



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO.423 OF 2017

(Before Hon. Justice Mathews N. Nduma)

ALFRED KIPCHUMBA KIMUTAI.....CLAIMANT

VERSUS

WEST KENYA SUGAR CO. LOMITEDRESPONDENT

JUDGMENT

1. The suit was filed on 16th November 2017 by the Claimant seeking the following reliefs:-

(i) One month salary in lieu of notice Kshs. 43,000

(ii) Payment in lieu of 8 days leave Kshs. 20,066.67 and

(iii) Declaration that the claimant was unlawfully constructively dismissed and order reinstatement of the claimant without loss of remuneration and in the alternative maximum compensation for the unlawful dismissal.

(iv) Costs and interest.

2. CW1, the Claimant testified on oath and adopted a written statement dated 13/11/2017 as his evidence in chief. The claimant also produced exhibits '1' to '10' as per the list of documents filed on 16/11/2017.

3. CW1 testified that he was a permanent employee of the Respondent situated at West Kenya sugar Company. That on 23rd September 2017, he was served with a transfer letter to Olepito Sugar Company contrary to the terms in his contract of service and letter of appointment in the West Kenya sugar company limited.

4. The contract of service before court is dated 4/1/2016 in terms of which the claimant was appointed as management trainee on fixed term contract at West Kenya Sugar Company Limited. The contract was for one year starting on 11th January 2016 and was to expire on 31st December 2016.

5. The claimant was deployed in the Process Department where he was to understudy Assistant manager, Deputy Chief Process manager, Plant manager, Laboratory Superintendent and the Chief Process Manager. The Claimant was to be paid a gross monthly salary of Kshs. 34,500.

6. The Claimant was given a letter of appointment dated 15th May 2017 in the position of Plant Supervisor Process in the Process Department with effect from 1st January 2017 at a monthly gross pay of Kshs. 43,000. He was entitled to 28 working days leave. Termination notice was one month or one month's salary in lieu of notice.

7. On 23rd September 2017. The claimant was given a letter of transfer to Olepito unit. In terms of the said letter, the respondent stated that there was current need for manpower at Olepito unit. The claimant was transferred in the same capacity of Plant Supervisor – Process with effect from 27th September 2017. All terms and conditions of service remained the same. The claimant was to receive transfer allowance of Kshs. 7,000 to assist him to move to the new station

8. The claimant was also asked to make arrangements to hand over his current responsibilities to the immediate supervisor and relocate.

9. The letter of transfer was signed by Human Resource and Administration manager Dennis Adike and the General manager Karas Singh.

10. The Claimant responded to the letter of transfer by a letter dated 28/9/2017 addressed to the Human Resource Manager. He stated that he had “ personally disagreed with terms addressed” in the letter of transfer dated 28/9/2017 in that the letter contradicted the terms in his initial contract form.

11. The claimant asked for the terms in the letter of transfer to be reviewed. The claimant also produced a further letter written by him on 10/10/2017 addressed to the Human Resource Manager giving further details as to why the transfer to Olepito should be reversed.

12. The Claimant testified that failure by the respondent to address his concerns regarding the transfer amounted to constructive dismissal and prays for the reliefs sought.

DEFENCE

13. The respondent filed a memorandum of defence on 5th December 2017 and the same was responded to by the claimant on 19th January 2018.

14. RW1 Dennis Adika the Human Resource and Administration Manager testified under oath and adopted a written statement dated 23/4/2018 as his evidence in chief. RW1 also produced exhibits ‘1’ to ‘5’ filed in a list dated 23/4/2018.

15. RW1 testified that the claimant was lawfully transferred from West Sugar factory to another unit of the respondent named Olepito. RW1 explained that Olepito was a subsidiary of the respondent Company. That three employees were transferred to Olepito for operational reasons. That two employees reported faithfully but the claimant did not report and absconded work.

16. That the claimant was facilitated to relocate to Olepito and was given an allowance of Kshs.7, 000 for that purpose. That the claimant did not report to work from 4th October 2017 and was not denied access to the factory as he alleges or at all. That the claimant had just completed management training programme and could be deployed to any unit of the respondent.

