



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1291 OF 2018

(Before Hon. Lady Justice Maureen Onyango)

THE TRUSTEES OF PREMIER ACADEMY

CHARITABLE TRUST T/A PREMIER ACADEMY.....CLAIMANT

VERSUS

THOMAS NDANI NJUGUNA.....RESPONDENT

JUDGMENT

By a Statement of Claim dated 6th August, 2018 and filed on 7th August, 2018, (the **Statement of Claim**), the Claimant averred that it employed the Respondent as a secondary school teacher vide a contract of service executed by the Respondent on 22nd August, 2008. It averred that the contract of service was renewed from time to time, with the last renewal being on 15th June, 2017.

The Claimant averred that it was a term of the contract of service signed by the Respondent on 15th June, 2017, that either party could terminate the said contract by giving the other party three months' notice expiring at the end of the relevant school term or by paying three months' basic salary in lieu thereof.

The Claimant averred that in breach of his contractual obligations and without proper or lawful cause, the Respondent vide a letter dated 23rd May, 2018 purported to terminate his contract with effect from 13th July, 2018, during the course of the school term and failed to give a valid notice of the intention to terminate his employment as was required by the contract between him and the Claimant.

Further, the Claimant averred that the resignation of the Respondent failed to accord with the contract of service as it was not issued at the beginning of the term. Further that the notice fell short of the 90 days required by his contract and was therefore void and of no effect whatsoever.

The Claimant averred that despite not giving a valid notice and notwithstanding the fact that the Claimant rejected the said invalid notice, the Respondent quit his employment on 13th July, 2018 and failed to pay three months' salary in lieu of notice as was required by his contract of service.

The Claimant averred that at the time of the termination of employment by the Respondent, the Respondent was the head of the ICT Department earning a basic salary of KES 150,805/=. Aggrieved by the termination of the employment by the Respondent, the Claimant prays for Judgment against the Respondent for the sum of KES 452,415/= being three month's salary in lieu of notice. The Claimant also prays for costs and interest.

In support of the Claim, the Claimant filed witness statements by **Baenerjee Chinmoy**, the Chief Executive Officer of the Claimant and **Rebecca Kimani**, the Claimant's Chief Human Resources Officer both dated 6th August, 2018 and filed together with the Statement of Claim. The Claimant also filed a List of Documents also dated 6th August, 2018 containing documents in support of its Claim.

On 19th October, 2018, the Respondent filed a Response to the Statement of Claim and Counterclaim dated 17th October, 2018. Therein, the Respondent opposed the Claimant's claim and averred that his termination notice of 23rd May, 2018 was valid and proper on the ground that the 90 days' "before current term" termination clause was unfair, unlawful and/or unattainable.

The Respondent further averred that the Claimant appreciates the impossibility of performance of the 90 days' clause on the part of employees and indeed, in the event of a termination of employment by an employee, the Claimant allows a notice period which is less than 90 days without demanding for any payment from the employee. He averred that in the alternative the Claimant only demands for payment of salary in lieu of notice for the difference of unworked days and not 90 days as is prayed for by the Claimant.

The Respondent averred that the Claimant applied the 90 days' termination clause in a discriminatory and unfair manner as against the Respondent. This averment is on the grounds that:-

- i. The school term material to the claim commenced on 16th April, 2018 and was set to end on 13th July, 2018. Thus, the term was for 89 days.
- ii. The Respondent gave the Claimant a 90 days' notice to terminate his contract of employment on 23rd May, 2018.
- iii. The Respondent undertook to continue and indeed continued teaching until the end of the school term on 13th July, 2018.
- iv. From the time the Respondent served the termination notice, the Claimant commenced the process of recruiting a new staff member to replace the Respondent. The Claimant engaged the Respondent in the process of recruitment and induction as follows:-
 - a. The Respondent was made to interview several applicants for his post of Head of ICT.
 - b. Upon the successful interview of one Nelson Baraza, the Respondent was engaged by the Claimant to observe lessons of the interviewees.
 - c. For instance, on 6th June, 2018, the Respondent observed and assesses Mr Nelson Baraza during lesson 2 of that day.

The Respondent averred that the Claimant applied the 90 days' clause without equality as two previous employees of the Claimant with similar termination clauses were allowed to only pay for the days not served out of the 90 days. The said employees were Mr Afubwa Abdullahi and Mr Edward Ng'ang'a.

