



**Goodman Agencies Limited v Ndombi (Cause 567 of 2017)
[2022] KEELRC 12988 (KLR) (25 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12988 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 567 OF 2017
AN MWAURE, J
OCTOBER 25, 2022**

BETWEEN

GOODMAN AGENCIES LIMITED CLAIMANT

AND

GEORGINA NGINA NDOMBI RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed a statement of claim dated February 27, 2022 and the Respondent filed a response via memorandum of response dated July 18, 2017.

Claimants Case

2. The Claimant says they had employed the Respondent and given her a contract dated July 1, 2015 as a Human Resource Manager. The Respondent was on a three years renewable contract and there was a probationary period of 6 months.
3. Each party was to give a three months' notice of termination or three months' salary payment in lieu of notice. On December 9, 2016 the Claimant says the Respondent gave them a three months' notice to terminate her employment. Her last working day was to be March 9, 2017.
4. By a letter dated January 10, 2017 the respondent indicated she would not complete her notice period and indicated her last working day was to be January 14, 2017.
5. The Claimant says they rejected the request through their email dated January 13, 2017. They explained that due to Respondent's seniority there were issues she needed to address before her departure.



6. The Claimant rejected the request of Respondent for immediate departure. The Respondent failed to turn up for work on January 16, 2017 but sent her spouse to drop her access card and keys to her office.
7. The Claimant claims Kshs 395,650/- being notice pay for Respondent failing to serve the remainder of her notice period plus interest and costs.

Respondents Case

8. The Claimant in her response says she was employed on a fixed term contract dated March 18, 2015 and that each party would give the other a minimum of one (1) month written notice of termination or payment of an amount equal to one month salary in lieu of notice.
9. The Respondent says he did not in any way breach the term of the fixed term of the employment contract.
10. She says her maximum notice of termination date was to lapse on January 9, 2017. She therefore says she served her notice period of one month as stipulated in her contract of employment.
11. She says she served her one month notice in accordance to the law and the employment contract.
12. The Respondent says she handed all the Claimant's belongings and promised to clear any amounts owed to the Claimant by end of July 2017.
13. Respondent states she worked diligently for the Claimant and during her term with the Claimant she did not proceed on leave which amounted to 9 days. She says she was not compensated for the same. She says she also worked for overtime and yet was not compensated for the same.
14. She prays to be compensated for the following:
 - i. Leave days 9 days Kshs 71,219/42/-
 - ii. Overtime $205745/26 \times 98.3$ days 777,874.4/-All totaling Kshs 849.093/-
15. She prays the case for the Claimant be struck out with costs and she be awarded Kshs 849.093.08/- as her counter claim. She also prays to be issued her certificate of service.

Claimants submissions

16. The Claimant say they had signed a contract of employment for a three years and the notice period for termination of contract was to be 3 months by each party. The Respondent gave 3 months' notice on December 9, 2016 up to March 9, 2017. She however left on January 14, 2017. The Claimant says the Respondent is precluded from relying on the averment requiring one month notice to end the contract. The Claimant says the Respondent breached the terms of her employment by failing to serve the duration of the notice period.
17. The Claimant is relying on the case of *Pauline Kathure Kiraithe vs Nation Media Group Ltd* [2021] eKLR which held:-

“Having found that the Claimant breached her contract of service by exiting when 70 days of her notice period were still outstanding, I must hold, as I do, that the Respondent is entitled to payment of Kshs. 681,007 in lieu of the 70 days of the resignation notice not served by the Claimant.”



The Claimant submission therefore is that the Respondent must pay the Kshs 395,650/- in lieu of notice. Furthermore the Claimant claims the Respondent is not entitled to overtime payment or leave payment as per her counterclaim.

Decision

18. The Court did not get the benefit of the Respondent's submissions despite being given several chances to avail the same. The Court nevertheless considered the pleadings and the evidence adduced in Court as well as the Claimant's submissions.
19. The Claimant and the Respondent signed a contract for employment for the Respondent for three years as a HR manager. It was a clear term of contract that each party was to give a minimum of three months' notice to terminate the employment. This was per the letter of employment dated July 1, 2015.
20. In pursuance of the said contract the Respondent gave a 3 months' notice to the Claimant to terminate her employment. This was by her letter dated December 9, 2016. She indicated that her last working day was to be March 9, 2017. She however changed her mind and by her letter dated January 10, 2017 she asked to be allowed to leave by January 14, 2017. She also requested to be allowed to pay in six installments months moneys due to the company in lieu of notice. The Respondent rejected her offer to leave early due to her senior position but nevertheless she left.
21. There is clear evidence by the Claimant that the Respondent was to give three months' notice to terminate employment. Actually both parties were to give 3 months' notice. With that clear proviso the Respondent gave notice only later for her to request to be released earlier and she offered to pay the money due in lieu of notice.
22. There is no way the Court can go against a written and valid contract between the parties. And clearly the Court as held in the case of [Pius Kimaiyo Langat vs Cooperative Bank of Kenya Ltd](#) [2017] eKLR to the effect that:

“We are alive to the hallowed maxim that it is not the business of Courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercions, fraud or undue influence are pleaded and proved.”

Courts therefore have no mandate to re write a contract between the parties. The Court can only enforce the contract.
23. The Respondent breached the terms of her contract. In the case of [Pauline Kathure Kiraithe vs Nation Media Group Limited](#) [2021] eKLR (*supra*) the Judge held that:-

“Having found that the Claimant breached her contract of service by exiting when 70 days of her notice period were still outstanding, I must hold, as I do, that the Respondent is entitled to payment of Kshs. 681,007 in lieu of the 70 days of the resignation notice not served by the Claimant.”
24. The Respondent had accepted to pay for the money in lieu of notice. This was by her letter of January 10, 2017. It was therefore clearly an afterthought that when she was served with this claim she now claimed she was owed overtime and leave days and so demanded to be paid the same in her counterclaim.



25. As held in the case of *Joash Nyongesa Makokha vs Amboseli Court Limited* (2021) eKLR the Court held that no claim was proved for unpaid leave of Kshs 16,295/- and no unapproved leave forms are produced. The claim was therefore denied. In the same breath there is no prove that the Respondent was entitled to overtime payment.
 26. In view of the foregoing, the Court is satisfied that the Claimant has proved its case that the Respondent was mandated to serve for three months or pay three months salary in lieu of notice. The Respondent is found culpable therefore to pay Kshs 395,650/- for the period she did not serve as per the contract. The Court also finds the Respondent has failed to prove that she was entitled to be paid for any leave or overtime. Her counterclaim therefore fails.
 27. The Respondent will pay interest at Court rates from date of this judgment till full payment.
 28. Costs of the suit are awarded to the Claimant.
 29. The Respondent is to be issued with the certificate of service within 14 days from today's date.
- Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 25TH OCTOBER, 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 March 15, 2020 and subsequent directions of April 21, 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 had 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 Civil 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.

ANNA NGIBUINI MWAURE

JUDGE

