



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1307 OF 2014

(Before Hon. Lady Justice Hellen S. Wasilwa on 15th April, 2020)

AMOZ WAWERU GATUNE..... CLAIMANT

VERSUS

SPECIALIZED FIBREGLASS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed a Statement of Claim on 7th August 2014. He avers that he was employed by the Respondent for 22 years until 6th June 2014 when he resigned after due notice. He avers that despite issuing a notice terminating his employment contract, the Respondent has failed to pay his terminal dues.

2. He further avers that he was never issued with an itemised pay statement as required under the Employment Act, was never paid any house allowance and that the Respondent has refused to withdraw itself as the payee of his personal Safaricom line.

3. He seeks the following prayers:

i) A declaration that the Claimant is entitled to the terminal dues as pleaded under paragraph 12 of the claim.

ii) Costs of the suit.

iii) Interest on (i) and (ii) above.

iv) An order requiring the Respondent to write to Safaricom Limited withdrawing its name as the account holder and solely have the line in the name of the Claimant.

v) An order compelling the Respondent to issue a Certificate of Service to the Claimant.

vi) Any other orders or directions that this Honourable Court may deem fit and just to grant in the circumstances of this case.

4. The Respondent filed a Statement of Response and Counter-claim on 26th September 2014. It avers that the Claimant resigned from employment effective 13th June 2014. It avers that the Claimant incorporated and operated a competing company Ambeat Fibre Glass Limited during his tenure of employment and contrary to the conditions of his contract of employment.

5. The Respondent denies not paying the Claimant his terminal dues. It avers that the Claimant was always issued with an itemised pay statement and being in charge of human resource matters, he was aware that his monthly salary was consolidated.

6. It denies there being any agreement with the Claimant for payment of gratuity.

7. In respect of its counter-claim, the Respondent avers that as a result of the breach of the Claimant's implied contractual terms, it suffered loss of business and claims in the sum of Kshs.2,496,600.00 based on the profit that would have been realised from the raw materials purchased by Ambeat Fibre Glass Limited while still under employment.

8. It avers that the Claimant has retained possession of a Safaricom line 0722 *** 202 that belongs to the Respondent. It avers that it seeks delivery of the Safaricom line together with a refund of Kshs.5,757.70 being the telephone expenses incurred by the Respondent in his competing business.

9. It avers that the Claimant infringed upon its design copyright by copying its unique mould designs of motor cycle boxes, battery boxes and wind spoiler.

10. It seeks the following prayers:

*a) The delivery-up to the Claimant of the Safaricom Telephone Line Number 0722 *** 202.*

b) Kenya Shillings Five Thousand Seven Hundred and Fifty Seven and Seventy Cents (Kshs.5,757.70) being the telephone expenses incurred by the Respondent in his competing business.

c) Kenya Shillings Two Million Four Hundred and Sixty Nine Thousand and Six Hundred (Kshs.2,469,600.00) on account of loss of business.

d) Kenya Shillings Seven Hundred and Twenty Eight Thousand (Kshs.728,000.00) being a refund of the Respondent's salary during the period do operation of the competing business.

e) General damages on account of copyright infringement.

f) Costs of this suit.

Claimant's case

11. The Claimant testified that he was employed by the Respondent from 3rd December 1991 to 2014.

12. He testified that he initially worked as an accounts clerk and at the time of separation, he was a sales assistant. He testified that he earned a salary of **Kshs.104,000** but there was no indication that it was inclusive of house allowance.

13. He contended that he acquired the telephone line in 2009 and the Managing Director agreed to pay the post-paid bill because the claimant used the line to transact its official business. He testified that the change of the bill to the company's name was done. He stated that upon leaving employment, he wanted his line back. Therefore, he wrote to Safaricom who reversed his line under pre-paid terms.

14. He testified that he registered his company in **July, 2014** after leaving the Respondent. He stated that he never copied the Respondent's designs.

15. In cross-examination, he testified that he did resign from employment. He stated that during his employment, he made verbal claims for his house allowance. He further stated that his salary was not composite. He testified that his claim for service pay is not in his statement of claim but he has pleaded for gratuity.

16. He testified that he registered his business while still at the Respondent's employment and denied dedicating his time to his company while still under employment. He stated that there was a payment, which was his service benefit and was not for the purchase of a vehicle.

17. He testified that his NHIF and NSSF contributions were remitted and it is not true that the payments were cash advances. He testified that there was no written communication on entitlement to gratuity.

