



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAKURU**

**ELRC CAUSE NO. 43 OF 2019**

**JACKSON M. ITALAKUA.....1<sup>ST</sup> CLAIMANT**

**ANGELA BIRIR..... 2<sup>ND</sup> CLAIMANT**

**-VERSUS-**

**KENYA FARMERS ASSOCIATION LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The Claimants brought this suit on 8<sup>th</sup> July, 2019 claiming to have that the Respondent had breached the contract of employment and underpaid them. They therefore sought for the following reliefs; -

**a. A declaration that the Respondent breached the employment contract between itself and the Claimants**

**b. Payment of all the sum calculated as underpayments in salary and other allowances and interests.**

**i. Unpaid salary.**

**1<sup>st</sup> Claimant Kshs 7,050,00 as at 1<sup>st</sup> July, 2019**

**2<sup>nd</sup> Claimant Kshs 7,050,00 as at 1<sup>st</sup> July, 2019.**

**ii. Unpaid Service gratuity.**

**1<sup>st</sup> Claimant Kshs. 1,762,500 as at 1<sup>st</sup> July, 2019**

**2<sup>nd</sup> Claimant Kshs. 1,762,500 as at 1<sup>st</sup> July, 2019.**

**iii. Unpaid House allowance.**

**1<sup>st</sup> Claimant Kshs. 375,000 as at 1<sup>st</sup> July, 2019**

**2<sup>nd</sup> Claimant Kshs. 900,000 as at 1<sup>st</sup> July, 2019**

**c. Cost of claim.**

**d. Respondent to pay the Claimants costs with interest.**

2. The summary of the Claimants' case is that they were both employed vide employment contracts dated 15<sup>th</sup> October, 2008 which employment was to take effect from 1<sup>st</sup> October, 2007 and was to be renewed from time to time.

3. The 1<sup>st</sup> Claimant was the Respondent's marketing manager while the 2<sup>nd</sup> Claimant was the Human resource manager both earning similar salary of Kshs 170,000 per month together with 15% house allowance and 25% Gratuity to be paid on yearly basis. However, the house

allowance was increased to 30% with effect from January 2014.

4. The Claimants stated that they received Kshs 119,070 from the Respondent as their basic salary instead of Kshs 170,000 as indicated in the employment contract. That this pay affected their house allowance and gratuity pay and despite their several inquiries on the said pay the Respondent failed to pay them their salary arrears.

5. It is stated also that other employees who were in management position were well paid as per their contract except them therefore that the Respondent discriminated against them.

6. The Respondent entered appearance on the 24<sup>th</sup> July, 2019 and file a response to claim on 8<sup>th</sup> August, 2019 admitting to employing the Claimants in their respective capacities.

7. It was stated that the Claimant who had earlier been retire were re-engaged by the Respondent on a 3 year fixed term contract that commenced on 1<sup>st</sup> October, 2007.

8. Prior to their engagement, the Respondent in a board meeting held on the 6<sup>th</sup> September, 2007 resolved to increase the salary of its employees by 50%. Subsequently the Claimants were informed of the new terms and their salary was increased from Kshs 79, 380 to Kshs 119, 070. Which terms were indicated in the employment contract issue to the Claimants on the 15<sup>th</sup> October, 2008.

9. That sometime in 2012, the Respondent engaged a consultant to carry out restructuring and in October, 2012 the 2<sup>nd</sup> Claimant by misrepresentation approached the Respondent's managing director and informed him that the consultant is requesting for copies of appointment letters for the Claimants showing salary of Kshs. 170,000, to be used only during the restructuring. Following the misrepresentation, the Respondent's managing Director presented contracts dated 15.10.2008, 1.10.2010 and 1.10.2012 reflecting the intended salaries.

10. It is stated that the said letter was signed by the Respondent's managing Director without authority of the Board on the basis that the said letter was to be used as sample for the purposed of restructuring only. It is alleged that the said director informed the 2<sup>nd</sup> Claimant that any salary review was to be done with the approval of the Board.

11. The Respondent avers that in the same month of October, 2012, the Claimants approached the managing director and verbally requested for salary review which request was tabled before staff and Finance committee of the board that was held on 12<sup>th</sup> October, 2012. Before the date of the said meeting the Claimants were both invited into the said meeting to allow them negotiate their new terms which they honored and attended the meeting of 12.10.2012.

