



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. E497 OF 2021

BURT AGGREY ODHIAMBOCLAIMANT

VERSUS

UNIVERSITY OF NAIROBI

ENTERPRISES & SERVICE BOARD.....RESPONDENT

RULING

1. The Claimant seeks through the Notice of Motion dated 22nd June 2021 seeking for orders that the Respondent be ordered to compute and remit the terminal dues to the Claimant pending hearing and determination of the suit. The application is supported by the affidavit of the Claimant and the grounds on the face of the motion. The Claimant further filed a further Affidavit dated 23rd July 2021. The Respondent on the other hand opposed the matter and filed a Replying Affidavit dated 2nd July 2021. The application was disposed of by way of written submissions.

2. The Claimant asserts that he was employed by the Respondent on 26th April 2012 as an Assistant Maintenance Officer for a term of 3 years renewable on satisfactory performance. The Claimant submitted that his contract has been renewed periodically and on 25th November 2020 the Claimant made a written request for renewal of the contract. The Claimant submits that the request was not responded to until 27th April 2021 when the Respondent's Managing Director wrote to the Claimant and informed him of the Respondent's decision not to renew the contract. The reason advanced was that the Respondent's board decided to outsource Facilities Management as a cost containment measure as the efforts to have facilities management as a revenue stream failed. The Claimant submitted that he has filed a suit wherein he seeks to be awarded damages on account of unfair termination but that the matter before court at this stage narrows down to the enforcement of a clear policy of the Respondent as per the contents of Paragraph 9.2(e) of the Respondent's Human Resource Management Manual which provides that payment of terminal dues shall be subject to clearance of the staff concerned from all liabilities to the Respondent. It is the contention of the Claimant that he duly complied with the said provision and was duly cleared from the institution of the Respondent. He submits that but out of unfair directive of the Managing Director of the Respondent, the MD unlawfully suspended the processing of the terminal dues. The Claimant submitted that the processing ought to be completed and terminal dues duly paid to the Claimant herein. The Claimant submits that the key question is whether he duly cleared from the Respondent in accordance with the aforesaid policy of the Respondent. The Claimant asserts that he has complied with clearance and that the first point of call would be the Respondent's letter dated 30th April whose penultimate paragraph states as follows: *'...Please follow the clearance process using the Clearance Form (UNES/FM/A009)*. The Claimant submits that clearance from the Respondent has been institutionalized to mean that the procedure and nature of clearance has been clearly documented in the said form UNES/FM/A009 and not through any other extraneous or subjective method or model. The Claimant submitted that he duly commenced the process and by 7th June 2021, he was duly cleared from ALL the relevant departments including the Managing Director's office and exited the Respondent's service. The Claimant submitted that the relevant officials of the Respondent clearly indicated that there existed no liability on his part and that his dues were to be paid without any deduction at all. The Claimant posed the question 'Why then would the Respondent refuse to compute and remit the terminal dues of the Claimant as required under the Human Resource Policy?' The Claimant submitted that per annexure in the Replying Affidavit, he questioned the motive of the Managing Director in terminating his services as it is directly related to his whistleblowing on irregularities as concerns the Managing Director's office and which prompted the Vice Chancellor to request the Respondent to investigate the pilferage of a sum of Kshs. 4,500,000/- by the Managing Director, which request the Applicant had done way back on 20th May 2021. The Claimant submits that indeed the said Managing Director was irked and instead of approving his clearance and eventual computation of the terminal dues, the Managing Director wrote an e-mail of 14th June 2021 where the MD stated *'Your allegations are under investigations so please don't prejudice the process. We have suspended any processing of your dues until further notice.'* The Claimant submits that it is an act of unfair labour practice to unilaterally proceed to 'suspend' the computation and payment of terminal dues for the following reasons:

(a) The Respondent voluntarily cleared the Applicant of any liabilities and all the reports were duly submitted and there existed no identified liability accruing and none has been proven even on a *prima facie* level.

