



**REPUBLIC OF KENYA**

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

**CAUSE NO. 1972 OF 2016**

**ALFRED NZOMO KITHUSI.....CLAIMANT**

**-VERSUS-**

**HILLCREST INVESTMENTS LIMITED..... RESPONDENT**

**JUDGMENT**

1. The claimant brought this suit on 23.09.2016 alleging that his employment contract had been unlawfully and unfairly terminated by the respondent vide the letter dated 1/3/2016. The suit seeks the following reliefs:

- a) A declaration that the claimant's dismissal was unfair and unlawful.
- b) Damages in the sum of Kshs.48,537,051/=.
- c) Interest on (b) above at court rates from 31<sup>st</sup> May 2016 until payment in full.
- d) Certificate of service.
- e) Costs of this suit.
- f) Any other or further relief that this Court may deem fit to grant.

2. The respondent filed defence on 20/2/2017 denying the alleged unfair and unlawful termination of the claimant's contract and on the contrary averred that the termination was by a mutual agreement between it and the claimant. It further averred that the separation agreement was signed by the claimant voluntarily, freely and without fraud or misrepresentation and he accepted to be bound by each and every term and condition contained therein. He also averred that the termination was done in accordance with clause 13.2 of the claimant's contract of employment dated 3/6/2015 and as such there cannot be any cause of action that arises. Finally it averred that the claimant is not entitled to the reliefs sought and prayed for the suit to be dismissed with costs.

**EVIDENCE BY THE CLAIMANT**

3. The claimant testified as CW1 and explained how he joined the respondent on 10/9/2012 as Finance Director under a 3 years' contract. The contract was reviewed on 3/6/2015 for a further 3 years but this time as the Chief Financial Officer and his salary was increased from Kshs.857,000/= to Kshs.1,080,000/= per month.

4. On 28/2/2016 after work, he received a telephone call from a director of the respondent Mr Ayis Makatiani inviting him to a meeting on 29/2/2016 at 11.00 a.m. but the agenda for the meeting was not disclosed to him. He attended the meeting with Mr Makatiani and Mr Antony Wahome both directors of the respondent.

5. At the meeting he was informed that his contract of employment would terminate on 31/5/2016; that another person had already been interviewed to take over his position; that he would be paid salary during the notice period; that he would be paid ex-gratia payment equivalent to 2 months basic salary on condition that he keeps the termination confidential and that he cooperates in handing over to the new employee the operations, commercial and financial functions.

6. The claimant further testified that on 2/3/2016 he received an email summarising the exit terms, but he declined to respond because he was not in agreement with the same. Again on 14/3/2016 he received Notice of termination dated 1/3/2016 offering to pay terminal dues including full salary during the notice period, accrued leave upto 31/5/2016 and an ex gratia payment equivalent to 2 months salary in recognition of his good service on condition that he signs a 'formal release and discharge' that he voluntarily waives any further claims against the respondent in connection with the contract or its termination.

7. According to the claimant there was no reason given for the termination and the requirement to sign the said discharge agreement amounted to a subtle coercion in order to denying him the right to sue for the unfair termination.

8. On 24/3/2016, he signed the Notice of termination because he desperately needed the money at a time when he was staring at future without employment. He maintained that he did not sign the discharge clause voluntarily but because he had no option in front of the omnipotent employer who dictated the terms to him.

9. He further testified that by email dated 29/2/2016, the new employee Mr Edwin Karura was introduced Commercial Director, the same role the claimant was undertaking pursuant to communication to all staff dated 2/12/2015 and minutes of Board of Directors dated 6/10/2015. In his view, he was just replaced by another person without any justifiable reason and without being heard.

10. He further contended that he was discriminated by being paid 2 months salary as ex-gratia payment yet the other staff who left before him were paid 6 months salary plus salary for the remaining term of their contract.

11. On cross examination, he maintained that he signed new contract for 3 years on 3/6/2015 to end in 2018. He contended that his position changed to that of Chief Finance Officer (CFO). He admitted that the contract contained confidentiality clause.

