



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 55 OF 2015

[FORMERLY MOMBASA HIGH COURT COMMERCIAL SUIT NO 5 OF 2008]

NEWTON K. MUNYAO.....CLAIMANT

VS

WUERTH (K) LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This matter was initially filed in the High Court at Mombasa as *Commercial Suit No 5 of 2008*. By an order issued by **Kasango J** on 13th November 2014, it was transferred to this Court for hearing and determination.

2. The Claimant states his case in a Plaint dated 25th January 2008 and filed in court on 28th January 2008. The Respondent filed a Defence on 27th March 2008, to which the Respondent responded on 8th April 2008. The Respondent then filed an amended Defence and Counterclaim on 2nd May 2008 and the Claimant filed a Reply to amended Defence and Counterclaim on 15th May 2008.

3. When the matter came up for trial, the Claimant testified on his own behalf and the Respondent called its General Manager, Finance and Administration, Elijah Irungu and External Auditor, Martin Khoya.

The Claimant’s Case

4. By a letter of appointment dated 12th May 1997, the Respondent employed the Claimant as an Accountant. The Claimant was initially assigned duty in the Respondent’s Mombasa Office. In June 2002, he was transferred to Nairobi from where he would serve both the Nairobi and Mombasa Offices.

5. The Claimant claims that due to pressure of work, he used to work beyond official working hours, including weekends and public holidays.

6. The Claimant avers that by letter dated 15th June 2005, the Respondent irregularly and wrongfully dismissed him from employment.

7. The Claimant now claims the following from the Respondent:

- a) Final/terminal dues as computed.....Kshs. 550,667.00
- b) 9 public holidays per year for 8 years.....335,995.20
- c) Saturdays worked at extra 4 hours.....796,224.00
- d) Sundays worked over the period.....1,941,305.60
- e) Out of station allowance for 7 days a month.....957,600.00
- f) Costs plus interest

The Respondent's Case

8. In its amended Defence and Counterclaim filed in court on 2nd May 2008, the Respondent admits having employed the Claimant as an Accountant with effect from 3rd June 1997 until 1st June 2005, when the Claimant was summarily dismissed for cause.

9. The Respondent states that upon commencement of his employment, the Claimant had expressly agreed to make himself available outside the usual working hours or business days, without further remuneration, if the pressure of work so demanded.

10. The Respondent maintains that the Claimant's dismissal was lawful and was fully compliant with the provisions of all statutes and labour laws, then in force.

11. The Respondent concedes that the Claimant was not paid any terminal dues but adds that the Claimant owed the Company a larger sum of money by reason of fraudulent and negligent performance of his duties, during the course of his employment.

12. The Respondent denies that the Claimant worked on all Saturdays, Sundays and public holidays for 8 years as alleged by the Claimant.

13. The Respondent states that the Claimant was not entitled to an out of station allowance as claimed.

14. By way of counterclaim, the Respondent states that at the time of his summary dismissal, the Claimant owed the Company substantial sums of money, arising from fraudulent and improper use of the Company's money, which amounts the Claimant had deprived the Respondent of and converted to his own use.

15. The Respondent cites the following particulars of fraudulent and improper conversion by the Claimant:

- a) Making unauthorised loans and salary advances to himself;
- b) Making payment unsupported by any documentation as required;
- c) Making fictitious payments in favour of himself and unrelated to the business.

16. The Respondent states that the Claimant did confirm verbally to the Board of the Respondent that he owed the said sums of money and had initially agreed to sign an acknowledgement of debt in the year 2005, after his dismissal, but he later declined to do so and made no further communication until the filing of the suit.

17. The Respondent further states that due to the wilful negligent performance of the Claimant's duties under the contract of employment, including failure to make timely submission of monthly returns in relation to government taxes, the Respondent was surcharged substantial penalties and interest by the Kenya Revenue Authority, covering the duration that the Claimant was in the Respondent's employ.

18. The Respondent avers that it was forced to pay the penalties and interest assessed by the Kenya Revenue Authority and by the National Hospital Insurance Fund. The Respondent claims the said sums amounting to Kshs. 1,006,776.