18. In re-examination, he testified that his terms were governed by the Employment Act. He testified that he was entitled to house allowance. He further stated that he intended to claim service pay and that the prayer for gratuity is an error. He stated that Mr. Field initiated the letter providing for the payment of Kshs.30,000 as service pay.

Respondent's Case

19. Ross Gordon Field, RW1, adopted his Witness Statement filed on 10th May 2018 as his evidence in chief.

20. He testified that the Claimant is not entitled to severance pay as he was a member of NSSF. He testified that the Respondent would issue a bonus but it was discretionary. He stated that the Claimant was aware that his salary was consolidated and that he never made such claim during his employment.

21. He avers that after the Claimant resigned, they found out that he had a competing interest, which is now the basis of the counter-claim. He contends that the counter-claim of 2.4 million is based on the salary earned during that period.

22. Upon cross-examination, he testified that he could not confirm the period the Claimant had worked for the Respondent. He testified that the Respondent never committed to pay him service pay but he was paid for his long service.

23. He stated that he had no evidence that the salary was consolidated. He testified that the Respondent has produced the Claimant's licence, social media accounts and has also visited the Claimant's company premises. He stated that the Claimant's business has caused him loss. It was his testimony that there was no express provision against the business.

24. He testified that he had no evidence that the Safaricom line was his but he paid the invoice sent to him by Safaricom and bore

responsibility for the number. He stated that the Respondent tried entering into a settlement agreement but the Claimant refused.

25. In re-examination, he stated that he was not admitting liability by suggesting an out of Court settlement.

Claimant's Submissions

26. The claimant submits that there was an agreement for the payment of gratuity as the Respondent paid part of the gratuity and declined to pay for the 10 year period. He submits that the earlier payment of gratuity to the Claimant formed part of the contract of employment and the Respondent should not be allowed avoid it. He submitted that the unpaid gratuity ought to be calculated as per the formula set out in **George Onyango Akuti v G4S Security Services Kenya Limited [2013] eKLR**.

27. He avers that the Respondent did not adhere to the express provisions of section 31 of the Employment Act on housing. He submits that though the Respondent contends that his salary was consolidated, the payslips produced in Court indicate that house allowance was never paid.

28. He submits that the failure to pay him house allowance amounts to discrimination and relies on the case of **Council of Governors v Salaries and Remuneration Commission [2018]eKLR** where the Court held that housing allowance is not pegged on performance. He further submits that RW1 did not explain how much was house allowance from the gross earnings contrary to section 74 (i) of the Employment Act.

29. He submits that the Court ought not to consider the counter-claim as it is outside the jurisdiction of the Court and urged the Court to find that the issues of alleged theft of copyright and industrial design fall under the commercial division of the High Court.

30. He relies on the case of **Registrar of Trade Unions v Nicky Njuguna & 4 others [2017] eKLR** where the Court cited the decision in **Judicial Service Commission v Gladys Boss Shollei** Civil Appeal No. 50 of 2014 that the jurisdiction of this Court is not ousted where the matters are intricately interwoven with a labour issue.

31. He submits that the Respondent was duty bound to specifically demonstrate how the registration directly prejudiced the business and dispensation of his duties. He urges the Court to find that the telephone line did not at any time belong to the Respondent.

32. He contends that the Respondent did not produce any document to show ownership or existence of the alleged copyright thus the Court should dismiss the claim for infringement of copyright.

33. He avers that the claim for a refund of salary should be dismissed as it was not demonstrated that the incorporation of the company was being run in detriment of the Respondent who in its pleadings described the Claimant as hardworking and dependable.

34. In conclusion, he submits that he has proved that he is entitled to the claims sought and grant of the prayers in the claim and urges the Court to dismiss the counter-claim with costs.

Respondent's Submissions

35. The Respondent submits that service pay is a creature of statute under Section 35(5) of the Employment Act and Section 36 of the Act qualifies the entitlement of service pay. It avers that the Claimant was a member of NSSF and that Courts have held that service pay is precluded where the employee is a member of NSSF or a provident scheme. In support of this, it relies on the decision in **Howard Andrew Nyerere v Kenya Airways Limited [2014] eKLR**.

36. It submits that the Claimant's allegation that there was an express agreement between the parties to pay gratuity is unfounded.

37. It avers that the payments made to the Claimant were discretionary and in appreciation of his long service. It avers that gratuity is only payable when included as an express contractual term as held by the Court of appeal in **Central Bank of Kenya v Davies Kivieko Muteti [2009] eKLR**.