12. He admitted that the notice of termination was dated 1/3/2016 and he signed it on 24/3/2016 accepting the terms. He admitted that he never registered any protest or wrote back to ask for better terms but contended that he was coerced to sign otherwise he would not get any payment. He further maintained that there was no agreed terms for his exit between the employer and himself. He maintained that he was treated differently from other employees including Ian Stamp, Jack Kimutai and Karen Morey who were executive members with him. He explained that he got the information about the exit package by virtue of his position as the CFO but he did not see any breach of confidentiality by mentioning them to Court for the benefit of both parties to the suit.

13. He contended that the termination was so unfair that to date he has not secured another job and that in all interviews attended he was not appointed because his employment in finance sector had been terminated by the respondent. He also contended that he was dismissed when he was 58 years old while he legitimately expected to work until September 2018 when he would reach 60 years. He therefore prayed for pension and benefits for the unexpired term of his contract.

14. He admitted that his contract did not provide for ex gratia payment but contended that it was the practice of the respondent company to pay its exiting staff the same.

#### **EVIDENCE BY THE RESPONDENT**

15. Mr Edwin Nginya Karatu, is the respondent's Commercial and Operations Director and he testified for the respondent as RW1. He clarified that he did not take over claimant's job since he was the CFO while he was employed as Commercial Operations Director. He further testified that he took over finance docket temporarily only after the claimant exited before the Chief Accountant was appointed the Head of Finance and Procurement.

16. On cross examination, RW1 stated that he joined the respondent on 4/3/2016 and as such he could not testify on matters that happened before then except by referring to the correspondences that followed after the meeting held on 29/2/2016. He admitted that he is unaware of the reason for the termination of the claimant's contract for employment.

17. He further admitted that termination of the claimant's contract had to comply with the terms of his contract. He contended that clause 13.1 of the contract provided that the contract could be terminated without notice. He admitted that the contract was governed by the prevailing law in Kenya.

18. He contended that clause 2.1.1. of the Notice of termination indicated that the claimant was to hand over his responsibility to him (RW1). He admitted that clause 2.2. of the HR Manual provided that the claimant was to report to the CEO but because there was none he was reporting to the Board.

19. He admitted that the 3 persons named by the claimant were paid ex gratia payment upon exit. He explained that Jack Kimutai was paid 6 months ex gratia payment because he resigned due to ill-health. He admitted that the claimant was paid 2 months ex gratia payment based on a mutual agreement which he accepted by signing the Notice of termination.

20. He contended that the claimant did not use the appeal mechanism to challenge any unfairness but instead he signed the agreement. He further contended that the claimant was given certificate of service and if he needs another one he can go for it.

21. In re-examination, he contended that clause 1.3 of the termination Notice dealt with payment of ex-gratia upon condition all the other dues could still have been paid even without signing the Notice. He reiterated that the claimant was paid all his terminal dues.

#### **SUBMISSIONS**

22. The claimant submitted that the termination of his contract was not through mutual agreement but it was unilaterally done by the respondent. He further submitted that the termination was substantively and procedurally unfair because no reason was given for the termination and he was not accorded any fair hearing before the termination.

23. For emphasis he relied on **Kenfreight (EA) Ltd V. Benson K. Nguti [2016]eKLR** among other precedents where the courts were unanimous that Employment Act provides minimum and mandatory terms in every contract of service including requirement that the

employer must have a valid and fair reason related to employee's conduct, capacity and capability or based on the employer's operational requirements, and that the employee is entitled to a fair hearing before the termination.

24. The claimant further submitted that the discharge clause in the Notice of termination was unconstitutional because it contravened his right to fair labour practices as enshrined in Article 41(1) of the Constitution. He contended that the insertion of the discharge clause in the Notice of termination also contravened his right of access to justice as envisaged under Article 48 of the Constitution.

25. For emphasis he relied on **Kenya Bus Service Limited Vs. Minister for Transport & 2 others [2012]eKLR** where the court held that the right of access to justice involves the right of ordinary citizens to access remedies and relief from the courts. He further relied on **Dennis Kipngetich Koech Vs. MKAPP Kenya Limited [2018]eKRL** where the court held that where there is valid claim founded on the Constitution and law, any declaration made to discharge liability is null and void.