The Respondent averred that as a sign of good faith he undertook to pay the Claimant KES 105,563.50 being payments for the difference of days not served out of the total 90 days which was ignored by the Claimant. He averred that he did not quit employment on 13th July 2028 but that Claimant school closed on the said date.

Further, the Respondent avers that the Claimant treated him in a discriminatory manner when the Claimant failed to pay him the full July, 2018 salary. He averred that the Claimant was discriminatory on the following grounds:

- i. The Respondent habitually closes the term in the month of July every year.
- ii. Since the Claimant is in the academic and education field, once the School, closes, the employees such as the Respondent are equally relieved from their duties until the opening of the School.
- iii. The Respondent usually pays all its employees full July salary despite the fact that the School closes in the middle of the month
- iv. Consequently, there was no ground for deducting salary of the Respondent on account of "lost days". The Claimant has in fact not paid his salary for the month of July, 2018.

Counterclaim

The Respondent also raised a Counterclaim within his Response to the Statement of Claim where he averred that the Claimant was discriminatory in the failure to pay him his full July 2018 salary and re-iterated the particulars of discrimination as set out in his Response to the Claim.

The Claimant also averred that as per the Respondent's Farewell Gift Committee, the Respondent was entitled to be paid KES 50,000 on the basis that he falls in the bracket of having worked between 9-10 years for the Claimant. The same was withheld by the Claimant.

The Claimant thus prayed for Judgment in the following terms:-

- i. A Declaration that the Claimant's claim for 90 days' salary in lieu of notice is unlawful, unfair and in utter breach of the Respondent's fundamental rights and freedoms to wit the right to equality and freedom from discrimination and right to human dignity.*
- ii. A Declaration that the Claimant's action of withholding the Respondent's July 2018 salary is unlawful and unfair.*
- iii. A Declaration that the Claimant's action for withholding the Respondent's Farewell gift is unlawful and unfair.*
- iv. KES 150,415/= being unpaid July salary.*
- v. KES 50,000/= being a farewell gift.*
- vi. Costs*

vii. *General and Exemplary damages*

viii. *Interest on (d) through to (g) above at the Court's rate until payment in full.*

ix. *Any other appropriate relief as this Court may deem fit just and fair to grant.*

The Claimant did not file a response to the Respondent's Response to the Statement of Claim and Counterclaim.

Submissions

On 16th December, 2019, the parties agreed to dispose of the suit by way of written submissions. The Claimant filed written submissions dated and filed on 18th February, 2020. Therein, the Claimant identified the issues for determination as whether the notice terminating the contract by the Respondent was valid and whether the Respondent is entitled to the reliefs sought in his Counterclaim.

The Claimant submitted that the Respondent's employment was governed by the Contract of service which was binding on both the Claimant and the Respondent. As such a breach of the Contract of Service by either party entitled the other party to seek relief to remedy the breach.

The Claimant cited clause 18(3) of the Contract that provided:-

"This contract may be terminated by either party giving to the other 90 days written notice to expire at the end of the current term or payment in lieu of notice."

It was the Claimant's submission that the Respondent failed to accord to his contract by issuing a notice below the 90 days required in the Contract which rendered it void and of no effect. The Claimant submitted that the Respondent freely signed the Contract and cannot be heard to say that some of the terms were unattainable.

The Claimant submitted that it would be just and equitable for Court to compel the Respondent to pay the Claimant for the reasons that:-

- i. If it was the Claimant that had been terminated the Respondent at will without giving the 90 days' notice, the Respondent would have sued for unlawful termination and could have been given inter alia, 12 months' compensation. The Claimant submitted that it is necessary to put every party on equal footing by subjecting both parties to the same benefits and sanctions.
- ii. The prayers sought by the Respondent in his Counterclaim have no legal basis and have not been supported by any evidence whatsoever.

The Claimant relied on the provisions of Article 159(2) of the Constitution of Kenya, 2010, Section 3A of the Civil Procedure Act, Section 35 of the Employment Act and Section 107(1) of the Evidence Act.