12. The Respondent's Staff and Finance committee did not approve the said salary review and the matter was escalated to the Respondent's full board that was held on 30<sup>th</sup> April, 2013. The full board equally declined the Claimants request for salary review on the basis that the review was to be done for the Claimants with exclusion of all other employees and instead recommended that the review of salaries for all employee be considered once the finance position of the Respondent improves.

13. The Respondent then maintained that the agreed salary that was passed by the resolution of the board sitting on the 6<sup>th</sup> September, 2007 was Kshs. 119,070 and not 170,000 as alleged herein.

## **Hearing**

14. During hearing the 1<sup>st</sup> Claimant testified as CW-1 and adopted his witness statement dated 14.7.2019 which basically reiterated the claim and in addition confirmed that he has since exited the Respondent's employment. He also produced the documents attached to their claim marked as JM-1 to JM-13 respectively as the Claimants' exhibits.

15. Upon cross examination, CW-1 testified that he was the marketing manager for the Respondent vide the contract of employment dated 15.10.2008. that he had earlier engaged the Respondent on other terms. He testified that his basic salary as per the contract of 15.10.2008 was Kshs 170,000, however that he was not paid that sum despite seeking clarification from the Respondent.

16. Upon further cross examination, the witness testified that the never signed the contract dated 1.10.2010 indicating salary as Kshs 119000 and that he was seeing it for the first time in Court. He also testified that he received his salary which varied from Kshs. 99,000 in July, 2013 to Kshs. 119000 in January, 2017. He also admitted that he received the letter extending his contract on similar terms. That when he filed this claim his salary was now paid in full however that he is still owed by the Respondent.

17. On re-examination, the witness testified that he never signed the contract for October, 2010 but admitted having signed other contract. He then stated that the Respondent had occasional financial challenges which forced their salary to be staggered for months.

18. Angela Birir appeared as CW-2 and adopted her witness statement dated 4.7.2019 and produced the list of documents marked as AB-1 TO AB-13 as her exhibits.

19. Upon cross examination, CW-2 testified that she was to earn Kshs 170,000 as per the contract of employment dated 15.10.2008 which money was to be paid in arrears however that the money was never forthcoming. She further testified that she never received any salary amounting to Kshs. 119,000 at any point as alleged. On seeing the employment contract showing her salary as Kshs 119,000, CW-2 testified that the signature looks like hers however that she has never received that salary of Kshs 119,000 or the Kshs. 170,000 and that she was

always paid less.

20. Upon further cross examination, CW-2 indicated that there is no evidence of the increased house allowance and finally testified that she has not received any money in settlement of the claim herein.

21. On re-examination, the Claimant disowned the contract indicating her salary as Kshs. 119,000 when she was the Human Resource manager.

#### **Claimant's Submissions.**

22. The Claimants submitted that, they entered into a contract with the Respondent which contract was signed by the Respondent's a managing director as such that their basic salary is as indicated in the contract of employment dated 15<sup>th</sup> October, 2008. It was argued that the claim by the Respondent that the said contracts were made up for the purposes of being used by a consultant in the restructuring process cannot suffice in light of the fact there is no evidence table before Court to demonstrate that indeed there was consultancy services and also if indeed the Claimants made up the said contract then they ought to have been disciplined.

23. They therefore submitted that the employment contract ought to be relied upon by this Court without any leeway to construe the contract in any other way. In this they cited the case of **Pius Kimaiyo Langa V Cooperative Bank of Kenya Limited [2017] eKLR**.

24. The Claimants submitted that the contract of employment was produced as primary evidence as provided for under section 67 of the Evidence unlike the Respondent who produced their copies without explaining therefore that the documents produced in their original form ought to take precedence. In support thereof the Claimant cited the case of **Jane Wambui V Stephen Mutembei & another[2006] eKLR**.

25. It was further submitted that having established that the contract indicated the basic salary as Kshs 170,000, the Claimants were not remunerated as per the contracts therefore that the Respondent breached an essential term of contract. In this they cited the case of **Vincent Omollo Obuom V Catholic Diocese of Nakuru[2015] eKLR**.

26. The Claimants then submitted that despite the Claimants termination of employment later on the 17<sup>th</sup> March, 2020, they were paid only one month salary instead of the 3 months indicated in the employment contract. Also that the Claimants were not paid gratuity prior to the said termination which they now urged this Court to grant them.

