



**Gitonga v Spire Bank Limited (Cause E651 of 2021)
[2022] KEELRC 1602 (KLR) (16 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1602 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E651 OF 2021
AN MWAURE, J
JUNE 16, 2022**

BETWEEN

TIMOTHY GITONGA CLAIMANT

AND

SPIRE BANK LIMITED RESPONDENT

RULING

1. The Claimant (Mr. Timothy Gitonga) filed a Notice of Motion and a Certificate of Urgency on the 22nd of January 2022 in which he sought the following orders from this Honourable Court:
 - a. That judgment be and is hereby entered in favour of the Claimant against the Respondent for the principal sum of Kshs. 5,475,000 being the equivalent of 3 months' salary in lieu of written notice to terminate services with the Respondent;
 - b. That this Honourable Court be pleased to strike out the Respondent's response to the Memorandum of Claim dated 1st October 2020;
 - c. That the costs of this application and suit be awarded to the Claimant and;
 - d. That interest on (a) and (c) be awarded to the Claimant at Courts rates from 12th June 2018 until payment in full.

The Claimant's Case

2. The Claimant avers that he was employed by the Respondent as Managing Director and reported to work on 1st November 2015 for a five-year contract that was renewable by mutual agreement. The contract provided that either party could terminate the employment by serving on the other party 3 months' written notice of intention to terminate the employment, or payment of 3 months' salary in lieu of notice in the event that such notice was given by the Respondent.



3. He further submitted that he tendered his resignation letter dated 12th of June 2018 as a result of governance frustrations which seemed to be systemic in the Respondent's bank and his continual stay would have jeopardized the business operations of the Respondent.
4. In his resignation letter he avers that he requested the Respondent's Board of Directors to allow him to leave the employment immediately in order to give room to his successor to take the position. On the same date, the Chair of the Board informed him that the Board had accepted his resignation and that he was required to prepare a summary of his handover notes and submit the same to the chair of the Board by close of business of 12th June 2018.
5. The Claimant contends that by him being required to prepare hand over notes and submit the report to the Respondent's Board of Directors, the Respondent deliberately and with full knowledge of the consequences waived the whole period of three months' notice that the Claimant would have otherwise served. To his mind, the Respondent now became liable to pay him remuneration equivalent to 3 months' salary in accordance with Section 38 of the *Employment Act*, 2007.
6. To the Claimant's utter surprise, he received the Respondent's letter dated 29th August 2018 in which the Respondent purportedly computed his final dues excluding the 3 months' salary payable to him.

The Respondent's Case

7. The Respondent asserts that there is no contention as to the fact that the Claimant was an employee of the Respondent and that he tendered his resignation letter dated 12th June 2018 which was accepted by the Respondent's Board. Consequently, the Claimant was asked to prepare hand over notes and submit to the Chair of the Board of Directors.
8. It is the Respondent's argument that the terms of employment provided that any party could issue a termination notice for three months and in default pay in lieu of notice. By not issuing the Respondent with a 3 month notice of intention to terminate his services, the Claimant ought to pay the three months' payment in lieu of notice and not the other way round.
9. It is submitted that the Respondent failed to pay the three months' pay in lieu of notice for lack of the three months' notice and acceptance of the Claimant's immediate release did not amount to waiver of notice by the Respondent.
10. The application is deemed frivolous and bad in law as it is not supported by any provisions of the *Employment and Labour Relations (Procedure) Rules* 2016 which govern the Employment and Labour Relations Court.
11. The Respondent seeks to have the application before this Honourable Court dismissed with costs to the Respondent
12. The Court considered critically the pleadings by the respective parties as well as the submissions and referenced the same hereto.

Decision

13. The issues for determination by this Honourable Court are framed thus as:
 - a. Is Claimant entitled to the prayers sought in the application.
 - b. Was respondent entitled to deduct Claimants three months' salary.



