



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1514 OF 2013

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

JOSEPH NGUNGU WAIRIUKO.....CLAIMANT

VERSUS

TASSIA COFFEE ESTATE LIMITED.....RESPONDENT

JUDGEMENT

INTRODUCTION

1. The Claimant filed an amended memorandum of claim dated 21st September, 2015.

The Claimant's memorandum was first filed and dated 21st September, 2013.

The Respondent's response was dated 17th October, 2013.

CLAIMANT'S CASE

2. The Claimant was employed by the Respondent by a contract dated 19th June, 2008 at a monthly salary of Kshs.30,000/= and at an increment of 10% per month.

On 12th January, 2012 however he received a letter from HON. GITHUNGURI instructing him to hand over the assets of **TASSIA FARM to MILELE VENTURES LIMITED** including motor vehicle log books. He says he did so by 31st January, 2012.

3. He says after handing over Milele assets to the said **MILELE VENTURES** he was technically declared redundant.

4. He says he was then offered employment by the 2nd Respondent **LIZTAN ENTERPRISES** as a General Manager. That was on 6th March 2012.

5. The Claimant says he was not given notice or payment in lieu of notice and neither was he paid unpaid leave or salary in lieu of notice and certificate of service was not issued to him. He says the process of terminating him was flawed.

He prays that his termination should be declared unlawful and unfair and prays for terminal dues amounting to Kshs.59,804,642/60 as particularized in the amended memorandum of claim plus costs, interest and any other relief the court may deem fit to award.

He also prays to be issued certificate of service.

RESPONDENT'S CASE

6. The Respondent states that the Claimant was engaged as an Assistant Manager of the Respondent on 19th June, 2018 at a monthly salary of Kshs.30,000/= and at an increment of 10% per annum and not 10% per month as put in the appointment letter.

7. The Claimant worked for the Respondent until June, 2010 and employees were paid their terminal dues.

The Claimant worked until November, 2010 as a casual and he then left employment.

He however resumed employment in January, 2011 till February, 2012. He was paid all his dues and benefits.

8. The Respondent says the Claimant's services were lawfully terminated and he confirmed he had no further claims against the Respondent.

He says his claim is therefore fraudulent and should be dismissed with costs.

Issues for determination

9. (i) Was the Claimant entitled to monthly 10% increment of his salary or annual 10% increment.

(ii) Was he unfairly terminated?

(iii) Is he entitled to the remedies claimed?

DETERMINATION

10. The Claimant was employed by the Respondent by a letter of appointment dated 19th June, 2008.

It was a term of contract that he would be paid Kshs.30,000/= per month and 10% increment per month,

11. The Respondent wrote to him on 26th June, 2008 and apparently clarified that his salary increment was 10% per annum not per month.

The Claimant worked for the Respondent from 1st July, 2008 upto 12th January, 2012 after TASSIA FARM was sold to **MILELE VENTURES** and the Claimant was technically declared redundant.

He was offered a job with another company sister to the Respondent known as **LIZTAN LIMITED**. We are not apprised on the fate of that engagement and is not part of this suit anyhow.

12. The Claimant continued to work for the Respondent from 2008 to January, 2012 when the farm was sold.

He did not as far as the records demonstrate raise the issue of his salary not being increased by 10% per month. The Respondent before the Claimant commenced the employment informed him in writing that the rate per increment was 10% per year not per month. This was by a letter dated 26th June, 2008.

The Claimant then commenced employment on 1st July, 2008 and did not raise the issue of that increment until he filed the suit after the employment came to an end.

13. In variation of agreement the employer should consult the employee before revising the terms as provided in Section 10 (5) of the Employment Act. He should notify the employee of the changes in writing.

14. In this case the Respondent avers he gave a letter to the Claimant clarifying the variation. Thereafter the Claimant commenced employment on those terms without raising any issue.

