



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR REALATIONS COURT

AT NAIROBI

CAUSE NO. 1321 OF 2015

BEN OTIENO AKETCH.....CLAIMANT

VERSUS

MACHARIA MWANGI & NJERU ADVOCATES.....RESPONDENT

J U D G M E N T

1. Vide a Memorandum of Claim dated 31st July 2015 and filed in Court on the same date, the Claimant sued the Respondent and pleaded, *inter-alia*:-

a) that the Claimant joined the Respondent's employment on 18th February 2013 and worked with it as an associate advocate till 29th May 2015 when the Claimant terminated his contract after issuing the appropriate notice on account of his decision to take advantage of a scholarship opportunity at Georgetown University.

b) that during the term of his service, the Claimant's salary rose from sixty thousand Kenya Shillings to one hundred and twenty thousand Kenya shillings (kshs.120,000).

c) that the Respondent paid the Claimant a sum of kshs 90,666.70 in respect of twenty five (25) outstanding leave days, which sum the Claimant considered to have been calculated wrongly, thereby depriving the Claimant of ksh.45,696.94.

d) that the Claimant worked with the Respondent for two(2) years and three (3) months and was entitled to service pay amounting to ksh.113,625.00, which sum the Respondent had refused to pay.

e) that for the two (2) years and three (3) months that the Claimant worked for the Respondent, the Claimant was never provided with accommodation, and neither did the Respondent pay additional sufficient sum as rent to the Claimant on top of his salary to enable him to seek alternative accommodation, and thereby deprived the Claimant housing allowance totaling to ksh.409,050.

f) that prior to issuance of the notice terminating his employment, the Claimant had entered into discussion with the Respondent for a salary increment to take effect in February 2015, and that the agreed new salary was supposed to be ksh.150,000.

g) that the (salary increment) negotiations applied for other employees of the Respondent.

h) that in contravention of the Claimant's right, the new salary was never effected in favour of the Claimant, and that this was motivated by bad faith and precipitated by knowledge on the part of the Respondent that the Claimant had secured an opportunity to leave the country and would inevitably have to terminate his services.

i) that the salary increment was implemented in respect of all employees thereby elevating the Claimant's peers and juniors to a salary status above the Claimant on a discriminatory and unfair basis.

j) that the total outstanding amount of salary unlawfully withheld for the period between February and May 2015 is ksh.90,000.

k) that the Respondent has refused to issue the Claimant with a Certificate of Service as by law required.

2. The Claimant also filed a written statement duly signed by himself on 31st July 2015 and a list of documents dated 31st July 2015, listing some five documents. The documents listed by the Claimant are the letter of appointment dated 8th April 2013, a letter of confirmation of employment dated 29th April 2013, notice of termination of employment, admission letter to Georgetown University and a demand letter dated 24th June 2015.

3. On 23rd November 2015, the Respondent filed a Memorandum of Response and pleaded, *inter-alia*:-

a) that the Claimant's net consolidated salary at the commencement of employment was ksh.65,000

b) that throughout his two(2) years employment with the Respondent, the Claimant was earning a net consolidated salary, and as at 24th April 2015 when the Claimant issued notice of termination of his service, the Claimant was earning a net consolidated salary of ksh.120,000.

c) that there was no dispute between the Claimant and the Respondent in respect of the Claimant's dues; and that by his Notice of Termination of Employment dated 24th April 2015, the Claimant stated that by his computation, his leave days were approximately 25 days.

d) that a meeting was held with the Claimant and the parties agreed that payment due to the Claimant was ksh.90,667; and that the Claimant, who is an advocate of the High Court of Kenya, executed a Discharge and Clearance Certificate dated 8th June 2015 stating, *inter alia*:-

"having considered leave days during the time of my employment, I have tabulated my accrued leave days not taken within the period of my employment based on the salary rate, increased from time to time and it amounts to ksh.90,666.70cts...that I fully and completely Discharge my employer MACHARIA MWANGI & NJERU ADVOCATES from any claims by myself and from any other liability or claims in respect of my employment."

e) that the Claimant is estopped from making claim allegedly for unpaid leave, and allegations thereon are frivolous and vexatious.

f) that the Respondent is not liable to pay the Claimant any service pay under Section 35(6) of the Employment Act as the Respondent made prompt contributions to the National Social Security Fund (NSSF). That the claim for ksh.113,625, having been made by counsel who is fully aware of legal provisions, is meant to vex the Respondent, and is therefore frivolous and vexatious.

g) that the Claimant earned a consolidated net salary and as such the issue of provision of accommodation and related sum does not arise; and never arose during the Claimant's two years of employment.

h) that Clause 18 of the Letter of Appointment dated 18th April 2013 and the terms contained in the letter of appointment constituted the entire agreement between the Claimant and the Respondent, and that the Claimant is estopped from imposing additional terms on the respondent after he has voluntarily left employment.

i) that whenever the claimant's net consolidated salary was increased, a new payslip was computed for the subject month, and that it is inconceivable that the Claimant's pay was increased in February 2015, and yet he continued to receive the same pay for February, March, April and May 2015.

j) that the Claimant's claim is inadmissible, and is an abuse of the Court's process.

