



REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR  
RELATIONS COURT AT MOMBASA  
CAUSE NUMBER 449 OF 2015

BETWEEN

RICHARD ABIERO..... CLAIMANT

VERSUS

NYALI GOLF AND COUNTRY CLUB LIMITED.....RESPONDENT

*Rika J*

*Ananda & Company Advocates for the Claimant*

*Kinyua Muyaa & Company Advocates for the Respondent*

**JUDGMENT**

1. The Claimant filed his Statement of Claim on 7<sup>th</sup> July 2015. He states, he was employed by the Respondent, as the Chief Accountant, between 1<sup>st</sup> November 2011 and 16<sup>th</sup> September 2013. His last salary was Kshs. 134,385 monthly. He resigned through a notice issued to the Respondent on 16<sup>th</sup> September 2013, alleging to have been intimidated and humiliated by the Respondent. He states he was compelled to resign by the hostile work environment. He prays for Judgment against the Respondent for: -

- a. 8 Public Holidays at Kshs. 41,211.
- b. Pending annual leave, 2011/2012 at Kshs. 154,542.
- c. Pending annual leave, 2012/2013 at Kshs. 141,664.
- d. Unpaid salary for September [year not pleaded] at Kshs. 141,664.
- e. Acting allowance for 8 months at Kshs. 415,904.
- f. Underpayment of salary February- December 2012 at Kshs. 221,735.
- g. Underpayment of salary January 2013 –September 2013 at Kshs. 40,884

Total... Kshs. 1,098,365

Less acting allowance paid ...Kshs. 100,000

“ ” club loan...Kshs. 90,000

**Total due... Kshs. 908,365**

- h. 12 months' salary in compensation for unfair termination.

i. Costs.

j. Interest.

2. The Respondent filed its Statement of Response on 2<sup>nd</sup> January 2018. Its position is that the Claimant resigned without notice. He was not unlawfully or otherwise dismissed by the Respondent. He resigned on 16<sup>th</sup> September 2013, the same date he issued his letter of resignation. The Respondent states, it is entitled to 1-month salary in lieu of notice from the Claimant, at Kshs. 150,000, which should be offset from any sum found due to him. His position demanded he discharges his duty with honesty and integrity. He was to bank all money received in the course of his duty. He failed in his duty, leading to multiple complaints against him. He failed to address the complaints, and opted to resign. The Respondent did not intimidate or humiliate the Claimant. At no time did the Respondent's Management Board, pass a resolution designating the Claimant as the Acting General Manager. He was paid cumulative monthly salary, without separate pay for holiday work, or allowance for any acting capacity. He was never underpaid his salary. The Respondent did not compel the Claimant to resign, but accepts it did call upon the Claimant, to answer various allegations against him, made with regard to discharge of his role. The Respondent prays the Court to dismiss the Claim. Alternatively, any sum found due to the Claimant, is offset against what is found due to the Respondent.

3. The Claimant gave his evidence and rested his case on 11<sup>th</sup> February 2019. Respondent's Secretary, Hon. Justin Kaburu, and General Manager Eunice Mutile Masila, gave evidence for the Respondent on 17<sup>th</sup> February 2020, when the hearing closed. Parties subsequently filed their Closing Submissions, and the file was forwarded to the Trial Judge on 18<sup>th</sup> August 2020 for preparation of Judgment, under the Ministry of Health and Judiciary Covid-19 Guidelines.

4. The Claimant told the Court he is a Tax Consultant, resident of Mombasa. He earned Kshs. 134,385 monthly. He was the Chief Accountant. He resigned effective 16<sup>th</sup> September 2013. From October 2012, he acted as the Club's General Manager. A new General Manager was employed sometime in August 2013.

5. The Respondent contracted an Events Manager. The Claimant made a down-payment of Kshs. 100,000 to the Events Manager. The Club Chairlady went wild, asking the Claimant why he was paying Kshs. 100,000 to the Events Manager. The Claimant explained that he had consulted the Club Manager in doing so. He showed the Chairlady documents to support his position. She did not buy the explanation. She approached the Claimant, in the company of the Club Captain, and asked the Claimant to leave the Club. The Claimant felt humiliated. He was never called before the Board. He was asked to hand over. He left on 13<sup>th</sup> September 2013.

6. He was humiliated. He had been pressing the Respondent to pay him acting allowance. He consulted the Federation of Kenya Employers, who advised him, he was entitled to acting allowance. The Club Chair advised that the Claimant is paid part of the acting allowance of Kshs. 100,000. This was in May 2013. When he asked for the balance, it caused bad blood between him and the Respondent. This led to resignation by the Claimant. He made demand before filing the Claim. The issues raised by way of Counterclaim by the Respondent, have no foundation. They were raised only after the Claimant presented his Claim.

