



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 2495 OF 2016

DENNIS KIPTOO TANUI.....CLAIMANT

VERSUS

SUPERIOR HOMES KENYA LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant, Dennis Kiptoo Tanui instituted this claim vide a Memorandum of Claim dated 22nd November 2016 suing Superior Homes Kenya Ltd for unfair and unlawful dismissal from employment and for the non-payment of terminal benefits. He avers that he was employed by the Respondent from 10th February 2014 and his last salary was computed at Kshs. 520/- per day payable at the end of every month.

2. The Claimant further avers that he reported to work on 7th March 2016 as usual and was tasked with uprooting and gathering grass after which he proceeded to request for a tractor to carry away the uprooted grass. That the Respondent's General Manager then showed up on site and claimed the Claimant was not working and further ordered him to go home and report back after 7 days. That however when he reported back to work on 14th March 2016, the said General Manager ordered him to return his uniform and go away for good. That the said action amounted to unfair and unlawful dismissal because:

- i. The Claimant had done nothing wrong to warrant the dismissal;
- ii. The Claimant was never served with any show cause notice;
- iii. No hearing took place before the decision to dismiss the Claimant was reached;
- iv. Due process was disregarded in the haste to dismiss the Claimant; and
- v. That the decision to dismiss the Claimant was harsh, unwarranted and unjustified considering he had served the Respondent for many years without blemish.

3. The Claimant thus claims salary in lieu of notice, house allowance, leave pay for 2014 and 2015, a certificate of service and compensatory damages at 12 months' salary as tabulated in his Claim. The Claimant prays for judgement against the Respondents for:

- a. A declaration that the Claimant's dismissal from the Respondent's service was unfair and unlawful.*
- b. A declaration that the Respondent pays the Claimant his benefits totalling Kshs. 290,160/-*
- c. A declaration that the Respondent issues the Claimant with a certificate of service.*
- d. Interest on (ii) above until payment is made in full.*
- e. Cost of the suit plus interest thereon.*

4. The defendant did not enter appearance nor file any defence. During formal proof, the Claimant adopted his witness statement of 22nd November 2016. In his examination-in-chief he additionally relied on his list of documents as evidence and stated that he was employed by the Respondent as a general worker/labourer and was dismissed and chased away on 13th March 2016. He prays that he be allowed to get the claims as pleaded and for the Court to get him costs.

5. At the hearing, one Mr. Omari appeared for the Respondent in the matter and stated that the mention notice was served directly to his client and that he was not expecting the case to proceed and was attending to another matter in Malindi. The Claimant's advocate responded that the Respondent did not serve them with the Response on 13th March 2018 when they were required to and that the matter herein was duly certified ready for hearing *ex-parte* in January 2020. The Respondent's advocate then stated that none of the documents were served on his client save for the notices and that as per instructions they seek to file a Motion to dismiss as the suit is a 2016 case.

6. The parties were directed to file submissions after the hearing and in his submissions dated 19th February 2021, the Claimant submits that it is clear the Respondent has not put forth any cogent reason to purport to terminate the employment relationship it had with him. That the effect of the Respondent's failure to appear in court is that there is no evidence adduced in support of the defence case and the Claimant's testimony remains uncontroverted. He urged the Court to be guided by the authority of **Stanely Mwangi Gachungu & Another v Barclays Bank of Kenya Ltd [2019] eKLR**. The Claimant further submits that fair procedure as under Section 41 of the Employment Act was not adhered to by the Respondent before his dismissal and that there was further no justification for the Respondent to dismiss him. The Claimant submitted that Section 43 provides that where the employer fails to prove the reason(s) for termination, the termination is deemed unfair within the meaning of Section 45 of the Act. That Section 45 emphasizes that the employer must not only prove that the reason for termination is valid and fair but also that the employment was terminated in accordance with fair procedure. He relies on the case of **Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR** where the Court held that the duty was on the respondent to demonstrate to the Court that there existed valid grounds to justify the termination of the claimant. Further, that the Court in the case of **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** held that for a termination of employment to pass the fairness test, there must be both substantive justification (establishment of a valid reason) and procedural fairness.

7. He submits that he is entitled to Notice pay under Section 36 of the Employment Act since he was not given or paid the same and housing allowance as under Section 31 of the Act as he was never paid a housing allowance or provided with a housing facility by the Respondent. That his salary did not include house allowance and no evidence was produced to prove that he indeed was paid a housing allowance. As regards untaken/unpaid leave, he submits that he worked on all days of the week without taking any off day or proceeding on leave. That an employer ought to keep employee records such as leave applications and approvals and that since none was adduced to rebut this claim, the same is payable under Section 28 of the Employment Act. He further submits that he is entitled to damages under Section 49 of the Act as he was the sole bread winner of his family at the time of his dismissal and has suffered abrupt loss of income and inability to meet his continuing financial obligations. That he is also yet to find a befitting job owing to the current hard economic times and also bearing in mind that the Respondent did not issue him with a certificate of services to enable him get alternative employment. He prays that the Respondent be ordered to issue him with a Certificate of Service as provided for under Section 51 of the Employment Act. The Claimant urges the Court to be further persuaded by the authority of **Peter Karenju Mwangi v Home Afrika Limited [2015] eKLR, Cause No. 1110 of 2014**.

8. The Claimant was from the evidence adduced a daily casual whose term converted to a contractual employee since he served beyond the period one would conceivably serve as a casual. His dismissal was stated to have occurred on the appearance of the manager who accused him of being idle and promptly suspended him for 7 days. He asserts upon return he was told to hand over and leave never to return. His dismissal in the circumstances was unlawful and unfair within the meaning of Sections 41, 43 and 45 of the Employment Act. He would therefore be entitled to notice. His dismissal having not been fair, he would be entitled to some compensation which in the circumstances of this case would be capped at 3 months. The reason is that he had not served the Respondent for a considerably long period and the fact that he could obtain employment for his skill set within short shrift. He will also have costs of the suit. In the final analysis I enter judgment for the Claimant against the Respondent for

- a. Kshs. 15,600/- as notice
- b. Kshs. 46,800/- being the 3 months compensation
- c. Costs of the suit
- d. Interest at Court rates on a) and b) above from date of judgment till payment in full.
- e. Certificate of service in terms of Section 51 of the Employment Act.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF MARCH 2021

Nzioki wa Makau

JUDGE