19. The Respondent also counterclaims the amount of Kshs. 2,699,649,12 being the total sum owed in respect of improper and unauthorised loans and advances, as well as penalties and interest surcharges incurred due to the default of the Claimant.

20. The Respondent lays down the following as particulars of its counterclaim:

- | | |
|---|---------------------|
| a) Improper and unauthorised loans and advances | Kshs. 2,625, 079.50 |
| b) Government penalties and interest surcharges | <u>1,006,776.00</u> |
| Total | 3,631,855.50 |

Findings and Determination

21. Although the Claimant alleges wrongful dismissal, he made no prayer for compensation. The issues for determination in this case are therefore the following:

- a) Whether the Respondent has made out a proper counterclaim against the Claimant.;
- b) Whether the Claimant is entitled to the remedies he has sought.

The Respondent's Counterclaim

22. The Claimant takes issue with the Respondent's counterclaim first, on the basis that it was filed out of time, without leave of the Court, second, that it was not accompanied by a verifying affidavit and third, that it is not backed by credible evidence.

23. The Claimant relies on Order 8 Rule 1 of the Civil Procedure Rules which provides as follows:

1. (1) A party may, without leave of the court, amend any of his pleadings once at any time before the pleadings are closed.

(2) Where an amended plaint is served on a defendant-

(a) if he has already filed a defence, the defendant may amend his defence; and

(b) the defence or amended defence shall be filed either as provided by these rules for the filing of the defence or fourteen days after the service of the amended plaint whichever is later.

24. The Claimant submits that because he had not filed an amended plaint, the Respondent could not file an amended defence and counterclaim, without leave of the Court.

25. On its part, the Respondent states that failure to obtain leave prior to amending its defence is not an issue for determination in this suit. In this regard, the Respondent submits that because the Claimant had not raised an objection either in his Reply to Defence and Counterclaim or in the course of the proceedings, he is deemed to have waived his right to do so and is estopped from relying on this issue in final submissions.

26. The Respondent referred the Court to the decision in *Sita Steel Rolling Mills Ltd v Jubilee Insurance Co. Limited [2007] eKLR* where **Maraga J** (as he then was) stated the following:

“Waiver can be express or implied. Disputes hardly arise where it is express. They however do where it is implied. An implied waiver may arise where a person has pursued such a course of conduct as to evidence an intention to waive his right or where his conduct is inconsistent with any other intention than to waive it. It may be inferred from conduct or acts putting one off one’s guard and leading one to believe that the other has waived his right.”

27. Relying on the decision in *Thomas Owen Ondiek & another v National Bank of Kenya Limited & another [2015] eKLR*, the Respondent maintains that under the doctrine of relation back, its amended Defence and Counterclaim is deemed to have been filed on 27th March 2008, when the original Defence was filed.

28. The Claimant further relies on Order 4 Rule 1 (5) of the Civil Procedure Rules, which requires a counterclaim to be accompanied by a verifying affidavit. On this issue, the Respondent submits that the requirement that a counterclaim be accompanied by a verifying affidavit introduced by Order 4 Rule 1(5) of the Civil Procedure Rules, 2010 did not exist at the time the Respondent’s Counterclaim was filed on 2nd May 2008.

29. The Respondent urges the Court to render substantive justice to the parties.

30. From his conduct, the Claimant appeared not have had a problem with the manner in which the Respondent had brought its Counterclaim before the Court. He even went ahead to respond to the Counterclaim, without raising any issue.

31. It seems to me therefore that the procedural issues raised by the Claimant are an afterthought and because these issues do not go to the core of the Respondent’s Counterclaim, the Court is persuaded to overlook them and to consider the Counterclaim on merit.

32. The Respondent’s Counterclaim against the Claimant is made up of two segments; first, improper and unauthorised loans and advances and second, government penalties and interest surcharges.