4. The Respondent filed a detailed witness statement by Elijah Mwangi Njeru dated 23rd November 2016 and a bundle of documents dated the same date, listing a total of 32 documents, and a supplementary list and bundle of documents dated 26th March 2018, listing an NSSF statement covering the period of the Claimant's employment. Among the documents listed by the Respondent in the list and bundle of documents dated 23rd November 2016 are the Claimant's letter of appointment dated 8th April 2013, letter of confirmation of employment dated 29th April 2015, the Claimant's payslips dated 30th April 2015, 30th January 2014 and 28th May 2015; a letter of recommendation dated 16th May 2014, the claimant's notice of termination of employment dated 24th April 2015 and a Discharge and Clearance Certificate dated 8th June 2015 signed by the Claimant.

5. When the matter came up for trial on 2nd August 2021, the Claimant told the Court that he is an Advocate of the High Court of Kenya and a member of the New York State Bar and Maryland State Bar, currently residing in the United States of America. The Claimant adopted his signed and filed statement as his evidence in chief and further produced the documents listed in his filed list of documents as exhibits. He prayed for judgment as prayed in his Memorandum of Claim.

6. Cross examined by counsel for the Respondent, the Claimant testified that Clause 5 of his letter of appointment provided that he would be paid a consolidated salary of ksh.65,000 and that his said salary would be reviewed every one and a half years, and that the Claimant's salary was reviewed thrice. The Claimant told the Court that at the time of his departure, his salary was ksh.120,000.

7. The Claimant further testified and confirmed, under cross examination:-

a) that Clause 5 of the letter of appointment further provided that there would be no contractual salary increment, and that the Claimant would, however, be notified in writing of any salary increment.

b) that Clause 9 of the letter of appointment provided for 21 leave days, that leave days would not be carried forward without written consent, and that any unutilized leave days would be deemed forfeited.

c) that in his letter of termination of employment, the Respondent had stated that he had approximately 25 outstanding leave days, and had thanked the Respondent for the beneficial working relationship that had existed between the Claimant and the Respondent.

d) that the Respondent held a farewell lunch for the Claimant on 28/5/2015, which was attended by staff members.

e) that in the letter of termination of employment (dated 24th April 2015), the claimant did not raise any issue of house allowance.

f) that the Claimant received the amount stated in the Discharge and Clearance Voucher (Certificate), being ksh.90,667, and that the document states that the Claimant had discharged the Respondent/employer from any claims by the Claimant and from any other liability in respect of the Claimant's employment.

g) that for the over two years that he had worked for the Respondent, the Claimant did not make any demand for the reliefs he is now seeking, reason being that there was no cause of action then.

h) that the NSSF statement filed by the Respondent had his name and details, though some like the KRA Pin were not shown.

8. Re-examined, the Claimant testified that his contract of employment provided for a consolidated salary and that at the time he left employment, he had 25 outstanding leave days.

9. The Claimant further confirmed that he signed the Discharge and Clearance Certificate on 8/6/2015, but added that he did not sign it out of his own free will because he had not received his dues from his employer by 29th May 2015, and had to reschedule his flight to 8th June 2015, the date on which he signed the Discharge and Clearance Certificate. That he had stated as much in his Reply to the Respondent's Response to the Memorandum of Claim.

10. The Respondent's witness, Elijah Mwangi Njeru (DW1) adopted his signed and filed statement as part of his evidence and produced the 32 documents listed in the Respondent's list and bundle of documents dated 23rd November 2016 and the NSSF statement listed in the Respondent's supplementary list and bundle of documents dated 26th March 2018 as exhibits. The same were marked as the Respondent's exhibits Nos. 1-33. An earlier objection by the Claimant to production of some of the Respondent's documents was dismissed vide this Court's Ruling dated 2nd August 2021.

11. Cross-examined by counsel for the Claimant, the Respondent's witness (DW1) testified:

a) that the contract of employment provided for a consolidated salary covering all the Respondent's contractual obligations, without breaking down the figure.

b) that although the payslips exhibited at pages 20,22,23 and 24 of the Respondent's list and bundle of documents do not show NSSF deductions, the NSSF statement which is computer generated and on which the Claimant's name appears, confirms that the deductions were done and payment made to NSSF.

c) that the Claimant was issued with a Certificate of Service, but never collected the same. That it is not in dispute that the claimant worked for the Respondent.