Further in support of its submissions, the Claimant relied on the case of **Jaswinder Kaur Ghataura v Naredrasing R. Mahida & Another [2013] eKLR** wherein it was held that:

"A counterclaim is a fresh suit where a claimant should be given a chance to reply. It is an independent action by the respondent as against the claimant. It is a cross-claim and the principles of pleadings which govern a counter-claim are substantially the same as those, which would apply to a statement of claim in a cross-action brought by the respondent against the claimant. Where a claim must comply with the Rules of the Industrial Court or in the case where Order VII, Rule 1(2) of the Civil Procedure Rules, then by parity of reasoning a counter-claim must equally comply with the mandatory provisions of Order VII and the relevant rules therein."

With respect to the farewell gift, the Claimant submitted that the Respondent has not provided any evidence in support of this claim which in any event is not provided for in the Contract. The Claimant relied on the provisions of Section 107(1) of the Evidence Act in support of the submission that the party alleging an existence of facts must prove the same. It further relied on **KIPKEBE LIMITED V PETERSON ONDIEKI TAI [2016] EKL** where the Court held:-

"It is trite law in evidence that he who asserts must prove his case. No evidence was adduced by the plaintiff. In such cases, the burden of proof lies with whoever would want the court to find in his favour in support of what he claims."

It was the Claimant's submission that the Respondent did not demonstrate that the Claimant had an obligation to pay him **KES 50,000/=** being the farewell gift which is an ex gratia payment made out of the giver's own grace.

The Claimant submitted that the Respondent was issued with a Certificate of Service and his dues for the month of July, 2018 have been processed and are ready for collection.

With respect to the Respondent's claim for general and exemplary damages, the Claimant submitted that the same was unmerited as there is no claim for constructive dismissal as was held in the case of **KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS V B S MOHINDRA & COMPANY (K) LTD [2015]**

On 16th July, 2019, the Respondent filed his written submissions. Therein, he identified the issues for the Court's determination as:-

1. *Whether the termination clause in the contract between the parties was unenforceable or impossible to perform amounting to unfair labour practice?*
2. *Whether the Respondent gave a reasonable notice in the circumstances or whether the Claimant could demand for payment in lieu of notice where the employee (Respondent) continued working after serving notice?*
3. *Whether the Claimant was entitled to withhold the Respondent's July 2018 salary?*
4. *Whether the Claimant was entitled to withhold the Respondent's KES 50,000 being his farewell gift as has been the practice.*
5. *Whether the Statement of Claim should be dismissed?*
6. *Whether the Counterclaim should be allowed?*
7. *Who should bear costs of the Statement of Claim and Counter Claim?*

On whether the termination clause in the contract between the parties was unenforceable or impossible to perform, the Respondent cited the provisions of Clause 18.0 of the "Contract". He submitted that the clause is ambiguous and was impossible to perform hence amounting to unfair labour practice. He submitted that by tying the 90th day to the last date of the term an employee would not be able to fulfil such an obligation. This is because the reason to terminate or leave employment may come up at any time that does not fall within 90 days which expire on the last day of the term.

Further, the Respondent submitted that another reason for the unfairness of the clause is that the last date of the term could change at the discretion of the Claimant. This is evident even as regards the particular term that is subject to the current suit. The term in question ended on 13th July, 2018 yet through the Claimant's letter dated 11th June, 2018, the term had earlier been set to expire on 6th July, 2018.

It was the Respondent's submission that the presence of the clause with a limitation as to when the 90th day falls amounts to unfair labour practice contrary to Article 41(1) of the Constitution of Kenya which provides that every person has a right to fair labour practices. Further, that the clause amounts to flagrant breach of Article 47 of the Constitution which guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

The Respondent submitted that in prior dealing with employees who decide to terminate their contracts, the Claimant allowed termination that would not expire on the last day of the term and all an employee would be required to do is pay for the difference of days not worked.

It was the Respondent's submission that it is a well-established principle of the law of contract that a contract may be vitiated by reason of frustration whereby the contract becomes impossible to perform.

On whether the Claimant was given reasonable termination notice by the Respondent, it was the Respondent's submission that it is trite law that the purpose or rationale of a notice to terminate is meant to give the other party adequate time to deal with the effects of termination. For instance, in this case, the notice would entitle the Claimant to recruit a new employee and perhaps allow for induction in good time. He submitted that this was achieved through the Respondent's notice of 23rd May, 2018. The work of the Claimant was not jeopardized since the Respondent continued to work until the end of the term and was in fact directly involved in the recruitment of his replacement.