(b) The Claimant has never been to any disciplinary action or any investigations at all over any liability of the Respondent at all.

(c) The Respondent has no pending or active claim or even a counterclaim against the Claimant in any forum.

3. The Claimant submits that having worked for the Respondent for a period of approximately 10 years, is entitled at the point of exit to his contractual and statutory dues. The Claimant submitted that finally, the reason advanced for termination was a result of the position being declared redundant, Section 40 of the Employment Act obligated the Respondent to proceed to compute and pay the dues before termination. In support of this proposition, the Claimant relied on the case of **Ignas Karingo Mghona & 4 Others v Star of Hope International Foundation [2016] eKLR** where it was held as follows:

“Importantly, Section 40 states an Employer shall not terminate the Employee’s contract of employment, unless the Employer has complied with the conditions outlined under Section 40. The payments of severance pay, notice pay, and outstanding annual leave days, must be made before termination. The refrain under Section 40 is that the Employer “has paid.” The law does not state that the Employer “shall pay.” The Employer shall not terminate the Employee’s contract of employment, unless all the conditions under Section 40 have been met. Redundancy dues must be paid before termination. What most Employers do, as did the Respondent herein, is tabulate redundancy dues, terminate and advise Employees when to collect their dues at a later date. Redundancy dues must be paid before termination. Failure to meet any of the conditions under Section 40, which includes payment of all terminal dues before termination, would result in an unfair and unlawful termination.”

4. The Claimant submitted that he had made a case that the Respondent has refused to tabulate and remit the terminal dues as required by the law which mandates the Respondent to remit the dues before termination. The Claimant asserts that the Respondent however proceeds to act unlawfully through its Managing Director by unilaterally suspending the processing of the dues until further notice without any basis or reason and therefore the motion is merited and ought to be granted as prayed.

5. The Respondent submitted that the Human Resource Policy and Procedures Manual July 2nd, 2018 at Section 13 provides for the procedure of employee separation from time to time and for various reasons to ensure smooth and fair separation process. The Respondent submitted that the separation between the Respondent and Claimant is not in dispute, as the Claimant's term contract came to an end on June 4th, 2021 by effluxion of time. The Respondent submitted that it has clearance procedures that the Claimant was aware of having worked for the Respondent for a long time, and it is that proper clearance procedure that would inform the tabulation and calculation of terminal dues. The Respondent submitted that the Claimant's last day of clearance was therefore on June 3rd, 2021, when he was expected to *inter alia* comply with Human Resource Policy and Procedures Manual July 2nd, 2018, complete a clearance form, attach an exit interview form, fill in prescribed declaration of wealth form, fill in the Official Secrets Act form, Kenya Revenue Authority and Higher Education Loans Board (HELB) Clearance Forms, and as the case may be, settle any outstanding company debts, surrender among others medical card, employee identity card, office desk, keys, tools, equipment, user manual, laptops, mobile phones, safe codes, transaction codes etc., and hand over to the immediate supervisor. The Respondent submitted that this procedure was to help the Claimant formally exit employment and to ensure that all properties belonging to the Respondent were accounted for and the Claimant's terminal dues computed based on the exit clearance form. It is the Respondent's submission that the Claimant is yet to perform requisite exit clearance procedure as laid down in the Respondent's Human Resource Policy and Procedure Manual and his alleged clearance is a forgery, doubtful and irregular for the following reasons:

i) The Facilities Management report marked “BAO 7” as at March 19th, 2021, does not incorporate matters of his last day of service on June 3rd, 2021.

ii) Annexure marked “RAO 8” purporting to be a handing over report was not made to the Claimant's immediate supervisor but to a stranger.