38. It submits that it is evident that the obligation by the employer to provide housing allowance ends where the employment agreement consolidates the basic salary as inclusive of rent. It relies on the case of **Joseph Sani Orina v Hiprora Business Solution (EA) Limited [2017] eKLR** where the Court held that gross salary as opposed to basic salary includes house allowance and other allowances paid by an employer and includes basic salary. It is therefore its submission that the Claimant's salary included rent as an element of it and this was agreed upon in good faith by the parties.

39. With regard to the counter-claim, it submits that the Claimant occasioned loss upon it which has been pleaded as loss of business, specific monetary loss and infringement of copyright. It contends that the Court has discouraged such practices from employees as held in **Leland I. Salano v Intercontinental Hotel [2013] eKLR**.

40. It submits that the Claimant's actions were a blatant breach of his implied contractual duties. It submits that the Court needs to note that the Safaricom line is officially registered in its name and is used in its direct business.

41. In conclusion, it submits that the Claimant has failed to prove its case against the Respondent on a balance of probabilities.

42. I have examined the evidence and submissions of the parties herein. From the Claimant's evidence, he resigned from employment of the

Respondent on 6th June 2014, the fact the Respondent admits. The Respondent however avers that the Claimant is not entitled to terminal dues as pleaded which includes 10 years gratuity and 22 years house allowance.

43. From the evidence of both the Claimant and the Respondent, there is no evidence of an employment contract between the Claimant and the Respondent. It therefore appears that the contract was oral, if at all and which is in contravention of the express provision of the Employment Act 2007, which states at Section 9 that all contracts in excess of 3 months shall be in writing.

44. Indeed, the employment commenced in 1991 but when the law changed in 2007, the Respondent should have aligned themselves to the law by issuing the Claimant with a written contract. This was never done.

45. In view of the fact that there was no written contract, Section 10(7) of the Employment Act 2007 states as follows:-

7) "If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer".

46. The burden then of proving or disapproving the terms of the contract lies upon the Respondent and in this case, because there is no such contract, the Court relies solely on the evidence of the Claimant and the law. What the Claimant has sought is his terminal dues, which include gratuity. However, Section 35(5) and (6) of the Employment Act provides as follows:-

(5) An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.

(6) This section shall not apply where an employee is a member of:-

a) a registered pension or provident fund scheme under the Retirement Benefits Act;

b) a gratuity or service pay scheme established under a collective agreement;

c) any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and

d) the National Social Security Fund.

47. Since the Claimant was a member of NSSF as admitted, he is therefore not entitled to gratuity and that prayer therefor fails.

48. The Claimant also sought payment of his house allowance. The Respondent has admitted not paying him house allowance and contest that this was not part of the contract as the salary was consolidated. However, Section 31 (1 & 2) of the Employment Act 2007 states as follows:-

(1) "An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

(2) This section shall not apply to an employee whose contract of service:-

a) contains a provision 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; or

b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).

49. The Respondent are unable to prove that they had a contract with the Claimant, which provided that the salary was consolidated including house allowance. In this case then, the Claimant is entitled to payment of house allowance of the last 3 years of employment the rest of the claim being time barred and thus equals to:-

15% of the basic salary for the 3 years

15% x 104,000 x 36 = 561,600

50. The Claimant also sought an order requiring the Respondent to write to Safaricom Limited withdrawing its name as account holder of her Safaricom line and solely have it on her name.

51. The Claimant in this case showed that he was the subscriber of this line no. 0722862202 and changed it to the Respondent for purposes of billing. It is therefore in order that the line should revert to him if he so will. This prayer is therefore valid and is allowed.

52. As for the counter claim by the Respondent, the Respondent avers that the Claimant infringed on their copyright by copying their unique designs.

53. They further aver that he registered a company doing rival business while still in employment and therefore seeks to be paid back the salary he received in the 7 months the company was in existence as he worked for the Respondent. The Respondent however did not produce evidence that the company in question though registered transacted any business to the detriment of the Respondent. The nature of the business the said company transacted is also not explained.

54. RW1 also admitted that there was no express provision in the contract between them and the Claimant against such a business. In the circumstances, the counter claim as raised lacks merit and must fail.

55. The only claim that stands is the 5,000/= paid by the Respondent to Safaricom after the Claimant left and was using that line paid by the Respondent.

56. In the in the circumstances, I find the Claimant is entitled to the 561,000/= awarded above less the 5,000/= Safaricom line bill paid by the Respondent and this leaves 556,000/=.

57. The Respondent will also pay costs of this suit plus interest at Court rates with effect from the date of this.

Dated and delivered in Chambers via Zoom on this 15th day of April, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kuyo for Respondent – Present

Claimant – Absent