REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.2570 OF 2016

SAMUEL NYABETA GESACHO.....CLAIMANT

VERSUS

DR. LABAN MUNENE.....RESPONDENT

JUDGEMENT

The respondent did not attend at the hearing despite being served with notice and returns filed.

Claim

The claimant was employed by the respondent on 11th October, 2016 as a night guard at the Karen residence of the respondent at a wage of ksh.7, 500 per month and which was increased to Ksh.10, 000. On 1st October, 2016 the respondent informed the claimant that he would work both day and night and reside at the residence but he refused the offer on the grounds that his was not possible since he had a family and young children. He could also not work for the long hours assigned.

On 7th November, 2016 when the claimant reported to work he found the respondent had engaged another person to replace him and that his employment would cease on 15th November, 2016.

The claim is also that the claimant demanded to be paid gratuity for the 6 years of work without success. The November, 2016 wage was paid through Mpesa.

The unpaid claims are for;

a) Service pay Ksh.60,000;

b) Leave pay for 6 years ksh.60,000;

c) House allowance ksh.108,000;

d) Underpayment since October, 2010 Ksh.180,000;

e) Service pay for 6 years Ksh.30,000;

f) Compensation for redundancy ksh.120,000;

g) Damages for unfair termination ksh.120, 000.

The claimant testified in support of his claims that he was employed on 11th October, 2010 at the private residence as a guard and paid his wages in cash. This was until 15th November, 2016 when employment terminated after the respondent demanded that he works night and day but due to family commitments he could not work for such long hours and he was then replaced without notice of payment of his terminal dues.

Defence

The deface comprise mere denials and that there was no employment relationship between the parties as alleged. The suit should be dismissed with costs.

Determination

The pleadings and the evidence are at great variance.

On the one hand the claimant pleaded that he was employed on 11th October, 2016 and employment terminated on 15th November, 2016. On the other hand his evidence was that he was employed for 6 years from 11th October, 2010 to 15th November, 2016.

Parties are bound by their pleadings.

In the case of **Boniface Kinyua Kathuri v David Munyoki [2020] eKLR** the court in addressing the evidence before it held that;

> *A party as observed above is always bound by his/her pleadings whether the same is challenged/ controverted/defended or not. The rules of procedure and the law do not change. The onus or proof remains and the trial court must be satisfied that the case has been proved to the required standard in law.*

And in the case of **Philmark Systems Co. Ltd v Andermore Enterprises [2018] eKLR** the court in addressing a similar question of pleadings held that;

> *As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings…for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice.*

Upon the response herein, the claimant did not reply thereto or seek to assert his case properly. Even with hindsight with the nature of pleadings filed, there was no application, oral or in writing seeking to amend the filed pleadings.

The import of it is that employment was from 11th October, 2016 to 15th November, 2016 a period of one month only. Such is a serious lapse. The claimant enjoyed legal representation and as the right holder, he filed his Verifying Affidavit with confirmation that the pleadings had been read to him and was in agreement.

The pleadings cannot be amended during the hearing or when filing written submissions. To allow such practice would negate the very right to a fair hearing and the right to the respondent to defend the claim. The defence was clear and categorical. No employment existed between the parties as pleaded. The claimant ought to have taken the cue. The lapse renders the claims made fatal.

On the claims made for gratuity, without any contract existing between the parties and giving this as a benefit is not due. Even where such was due as claimed, under paragraph 4 of the Memorandum of Claim the claim is that employment started on 11th October, 2016 and terminated by notice on 15th November, 2016. This is not a period of 6 years to claim for gratuity pay.

Notice pay is not due on the evidence that the claimant was paid for his November, 2016 wages via Mpesa.

The claim for leave for 6 years, house allowance, and underpayment since October, 2010 these are claims premised on pleadings that are fatal. These due do not arise.

The claim for severance pay only relates to a case of redundancy pursuant to section 40 of the Employment Act, 2007. The instant claim did not plead such matter.

Accordingly, the claim as filed has no foundation and is hereby dismissed. Each party shall bear own costs.

DELIVERED IN OPEN COURT AT NAIROBI THIS 13TH DAY OF MAY, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

..... and .....