



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 1900 OF 2016

MARTIN OTIENO ODHIAMBO T/A MART ORIGATION.....CLAIMANT

VERSUS

JOSEPH OBUNGA OLIMARESPONDENT

JUDGEMENT

1. The claimant alleges through the instant suit that he employed the respondent on a fixed term contract for a period of twenty-four months with effect from 1st July, 2015. The claimant avers that the respondent breached his employment contract when he left to go and work with one of his clients without tendering any notice as required by his contract of employment.

2. The respondent entered appearance and filed a statement of defence through which he denied breaching the employment contract. He averred that he tendered his resignation and gave the claimant two months' notice. Further, he averred that it is the claimant who breached the employment terms, thus necessitating his resignation. He cited several contractual breaches on the part of the claimant for instance, delayed salary, sudden change in working hours, being compelled to work on public holidays without compensation etc. He prayed that the claim be dismissed with costs.

3. The matter came up for hearing on 9th November, 2021 and the respondent was not present in court. The claimant produced an Affidavit of Service sworn on 5th November, 2021 by one Mr. Elijah Kipkorir Chepkwony and through which he deponed that he effected service of the day's hearing notice, upon the firm of Ndemo Mokaya & Company Advocates, who were on record for the respondent. Annexed to the Affidavit of service was a copy of the hearing notice, duly stamped and received by the respondent's advocates.

4. The court being satisfied with the return of service, proceeded to hear the claimant's case, in absence of the respondent pursuant to Rule 22 of the Employment and Labour Relations Court Rules (2016).

Claimant's case

5. The claimant testified in support of his case and sought to adopt his witness statement as part of his evidence in chief. He also produced the bundle of documents filed together with his claim, as exhibits before court.

6. It was his testimony that he is an interior designer and runs a business which goes by the name "Mart Origination". He averred that the respondent was his employee and was subject to an employment contract which was to run for a term of 2 years. That the said employment contract was terminable by each party giving the other 2 months' notice or payment in lieu thereof. The claimant further told court that the respondent served under the said employment contract for only one year, whereafter he opted to leave and work in another place without tendering the requisite notice of 2 months. He thus stated that the respondent was liable to pay him the sum of Kshs 130,000/= being equivalent to 2 months' salary in lieu of notice.

Submissions

7. The claimant filed written submissions through which it submitted that he had proved his case to the required standard of proof as his testimony and evidence before court, was uncontroverted by the respondent. On this issue, it invited the court to consider the case of **Shaneebal Limited vs County Government of Machakos (2018) eKLR**.

Analysis and determination

8. Having considered the pleadings on record and the claimant's submissions, to my mind, the sole issue for determination is whether the claimant is entitled to the reliefs sought against the respondent, that is, payment of 2 months salary in lieu of notice.

9. In as much as the evidence of the claimant was uncontroverted, it is imperative to evaluate the evidence presented so as to arrive at a reasoned determination. In this regard, the employment contract which governed the parties' relationship and which was produced as an exhibit before court, remains the guiding light in the determination of this case.

10. In this regard, the relationship between the parties is founded on the employment contract dated 7th July, 2015, which is part of the record herein. I am also mindful, that the role of the court is not to rewrite that contract between the parties but rather, to review same and infer their intentions therefrom. On this issue, I wish to reiterate the holding in the case of **Pius Kimaiyo Langat versus Co-operative Bank of Kenya Ltd [2017] eKLR**, thus;

“We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, Fraud or undue influence are pleaded and proved.”

11. The interpretation of the parties' contract will ultimately inform the final determination herein.

12. At the heart of the dispute herein is the issue of “notice” as agreed and reduced into contract by the parties. I have carefully perused the contract between the parties and note that the relevant clause therein is 2.4 which reads as follows;

“Either party may terminate this agreement upon notice in writing if:

The other party is in breach of any material obligation contained in this agreement, which is not remedied (if the same is capable of being remedied) within 60 days of written notice from the other party so to do: or”

13. This is the only clause that comes closest to the issue of notice. Notably, there is no other provision in the contract which covers the issue of notice.

14. A literal interpretation of the said clause 2.4 contemplates an issue where breach has occurred and the same is not remedied within 60 days by the party in breach. Evidently, the clause does not provide for the termination under any other circumstances. Therefore, the termination under that clause is very specific and does not cover normal cases of termination. Besides, it does not provide for payment of salary in lieu of the notice.

15. The upshot of the foregoing is that the employment contract as it is, bound both parties and it is not the place of the court to import clauses that are not expressly provided therein.

16. Therefore, for the claimant to be entitled to the remedy he seeks, the employment contract ought to have expressly provided for the notice period and payment of salary equivalent to the notice period, in lieu thereof. In this case, the remedy sought by the claimant, does not flow from the contract by the parties as it was not provided for in black and white. To this end, the said remedy cannot avail.

Conclusion

17. The upshot of the foregoing is that the claim is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF DECEMBER, 2021

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Malonza

For the Respondent No appearance

Court Assistant Barille Sora

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 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is

to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE