



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 357 OF 2017**

**PETER OTIENO OKUMU.....CLAIMANT**

**v**

**THOMAS & PIRON GRANDS LACS LTD.....RESPONDENT**

**JUDGMENT**

1. This Cause was heard on 12 November 2020 when Peter Otiemo Okumu (the Claimant) testified and closed his case and on 23 November 2020 when the Human Resources Manager of Thomas & Piron Grands Lacs Ltd (the Respondent) testified.

2. The Claimant filed his submissions on 15 December 2020, while the Respondent filed its submissions on 26 January 2021.

3. The Claimant identified the Issues for determination as:

(i) Whether the Claimant was a permanent employee of the Respondent.

(ii) Whether the termination of the Claimant's employment was fair.

(iii) Whether the Claimant is entitled to the reliefs sought.

4. The Court has considered the pleadings, evidence and submissions and adopts the issues identified by the parties.

**Nature of employment relationship**

5. The Claimant testified that the Respondent employed him on 1 November 2015 as a carpenter and that he served continuously until separation on 30 January 2017.

6. To demonstrate the employment relationship, the Claimant produced a copy of a Provisional Statement of Account, which shows that he was employed on 1 November 2015 by the Respondent. He also produced a Statement from the National Hospital Insurance Fund showing consistent monthly deductions from 2015 to 2017.

7. The Respondent in the Response contended that being a construction entity, it would only employ temporary staff depending on the ongoing works. As regards the Claimant, it was asserted that he was paid on a daily basis (casual employee).

8. The Respondent's witness testified that the Claimant was employed in a Kisumu project, which runs from 2015 to 2017.

9. Casual employees are paid daily, and their wages are not subject to monthly standard National Social Security Fund deductions.

10. The Statement produced by the Claimant shows that the Respondent was deducting and making intermittent monthly standard deductions.

11. The Respondent would not have been making standard monthly deductions if the Claimant was a casual employee paid at the end of the day.

12. The Court also notes that the Respondent made National Social Security Fund deductions for more than 3 consecutive months at some point and, by virtue of section 9(1) of the Employment Act, 2007 was under an obligation to issue a written contract to the Claimant.

13. By virtue of sections 9 and 37 of the Employment Act, 2007, the Claimant was deemed to be on a term contract of 1-month at each

individual time.

### **Unfair termination of employment**

14. The Respondent's primary defence to the unfair termination claim was that the Claimant was a casual employee, but the Court has discounted that defence.

15. With the conclusion that the Claimant was on a term contract, the Respondent should have issued him with a 1-month notice of termination as demanded by section 35(1)(c) of the Employment Act, 2007.

16. Since the written notice was not issued, the Court finds that this was a case of unfair termination of employment.

17. The Court also notes that although the Respondent's witness testified that the construction in Kisumu was completed, handed over, and the employees discharged, no evidence or documentation on completion or handover was placed before the Court and more so considering the Claimant's testimony that at the time of separation, the project was still going on.

### **Appropriate remedies**

18. The Claimant sought compensation for unfair termination of employment, salary in lieu of notice and accrued leave.

19. The Claimant engaged the Respondent through his trade union. A Discharge and Acknowledgement was then executed on 1 August 2017 wherein the Claimant was paid Kshs 10,000/-.

20. During cross-examination, the Claimant disowned the Discharge.

21. In the Discharge, the Claimant waived any further claims against the Respondent.

22. The Claimant filed a Reply to the Response but did not set the ground for disowning the Discharge, which had been filed as part of the Respondent's documents.

23. In the circumstances, the Court finds his disowning the Discharge during testimony an afterthought.

24. Having released the Respondent after being paid Kshs 10,000/-, the Court declines to award any of the reliefs sought by the Claimant.

### **Conclusion and Orders**

25. The Court finds and declares

(i) The Claimant was on a term contract and not casual employment basis.

(ii) The Respondent unfairly terminated the Claimant's employment.

(iii) The Claimant discharged the Respondent from further claims in consideration of payment of Kshs 10,000/-

26. Each party to bear its own costs.

**Delivered through Microsoft teams, dated and signed in Kisumu on this 24<sup>th</sup> day of February 2021.**

**Radido Stephen, MCI Arb**

**Judge**

**Appearances**

For Claimant Ms. Otieno instructed by Odhiambo Ouma & Co. Advocates

For Respondent Mr. Dachi instructed by Nyaanga & Mugisha Advocates

Court Assistant Chrispo Aura