



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO.371 OF 2018

THOMAS OGUNDE MBOYACLAIMANT

v

GRAND ROYAL SWISS HOTEL.....RESPONDENT

JUDGMENT

1. The Grand Royal Swiss Hotel (the Respondent) and Thomas Ogunde Mboya (the Claimant) engaged in discussions regarding the Respondent offering the Claimant an employment contract.
2. The Claimant was interviewed, and on 10 February 2017, a Manager with the Respondent sent an offer letter to him through email. The Claimant was informed in the email that he was expected to develop a business plan within the first month of employment and which plan was to be agreed on.
3. The offer also informed the Claimant that an employment contract would be prepared after he had accepted the offer by return email.
4. In an email of the same date, the Claimant informed the Respondent that he had accepted to join it as Group Marketing Manager.
5. On 16 February 2017, the Respondent formally offered the Claimant employment as Group Marketing Manager for a fixed-term of two years.
6. The formal offer letter requested the Claimant to sign the original letter and return the same to the Executive Director on the first day of reporting to work.
7. On 18 February 2017, the Human Resources Manager of the Respondent sent a copy of the offer letter to the Claimant through email. The email requested the Claimant to signify acceptance by signing, scanning, and sending a signed copy of the offer letter through email.
8. The email further advised the Claimant to present the original letter when reporting to work. The Human Resources Manager regretted that the Group General Manager had not signed the initial letter due to other commitments.
9. On 8 November 2018, the Claimant sued the Respondent alleging unfair termination of contract and breach of contract.
10. The Respondent filed a Response on 17 December 2018, and the Cause was heard on 16 November 2021 and 25 January 2022. The Claimant and the ICT Manager with the Respondent testified.
11. The Claimant filed his submissions on 21 February 2022, and the Respondent on 21 March 2022.
12. The Court has considered the pleadings, evidence, and submissions.

Employment relationship

13. The Respondent's primary defence to the claims by the Claimant was that there was no employment relationship between it and the Claimant because the Claimant had failed to signify acceptance of the offer for employment by appending his signature on the formal letter of offer.
14. The Respondent also contended that the Claimant did not execute the original of the employment offer dated 16 February 2017 or return the same to the Executive Director.

15. The Respondent also asserted that the Claimant did not report to work at all, and on 11 March 2017, the offer was withdrawn.
16. The Claimant, on the other hand, asserted that he acknowledged acceptance of the offer through email on 10 February 2017 and that when he travelled to Kisumu, he was given the original formal employment letter, which he signed and returned to a Human Resources Manager called Eunice (copies of air tickets were filed in Court).
17. The Claimant denied receiving the letter dated 11 March 2017 purporting to withdraw the employment offer.
18. The Respondent's ICT Manager sent an email to the Claimant on 10 February 2017, formally offering him the position of Group Marketing Manager.
19. The email requested the Claimant to confirm acceptance of the offer by return email before the preparation of a formal employment contract.
20. The Claimant acknowledged acceptance of the employment offer through an email to the Respondent's ICT Manager on 10 February 2017.
21. The Respondent then prepared a formal employment contract on 16 February 2017.
22. On 18 February 2017, the Respondent's Human Resource Officer sent a soft copy of the contract to the Claimant through email.
23. The email instructed the Claimant to send back through email a copy of the after printing, signing and scanning.
24. The email further instructed the Claimant to deliver the original signed copy upon reporting to work.
25. The Claimant was also informed in the email that the Group General Manager had not signed the hard copy of the letter due to other commitments but that he would sign his part upon returning to work.
26. The Respondent did not controvert or deny the Claimant's testimony that he complied with the instructions by Eunice. It did not disclose or produce any evidence to show how the letter dated 11 March 2017 purporting to withdraw the employment offer was delivered.
27. Concerning the contention that he never reported to work, the Claimant produced copies of air tickets showing that he travelled from Kisumu to Nairobi.

Withdrawal of employment offer under Kenyan law

28. The general and primary law of employment in Kenya, the Employment Act, 2007, does not address a situation where an employment offer has been accepted before a formal contract and where the relationship does not progress beyond the offer.

Common law

29. Under the general law of contract, the acceptance of an offer constitutes a binding contract that can be justiciable.
30. Under the common law, for an offer to be binding or valid, three essentials should be construed, and these are an intention to create a legal relationship; an offer and an acceptance and agreement on the essentials of the contract (including consensus on the rights and duties of the parties, remuneration, duration and start date).
31. In the case at hand, the Respondent made an offer that set out the remuneration, job description and duration (some of the *essentialia* of an employment contract).
32. The Claimant accepted the offer through an email dated 10 February 2017.

Comparative jurisdiction

33. In the South African case of *Greyvenstein v Iliso Consulting Engineers* (2004 BALR 330), the employer revoked the offer of employment before the commencement date. The employee referred the matter to the CCMA and the Commission found that a valid and binding contract arises as soon as the employee accepts the offer of employment, verbally or contractually.
34. The Labour Appeal Court South Africa case was faced with a similar question in the matter of *Wyeth SA(PTY) Ltd v Manqele Ors* (2005) 6 BLLR 523 (the employer had revoked an offer before the employee commenced work), and it held that common sense, justice and the values of the Constitution would best be served by extending the literal construction of employee to include such a person, and that employee includes a person who has accepted an offer of employment to start work at a later date.
35. It seems clear to this Court that an offer of employment, even if accepted verbally, constitutes a legally binding employment contract.
36. The Respondent herein made an offer to the Claimant, which the Claimant accepted. The Claimant's testimony that he signed and returned the original contract was not controverted.

37. The Court finds that a binding and valid employment relationship had commenced between the parties herein.

Unfair termination of employment

38. The Respondent contended that since there was no employment relationship between it and the Claimant, the question of unfair termination of employment did not arise.

39. The Court has made a contrary finding to the assertions by the Respondent.

40. The Respondent purported to revoke the offer of employment/the contract. Although strictly and with a narrow construction that would amount to a termination of the contract, the Court is of the view that the Respondent was repudiating the contract before the Claimant could begin to fulfil his obligations therein.

41. The repudiation was in or a breach of contract.

Appropriate remedies

Pay in lieu of notice

42. The offer letter informed the Claimant that the contract would be subject to 3-months' probation. In light of that clause and section 42(4) of the Employment Act, 2007, the Court is of the view that the equivalent of 7-days pay in lieu of notice would be adequate (gross wage divided by 26 days and multiplied by 7).

Damages for unfair termination of the contract/breach of contract

43. The Claimant prayed for the equivalent of 12 months' gross wages amounting to Kshs 8,426,760/-as damages for unfair termination of employment.

44. The Claimant barely served the 2-year contract, and the Court is of the view that the equivalent of a 1-month gross salary as damages for breach of contract would be fair and appropriate (wage was Kshs 351,115/-).

Conclusion and Orders

45. The Court finds and declares:

- (i) The Claimant had accepted the offer of employment.
- (ii) The acceptance of the offer created a binding and valid contract.
- (iii) The Respondent was in breach of contract.

46. The Claimant is awarded:

- (i) Pay in lieu of notice Kshs 94,530/-
- (ii) Damages Kshs 351,115/-
- TOTAL Kshs 445,645/-**

47. The decretal sum to attract interest at court rates from the date of judgment.

48. Each party to bear own costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 11TH DAY OF APRIL 2022.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Claimant Githongori & Harrison Associates Advocates

For Respondent Maxwell O. Ogonda & Associates Advocates

