



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO. 13 OF 2021**

**PAUL KRIJNEN.....CLAIMANT**

**VERSUS**

**NAS AIRPORT SERVICES LIMITED.....RESPONDENT**

**R U L I N G**

1. Vide a Statement of Claim dated 10<sup>th</sup> February, 2021 and filed in Court on 12<sup>th</sup> February, 2021, the Claimant sued the Respondent and pleaded unjustified, unfair and unlawful dismissal by the Respondent. The Claimant claims a total of Kshs. 24,362,972.83 against the Respondent, made up of claims for payment in lieu of leave days, severance pay, 24 months salary cuts @ 25% and payment (damages) for physical and mental anguish due to discrimination and harassment.

2. The Claimant pleads, *inter alia*:-

**a) that the Claimant was employed by the Respondent as the Manager, NAS Mombasa Unit since 1999 or thereabouts and has since honestly and diligently carried out his duties.**

**b) that upon the claimant attaining the retirement age of fifty-five (55) years in 2010, the Respondent purported to terminate the Claimant's services and immediately re-hired him as an independent contractor for a term of one year, still performing the same job, NAS Mombasa Unit.**

**c) that from the year 2010 upto and including 2019, the Respondent repeatedly rolled over the independent contract with the same terms and conditions each year.**

**d) that in 2020, the Respondent purported to re-hire the Claimant on a eight (8) month contract, with a termination date of 31<sup>st</sup> August, 2020.**

**e) that on 23<sup>rd</sup> March 2021, the Respondent, without any notice, decided to terminate the employment of the Claimant.**

3. Among the reliefs sought by the Claimant is a declaration that the Claimant's dismissal was unfair, unlawful and a nullity.

4. On 6<sup>th</sup> April, 2021, the Respondent filed a Memorandum of Response (under protest), dated 24<sup>th</sup> March, 2021 and pleaded, *inter alia*:

**a) that the Claimant was first employed by the Respondent company in 1999 and upon reaching retirement age of 55 years retired from employment effective 31<sup>st</sup> December, 2010; and was paid his terminal dues consisting his salary upto 31<sup>st</sup> December 2010, gratuity, unpaid leave and a bonus payment, all amounting to Kshs. 4,553,279/=.**

**b) that the Respondent took the decision to offer the Claimant a two-year fixed term contract the terms of which were that the Claimant would be employed as a Station Manager for the period 1<sup>st</sup> January 2011 to 31<sup>st</sup> December, 2012.**

**c) that the contract was thereafter renewed severally with the final renewal of three months being from 8<sup>th</sup> September 2019 to 31<sup>st</sup> December 2019.**

**d) that the Claimant was advised that he would be returning to the company as a consultant, not an employee, from 1<sup>st</sup> January, 2020 to 31<sup>st</sup> August, 2020, during which time the Claimant's successor would be appointed and inducted**

accordingly.

e) that the Claimant's employment relationship with the Respondent ended on 31<sup>st</sup> December, 2019 by way of effluxion of time as per the fixed term set out in the letter dated 27<sup>th</sup> September, 2019.

f) that the Claimant's return to the Respondent company was as a consultant/independent contractor as per the consultancy appointment letter dated 18<sup>th</sup> December 2019, pursuant to which the Claimant submitted consultancy invoices to the Respondent for payment.

g) that the consultancy contract between the Claimant and the Respondent was terminated by a notice dated 23<sup>rd</sup> March, 2021 by the Respondent following the onset of corona virus pandemic.

h) that the Respondent denies:

(i) the claim for unpaid leave as the same was forfeited by the Claimant during his employment tenure which ended on 31<sup>st</sup> December, 2019.

(ii) the claim for severance pay as the Claimant's employment did not end with redundancy.

(iii) the claim for physical and mental anguish due to discrimination,

(iv) the claim for payment of salary cuts as the same is time-barred, and was compensated by enhanced salary to the Claimant and working for less hours.

i) that the Claimant's employment terminated on 31<sup>st</sup> December, 2019 and claims herein being continuous injuries ought to have been filed within 12 months of the said dates.

5. The foregoing is the full and/or substantial summary of pleadings presented to this Court by both parties to the suit. Matters of fact have been raised in those pleadings, and documents have been filed by both parties in support of the facts pleaded by them. An affidavit in response to the Respondent's Memorandum of Response was filed on 12<sup>th</sup> May, 2021.

6. It is against the foregoing background that I have been called upon to determine the Respondent's Preliminary Objection dated 24<sup>th</sup> March, 2021 and filed in Court on 6<sup>th</sup> April, 2021, which is raised against the claim herein on the following grounds:-

a) that this Court lacks jurisdiction to hear this claim as there was no employer-employee relationship at the time material to the suit.

b) that the claim for terminal benefits is time-barred pursuant to the provisions of Section 90 of the Employment Act, 2007 Laws of Kenya.

7. It was held in the case of Mukisa Biscuit Manufacturing Co. Ltd vs- West End Distributors Limited [1969] E.A. 696 as follows:-

*"... a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a Preliminary point may dispose of the suit."*

8. A Preliminary Objection can only be taken where what is involved is a pure point of law. In a situation where what is involved is a conflict or clash of facts, a trial must be conducted, witnesses must be called, testimonies must be given and evidence produced for assessment by the trial Court and determination of the case on its merits.

9. In the present case, rival and/or clashing facts have been pleaded regarding the employment relationship between the Claimant and the Respondent upto March 2021. The issue of whether or not there existed employer - employee relationship at the time material to the suit herein can only be determined upon consideration of evidence adduced in a full trial.

10. The issue of whether or not the Claimant's claim for terminal dues is time-barred pursuant to Section 90 of the Employment Act can only be determined upon assessment of evidence given in a full trial. The terminal dues are alleged to have accrued during the period of employment which the Respondent has clearly demonstrated in its pleadings ended on 31<sup>st</sup> December 2019.

11. In sum, the Respondent's Preliminary Objection does not raise pure points of law. It raises matters of fact and/or matters that must be ascertained. The suit should go for trial.

12. In the Mukisa Biscuit Case (Supra), Sir Charles Newbold had the following to say:-

*"... a Preliminary Objection is in the nature of what used to be called a demurrer. It raised a pure point of law, which was argued on assumption that all the other facts pleaded by the other party were correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary*

*Objection does nothing but unnecessarily increase costs and, on occasion confuse the issue. The improper practice should stop.”*

13. The Respondent’s Preliminary Objection is without merit. The same is dismissed with costs to the Claimant.

14. The suit should be fast tracked and fixed for hearing.

15. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 2<sup>ND</sup> DAY OF DECEMBER 2021**

**AGNES KITIKU NZEI**

**JUDGE**

**ORDER**

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this ruling 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**

**APPEARANCE:**

..... **FOR CLAIMANT**

..... **RESPONDENT**