



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2054 OF 2014

(Originally Nairobi High Court Civil Case No. 1227 of 2006)

ABOK JAMES ODERACLAIMANT

v

NATIONAL HOUSING CORPORATION.....RESPONDENT

JUDGMENT

1. It is regrettable that this Cause has been in the Court system for about 13 years considering that the dispute did not present any complex questions of law but was anchored on contract.
2. Abok James Odera (Claimant) was appointed as Managing Director of the National Housing Corporation (Respondent) on a 3-year fixed term contract from 18 June 2003.
3. Around 14 February 2006, the Claimant applied for the renewal of the contract.
4. On 13 April 2006, the Permanent Secretary, Ministry of Housing sent the Claimant on leave pending investigations of allegations concerning the irregular allocation of houses at Pumwani Housing Scheme.
5. The decision was followed by a meeting of the Respondent's Board on 25 April 2006 wherein it was resolved that the Claimant continue/proceed on leave.
6. Around 23 May 2006, the Respondent received the Investigation Report on the Allocation of Houses at Pumwani Housing Scheme and the Claimant was invited to respond to the Report on 24 May 2006.
7. On 21 November 2006, the Claimant instituted legal proceedings against the Respondent before the High Court alleging breach of contract and seeking Kshs 3,364,600/- being unpaid salaries and gratuity. He also alleged unlawful repossession of a motor vehicle sold him pursuant to a car loan by the Respondent.
8. Filed together with the Plaint was a motion seeking injunctive orders restraining the Respondent from repossessing the vehicle in question.
9. The Respondent filed a *Defence, Set-Off and Counterclaim* on 25 July 2007, and the Claimant filed a *Reply to Defence and Defence to Counterclaim* on 31 July 2007.
10. On 4 July 2012, the Claimant applied to the High Court to transfer the suit to this Court and the Court directed the transfer on 11 November 2014.
11. When the file was placed before this Court on 21 January 2016 the Court, upon the application of the Claimant, directed that this file be consolidated with Judicial Review Application No. 28 of 2014.
12. The Court differently constituted expressed misgivings about the consolidation order on 11 April 2017 and directed that the mix-up be rectified.
13. On 27 June 2018, this Court gave directions as to the hearing of the Cause and on 8 November 2018 when the Cause came up for hearing, the parties informed the Court that there were only 2 Issues in dispute:

Computation of dues to the Claimant, and

The Counterclaim.

14. The Court, during the appearance, directed the parties to attempt out of court settlement as the real issue in dispute appeared to be arithmetical. No agreement was reached.

15. On 26 June 2019, the Claimant filed an *Amended Memorandum of Claim* after securing leave of the Court.

16. The Cause was heard on 24 October 2019 and 5 December 2019. The Claimant and the Respondent's Chief Human Resources Officer testified (both produced exhibits).

17. The Claimant filed his submissions on 13 December 2019 while the Respondent filed its submissions on 14 February 2020.

18. The Court has considered the pleadings, evidence and the submissions and adopted the Issues as proposed by the Claimant in his written submissions.

Unfair termination of employment

19. The Claimant was on a fixed-term contract set to lapse on or around 17 June 2006.

20. Before the expiry of the contract, the Claimant applied for the renewal of the contract.

21. In the meantime, the Claimant was sent on leave on 25 April 2006 to facilitate certain investigations.

22. Upon the conclusion of the investigations, the Respondent wrote to the Claimant on 24 May 2006 to respond to allegations. The Claimant, it appears did not respond.

23. The contract, however, lapsed without the Respondent taking any determinative action on the investigations, or making a decision on the application by the Claimant for renewal.

24. The Claimant admitted that renewal of the contract was not automatic.

25. In *Amatsi Water Services Co Ltd v Francis Shire Chachi* (2018) eKLR, the Court of Appeal was confronted with a case where the facts were near/similar to this case (contract lapsed during investigations process and before determination of disciplinary proceedings).

26. In the said authority, the Court of Appeal rendered itself thus

That the contract ended during the investigation process cannot be placed solely on the appellant's doorstep. It is our finding in all the circumstances, that the contract was not terminated before its expiry. It ended by effluxion of time before any communication on the disciplinary process envisaged in the letter of 15th June 2010 could take effect.

27. In the instant case, the Claimant's contract lapsed before the Respondent had considered and made a determinative finding on the allegations set out in the letter of 24 May 2006.

28. The Court is, therefore, unable to agree with the Claimant that there was unfair or premature termination of the contract. The contract expired through effluxion of time.