12. Re-examined, DW1 clarified that the consolidated salary paid to the Claimant covered all the Respondent's contractual obligations to the Claimant save for CLE, Practicing Certificate and Medical Cover, which were referred to in Clause 10 of the contract of employment, and that statutory deductions, including NSSF, were being remitted directly by the employer.

13. Upon conclusion of the trial on 2nd August 2021, the court directed counsel for both parties to file and to exchange written submissions before mention of the matter on 12th August 2021. The Respondent's submissions were filed on 9th August 2021 while the Claimant's written submissions were filed on 14th October 2021, apparently after this Court's Ruling dismissing the Claimant's application (dated 5th August 2021) seeking to re-open the Claimant's case. I have considered the submissions filed by both counsel.

14. Parties did not file any statement of issues for determination, either jointly or separately. From the pleadings filed, evidence adduced and submissions filed by counsel, issues for determination appear to me to be as follows:-

a) whether the Claimant was entitled to house allowance.

b) whether the Claimant is entitled to service pay.

c) whether the Claimant was entitled to salary increment as from February 2015, and whether the Respondent discriminated

against the claimant and withheld the increment unlawfully.

d) whether the Claimant is entitled to payment of unutilized leave days.

e) what is the legal import of the Discharge and Clearance Certificate/Voucher executed by the Claimant on 8th June 2015.

f) whether the Claimant is entitled to a Certificate of Service.

g) whether the claimant is entitled to the reliefs sought

15. On the first issue, although Section 31(1) of the Employment Act obligates an employer to provide reasonable housing accommodation for each of his employees or to pay to each a sufficient sum as rent in addition to the wage or salary of each employee, Section 31(2) (a) of the Act lifts such obligation regarding an employee whose contract of service contains a proviso which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation.

16. Clause 5 of the Claimant's contract of employment provides in part:-

“Your net consolidated salary during the probation period is ksh.65,000 per month, which shall be structured in accordance with the firm's policies...”

Your salary shall be reviewed at least every 1 ½ years depending on your performance and the financial position of the Firm as seen by the partners. There is no contractual entitlement to any increase in your salary but you shall be informed in writing in any case where there is any change to your salary.”

17. The Claimant's contract of service dated 8th April 2013, whose terms the Claimant never disputed, contained a proviso to the effect that his salary was consolidated. He was not entitled to house allowance over and above the consolidated salary. It was held in the case of **Jubilee Jumbo Hardware Ltd –vs- Rogaciana Rading Ogwag [2021] eKLR** that:

“Section 31 of the employment Act 2007 obligates the employer at the first instance to provide housing to its employees. Where the employer cannot provide housing, it should pay the employee an allowance to cover housing. The requirement to provide housing and/or house allowance however does not apply where there is a proviso in the contract that the remuneration is consolidated, or where a collective bargaining agreement provides for consolidated wages...”

18. I have, indeed, looked at the Claimant's payslips for the months of April 2013, January 2014 and May 2015 which were exhibited by the Respondent as exhibit Nos.7,8 and 9. They are duly signed by the Claimant, and they all include the following Clause:-

“I BEN OTIENO AKECH, the above named payee hereby acknowledge receipt of the aforesaid sum in full and final settlement of my dues from my employer for the period aforesaid.”

19. On the second issue, Clause 17.1 of the Claimant's contract of employment provides:-

“All fiscal income and other taxes levied on you in respect of your remuneration from the firm or otherwise are your personal liability and are to be paid by you unless otherwise required by law. Higher Education Loans Board and other personal liabilities are expected to be repaid by you without the firm's intervention. However, statutory dues and specifically NHIF, NSSF and PAYE shall be paid over to the relevant authorities to the intent that the net consolidated pay remains the same.” (emphasis mine).

20. The foregoing clause in the Claimant's contract of employment meant that the claimant was contractually bound to be a member of NSSF into which dues would be remitted by the Respondent to the intent that the Claimant's consolidated pay would remain the same. As already stated in this judgment, the Claimant never disputed any part of his contract of employment, which he also produced in Court as part of his evidence.

21. Under Section 35(5) and (6) (d) of the Employment Act, an employee who is a member of the National Social Security Fund shall not be entitled to service pay. To buttress its assertion that the Claimant is not entitled to service pay for the years worked, the Respondent produced, as part of its evidence, an NSSF statement on the Claimant's contributions to the fund covering the period of the Claimant's employment, with contributions and remittances fully made for the entire period. I find and hold that the Claimant is not entitled to service pay. In the case of **Johana Kipngeno Cheborgei –vs- Bob Morgan Services Ltd [2021]eKLR**, the Court quoted with approval the decision in **Hassanath Wanjiku-vs- Vanela House Coffee [2018] eKLR** where the Court held as follows:

“under Section 35(6) an employee who is a member of NSSF is not entitled to service pay...even if no remittances had been made by the Respondent, the Claimant would still not be entitled to a refund of the same as both NSSF and NHIF have statutory and administrative structures to collect the same from defaulting employers, backed by powers to prosecute and charge penalties for late payment.”

22. On the third issue, I make reference to Clause 5 of the Claimant's contract of employment, which I have substantively reproduced in paragraph 16 of this Judgment. It is clearly stated in the said Clause that the Claimant had no contractual entitlement to any increase in his

salary, but would be informed in writing in any case where there was any change to his salary. The Claimant did not demonstrate by evidence that there was any such change or increase in his salary in February 2015, neither did he demonstrate that any salary increase had been agreed upon between himself and the Respondent. The claim for withheld salary cannot, therefore stand.

23. On whether the Claimant is entitled to any payment for unutilized leave days (the fourth issue), it is to be noted that in his notice of termination of employment dated 24th April 2015, the Claimant informed the Respondent that he had approximately twenty five (25) outstanding leave days.

24. On 8th June 2015, the Claimant executed a Discharge and Clearance Certificate/Voucher whereby he; *inter-alia*:

a) confirmed having been paid his full salary from time to time until when he ceased employment with the Respondent.

b) confirmed having considered his leave days during the time of his employment and having tabulated his accrued leave days not taken within the period of employment based on the salary rate increased from time to time and that it amounted to ksh.90,666.70; payment of which he acknowledged.

c) fully and completely discharged the Respondent from any claims by himself and from any other liability or claims in respect of his employment.

25. As already stated in this judgment, the Claimant confirmed, under cross examination, that he indeed executed the Discharge and Clearance Certificate. Re-examined by his counsel, however, the claimant stated that he did not sign the Discharge and Clearance Certificate out of his free will because he had not been paid on 29th May 2015 and had to reschedule his flight to 8th June 2015 when he signed the Discharge and Clearance Certificate.

26. The Claimant, who is an Advocate of the High Court of Kenya, did not demonstrate the existence of any vitiating factors like fraud, undue influence, undue pressure, ignorance, misrepresentation, coercion, threats or illegality. The allegations of a flight cancellation are not a vitiating factor and were not proved. The Discharge and Clearance Certificate executed by the Claimant on 8th June 2015 is binding on him and the Respondent is fully discharged.

27. In Trinity Prime Investment Limited –vs- Lion of Kenya Insurance Company Limited [2015] eKLR, the Court of Appeal, while discussing the import of a Discharge voucher, observed:-

“the execution of the Discharge Voucher, we agree with the learned judge, constituted a complete contract. Even if payment by it was less than the total loss sum, the appellant accepted it because he wanted payment quickly and execution of the voucher was free of misrepresentation, fraud, or other. The appellant was thus fully discharged.”

28. This Court cannot be called upon to undo, change and/or overlook agreements and undertakings made by parties out of their own free will. The court can only enforce and/or give effect to the intention of parties as discerned from their agreements and/or undertakings. In the case of Damondar Juhabhai & Co. Ltd and another –vs- Eustace Sisal Estates Ltd [1967] EA 153, Sir Charles Newbold P expressed the following sentiments:-

“The functions of courts is to enforce and give effect to the intention of the parties as expressed in their agreement. In the English Court of Appeal case above – Globe Motors Inc & others –vs- TRW Lucas electrics Steering ltd & others (supra) Lord Justice Beatston stated as follows:-

...Absent statutory or common law restrictions, the general principle of English Law of contract is [that parties to a contract are free to determine for themselves what obligations they will accept].

The parties have the freedom to agree whatever terms they choose to undertake, and can do so in a document, by word of mouth or by conduct.”

29. Regarding the claim/prayer for a Certificate of Service, the Respondent (DW1), testified under cross-examination, that the Claimant's Certificate of Service was issued by the Respondent but the Claimant never collected it. This evidence was not rebutted and/or controverted by the Claimant. It is to be noted that on 8th June 2015, the Claimant signed and executed a Discharge and Clearance Certificate whereby he, *inter-alia*, discharged the Respondent from any claims by the Claimant and from any other liability or claims in respect of the Claimant's employment. If the Claimant has not collected his Certificate of Service from the Respondent, it is his duty to do so.

30. On whether the Claimant is entitled to the reliefs sought, it is my finding that the Claimant is not entitled to any of the reliefs sought. In sum, the Claimant's claim against the Respondent is dismissed with costs.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9TH DAY OF DECEMBER 2021

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on 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.

AGNES KITIKU NZEI

JUDGE

In the presence of

No Appearance for Claimant

Mr. Kimani for Respondent