#### **Respondent's Submissions.**

27. The Respondent on the other hand submitted that the Claimant have alleged to be owed arrear to the tune of Kshs 18,900,000 as at 1<sup>st</sup> July, 2019 but have failed to prove their allegation in accordance with section 107 and 108 of the Evidence Act. In support of this submission the Respondent relied on the case of **Charterhouse Bank Limited (Under statutory management) V Frank N Kamau [2016] eKLR**.

28. It was then submitted that the allegation of the Claimants' that their salary was reviewed upward to Kshs 170,000 is not backed up with any evidence in any case that the Managing Director who signed the said contracts of employment was acting in excess of his authority whose action was null and void. The Respondent then cited the case of **Affordable Homes Africa Ltd V Henderson & 2 other [2004] eKLR**.

29. Accordingly, it was submitted that the board of directors' decline to review the salary of the Claimant and instead proposed review for all employees to be considered when the company was financial stable.

30. The Respondent urged this Court to disallow the claim and dismiss it with costs.

31. I have examined the evidence and submissions of the parties herein. The main issues for consideration by this Court is what were the contract terms between the Claimant and the Respondents and whether these terms were breached in any way.

32. From the documents submitted by the parties – Claimants JM1 – 8 & JMI, 9 – 14 & AB1 – 7 & AB 8 – 12, the 1<sup>st</sup> Claimant was employed vide letter dated 15/10/2008 – JM I. The letter was a contract for 3 years with effect from 1<sup>st</sup> October, 2001 to 30<sup>th</sup> September, 2010.

33. Salary therein was 170,000/= per month and 15% of salary as house allowance. Gratuity is indicated at 25% payable at the end of each year worked.

34. JM1 - 2 is a further contract with effect 1/10/2010 to 30/9/2012 containing similar terms. JM1 – 3 is the contract for 1 year ending 30<sup>th</sup> September, 2013 with effect from 1/10/2012 also containing similar terms as per JM 1 – 4, the contract was further extended for 6 months with effect from 1/10/2013 to 31/3/2014 and as per JM 1 – 5, the contract was again extended to 30<sup>th</sup> September, 2014 for another 6 months and then as per JM 1 – 6 the contract was extended for 3 months with effect from 1/10/2014 to 31/12/2014.

35. As per JM 1 – 7 the contract was again extended from 1/1/2015 to 30/6/2016. The terms of the contract were to remain the same.

36. This also applies to JM1 – 8 where the contract was again extended for 1 year up to 30<sup>th</sup> June 2017 on similar terms.

37. JM 1 – 9 to JM 1 – 14 are payslips for the Claimant and show salary paid within the said period. There is an indication that some salary arrears were paid over the said period where the salary had remained unpaid.

38. AB1 to AB 12 in respect of the 2<sup>nd</sup> Claimant contains similar terms as for the 1<sup>st</sup> Claimant.
39. The Respondents contend that the salary in respect of the Claimants had been changed and new contracts issued. in cross examination CW1 agreed that he received a new contract and on 15/10/2010 in the new contract the salary payable was 119,000/=.
40. In fact this contract was signed by CW1. CW2 also testified and in cross-examination she indicated that they were retired in 2007 October and placed on contract. She also admitted signing the contract in question.
41. In the circumstances of this case I find that the Claimants and Respondents had new contracts signed from 2007 which pegged the basic salary payable to the Claimants at 119,000/= per month.
42. House allowance was 15% of basic pay and gratuity payable was 25% of salary for the year.
43. The 2<sup>nd</sup> Claimants admitted signing the contract at page 25 of the Respondent's documents.
44. Despite my finding that the salary payable to the Claimants as per the said contracts was 119,000/= it also appears that the Claimants were also housed by the Respondents hence the terms in the payslip "housing quarters VA".
45. The Claimants however appears to have been paid less than the 119,000/= as per the payslips produced.
46. Some arrears were also paid to the Claimants as admitted. In cross-examination, the Claimants admitted they were paid some arrears of salary but CW1 when asked, he said he was paid full pay after he filed this claim but he didn't know how much he was paid.
47. It is my finding the Claimants have not presented their case in a manner in which this Court can ascertain with finality what they were paid and what is owing.
48. In the circumstances I will direct the Claimant to file before this Court within 30 days a detailed schedule of amounts not paid with evidence based on 119,000/= salary for further consideration by this Court.
49. There will be no order of costs at this time.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT THIS 21<sup>ST</sup> DAY OF APRIL, 2022**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Kimathi for Claimants – present

Omae for Respondent – present

Court Assistant - Fred