17. That the claimant was bonded to serve the respondent for a minimum period of 4 years but he had absconded upon being transferred to Olepito. The respondent prays that the claim for constructive dismissal lacks merit and it be dismissed with costs.

Determination

18. The claimant’s case is that he was constructively dismissed by the respondent upon transfer from West Kenya Sugar Company to a different company named Olepito contrary to the terms of the employment contract that had bonded the claimant to serve the respondent for a period of four (4) years.

19. The respondent’s case is that the Claimant was lawfully transferred to a different unit of the respondent but he failed to report to work after protesting the transfer.

20. The respondent denies that it breached terms of Claimant’s contract of service nor did it refuse the claimant access to Olepito factory.

21. The Court has carefully considered the evidence adduced by the claimant vis avis that adduced by the respondent. The court has in particular considered the letter by the claimant dated 29th September 2017 in response to the letter of transfer signed by the Human Resource and Administration Manager and the General Manager of the respondent and noted the following:-

22. The Claimant showed no intention at all of reporting to the new station from the wording of the response he wrote to the management.

23. The claimant had just completed management trainee programme which was well defined to serve in different units of the respondent’s operations.

24. The claimant did not in the letter dated 28th September 2017, give in the court’s view any justifiable reason not to be deployed to Olepito. The court is satisfied that Olepito was another unit of the respondent company. Even if it was a different company owned by the same Directors, it was not the business of the Claimant to dictate where he should be deployed to having been trained and confirmed in the position of Plant Supervisor Process.

25. The lack of intention by the Claimant not to report to duty in the new unit is corroborated by the 2nd letter he wrote on 10/10/2017 still protesting his transfer to Olepito sugar factory. The Claimant did not indicate in the letter dated 10/10/2017 that he had already reported to Olepito , yet he was supposed to have relocated and reported to the new station with effect from 27th September 2017.

26. The letter of transfer was dated 23rd September 2017, and the respondent had given the Claimant a young, new employee adequate time to report to the new station.

27. The claimant did not adduce any credible evidence that he was being victimized by being transferred. To the contrary, the respondent demonstrated that it had transferred the Claimant with two other employees for operational reasons since extra manpower was needed at the Olepito unit.

28. Clearly the claimant carried the wrong attitude to his new workplace and showed little if any respect for the highest authority in the company being the Human resource and Administration Manager and the General Manager who had faithfully trained him to hold a

responsible position and later deployed him where they thought his skills and service were required.

29. Constructive dismissal was well defined by Lord Denning MR. in **Western Excavating (ECC) Ltd – VS- Sharp (1978) KR 222 or (1978) Qrs 701** as follows;-

30. “ *If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so then he terminates the contract by reason of the employer’s conduct. He is constructively dismissed.* ”

31. The conduct by the respondent in the present case did not evince any intention on the part of the respondent not to be bound by the contract of employment between the respondent and the Claimant.

32. Deployment of the Claimant to another unit of the company in the same position and on the same terms, including provision of relocation allowance, and on good notice does not fit the bill at all. To the contrary the court is satisfied that the Claimant dishonored his contract of service by refusing to be transferred to another unit of the company and failing to report to work for considerable period of time.

33. That notwithstanding, the claimant was paid full salary in the month of October 2017. The Claimant is not entitled to a salary in lieu of notice having absconded duty.

34. The Claimant has also failed to prove that he was unlawfully constructively dismissed on a balance of probabilities.

35. The claim in lieu of leave days not taken in the sum of Kshs. 20,066.67 was not contested by the respondent and the claimant is awarded accordingly.

36. In the final analysis the suit by the claimant against the respondent for constructive dismissal is dismissed in its entirety.

37. The claimant to be paid Kshs. 20,066.67 in lieu of leave days not taken at the time of separation. The parties to meet their own costs of the suit.

Judgment Dated, Signed and delivered at Nairobi this 28th day of May, 2020

Mathews N. Nduma

Judge

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, this ruling has been delivered to the parties online with their consent. 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 has 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 18 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.

Mathews N. Nduma

Judge

Appeaances

M/s Mwakio Kiwa & Co. Advocates for the Claimant

Ogejo, Olendo & Co. Advocates for Respondent

Chrispo – Court Clerk