6. The Respondent submits that on May 12th, 2021, the Claimant made a report to the Vice-Chancellor University of Nairobi about flagging of illegal transactions practices in Respondent's consultancy projects, a clear indication that the Claimant had not cleared with his immediate supervisor, following the wrong Human Resource Management Manual, January 2016 instead of the correct Human Resource Policy and Procedure Manual July 2nd 2018. The Respondent submits that the application as framed and presented is an abuse of the Court process for the reasons that the Claimant's dues if any, are only payable after following the due clearance process. The Respondent asserts that the Claimant has contested his end of term contract, while at the same time dramatically insisting on payment of his terminal dues, a contradiction in his pleadings, and that in terms of Section 47(5) of the Employment Act, 2007, the Claimant had the burden of proving that an unfair termination of employment had occurred. The Respondent submits that the Claimant was producing conflicting information and data on clearance process and Manual, and had failed to account for Kshs. 4,500,000/- being Respondent's Consultancy monies. The Respondent submits that the Honourable Court has no basis to interfere with the parties voluntary agreement as to exit clearance procedure and process, and the Claimant is to be blamed for not following the laid down exit process. The Respondent submits that its Managing Director does not have any personal vendetta against the Claimant but simply executing exit clearance procedure and process duties as bestowed upon him by the Respondent's Human Resource Policy and Procedures Manual. It was submitted that the MD has to ensure exit interviews are conducted and that prior to payment of final dues, the exiting staff obtains a Clearance Certificate confirming that all company assets have been returned; exiting staff clears the outstanding liabilities; exiting staff is issued with a Certificate of Service, and exiting staff signs an Indemnity Certificate. It is the Respondent's submission that the Claimant's pending exit clearance issue with the Respondent is to among others account for Kshs. 4,500,000/- and thereafter attend an exit interview before his final dues can be processed. The Respondent relies on the case of **Daniel Mwanzau Nzioka v Brinks Security Services limited [2020] eKLR** where O.N Makau J. ordered a Claimant who did not fully clear with the employer to pay counter claim before payment of terminal dues. The Respondent submits that the Honourable Court should consider a counter claim and set off of Kshs. 4,500,000/- against the Claimant before his terminal dues are processed in addition to attending an exit interview and handing over the Respondent properties and items in his possession. The Respondent submits that it is willing and ready to pay the Claimant's terminal dues in full less any liability to the Respondent upon clearance and handing over. The Respondent submits that the Claimant's claim is not a case of unfair termination of the contract but that of his employment contract having lapsed and payment of his terminal dues is subject to him being processed through appropriate clearance procedure and not what he purports to be “clearance” without conducting an exit interview. The Respondent submits that the case of **Ignas Karingo Mghona & 4 Others v Star**

of Hope International Foundation [2016] eKLR cited by the Claimant is irrelevant in this dispute as it dealt with unfair termination as opposed to the Claimant's term contract coming to an end on June 4th, 2021 by effluxion of time. The Respondent cited the case of **Amos Kitavi Kivite v Kenya Revenue Authority [2020] eKLR** where O.N. Makau J. held that terminal dues should be paid after the Claimant completes clearance as directed by the respondent and proceeded to dismiss the suit with costs. The Respondent also cited the case of **Lawrence O Moseti & 22 Others v County Government of Nakuru [2018] eKLR** where Mbaru J. held that the motions of clearance with the employer are imperative to access the benefits due under any statutory provisions for retirement benefit for NSSF, Retirement Benefits Act or the Pensions Act, and terminal dues. The Respondent submitted that from the foregoing the Claimant's application is not tenable for want of exit clearance and should be dismissed/struck out with costs to the Respondent as the application is misconceived, lacking in merit, and an abuse of the court process.

7. The Claimant seeks through the Notice of Motion dated 22nd June 2021 seeking for orders that the Respondent be ordered to compute and remit the terminal dues to the Claimant pending hearing and determination of the suit. The Application by the Claimant is one that cannot be granted in the interim as it deals exhaustively with the dispute in question in the Claim. As such the application is not for grant and is accordingly dismissed. The Court will set the matter for directions as to hearing of the main claim shortly after the delivery of this Ruling.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF SEPTEMBER 2021

NZIOKI WA MAKAU

JUDGE