26. He further relied on **Thomas De la Rue (K) Limited Vs. David Opondo Omutelema [2013]eKLR** where the Court of Appeal held that a discharge voucher *per se* cannot absolve an employer from statutory obligation and that it cannot bar this court from inquiring into the unfairness of the termination. The Court of Appeal went on to hold that in every case the Court must make a determination whether or not the discharge was freely and willingly executed.

27. Finally he relied on **Moses Daniel Kyalo Vs. Freedmaster Tyres Limited [2019]eKLR** where the Court held that the discharge had been vitiated by undue influence or coercion and proceeded to award compensation for the unfair termination.

28. In view of the foregoing, the claimant submitted that he is entitled to the reliefs sought in the suit including compensation and salary for the remainder of contract term. He further submitted that he was discriminated by being paid 2 months ex-gratia payment while his colleagues were paid between 4 and 6 months ex-gratia payment upon exit. He contended that his rights under Article 27 of the Constitution and Section 5(3) of the Employment Act were violated through unequal treatment. He relied on **Peter K. Waweru Vs. Republic [2006]eKLR** where discrimination was defined as affording different treatment to different persons.

29. On the other hand, the respondent submitted the termination of the claimant's contract was through mutual separation. It contended that the separation was discussed in meeting held on 29/2/2016 and subsequently reduced into writing on the email dated 2/3/2016 vide which the claimant was requested to confirm the terms as negotiated so to enable the respondent to prepare the termination Notice and a simple mutual separation agreement.

30. The respondent further submitted that the claimant admitted in cross examination that he did not protest against the terms of the separation but he signed it on 24/3/2016 accepting the terms of the separation. According to the respondent, the claimant had sufficient time and opportunity to consider the offer and lodge any reservations but he voluntarily signed without raising any concern. It maintained that nothing stopped him from registering his protest before signing the agreement on 24/3/2016 or at any time before 31/5/2016 when the termination took effect.

31. Consequently, the respondent submitted that upon signing of the termination agreement on 24/3/2016, a binding contract came into force between the claimant and itself signifying an agreement to separate from employment. It further submitted that the claimant has not tendered any evidence to demonstrate that the said contract is vitiated by duress, fraud or misrepresentation.

32. It relied on **South African case of Muyira Gbenga – Oluwatore Vs. Reckitt Bensikar South Africa (Pty) Limited and another Case CC 41/16** where the Court held that employment is not a marriage and as such it can be dissolved by consent of the parties to an employment contract through mutual agreement on the basis of mutual undertaking between them for example waiver of claims, confidentiality, future cooperation among others.

33. It further relied on the **Thomas De La Rue case, supra**, where the Court of Appeal held that a discharge voucher is binding contract unless the validity is questioned in which case the Court must determine from evidence whether the same was freely and voluntarily signed when the employee was seized with all the information. In view of the said precedents, the respondent maintained that the termination of the claimant's contract was through mutual agreement and therefore the issue of unfair termination does not arise.

34. As regards the claim for discrimination the respondent submitted that the evidence adduced to support that claim being paragraph 114 – 245 of the claim bundle is confidential information within the meaning of clause 9 of the claimant's employment contract. The said clause bound the claimant not to divulge any confidential information acquired during employment and therefore the said evidence in its view lacks probative value for being tendered in breach of contractual obligation.

35. He relied on **SB1 International Holdings Ag (Kenya) vs. Amos Hadav [2015]eKLR** where the Court held that an employee has a common law duty not to reveal confidential information accessed during the course of employment.

36. He further relied on **John Harun Mwau Vs. Independent Electoral and Boundaries Commission and another [2013]eKLR** where the Court held that a person alleging violation of Article 27 of the Constitution must establish that the distinction between claimant and others denied him equal protection or benefit of the law. The respondent submitted that claimant and the other 3 former employees he named were not in the same work and their contracts ended in different circumstances from that of the claimant and therefore he was not discriminated.

37. As regards the reliefs sought, the respondent submitted that since the termination was through mutual agreement, the claimant is not entitled to compensation for unfair termination. It further urged the Court to take into account that the claimant was paid 2 months salary and ex-gratia payment to cushion the claimant for the loss of his job.