33. The Respondent’s second witness was Martin Khoya. Khoya told the Court that he was an Accountant running an audit practice, in addition to teaching Financial Accounting at the University of Nairobi. He gave his qualifications as; Bcom (Accounting Option) and MBA from the University of Nairobi, CPA(K) and Fellowship of Certified Accountants (UK).

34. Khoya testified that he had been engaged by the Respondent in August 2008, to conduct a forensic audit on petty cash payments for period between August 2004 and July 2005.

35. I have looked at a copy of the forensic audit report submitted by Khoya & Co., Certified Public Accountants, which flags the following:

- a) Unsupported payments.....Kshs. 167,850.00
- b) Unauthorised payments.....1,884,947.00
- c) Motor vehicle repairs.....278,146.50
- d) Lunch expenses.....318,710.00
- e) Air tickets.....258,948.00

f) Unrelated to business.....	15,875.00
g) Advances.....	<u>1,156,355.00</u>
Total.....	2,652,079.50

36. The report concludes as follows:

“It is apparent from the results of the exercise that we conducted that there were serious lapses in the payment process during the period under review. There does not seem to be any controls over cash payments as the imprest system and reimbursements were flouted with impunity.”

37. The final opinion was that as a result of these lapses, the Respondent had lost Kshs. 2,652,079.50. This is the figure forming the first part of the Respondent’s Counterclaim against the Claimant.

38. By definition, a forensic audit, unlike routine audit, is investigative, specific and targeted. In this case, the Respondent ordered a forensic audit in 2008 with the target period being August 2004 to July 2005. No explanation was given for the three-year delay. This was an important consideration, especially because the audit time coincided with the filing of the Claimant’s claim in court.

39. Significantly, Khoya told the Court that in conducting the forensic audit, he did not interview the Claimant. Moreover, the source documents on which he relied to reach his conclusions were not availed to the Court and the Claimant denied having seen them.

40. Apart from Khoya’s opinion therefore, there was no evidence to support the stated loss of Kshs. 2,652,079.50 much less any culpability on the part of the Claimant.

41. Regarding the alleged loss of Kshs. 1,006,776 in government penalties and interest surcharges, no documentary evidence was availed and the allegations of negligence against the Claimant were not proved.

42. Cumulatively, the Respondent’s Counterclaim against the Claimant fails for want of evidence.

The Claimant’s Terminal Dues

43. The Claimant’s first prayer is for final/ terminal dues in the sum of Kshs. 550,667.

44. On 15th June 2005, the Respondent wrote to the Claimant as follows:

“Dear Sir,

RE: DISMISSAL

The current Audit done by the group auditors from our parent company on 6th to 10th June 2005 reveal some anomalies (sic) in the Accounts Section.

You gave yourself advances and transferred them to loans, which is against the company policy.

This showed that you have no financial discipline and have abused the office that had been entrusted to you. In essence this is fraud of the highest order and you should organize how to repay this money back with immediate effect.

Owing to the above you have been dismissed from the services of Wuerth Kenya Ltd. with effect from 15th June 2005. You should hand over all company property under your possession to the undersigned.

We thank you for the time you have worked for this company.

Yours faithfully,

Wuerth Kenya Ltd.

(signed)

Joseph Mulandi

General Manager

45. It is on record that the Claimant’s terminal dues had been tabulated at Kshs. 550,667 but were withheld because of the Counterclaim against him. On dismissal of the Counterclaim, the Claimant’s terminal dues are payable.

Other Claims

46. Apart from the claim for terminal dues, the Claimant seeks overtime compensation on account of public holidays, Saturdays and Sundays as well as out station allowance. These claims fall within the province of special damages, which must not only be specifically claimed but also strictly proved. The Claimant did not attain this standard of proof and these claims must therefore fail.

Final Orders

47. In the ultimate, I enter judgment in favour of the Claimant in the sum of **Kshs. 550,667** being his terminal benefits.

48. This amount will attract interest at court rates from the date of judgment until payment in full.

49. The Claimant will have the costs of the case.

50. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 29TH DAY JULY 2021

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Mr. Tindika for the Claimant

Mr. Kinuthia for the Respondent