The case of **JAMES ANGAMA & 10 OTHERS VS JUDICIAL SERVICE COMMISSION (2017) eKLR** it was stated that

“the authorities also envisage that an employee's consent to the variation may be express or implied and can be inferred from conduct such as remaining at work after revised terms have been imposed.”

15. The conduct of the Claimant in this case reveals the Claimant gave his implied consent to be bound by the revised term.

16. The Claimant himself by his letter of 11th June, 2008 said his salary was Kshs.30,000/= but was hoping to get Kshs.85,000/=. Also in his letter of 11th April, 2013 he admitted his salary increment had been 10% per annum. In view of the above the Claimant accepted the revised terms by conduct and even expressly.

17. He is therefore estopped from demanding arrears of 10% per month after conceding to 10% per annum instead of 10% per month.

The Claimant did waive his right to the 10% monthly increment when he accepted payment from 2008 July to the time he left employment. In the case of **SITA STEEL ROLLING MILLS LIMITED VS JUBILEE INSURANCE COMPANY LIMITED (2007) eKLR** the court stated this

“a waiver may arise where a person has pursued such a course of conduct as to evidence an intention to waive his conduct and is inconsistent with any other intention than to waive it. It may be inferred from conduct or acts putting one off one's guard and leading over to believe that the other has waived his right.”

18. In **SARAH NJERI VS JOHN KIMANI**

NJOROGE (2013) eKLR stated

“The doctrine of waiver operates to deny a party its right on the basis that he accepted to forego the same rights having known of their existence. The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of the person.”

19. Without belabouring the point any further, I am persuaded the Claimant accepted his salary from July, 2008 to be increased by 10% per year and so the issue cannot be revisited several years after he acquiesced to the same.

20. The other issue for determination was the procedure that the Respondent used to terminate the Claimant. When the Respondent sold its farm it informed its employees of the process.

There is no evidence given that the employees were informed they were to be rendered redundant.

In that regard the Respondent failed the fairness test.

21. Section 40 of the Employment Act provides in mandatory terms and is not left to the choice of the employer to follow the process of declaring an employee redundant.

One point to note is that employee must be notified a month in advance or his union if he is a member of the union of the intended process to render him redundant.

22. The employer must show criteria used to declare their employees redundant and usually the practice is last in first out and of course employee is paid for notice period and severance pay.

In **HESBON NGARUIYA WAIGA VS EQUATORIAL COMMERCIAL BANK LIMITED CAUSE NO.60 OF 2013** the court held that termination of employment on account of redundancy should adhere strictly to applicable procedural requirements.

The court also held that where redundancy procedure was not followed any termination would be deemed unprocedural and unfair.

23. In this case the Respondent failed the fairness test and he terminated the Respondent's employment unfairly. Even if he recommended him for another job in a sister company he should still have followed the procedure.

On that front I find the Claimant was unlawfully and irregularly terminated and I enter judgement in his favour.

24. Having ruled so I find the remedies prayed by the Claimant are not justified as I already ruled on the salary arrears. I declare the Claimant is not entitled to arrears as already explained in details.

As for the notice pay he was already paid the Kshs.30,000/= in appendix three and he acknowledged receipt.

(b) He was paid 2 years' service pay but I would work out at 4 years @ 15 days for every year worked Kshs.60,000

Less Kshs.34,625

So due Kshs. 25,385

(c) I will also award him 5 months equivalent for the years worked for the Respondent Kshs.150,000/= as compensation for unlawful termination.

For avoidance of doubt I decline to award the reliefs prayed amounting to Kshs.59,804,642.60 as they are not proved.

The total awarded to the Claimant therefore is Kshs.175,385/= plus interest at court rates from the date of Judgement till full payment.

Costs are also awarded to the Claimant.

So ordered.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 17TH DAY OF FEBRUARY 2022.

ANNA NGIBUINI MWAURE

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 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.

A signed copy will be availed to each party upon payment of court fees.

ANNA NGIBUINI MWAURE

JUDGE