14. It is the Court's contention that our Courts are guided by labour relations Court rules 2016. The application has no legal basis as the rules relied on by the Claimant are not applicable to employment disputes. The rules of this Court do not as they provide for and do not have provision for or contemplate the application of the Civil procedure Rules under the Civil Procedure Act which apply to other Courts.
15. To support this is the case of *Patrick Kamunya Wambui vs Wananchi Sacco Society Limited* (2018) eKLR where the Court held that:-
- "The Court is established under Article 162(2) of *the Constitution*. The Court is one of two specialized Courts under *the Constitution*. The Court has its own set of rules being the Employment and Labour Relations Court (Procedure) Rules 2016. The Rules do not have provision for or contemplate the application of the Civil Procedure Rules under the Civil Procedure Act which apply to other Courts. In the premises, the application by the Claimant/Applicant is misplaced. On the issue of striking out pleadings, the Rules of the Court do not provide for such a drastic measure and where it may become necessary to strike out a pleading the same would be on the motion of the Court under its inherent powers."
16. It is this Court's contention that the Applicant should have been guided by the relevant rules hereto.
17. Issue No. 2 is whether the Respondent erred by deducting the three month's salary in lieu of notice. To address this issue reference is made to Paragraph 16 of the Terms of Employment between the Claimant and the Respondent by his letter of employment dated 9th September 2015. The said paragraph provides that the employment may be terminated by either party serving on the other three months' notice of its intention to terminate services with the Bank or payment of three months' salary in lieu of notice in the event such notice is given by the Bank.
18. There is no evidence on record that the Claimant issued the Respondent with a three months' notice of his intention to terminate his services. He, as a matter of fact, by a letter dated 12th of June 2018 tendered his resignation and requested that he be released immediately with effect from the date of that letter citing numerous challenges impacting the banking sector. He said that his request was to give room to his successor to take position.
19. Section 36 of the *Employment Act*, 2007 provides as follows:
- Payment in lieu of notice
- "Either of the parties to a contract of service to which section 35(5) applies, may terminate the contract without notice upon payment to the other party of the remuneration which would have been earned by that other party, or paid by him as the case may be in respect of the period of notice required to be given under the corresponding provisions of that section."
20. In simple language whoever leaves employment or resigns should give the contractual notice or equivalent in lieu of notice. This provision is only exempted if the employer gives a waiver in lieu of notice as provided in Section 38 of the *Employment Act* 2007. If such waiver is given, the employer is mandated to pay the employee in lieu of notice.
21. The Court finds that the Claimant has not adduced any document or letter to show that the Respondent expressly waived the notice period thereby excusing the Claimant from serving the



Respondent with the three months' payment in lieu of notice. To support this is the case of *Kenya National Library Services Board vs Beatrice N. Ayoti* (2014) eKLR where it was held that:

“a valid waiver of notice period must be express and not implied” and in the case of Carol Adhiambo Olela vs Asterisk Limited [2014]eKLR the Court held:

“where an employee leaves employment on their own volition without giving The requisite notice they are bound to pay the employer for the notice shortfall.”

22. In the matter before this Honourable Court, the Respondent did not waive the notice served upon it by the Claimant. The Respondent in effect accepted the wishes and demands of the Claimant to leave his employment immediately.

23. Further the Court contention is that summary judgment is granted where the respondent presents no triable issues as was held in the case of *Barclays Bank International Limited* [1981] eKLR 30 as cited in the case of *Postal Corporation of Kenya & Another vs Aineah Likumba Asienya & 11 Others* [2018] eKLR where it was held that:

“Where there are triable issues in an application for summary judgment, there is no room for discretion and the Court must grant leave to defend unconditionally.”

24. Furthermore in the case of *Keninida Assurance Co. Ltd vs Commercial Bank of Africa Limited* eKLR, as cited in the case of *Postal corporation of Kenya & Another vs Ainea Likumba Asienya & 11 Others* [2018] eKLR the Court held that:

“summary judgment can only be resorted to in the clearest of the cases. If a respondent shows a bona fide triable issue, he must be allowed to defend the suit without conditions. A defence that raises triable issues does not mean a defence that must succeed, it is one that discloses issues that ought to go for trial.”

25. The Respondent filed a response dated 1st October 2020.

Going by the above guidance the Respondent has raised bonafide issues. The Court's direction is the case goes for hearing to give the full picture of the issues.

26. Article 50 of *the Constitution* of Kenya 2010 provide that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court. It is fair and reasonable to hear all the parties.

Conclusion

27. The Court finds in view of the foregoing the application by the Claimant/Applicant to enter Judgment of Kshs 5,475,000/- in favour of the Claimant is brought prematurely and with no support of legal instruments and fails to demonstrate that the respondent has no triable issues. The Court therefore disallows the Claimant's application dated 27th January 2022 and in particular the prayers to enter judgment in favour of the Claimant for Kshs 5,475,000/- and also to strike out the Respondent's response dated 1st October 2020.

It is so ordered.

Costs to be in the cause.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 16TH DAY OF JUNE, 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