38. It further submitted that the claim for anticipatory income lacks basis and as such it should be dismissed. It relied on **Elizabeth Wakary**

**Kibe Vs. Telkom Kenya Limited [2014]eKLR, Engineer Francis N. Gachuri Vs. Energy Regulatory Commission and Robert Kennedy Moi Vs. Attorney General & another [2017]eKLR** where the Courts were unanimous that salary for memorandum of the contract or till retirement should not be awarded because it is not provided under Section 49 and 50 of the Employment Act, and that an employee is supposed to look for an alternative job after dismissal to mitigate losses.

39. As regards ex-gratia payment, the respondent submitted that it is a discretionary benefit and as such there is no basis shown in this case for the same to be granted. It relied on **George Assey Vs. Mabati Rolling Mills Limited [2014]eKLR** where the Court dismissed a claim for ex-gratia payment because no evidence was tendered to support the same.

40. Finally, the respondent submitted that the claim for insurance cover premium was also anticipatory in nature and it could not accrue after the claimant exited the employment.

41. In a brief rejoinder, the claimant submitted that the alleged confidential documentary evidence was produced by consent and as such the submission that they lack probative value is without merits.

## **ISSUES FOR DETERMINATION**

42. After considering the pleadings, evidence and submissions, there is no dispute that the claimant's contract of service was prematurely terminated on 31/5/2016.

The main issues for determination are:-

- a) Whether the contract was terminated through mutual agreement or it was the unilateral decision by the respondent.
- b) If the termination was by the respondent, whether it was unfair.
- c) Whether the discharge was signed by the claimant freely and willingly.
- d) Whether the claimant is entitled to reliefs sought.

## **MUTUAL AGREEMENT OR UNILATERAL TERMINATION**

43. The claimant testified that the decision to terminate his contract of services was verbally notified to him in a meeting held on 29/2/2016, a follow up email dated 2/3/2016 and the Notice of termination dated 1/3/2016. No written evidence of a mutual agreement was produced in respect of the meeting of 29/2/2016 or response to the email dated 2/3/2016. The claimant denied any such agreement and contended that the decision to terminate his employment was unilaterally made by the respondent, who wanted him out of the company after a new person was recruited. He further stated that he did not respond to the email because he did not agree with the terms set out therein.

44. The respondent case is that by the claimant signing the Notice of termination on 24/3/2016, he signified a mutual agreement to end the contract.

45. The Notice of termination stated as follows:-

*“Dear Alfred,*

*I refer to our discussion held on 29<sup>th</sup> February 2016 and, as agreed, I now write on behalf of Hilcrest Investments Limited (the “company”) to formally give you a three (3) months’ Notice of the termination of your contract of employment dated 3<sup>rd</sup> June 2015 (the “contract”) in accordance with clause 13.2 of your contract as read with section 35 of the Employment Act. The Notice period runs from the date of the letter, and therefore, your last day of work shall be 31<sup>st</sup> May, 2016.*

### **1. Final Dues**

*Your final dues as per the relevant Kenyan Labour Laws are as follows:-*

*1.1 Full salary during the Notice period;*

*1.2 Payment for accrued leave up to 31<sup>st</sup> May, 2016; and*

*1.3 An ex gratia payment equivalent to two (2) months’ salary in recognition of your good service to the company subject to satisfying the condition below...*

### **3. Final Release and Discharge**

*By signing this letter you confirm that you have voluntarily and without coercion, intimidation or incentive whatsoever, accepted the terms contained herein and that save for the dues enumerated in clause 1 above, you have no other or further claims of any nature whatsoever against the company in connection with the contract or its termination.*

Please signify your acceptance of the above terms by signing this letter in duplicate, initial each page and return one to us.....

#### ACKNOWLEDGMENT AND ACCEPTANCE

I, ALFRED NZOMO KITHUSI, have read and understood the contents of this letter and hereby confirm that save for the dues enumerated above I have no other or further claims of any nature whatsoever against Hilcrest Investments Limited, the affiliates, share holders, directors or officers.

Signed .....

ALFRED NZOMO KITHUSI

24<sup>th</sup> March 2016

Witnessed at my request by

EDWIN KARARU.....”