On whether the Claimant was entitled to withhold the Respondent's July, 2018 salary, the Respondent submitted that having worked until the end of the term the Claimant had no right of withholding his salary. Similarly, on whether the Claimant was entitled to withhold the Respondent's farewell gift, the Respondent submitted that the Claimant had no right to do so. It was the Respondent's submission that he had worked for the Claimant for more than 9 years and was entitled to KES 50,000 as was the practice and tradition of the Claimant. The Claimant thus urged this Court to find that the unjustified withholding of the farewell gift was not only done maliciously but amounted to breach of Article 41(1) of the Constitution.

The Respondent prayed for dismissal of the Statement of Claim and for the Counterclaim be allowed.

With respect to the prayer for general and exemplary damages, it was the Respondent's submission that because of the flagrant breaches of his Constitutional rights, the Court be please to award him KES 1,000,000.00 under the head of general damages. In support of this submission, he relied on the case of *NATIONAL UNION OF WATER & SEWAGE EMPLOYEES v LAKE VICTORIA NORTH WATER SERVICE BOARD – KAKAMEGA-BUASI WATER SERVICES [2018] eKLR*.

He submitted further that this case is a proper case that would warrant an award of exemplary damages as the Claimant did not only insistently demand an unjustified payment in lieu of notice, the Claimant went ahead to deny the Respondent's salary for July, 2018 and failed to issue the Farewell Gift. It was his submission that it is trite law that exemplary damages will be awarded where an employer acts in bad faith or in an oppressive manner or against public policy. He prayed for an award in the sum of KES 2,000,000 and placed reliance on the case of *National Union of Water & Sewerage Employees v Lake Victoria North* case (supra).

Determination

The main issues for this Court's determination are:

1. Whether the Claimant is entitled to payment by the Respondent of KES 452, 514 being notice pay equivalent to the Respondent's three months' salary?

2. Whether the Respondent is entitled to the reliefs sought in the Counterclaim?

On whether the Claimant is entitled to payment by the Respondent of **KES 452, 514** in lieu of notice, it was the Claimant's contention that the Respondent's resignation letter and purported notice was invalid. The basis for the contention was that the notice was not issued at the beginning of the term in contravention of the terms of the Contract. **Clause 18** of the Contract at **paragraph 3** provides that:-

This contract may be terminated by either party giving to the other 90 days written notice to expire at the end of a current term or payment in lieu of notice.

The said clause allows either party to terminate the Contract with a proviso that the three months' notice period must lapse at the end of the term. The Respondent issued the Claimant with letter dated 23rd May, 2018 wherein he tendered his resignation notice of three months. The Claimant's school term was set to end of 18th July, 2018. It was the Claimant's contention that it is for this reason that the notice was invalid and consequently rejected it.

Section 35 of the Employment Act allows either the employer or the employee to terminate a contract of employment by issuing a written notice as stipulated in the terms of the contract. Both parties are thus required to adhere to the notice period set out therein or make payment in lieu of the same as is required in Section 36. The Employment Act and all other labour laws do not provide for the option of an employer to reject a notice of termination or resignation of employment as the same would amount to forced labour which is specifically prohibited by Section 5 of the Employment Act and Article 40 of the Constitution.

The purpose of the notice period is for the benefit of the employer as in this case to allow for planning, assignment or recruitment of a replacement and to ensure hand over and clearance of the outgoing employee. This was the case with the Claimant by its own admission set out in the witness statement of the Claimant's Chief Executive Officer, Baernajee Chimnoy. Therein he stated at paragraph 5 that:-

"Further to what is stated above, we ask our staff to notify us at the beginning of the term with a notice that takes effect at the end of the term if they intend to terminate the contract. This serves the following purposes:-

a. It enables out students to learn without interruption; and

b. It also enables our school recruit relief teachers and to orient the newly recruited teachers appropriately so that they can teach effectively."

It has not been disputed by the Claimant that the Respondent worked until the last day of the term. The Claimant did not file a response to the Respondent's Response to the Claim or to the Counterclaim. He addressed these issues in its submissions. The averments thus stand uncontroverted.