7. Cross-examined, the Claimant told the Court, he was confirmed on 1<sup>st</sup> January 2013. His salary was going to be Kshs. 150,000 upon confirmation. He was not confirmed earlier, because of the slow nature of the Club. The Club told the Claimant, it expected him, to satisfy the needs of its Members. His duties were shown in the job description. He gave his reasons for resignation. He said he was not happy with the way the Respondent treated him. He resigned the same date he gave the letter of resignation- 16<sup>th</sup> September 2013. The contract required he gives 30-day written notice.

8. The Club Manager signed the event contract. The Claimant did not have a personal relationship with the Events Management Company. He did not have any interest to declare. CCK was the sponsor of the event. It was to transfer funds to the Respondent directly, upon presentation of the invoice. The Respondent would give an advance invoice to the sponsor. He did not have this invoice in Court. The Claimant invoiced Kshs. 2,040,000. Relying on the Event Contract, he paid a deposit of Kshs. 100,000. He initiated payment of Kshs. 100,000. It was payable in cash.

9. The Claimant resigned. He did not write any complaint regarding his treatment by the Club. He was to take leave on 4<sup>th</sup> September 2019. The contract states if not taken, it was to be forfeited. He had applied for leave. He was appointed Acting General Manager by the Management Committee. He did not receive any document on appointment. It was verbal. This was after the Management Committee met in 2012. The Claimant paid to himself Kshs. 100,000 acting allowance. It was approved by the Treasurer. The Chair signed the cheque. The Claimant did not receive any money from anyone, without documentation. He did not know the persons who alleged that the Claimant received undocumented money. There was a Cashier, who dealt with Members' funds. The Cashier did the banking. The money was not paid to the Claimant. The Claimant received an advance of Kshs. 40,000.

10. Redirected, the Claimant told the Court the voucher for event management deposit, was duly authorized. He did not use the money for his personal gain. It was the duty of the Respondent to engage the Events Manager. It did not have the capacity to organize the event on its own. He did not have any personal interest in the event. He was asked to go on leave on 4<sup>th</sup> September 2013. His letter of resignation came later. He was partly paid the acting allowance. He does not know Eunice Masila, Respondent's Witness.

11. The Club Secretary confirmed that the Claimant was employed by the Club as the Chief Accountant. He resigned with immediate effect, on 16<sup>th</sup> September 2013. He used to present accounts to the Board. The Board did not deal with him in any way, before the Claimant presented his letter of resignation. The Secretary asked the Claimant to account, before his letter of resignation, could be accepted. He did not answer the letter from the Secretary asking him to account. He did not at any time answer to the letter from the Club Secretary.

12. The Secretary told the Court, the Claimant was not owed pending annual leave as claimed. He was never the General Manager, substantively or acting. A Committee ordinarily approves such acting roles. The Secretary sat in Committees, and took notes. At no time did the Respondent appoint the Claimant to act as General Manager.

13. The Claimant advanced to himself loans and salaries. He received money from Clients, without accounting. The Respondent reported him at Nyali Police Station. He did not have authority to pay himself acting allowance.

14. The Claimant was not harassed or intimidated by the Respondent. He was not authorized to pay to himself Kshs. 100,000. The Secretary did not sign the Event Contract exhibited by the Claimant. The Claimant signed without Respondent's authority. The Club had not received any money from the Client. A day's event would have cost Kshs. 700,000. The Respondent had the capacity to organize, with external catering. He was to explain the allegations against him. He did not, but opted to resign. He did not return to the Respondent, to collect what dues the Respondent computed. He went underground to avoid the criminal justice system. Police investigation is ongoing.

15. On cross-examination, the Club Secretary told the Court he recorded his Witness Statement on 3<sup>rd</sup> June 2019. He did not know, that the Claimant had already given his evidence. The Claimant was not advised by the Respondent to leave immediately. The Respondent accepted his resignation. He would be entitled to some dues upon clearance. The Secretary did not participate in the process of handover, which involved the Claimant and Rose Otieno. It was irregular for the Claimant to receive rent, from a Client who was a tenant of the Respondent. The Client knew where to pay rent. Part payment of acting allowance to the Claimant was illegal. He was not an Acting Manager. He was the Chief Accountant. In May 2013, there was no Manager. The Respondent did not ask the Claimant to step in. The Claimant ran away. He could not be arrested. Redirected, the Secretary told the Court, rent was payable to the Respondent. All money was to be banked. The Claimant failed to account as requested by the Secretary. He paid himself with regard to the event. He did not show that the money was paid to an Events Organizer.

16. Club General Manager, associated herself fully with the evidence of the Secretary. The Claimant was required to explain certain queries falling in his line of duty. He failed to do so. He did not pay to the Respondent what he owed. He did not particularize allegations of intimidation and harassment. No Officer could take money from the Respondent, to pay an Events Organizer, without the consent of the Board.

17. On cross-examination, the General Manager told the Court the matter was reported to Nyali Police Station. It was said that the Claimant went underground. She did not know why he was not arrested when he availed himself before this Court, in pursuit of his Claim. Other staff owed money by the Claimant followed up individual claims against him. The Respondent does not hold that it will not pay the Claimant what is found to be due to him; all it wishes, is to be paid by the Claimant what he owes in return. Accounting is a continuous process. The Respondent does not counterclaim in afterthought.

