



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.309 OF 2020

YVES PRESSLERCLAIMANT

VERSUS

DALUGA INVESTMENTS LIMITED

T/A EASY GYM KENYA1ST RESPONDENT

JAMES HOLDEN2ND RESPONDENT

RULING

The claimant filed application dated 16th November, 2020 and seeking for orders that judgement on the admitted sum of USD 21,500 be entered in favour of the claimant with interest at court rates from 18th May, 2020 to date when payment in full is received and awarded.

The application is supported by the annexed affidavit of the claimant and on the grounds that he was employed by the 1st respondent as the operations director on a 4 years contract dated 1st September, 2019. Under the contract the claimant was required to relocate from Dubai where he was operating a business to Nairobi for the duration of his employment contract but his employment was terminated by summary dismissal on 28th April, 2020.

The claimant also avers in his affidavit that by letter dated 18th May, 2020 the respondents have admitted owing him the following dues;

- a) Unpaid salary for January, February, March and April, 2020 all amounting to USD 4,500;
- b) Outstanding shipping expenses to Kenya at USD 7,000;
- c) Payment of untaken leave days; and
- d) Global relocating costs at USD 10,000.

The claimant also avers that upon employment by the respondents clause 9.3 of his contract provided that he is entitled to shipping costs of USD 13,223; clause 5.3 provided that he would work for three (3) weeks in a month in the country and one week outside the country; that on 23rd March, 2020 he wrote to the respondents informing them that he would travel to Germany as allowed under his contract of employment and for one week.

In terminating employment, the respondent admitted to owing the claimant terminal dues amounting to USD 21, 500 which should be entered in judgement and paid with interests from the date due to date.

In reply, the respondents filed the Replying Affidavit of Ahmed Mahmoud advocate acting for the respondents and who avers that the claimant misconstrued letter dated 18th May, 2020 to mean an admission but the same did not constitute any admission but a settlement offer to which the respondents offered to pay the claimant an amount in full and final settlement of the dispute between the parties and subject to the laid down conditions and to which there was offer to pay the claimant on condition he fulfilled the set conditions subject to clause 9.4 of the employment contract and on condition that he returned all company property and reimbursed the respondents the expenses incurred to obtain a work permit for him.

The offer extended by the respondents was not accepted and the conditions given were not met. There is no admission of any claim as alleged and the application should be dismissed with costs.

The claimant filed his Supplementary Affidavit and avers that letter dated 18th May, 2020 is not contested and it followed his letter of demand upon termination of employment and there is a plain, clear, unconditional admission of owing terminal dues. there are unpaid salaries for January to April, 2020 amounting to USD 4,500; shipping expenses USD 7,000, global relocation allowances USD 10,000 and despite efforts to have these dues paid the respondent has refused to pay but admitted in owing the same.

The claimant also avers that despite the respondent admitting to owing USD 21,500 this was on condition of reimbursement of expenses incurred in obtaining work permit which is not true because there was no such requirement. The 1st respondent did not acquire the work permit for the claimant. There is also no schedule of properties attached by the respondents that are alleged to be in the possession of the claimant. What is claimed in unpaid salaries and agreed allowances.

The parties filed written submissions.

Determination

From the application and affidavits the claimant is seeking for judgement on what he asserts is admitted sum of USD 21,500 of his claim and based on letter dated 18th May, 2020 by the respondents. The respondents deny that there is no such admission as such letter was a conditional offer of settlement and which conditions have not met.

Upon application, the court is allowed to enter judgement on admission of facts made and before the final determination of the matter. Order 13 Rule 2 of the Civil Procedure Rules, 2010 provides as follows:-

Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment as the court may think just.

in the case of **Endebess Development Company Limited v Coast Development Authority [2018] eKLR** the court held that;

... admissions can be express or implied either on the pleadings or otherwise, e.g. in correspondence. Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends upon the language used. The admissions must leave no room for doubt that the parties passed out of the stage of negotiations onto a definite contract.

The admission must be plain and obvious. Must be clear on the face of it and without requiring ascertaining the meaning. The admission must be definite.

In the case of **Isuzu East Africa Limited (Formerly General Motors East Africa Limited) v Nairobi City County Government [2020] eKLR** the court held that;

Granting judgment on admission of facts is a discretionary power which must be exercised sparingly in only plain cases where admission is clear and unequivocal ... the Judge's discretion to grant judgment on admission of fact under the order is to be exercised only in plain cases where admissions of fact are so clear and unequivocal that they amount to an admission of liability entitling the Plaintiff to judgment. ...

The respondents terminated the claimant's employment vide letter dated 28th April, 2020 effective 30th April, 2020.

By letter dated 5th May, 2020 the claimant through his advocates made demands against the respondents to the effect that there was unlawful termination of employment and where he outlined his claims to include;

- a) Unpaid salaries for January, March, April, 2020 amounting to USD 4,500;
- b) Exit amount USD 31,650;
- c) Guaranteed equity USD 7,650;
- d) 6 months' salary upon termination of employment USD 9,000;
- e) Compensation for unfair termination of employment USD18, 000;
- f) Shipping expenses to Kenya USD 7,000;
- g) Dog shipping expenses to Kenya USD 10,210;
- h) House renovation costs USD 4,902;
- i) Materials for renovation USD 7,500; and

j) Relocation costs out of Kenya USD 10,000.

These were the demands.

In response, the respondents in letter dated 18th May, 2020 the respondents asserts that employment terminated by summary dismissal for gross misconduct which was lawful and justified. The respondent also states;

Mr. Preissler will be issued with a Certificate of Service in accordance with section 51 of the Employment Act, 2007. In addition, he shall also receive the following dues from our client which will be contained in a Final Settlement Agreement between both parties:

- i. Salary for the months of ...*
- ii. Outstanding shipping expenses ...*
- iii. Untaken leave days ...*
- iv. Global relocation costs ...*
- v. The Final Settlement Agreement will stipulate the return of all company property and include the reimbursement of monies our client expended to secure a work visa for Mr. Preissler. ...*

The court reading of the demands made by the claimant and the responses by the respondent, there is conditional offer that the dues for unpaid salaries, shipping expenses, untaken leave days and relocation costs shall be paid upon his return of company properties and reimbursement of monies spent to secure his visa. There is a conditional offer of the payments.

Pursuant to sections 17 and 19 of the Employment Act, 2007 an employer in paying salaries to an employee is allowed to deduct costs for property held by the employee; an amount authored in law or under a contract of employment or by an agreement. Such deductions are lawful and legitimate.

The final dues offered by the respondent being subject to given conditions and that the same should be subject to a return or properties held by the claimant and a deduction of visa costs, the terminal dues are not admitted in an unequivocal manner to comprise payable dues in the interim.

There is need for the court to hear the parties on the merits of each case and make a final determination and upon which terminal dues owing shall be assessed, if any, and judgement entered accordingly. To rely on the fact set out in the affidavits at this stage would be to ignore the contested matters on the nature of terminal dues claimed and the responses therefrom.

However, on the pleadings filed, it is imperative that the claimant’s case be heard on priority. The court shall allow pleadings to close in the next 21 days and allow the parties to secure a hearing date at the registry.

Accordingly, application dated 16th November, 2020 shall not be allowed in this instance. Pleadings shall close within twenty-one (21) days. A hearing date shall be allocated at the registry on priority basis.

Delivered in open court at Nairobi this 20th day of January, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistance: Okodoi

..... and