29. General damages for unlawful termination of employment is in the circumstances not a remedy available to the Claimant.

Salary for May and June 2006

30. The Claimant asserted that he was not paid his salary for May and June 2006 which he stated amounted to Kshs 798,600/-.

31. The Respondent admitted in its submissions that the salaries were unpaid because the Claimant had not cleared.

32. In the Court's view, the Claimant would be entitled to the salaries as of right unless they are used to offset liabilities owing from the Claimant.

33. The Court must, however, observe that where required, an employee has a duty to cooperate with the employer upon separation and formally handover or clear.

34. The Court will revert to this head of the claim after addressing the Counterclaim.

Gratuity

35. On account of gratuity, the Claimant sought Kshs 3,825,000/- for the years 2004 to 2006.

36. Gratuity should be anchored on contract or law.

37. Although stating in Court that the contract provided for payment of gratuity, the Claimant did not produce a copy of the contract or disclose which part of his contract, or what law provided for payment of gratuity.

38. The Claimant did not prove this head of the claim.

Comprehensive health cover

39. Apart from laying claim to Kshs 1,500,000/- as comprehensive health cover, the Claimant did not prove that he was not provided with medical cover up to the date the contract expired or that he incurred medical expenses of Kshs 1,500,000/- and that the Respondent was under an obligation to refund the expenses.

40. Relief is declined.

Provident fund

41. Under the head of the claim for provident fund, the Claimant contended that he was entitled to Kshs 3,123,618/-.

42. The Respondent, however, admitted in the submissions that the Claimant was eligible for provident fund of Kshs 3,110,199/- and that it was used to offset liabilities owing from the Claimant.

43. Nothing, therefore, turns on this head of the claim.

44. The Respondent also produced documents to demonstrate that the Claimant was eligible for payment by the Insurance Company of East Africa Ltd of his entitlements of Kshs 468,714/- under the Staff Provident Fund.

45. If the computations were an underpayment, the Claimant did not prove as much. Equally, the Claimant did not file in Court a copy of the Provident Fund Rules to establish the formula he used to arrive at the amount he claimed.

46. In any case, this head of the claim was in the nature of special damages. The Claimant did not prove to the required standard the amount he sought.

Counterclaim

47. The Respondent advanced to the Claimant a car loan of Kshs 2,120,000/- repayable together with interest over 72 calendar months (6 years) around 28 October 2005.

48. On 2 October 2006, the Respondent wrote to the Claimant indicating that there was a balance of Kshs 1,826,672/- on the car loan.

49. To support the counterclaim, the Respondent produced copies of extracts of car loan journal indicating that it had been deducting Kshs 38,214/- monthly from the Claimant's pay for about 18 months.

50. Copies of payslips produced by the Respondent show that the Claimant was being deducted the car loan from as early as July 2005.

51. The monthly deductions spread over the 18 months suggest the Claimant repaid about Kshs 687,852/- out of the Kshs 1,120,000/-. Simple arithmetic and factoring interest make it more probable that the Claimant had Kshs 1,826,672/- car loan outstanding.

52. The Claimant did not serve the Respondent for 72 months and logically, he cannot assert that he cleared the car loan unless he made (a) lump-sum payments at some point in time. There was no evidence of a lump sum payment.

53. Reconciliation of the terminal dues, inclusive of unpaid salaries for May and June 2006, and liabilities owing from the Claimant shows that he is still indebted to the Respondent in the sum of Kshs 437,360/15.

Conclusion and Orders

54. From the foregoing, the Court finds and declares that the Claimant's contract expired by effluxion of time and not through unfair termination of the contract.

55. The Court also finds that the Claimant failed to prove breach of contract in respect to gratuity, health cover and provident fund.

56. In respect to the Counterclaim, the Court finds and holds that the Claimant is indebted to the Respondent in the sum of Kshs 437,360/15.

57. Judgment is entered for the Respondent in the sum of Kshs 437,360/25/-.

58. Under section 12(4) of the Employment and Labour Relations Court Act, the Court is required to make an order on costs it considers

just. Costs, therefore, will not follow the event automatically.

59. The parties were in an employment relationship which expired by effluxion of time. Each party to bear own costs.

Delivered, dated and signed in Nairobi on this 28th day of February 2020.

Radido Stephen

Judge

Appearances

For Claimant Mr. Opiyo instructed by Aminga, Opiyo, Masese & Co. Advocates

For Respondent Mr. Ratemo instructed by Robson Harris & Co. Advocates

Court Assistant Lindsey/Judy Maina