Further, the Respondent in its Response to the Statement of Claim averred that following the issuance of the termination notice, the Claimant engaged him in the process of recruitment and induction of his replacement. He averred that at the behest of the Claimant, he interviewed applicants for his post and upon a successful interview, was engaged by the Respondent to observe and assess the interviewee's lessons. The Respondent attached in his documents, a lesson observation form dated 16th June, 2018 which showed that he observed two lessons of one Nelson Baraza and gave his assessment based on the observation. The by line at the bottom of the form indicates:

"Observation by Mr Njuguna used to observe his replacement. The person (Mr. Baraza) was recruited to replace Mr. Njuguna"

The Respondent's Contract provides at Clause 7 that teachers, like the Claimant are entitled to leave during school vacations and that following the completion of leave, they are not required to report on duty but must remain on call. There has been no evidence presented by the Claimant to suggest that it asked the Respondent to attend to any duties or to report to work for the remainder of the notice period following the closing of the school term. Furthermore, the letter dated 19th June, 2018 by the Respondent addressed to the Claimant indicated that he was willing to pay the difference of the days not served for the notice period as a measure of good faith. The Respondent reiterated the same in the response to the Claimant's demand letter prior to the filing of the suit and in the Response to the Statement of Claim.

While the Claimant averred that the Respondent quit employment on 18th July, 2018, the fact of the matter is that the Claimant is a school and the school term ended on that date. The Respondent attached to his list of documents an email sent to him by the Claimant inviting him for an exit interview which was scheduled for 26th June, 2018. The Respondent also attached a Certificate of Service dated 13th July, 2018 and issued on the same date by the Respondent. It indicated the date of separation as 13th July, 2018. Evidently, it was the expectation of the Claimant that the Respondent would leave on that date which was at the end of the school term. Thus, it was not as alleged by the Claimant that he 'quit' on 18th July, 2018.

The Respondent has demonstrated that he worked until the end of the term and more importantly, accomplished what the notice was intended for as admitted by the Claimant in its pleadings.

In view of the foregoing, I find no merit in the Claimant's claim and accordingly dismiss it.

I will now proceed to consider the Respondent's Counterclaim under the respective heads of claims.

Withheld Salary for July, 2018

The Respondent avers that the Claimant withheld a portion of his salary for the month of July, 2018. He referred to the salary slip for the month of July, 2018 attached to his list of documents. The payslip shows that in addition to statutory deductions and deductions for loan payments, the Claimant deducted KES 90,134 as “lost time”.

The Respondent contends that he worked until the end of the term and was thus entitled to his salary for the month of July. As stated above, the Claimant did not file a response to the Respondent’s averments in the Response to the Statement of Claim and Counterclaim the same of which stand uncontroverted. Based on my findings above, there is no legitimate reason why the Claimant withheld the Respondent’s salary for the month of July, 2018 which is accordingly awarded.

Farewell Gift – KES 50,000

The Respondent contends that having worked for the Claimant for more than 9 years he was entitled to KES 50,000 as was the practice and tradition of the Claimant. There is however no provision for the same in the Contract and no evidence has been presented before this Court to establish that he was entitled to the same or that this was the practice of the claimant in respect of employees leaving service in the same circumstances as the respondent. In any case farewell gifts are issued ex gratia and not as a matter of right. This claim thus fails.

General and Exemplary Damages

The Respondent claims that the conduct of the Claimant violated his Constitutional right to be afforded fair labour practice and fair administrative procedure. I agree with the finding of my sister, **Mbaru J.** in the case of **KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS V B S MOHINDRA & COMPANY (K) LIMITED** (supra) as cited by the Claimant, that, in a case where there is resignation and no claim for constructive dismissal, the award for compensation does not arise so that where an employee voluntarily tenders resignation there would be no basis for payment of compensation, including damages.

In conclusion, I make the following orders:-

- 1. The Claimant’s claim is dismissed with Costs to the Respondent.**
- 2. The Claimant shall pay the Respondent KES 150,415 being unpaid salary for the month of July, 2018 with interest at court rates from date of judgment.**
- 3. All other claims in the Counterclaim are dismissed with no order as to costs.**

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17TH DAY OF JULY 2020

MAUREEN ONYANGO

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 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. 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, the 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 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on the 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.

MAUREEN ONYANGO

JUDGE