



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 776 OF 2017

BETWEEN

LOICE APIYO OMOGACLAIMANT

VERSUS

BANDARI SACCO SOCIETY LIMITEDRESPONDENT

RULING

1. In its Judgment delivered on 24th day of February 2021, the Court rejected the Claim herein, stating under paragraph 15 of the Judgment, that the Claimant did not plead specific reliefs, and that the Claimant did not establish her contract was unfairly terminated.
2. It was the position of the Court that the Claimant disregarded Rule 4 [g] of the E&LRC [Procedure] Rules, 2016 by omitting to set out the specific reliefs sought, in her Statement of Claim.
3. The Court found that the Claimant pleaded instead, that she had instructed her Advocates to write a demand letter before initiation of the Claim, with demands which were specified in the letter. The Court was of the view that the contents of a demand letter are not necessarily prayers in a subsequent Claim, and that specific prayers must be made under the above procedure.
4. Secondly, the Court was convinced that the Claimant worked under a fixed term contract, and left employment upon expiry, which did not warrant the remedy of compensation for unfair termination, and notice pay.
5. The Claimant, aggrieved by the Judgment on record, filed an Application for review, under Rule 33 of the E&LRC [Procedure] Rules, 2016. She prays the Court to review its Judgment and set aside orders which dismissed her Claim.
6. The Application is based on the Affidavit of Claimant’s Counsel, Ms. Cynthia Onyango, sworn on 1st March 2021. In main, Counsel depones that on 4th November 2019 when the Claim was heard and closed, her colleague who conducted the hearing, Ms. Obala, applied to amend paragraph 18 of the Statement of Claim.
7. She asked to have the following sentence at this paragraph struck out, and replaced.

*‘ This caused the Claimant to seek legal counsel following which her Advocates intervened on her behalf to demand for her...
[a, b, c, d, e, f].*
8. She applied to replace the above-quoted sentence with the following words: -

‘REASONS wherefore the Claimant seeks an award for the following...

[a, b, c, d, e, f.]
9. The amendment was allowed without objection.
10. The letter of demand was therefore adopted as the Claimant’s prayers, curing the defects in pleading, the Court later highlighted in its Judgment.

11. The Respondent submits that the Court found defects were incurable, therefore they could not have been cured through amendment. Secondly, it is submitted by the Respondent that even if the Court finds there was an error apparent on the face of the record, such error does not affect the finding on the status of the Claimant's contract. It was a fixed-term contract, which expired automatically, and not terminated by the Respondent.

The Court Finds: -

12. There was an obvious error apparent on the face of the record, in the Judgment delivered 24th February 2021.

13. The Court must apologize profusely to the Parties, for overlooking the oral amendment made by the Claimant, to paragraph 18 of the Statement of Claim, at the outset of the hearing on 4th November 2019. It is noted that the Judgment was made after the Trial Judge had been transferred from Mombasa to Nairobi, and the Judge under pressure to clear the outstanding matters from Mombasa, before embarking on the matters at the new station. The Court, in preparing the Judgment, must have gone straight into reading the evidence given by the Parties, as recorded on 4th November 2019, overlooking the amendment made at the beginning of the hearing. It is noted also that the file was only made available to the Judge at Nairobi, more than 1 year after proceedings closed in Mombasa. Such errors are in the circumstances bound to occur and this is why review jurisdiction under Rule 33 of the E&LRC [Procedure] Rules, is an important mechanism for the Court to clean its record.

14. The amendment corrected the defects in the Pleadings, which were highlighted by the Court in its Judgment.

15. The demands made in the Claimant's letter to the Respondent before instigation of the Claim, were made specific prayers through the oral amendment of 4th November 2019.

16. The Statement of Claim was therefore in conformity with Rule 4 [g] of the E&LRC [Procedure] Rules, 2016 after amendment.

17. Paragraph 15 of the Judgment, stating that the Claim is declined for lack of specific reliefs pleaded, is therefore reviewed, with the words "lack of specific reliefs pleaded" expunged from the record.

18. The Court however explained at paragraph 14 of the Judgment, that barring what the Court thought were fundamental defects in the Pleadings, the Claimant was on fixed term contract, which expired, and the Claimant had not shown that her contract was unfairly terminated. The Claimant handed over her office on 28th October 2016. She did not prove unfair termination under Section 47 [5] of the Employment Act 2007. These findings were not affected by the error apparent on the face of the record.

19. The Claimant did not merit compensation for unfair termination and notice. The Court found that the contractual date of termination was 31st October 2016. The prayer for November 2016 salary had no basis. Mutuality of obligations ended on 31st October 2016. The Court found also that the Parties had an unconventional arrangement where the Claimant took 16 days of annual leave, after her contract was effectively over. There is no obligation to enforce arrangements which went beyond the contractual date of 31st October 2016. The Respondent acknowledged owing the Claimant 13 days of annual leave, which were computed at the end of her service with gratuity. The evidence adduced by Respondent's Head of Operations Agnes Munyi, was clear that her final dues were computed, disclosing that the Claimant owed the Respondent a total sum of Kshs. 1,596,457. Offset against her dues, she owed the Respondent a sum of Kshs. 627,642. In her evidence, the Claimant conceded indebtedness. She said, " I have a loan of Kshs. 1.5 million." Why would she expect to be paid gratuity, while she is still owing the Respondent money?

20. The order dismissing the Claim must therefore stand. Paragraph 15 of the Judgment shall be rectified as stated above.

IT IS ORDERED: -

a. Paragraph 15 of the Judgment delivered on 24th February 2021 is reviewed with the words " lack of specific reliefs pleaded," expunged from the record.

b. The orders dismissing the Claim, with no order on the costs, shall stand.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 7TH DAY OF JULY 2021

JAMES RIKA

JUDGE