya Airways Limited v Satwant Singh Flora* [2013] eKLR).

15. Where a contract of service is rendered incapable of performance on account of frustration, the employer is still required to close the relation in accordance with due process. In the case of *Five Forty Aviation Limited v Erwan Lanoe* [2019] eKLR, the Court of Appeal suggested that in such

case, the employer has two options. First, if the contract has provision for a termination notice, the employer may invoke this clause to close the contract. Alternatively, the employer may opt to follow the procedure under sections 41, 43 and 45 of the *Employment Act* to close the relation. The court expressed itself on the matter as follows: -

> ''The above finding now leads us to the determination of what in our view should have been the correct mode of terminating the said contract following our finding that the same had been frustrated by the appellant's default to comply with the section 45(2) of the new *Act* procedures. In the case of *Nicola Romano v Master Mind Tobacco (K) Limited* (supra), the ELRC expressed the view that, parties to a frustrated contract have recourse to the contract itself. In the instant appeal, the contract itself made provision for clause 9 of the contract whereby either party could terminate the contract by giving the other one month's notice or one month's salary in lieu thereof. The appellant therefore had an opportunity to have recourse to the said clause to terminate the frustrated contract. Alternatively, since the contract was executed in compliance with the provisions of the *Employment Act*, 2007, the appellant as the employer, also had an opportunity to invoke sections 41, 43 and 45 of the *Employment Act*, 2007 procedures to terminate the said frustrated contract.''

16. Although the Statement of Response filed by the Respondent does not expressly allude to the term ''frustration of contract'', I understand the Respondent to be stating that the contract between the parties was frustrated due to the closure of the contract between it (the Respondent) and Pfizer Laboratories Ltd. This becomes clear when one considers paragraphs 7, 10, 11 and 16 of the said response together. The net import of these paragraphs is that: -

    a. Survival of the Claimant's contract of employment was tied to the subsistence of the marketing contract between the Respondent and Pfizer Laboratories Ltd.

    b. Pfizer Laboratories Ltd gave notice of termination of the marketing contract with the Respondent as from 30th November 2018 with the consequence that the Claimant's employment contract could no longer be performed after 30th November 2018.

    c. As a result, the Respondent issued the Claimant with a notice of termination of employment based on the notice that was issued by Pfizer Laboratories Ltd which closed the marketing contract between the two companies.

17. The totality of this plea is that the closure of the marketing contract between the Respondent and Pfizer Laboratories Ltd constituted a frustrating element to the continued performance of the Claimant's employment contract thereby lawfully bringing the employment relation between the disputants to an end. I am therefore satisfied that the defense of frustration is impliedly pleaded.

18. In the witness statement by the defense witness, he reiterates that the Respondent terminated the Claimant's contract following the closure of its (the Respondent's) contract with Pfizer Laboratories Ltd. This was repeated during the oral testimony by this witness.

19. In effect, the said witness was reiterating what I have indicated above. This evidence was followed by the closing submissions by the defense counsel in which he submitted that the contract between the disputants was frustrated following closure of the marketing contract between the Respondent and Pfizer Laboratories Ltd.

20. From the Claimant's letter of appointment dated 15th May 2012, it is clear that his responsibility was to manage Pfizer products. He was to: promote the products to the medical profession; ensure adequacy

of stock of the products with distributors, pharmacists, hospitals and dispensing doctors; and monitor market trends of products by competitors.

21. It appears from the circumstances of the case that the basis for the contract between the Claimant and Respondent was the latter's involvement in marketing the products for Pfizer Laboratories Ltd. Otherwise, it would be difficult to explain why the Respondent expressly mentioned in the Claimant's contract that his duties were specifically to handle Pfizer products. This implies that continuation of the relationship between the Respondent and Pfizer Laboratories Ltd was necessary for the survival of the Claimant's contract of service.

22. In the case of *Kenya Airways Limited v Satwant Singh Flora* [2013] eKLR which was quoted with approval in*Five Forty Aviation Limited v Erwan Lanoe* [2019] eKLR, the Court of Appeal described the effect of a frustrating element to a contract as follows:-

> "....the doctrine of frustration operates to excuse further performance where it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist, or that some particular person will continue to be available, or that some future event which forms the foundation of the contract will take place, and before breach performance becomes impossible or only possible in a very different way to that contemplated without default of either party and owing to a fundamental change of circumstances beyond the control and original comptemplation of the parties. The mere fact that a contract has been rendered more onerous does not of itself give rise to frustration."

23. The above definition of a frustrating element appears to fit the circumstances of the instant case. Pfizer Laboratories Ltd's decision to terminate its marketing contract with the Respondent appears to have been outside the power of the disputants (Claimant and Respondent) to control. On the other hand, closure of the contract between Pfizer Laboratories Ltd and the Respondent meant that the Pfizer products which the Claimant had been hired to market were no longer available to the Respondent for that purpose. This in effect, rendered performance of the contract between the Claimant and Respondent impossible thus discharging them from their obligation under it (the contract).

24. Notwithstanding the foregoing, I would perhaps have looked at the matter differently. In my view, the effect of withdrawal of products by Pfizer Laboratories Ltd from the Respondent was to essentially render the Claimant's position within the Respondent's establishment superfluous.

25. Once this happened, the position of the Claimant within the Respondent's establishment, in my view, became redundant. Ideally therefore, the Respondent ought to have released the Claimant from employment in accordance with the applicable redundancy regulations.

26. However, and going by the decision in the case of *Five Forty Aviation Limited v Erwan Lanoe* (*supra*), it would appear that it was not necessary for the Respondent to invoke the redundancy procedure in order to close the frustrated employment relation between the parties. If the position expressed in that decision is anything to go by, once the contract of service between the parties suffered frustration, all that the Respondent was required to do in order to bring it to closure was to either issue the Claimant with notice to terminate the contract or invoke the procedure under sections 41, 43 and 45 of the *Employment Act* to end their relation.

27. Notwithstanding my view that it would perhaps have been desirable for the Respondent to have invoked the redundancy process to close the employment relation between the parties, I am bound to adopt the position that was expressed by the Court of Appeal on the subject in *Five Forty Aviation Limited v Erwan Lanoe* (*supra*). This is on account of the principle of hierarchy of judicial precedent.

28. In the instant case, the Claimant's contract with the Respondent was premised on the latter's marketing contract with Pfizer Laboratories Ltd. The collapse of the marketing contract is cited as the reason why the Claimant's contract of service was terminated.

29. Following this development, there is evidence that the Respondent issued the Claimant with notice to terminate the relation between them in terms of the termination clause in the contract. This notice was issued through the Respondent's letter to the Claimant dated 1st November 2018. According to the said letter, the notice was to run for thirty days until 30th November 2018.

30. The foregoing suggests that the Respondent terminated the Claimant's contract in accordance with the procedure that was proposed by the Court of Appeal in the case of *Five Forty Aviation Limited v Erwan Lanoe* [2019] eKLR. In the premises, the contract was validly closed upon being frustrated.

Determination

31. The upshot is that the Claimant's case against the Respondent is without merit. Consequently, it is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED ON THE 26TH DAY OF OCTOBER, 2023

B. O. M. MANANI

JUDGE

In the presence of:

.....for the Claimant

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI