



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

CAUSE NO. 864 OF 2017

JACINTA WAITHIRA NJOGU.....CLAIMANT

VERSUS

KENYA PLANTERS' COOPERATIVE UNION LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. Through a memorandum of claim dated 15th May 2017, the Claimant herein impleaded the Respondent seeking the following reliefs:

- a) A sum of Kshs. 12,371,448.10
- b) Interest on (a) above from due dated until the date of payment in full.
- c) Costs of this suit.
- d) Any other relief that this court may deem appropriate to grant.

2. Upon being served with summons to enter appearance, the Respondent did, and filed a response to the memorandum of claim, on the 4th October 2017.

3. When this matter came up for directions on the 20th July 2017, parties indicated to court that they were attempting an out of court settlement and sought for 30 days to enable finalization of the negotiations and recording of a consent. The matter then got slated for the 6th of December 2017 for recording of the settlement.

4. Even after the court extending an indulgence to the parties twice, the settlement was never arrived at. On the 4th February 2019, the court got prompted to issue directions and timelines regarding filing of witness statements. The Claimant complied but the Respondent didn't.

5. When this matter came before me for hearing on the 28th October 2021, counsel for the Respondent sought for an adjournment which the court declined to grant. The court ordered the matter to proceed. Consequently, the Claimant testified closing her case. The Respondent closed its case without calling any witness.

6. The court gave timelines to the parties for filing of submissions, submissions which they have both filed.

The Claimant's case

7. At the hearing of this matter, the Claimant urged the court to adopt her witness statement dated 25th October 2018, herein filed, as her evidence in chief and admit the documents that she had filed under the list of documents dated 15th May 2017, as her documentary evidence. Absent of any objection from the Respondent the court so adopted and admitted.

8. It was the Claimant's case that through its letter of appointment dated the 18th December 2013, the Respondent appointed her to the position of Deputy managing director on a fixed term contract. The contract was to run for 3 (three) years commencing 18th December 2012.

9. She stated that prior to this appointment, she had served the Respondent as the Managing director, upon the appointment that was through the latter's letter dated 21st March 2013.

10. The Claimant stated that appointment was at a monthly remuneration of Kshs. 393,733.50.
11. She further stated that during her employment with the Respondent, the Respondent contrary to that which the law expected of it would not pay her, her full salary, for instance in December 2016, she was paid only Kshs. 90,303.00 as the pay slip for the month reflects.
12. The Claimant asserted that as a result of the persistent non-payment of her full salary as and when they fell due, as the December 2016, her accumulated salary arrears stood at Kshs. 8,348,786.00, as reflected on the December 2016, pay slip.
13. The Claimant contended that it was a term of the contract of employment that upon successful completion of each contract term, she was entitled to a one-off gratuity calculated at the rate of 25% of her annual gross salary. This was so provided in clause 12 of the letter of appointment. She contended that having worked from 21st March, 2013 to 19th December 2016, she was entitled to a sum of Kshs. 2,698,951.90 as gratuity.
14. The Claimant asserted that despite being entitled to an annual leave, she did not proceed for the same. She was not compensated for the same either. She is claiming for Kshs. 387,810.6 therefore.
15. It was her case that under the contract of employment she was entitled to transport allowance and Board allowance. As at the lapse of her contract, she had expended Kshs. 282,700 on fuel. The Respondent was obliged to compensate but did not. The Board allowance arrears stood at Ksh.653,200.00.
16. The Claimant stated that as a result of the non-payment of her entitlement by the Respondent she has suffered immense financial strains with a grave impact on her and her children.
17. The Claimant stated that a demand letter dated 10th April 2017 by her counsel, though received by the Respondent, did not attract any response or action.
18. The Claimant tendered the following documents as her documentary evidence, thus:
- (i) *Letter of appointment dated 21st March, 2013.*
 - (ii) *Letter of appointment dated 18th December, 2013.*
 - (iii) *Pay slip for December, 2016.*
 - (iv) *Salary arrears tabulation.*
 - (v) *Gratuity calculations document.*
 - (vi) *Leave allowance calculations.*
 - (vii) *On Board arrears calculations.*
 - (viii) *Demand letter dated 6th April, 2017.*
19. Cross examined by counsel for the Respondent, the Claimant stated that she is 69 years old. Since the separation, she has not been employed elsewhere.
20. She reiterated that her pay slip for December 2016, showed the total unpaid salary that was owed to her. She confirmed that gratuity sum was not an item on the pay slip.
21. The Claimant contended that the documents comprising the tabulations were prepared by the Finance officer, though he did not sign them.
22. The witness stated that there were attempted negotiations on the arrears but the Respondent was reluctant to settle.
23. On re-examination by her counsel, the Claimant testified that though she was entitled to gratuity under the letter of appointment, the Respondent never paid her.

The Claimant's submissions

24. Counsel for the Claimant submitted that section 17 of the Employment Act, 2007 protects salaries of an employee. It places a mandatory obligation on the employer to pay the employee the entire amount of the wages earned. The Respondent ran afoul this stipulation of the law. The Claimant's claim for withheld salaries is well grounded. The pay slip issued by the Respondent clearly shows the "balance unpaid salary Kshs. 8,348,786.00."
25. It was further submitted that the claim for gratuity is anchored on clause 10 of the letter of appointment. The sum claimed under the head

is calculated at the rate of 25% of the annual gross salary, for the period that that the Claimant worked.

26. The Claimant's claim for annual leave allowance finds foundation on clause 9 of the letter of appointment.

27. It was further submitted that according to clause 12 of the letter of appointment, the Claimant was entitled to official transport. Since there was none provided, she was forced to expend money from her own accounts for fuel, hence the claim for the Kshs. 282,100.

28. Counsel submitted that the Claimant was a member of the board of the Respondent and who was entitled to receive sitting allowances. The allowances were not paid, and as at the time of separation, the unpaid allowance had accumulated to Kshs. 653,200.00.

The Respondent's submissions

29. Counsel for the Respondent identified two issues as the issues for determination in this matter, thus:

(i) Whether the Claimant is entitled to gratuity pay.

(ii) Whether the Claimant is entitled to refund for fuel in lieu of official transport.

30. On the first issue, counsel submitted that the Claimant is not entitled to the Kshs. 2,698,951 that she has sought. That she has placed reliance on a document (Claimant's document No. 5) which document has no stamp for the Respondent and is not signed. That the document is evidence wise valueless. In this submission counsel put reliance in the holding in **Global Soap and Detergent Ind. Limited vs National Agency for Food and Soup Adamn. & Control [NadsX] [2011] LCN/4461 CA:**

31. Counsel sees a contradiction between the contents of document No. 3 (Claimant's) the pay slip, and her testimony on gratuity. He submitted that the pay slip does not indicate that the Claimant was owed gratuity as at that time, but salary arrears only. That if the Claimant was owed the gratuity sums sought, the pay slip would have indicated.

32. As regards the claim for Kshs. 282,700, a refund for fuel expenditure, counsel submitted that the Claimant has sought to place reliance on a document which is not signed or stamped, it should be ignored.

33. Counsel summed up his submissions by stating that the Claimant did not prove her entitlement to the reliefs sought for gratuity and a refund of fuel expenditure.

Analysis and Determination

34. From the material placed before me by the parties, only one broad issue commends itself as the issue for determination, namely, whether the Claimant is owed the amount sought.

35. Before I delve into addressing the issue, I find it imperative to state that though the Respondent did file a response to the memorandum of claim, it did not present any witness to testify on its behalf in support of its case. It is trite law that where a party files pleadings but at the hearing of the matter does not present any evidence on the same, such pleadings will remain mere statements without any evidential value. That is how exactly this court has decided to treat the response to the claim, a mere statement.

36. The Claimant contended that the Respondent throughout her contractual period was paying her salary that was not full. That consequently, the salary arrears accumulated to Kshs. 8,348,786.00. indeed, this is the sum reflected at the bottom of the pay slip for December 2016 as "Balances unpaid salary." The Respondent did not put forth any evidence to challenge the Claimant's evidence on this claim, and the authenticity of the pay slip.

37. Besides, looking at the submissions by counsel for the Respondent, he does not make the claim for the sum of Kshs. 8,348,786.00, a contested issue for determination by this court.

38. Consequently, I find that the Claimant is entitled to the sum of Kshs. 8,348,786.00.

39. Gratuity entitlement normally flows from a contractual term. Clause 10 of the letter of appointment provided:

"upon successful completion of each contract term, you will qualify for a one-off gratuity calculated at a rate of 25% of your annual gross salary."

40. It was duty upon the Respondent to demonstrate that it did discharge its contractual obligation in paying the Claimant her contractual entitlement, the gratuity. If at all there had been any payment of the gratuity, nothing would have been easier for the Respondent to provide evidence on when and how the payment was made by way of a record.

41. I do not agree with counsel for the Respondent that gratuity amounts would have been made an item of the December 2016 pay slip.

42. Further from the onset, the Claimant was clear on the documents that she was to put reliance on, in support of her case. The documents were served upon the Respondent. The authenticity of those documents was not challenged at any point. If indeed the documents did not emanate from the Finance officer as was contended by the Claimant, one would reasonably expect the Finance officer to have been called to

disabuse the documents. I am convinced that the tabulations were done by the Finance officer and that they are a true reflection of what the Claimant was owed as at the time the contract of employment came to an end.

43. It is by reason of the foregoing premise, that I further find that the Claimant is entitled to an award of Kshs. 282,700.00 being the refund of fuel expenses and board allowance arrears.

44. In the upshot, I find that the Claimant has proved her case to the requisite standards, and enter Judgment for her in the following terms:

a) Kshs. 12,371, 448.00

b) Interest on the award sum at court rates, from the date of filing this suit till full payment.

c) Costs of this suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY OF JANUARY, 2022.

OCHARO KEBIRA

JUDGE

In Presence of

Mr. Kamotho for the Claimant.

Mr. Gichui for the Respondent.