



REPUBLIC OF KENYA



KENYA LAW
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Barasa v Opius Ltd (Cause E1008 of 2021)
[2022] KEELRC 13119 (KLR) (9 November 2022) (Judgment)

Neutral citation: [2022] KEELRC 13119 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E1008 OF 2021
BOM MANANI, J
NOVEMBER 9, 2022

BETWEEN

MARTIN BICKETY BARASA CLAIMANT

AND

OPIBUS LTD RESPONDENT

JUDGMENT

1. This is a claim for compensation for alleged unfair termination. The claimant alleges that he was coerced by the respondent into signing a Deed for Mutual Separation and Settlement (DMSS) whose effect was to bring to closure the employer-employee relation between the disputants. He asks the court to find that the DMSS was unilaterally imposed and hence resulted into his unfair termination.
2. The respondent has resisted the claim. Contrary to the position taken by the claimant, it is the respondent's position that the parties mutually and voluntarily separated.

Facts of the Case

3. From the pleadings and evidence that was presented, the respondent hired the services of the claimant on March 12, 2020. The parties signed a contract of service of even date.
4. According to the contract, the claimant was engaged as a supply chain manager. However, from the evidence on record, the respondent appears to have redeployed the claimant's services from the supply chain to quality assurance department. This change was implemented in November of 2020.
5. According to the respondent, the redeployment was triggered by the poor performance of the claimant in the supply chain position. It was considered that the claimant would perhaps do better in the quality assurance department where he is said to have had some expertise.
6. The claimant states that on May 28, 2021, his employment with the respondent was unlawfully terminated. According to the claimant, the respondent's representative invited him for a meeting



on this date only to verbally inform him that his services with the respondent had come to an end. The claimant alleges that he was immediately thereafter forced to sign a DMSS whose import was to terminate his services. He thus prays that the court finds that he was unlawfully terminated.

7. Conversely, the respondent avers that despite deploying the claimant to the quality assurance department, his output did not improve. That on May 28, 2021, the respondent's management scheduled a performance review meeting with the claimant during which the claimant expressed his desire to separate with the respondent. He requested the management to negotiate a mutual separation.
8. That as a result of this request, the issue of separation was discussed and eventually the parties prepared a DMSS under which they documented their separation. The DMSS was voluntarily executed by the parties and through it, the claimant waived the right to institute proceedings to recover further compensation from the respondent.
9. In the respondent's view, the DMSS closed all issues between the parties. Consequently, it is the respondent's case that the claimant's case is unmerited and ought to be dismissed with costs.

Issues for Determination

10. From the pleadings and evidence, I consider the following to be the issues for determination:-
 - a. Whether the contract of service between the claimant and respondent was unlawfully terminated.
 - b. Whether the claimant is entitled to the reliefs pleaded in the statement of claim.

Analysis

11. I have considered the pleadings, evidence and submissions by the parties. Central to this dispute is the effect of the DMSS purportedly executed by the parties on May 28, 2021. Whilst the claimant alleges that he was coerced into signing the instrument, it is the respondent's case that the instrument was voluntarily signed by the parties.
12. I have studied the said DMSS of May 28, 2021. The consequence of the said agreement, if effectual, would be to terminate the employer-employee relation between the parties through mutual agreement.
13. Although the *Employment Act* provides for the procedure through which parties to an employment contract may terminate such contract, it is my understanding that this procedure targets situations where the decision to end employment is through the unilateral decision of either of the parties to the contract. Thus, where an employee elects to exit employment through resignation, he is obligated to issue the employer with the requisite notice under section 35 of the act. Conversely, where the employer purports to terminate the contract, he must not only comply with the requirements on notice under section 35 of the act but as well demonstrate that the termination is supported by valid reasons and is executed in accordance with due process in terms of sections 40, 41, 43, 45 and 47 of the act, whichever is applicable to the obtaining facts. The only exception with regard to notice by the employer is perhaps when the termination is on account of gross misconduct under section 44 of the *Employment Act*.
14. I do not understand these requirements on substantive and procedural fairness as applying to scenarios where parties mutually agree to separate. Where an agreement to separate is reached, the contract of service will terminate in accordance with the terms of the agreement (see *Godfrey Allan Tolo v Tobias O Otieno & another [2022] eKLR*). The only requirement for the validity of such agreement is that it must be voluntary.