46. I have carefully considered the foregoing letter which conveyed two messages, namely a Notice of termination and secondly an offer of final dues payable to the claimant. The Notice was not a proposal but a final decision by the employer but the offer of final dues was optional to the claimant. Therefore, it is my holding that the termination of claimant’s employment was not through mutual agreement but the unilateral decision by the respondent who did not want to continue employing the claimant.

#### Whether the termination was unfair

47. Under section 45 of the employment Act, termination of employment is unfair if the employer fails to prove that it was grounded on valid and fair reason related to the employees conduct, capacity and compatibility or based on the operational requirement of the employer; and that a fair procedure was followed.

48. In **Kenfreight (EA) Limited V. Benson K. Nguti [2016]eKLR**, the Court of Appeal held that:-

*“It is considered unfair to terminate contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair, that reason related to the employee’s conduct, capacity, compatibility or is based on the operational requirements of the employer. The employer must also prove that the termination was in accordance with fair procedure.....”*

*Apart from issuing proper Notice according to the contract (or payment in lieu of Notice as provided), an employer is duty-bound to explain to an employee in the presence of another employee or union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service”.*

49. Under Section 43 and 45 of the Employment Act, the burden of proving the reason for the dismissal and that fair procedure was followed is placed on the employer.

In this case the respondent did not rebut the evidence by the claimant that the reason for terminating his contract was not explained to him and he was not given any fair hearing. RW1 admitted that he was unaware of the reason for the termination and that he could not testify on matters which occurred on 29/2/2016.

50. Having considered all the facts and the circumstances of this case, I find that the termination of the claimant contract by the respondent vide the Notice dated 1/3/2016 failed the test of both substantive and procedural fairness envisaged under Section 45 of the Act and proceed to hold that it was indeed unfair despite the termination Notice having been served on the claimant as required under his contract of service and Section 35 of the Act.

#### Discharge Clause

51. The respondent contended that the claimant signed the discharge clause in the Notice of termination voluntarily and as such it became a binding contract. The claimant stated that the Notice of termination required him to sign it without any option otherwise he would not get paid his final dues. In his view the Notice constituted a subtle coercion.

52. In **Thomas De La Rue V. David Opondo Omutelema [2013]eKLR** the Court of Appeal held that:

*“we would agree with trial Court that a discharge voucher per se cannot absolve an employer from statutory obligation and that it cannot preclude the Industrial Court from inquiring into the fairness of a termination. . . The Court has, in each and every case, to make a determination, if the issue is raised, whether the discharge was freely and willingly executed when the employee was seized of all the relevant information and knowledge.”*

53. It is trite law that a settlement agreement between employer and employee at their separation constitutes a binding contract unless there is evidence that it vitiated by coercion, fraud, mistake, misrepresentation or undue influence. In this case the claimant did sign the discharge on

24/3/2016 after becoming aware of the terms as early as 2/3/2016 from an email correspondence. He also still had two months to go before the termination date.

54. I am satisfied that the claimant read and understood the discharge clause in the Notice of termination and he had all the necessary information to enable him make a decision since he did not write to request for any clarifications or to seek more information.

55. The claimant did not sign the discharge immediately or in the presence of the respondent's directors. He even stayed with the letter for weeks before signing. In such circumstances I find and hold that he freely and willingly signed the discharge after careful consideration of the terms set out and made a sound judgment of taking the final dues offered to cushion him after the termination.

#### **Reliefs**

56. The claimant signed the discharge agreement freely and willingly. The effect of the discharge agreement was to waive any further claim relating to the contract of employment or the termination of the contract.

The said undertaking was acted upon by the respondent as a binding contract. This Court must hold that in the absence of any vitiating factors, the discharge agreement is an enforceable binding contract between the parties and the only mandate for this Court is to enforce the said discharge agreement and deny the claimant all the reliefs sought herein.

57. Since the claimant has succeeded in showing that his termination was unfair, I award him costs of the suit plus interest.

**DATED, SIGNED, AND DELIVERED IN NAIROBI THIS 19TH DAY OF AUGUST, 2021**

**ONESMUS N. MAKAU**

**JUDGE**

**ORDER**

**In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**ONESMUS N. MAKAU**

**JUDGE**