15. A separation agreement, just like any other agreement, becomes enforceable the moment it is signed by the parties. It is binding on the parties unless it is set aside on grounds that will assail any other contract.
16. In *National Bank of Kenya Limited v Pipeplastic Samkolit (K) Limited & Another, Civil Appeal No 35 of 1999 [2001] eKLR*, the court indicated that a contract can only be set aside if it is shown that it was procured through fraud, coercion or undue influence. And the party alleging any of these grounds in a bid to upset a contract must not only plead the ground but prove it.
17. In *Sheila Kiplangat v Unliver Tea Kenya Limited [2022] eKLR*, the court observed that a settlement agreement conclusively settles an employment dispute unless it is demonstrated that it has been procured through fraud, coercion or undue influence. This position is reiterated in several decisions including *Coastal Bottlers Limited v Kimathi Mithika [2018] eKLR*, where the court indicated that a settlement agreement has the potential of closing an employment dispute except that in each case where the matter is raised the court must consider the import of such a discharge/agreement and secondly, the court must determine whether the settlement agreement was procured voluntarily.
18. In the case before me, it is evident that the parties executed the DMSS dated May 28, 2020. The claimant admits signing the agreement. However, he asserts that he was coerced into executing it. His evidence of coercion is that he was told that accessing his salary was subject to him signing the instrument. And that since he required the money for the upkeep of his family, he was left with no choice but to append his signature on the instrument.
19. As mentioned earlier, the respondent projects an entirely different position from that expressed by the claimant on the matter. According to the respondent, the claimant asked for the mutual separation at a review meeting on May 28, 2021. That it is this request that triggered a discussion about separation and the subsequent preparation of the agreement. That the agreement was entered into by the parties on voluntary basis. That the claimant voluntarily signed the DMSS.
20. I have considered the evidence by the parties around this issue. A reading of the instrument shows that upon execution of the DMSS, the claimant was to be paid Kshs 412,206/=. The claimant admits having received the payment against the instrument.
21. The instrument indicates that upon signing thereof, the claimant's employment would terminate. It also indicates that upon payment of the amounts aforesaid, the claimant waived the right to pursue the respondent for any other payment howsoever described.
22. Apart from asserting that he was forced to sign the agreement in order to receive his salary, there was no cogent evidence of coercion against the claimant. As a matter of fact, the payments sanctioned through the DMSS go beyond the claimant's basic salary. This tends to demonstrate that the claimant enjoyed the latitude to negotiate a more favourable exit pay than his bare salary thus negating his assertions of undue influence being asserted upon him.
23. The claimant neither gave specific particulars of coercion nor provided evidence in proof of this assertion. In addressing the question of establishing allegations of, inter alia, coercion, the Court of Appeal in *Patel & another v MJC & another (Suing as the guardians of PJP) (Civil Appeal 182 of 2019) [2022] KECA 364 (KLR)* had the following to say:-

“It should also be appreciated that apart from specifically pleading undue influence, coercion and fraud, the same has to specifically [be] proved by cogent evidence and not on the balance of probabilities as wrongly held by the trial court. Prove has to be higher than on the balance of probabilities but slightly lower than prove beyond reasonable doubt.”



24. Importantly, by disowning an instrument by which a benefit has been conferred on him, there is a sense in which the claimant is approbating and reprobating in respect of the same instrument. This is generally unacceptable conduct.

Determination

25. I find no evidence that the claimant was forced to sign the DMSS. Accordingly, I hold that the mutual separation of the parties was voluntary. The employment contract was closed through mutual agreement and the parties are bound by the terms of the separation agreement between them.

26. The claim by the claimant is therefore without sound basis. It is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED ON THE 9TH DAY OF NOVEMBER 2022

B O M MANANI

JUDGE

In the presence of:

claimant in person

..... for the respondent

ORDER

In light of the directions issued on July 12, 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B O M MANANI