**The Court Finds: -**

18. Much has been written and said by the Parties and their Witnesses, in pursuit of, and response to the Claim herein. In the respectful view of the Court, the issues in dispute fall within a very narrow compass. The facts relating to the employment history of the Claimant, the terms and conditions of employment, are not largely in dispute.

19. It is agreed that the Claimant issued a letter of resignation dated 16<sup>th</sup> September 2013. Resignation was with immediate effect. He alleged he was compelled to resign, because of intimidation and humiliation meted out against him by the Respondent, surrounding the appointment of an Events Manager, to oversee a golfing event involving a group named CCK.

20. The Court does not think that under the Employment Act 2007, the Respondent needed to accept the letter of resignation, for it to become effective. Termination of a contract of employment, which is what resignation is, under Section 35 and 36 of the Employment Act, does not depend on the notice being accepted by the other Party to the contract [recipient of the notice], for it to become effective.

21. In this dispute, it is clear to this Court that the employment relationship ended, once the Respondent received the letter of resignation from the Claimant. There was no need to accept or reject resignation. The Employment Act does not create such a condition for a notice of termination to take effect.

22. Neither did the contract of employment executed by the Parties, impose such a condition, under clause 10 on termination. All a Party was required to do, to walk out of the relationship, was to give 1-month notice, or pay 1-month salary in lieu of such notice.

23. The Claimant initiated termination on 16<sup>th</sup> September 2013. He did not give the requisite 30- day notice, or 1-month salary to the Respondent, in lieu of notice.

24. He implies that he was constructively dismissed, the Respondent having made, through intimidation and harassment, the work environment completely unsuitable for the Claimant to discharge his contractual obligations. He seeks compensation for what he deems to have been unfair termination. He does not expressly plead constructive dismissal.

25. He was not constructively or otherwise dismissed, by the Respondent. The prayer for compensation is misplaced. The Respondent asked the Claimant to give an account for various queries. All related to the Claimant's position as the Chief Accountant. The Court does not see how by raising these valid accounting queries, the Respondent intimidated or harassed the Claimant, creating a hostile work environment, compelling the Claimant to resign.

26. It is not necessary to go through the list of queries the Claimant was required to answer. He was not dismissed or even brought before a disciplinary panel over these queries. Ordinarily they would exercise the mind of the Court, if they were reasons given by the Respondent, to justify termination of contract at the initiative of the Respondent. Termination was at the initiative of the Claimant, and the reasons for his decision to terminate, are irrelevant to the proceedings herein. They would be relevant, if termination was by the Respondent, or if the Claimant pleads that he was constructively dismissed. The Court is satisfied that the Claimant was asked to explain a matter within his job description, balked, and voluntarily walked out of the employment relationship.

27. The Respondent makes a long list of complaints against the Claimant, under paragraph 17 of the Statement of Claim. The sums claimed under these complaints, are later at paragraph 18, characterized as a counterclaim. The Court is urged to compel the Claimant “ to account for all these funds, in default the same be offset against any dues that may be found due to him.”

28. The Court is not able, based on the evidence given by the Respondent, to find that the allegations contained at paragraph 17 of the Statement of Response, can be the basis for a monetary award in favour of the Respondent. There is evidence however, as concluded above, that the Claimant owes the Respondent 1-month salary in lieu of notice, in terms of the contract of employment. Paragraph 8 of the Statement of Response, indicates that the Claimant’s salary at the time of termination was Kshs. 150,000. **The Claimant shall pay to the Respondent 1-month salary in lieu of notice at Kshs. 150,000.**

29. Did the Claimant act as the General Manager? There is a document, exhibited by the Respondent which would suggest that the Claimant acted as General Manager. This is a Statement from one Edward Simiyu, complaining that the Claimant had borrowed Kshs. 100,000 from him, and failed to refund. Simiyu was an Employee of the Respondent, under the Claimant, and referred to the Respondent as ‘Acting Manager.’ Why would an Employee of the Respondent, in a document exhibited by the Respondent, refer to the Claimant as ‘Acting Manager’?

30. The Secretary conceded that in May 2013, the Club did not have a substantive General Manager. The Claimant wrote an internal memo to the Club Treasurer dated 17<sup>th</sup> May 2013, asking to be paid acting allowance as the General Manager. He states he acted from 1<sup>st</sup> October 2012, and was still acting, as of the date he issued the memo. He specifically asked to be paid the difference between what was paid to the previous General Manager monthly, Kshs. 201,988 and what the Claimant earned as the Chief Accountant, Kshs. 150,000 monthly. The Respondent did not call its Treasurer to dispute the authenticity of the internal memo. The Court does not think that the argument by the Respondent, that the Claimant was not appointed in an acting capacity through Board resolution or Committee sitting, has validity. Acting appointment is a form of variation of contract. It is not vitiated only by the fact that it is not given in writing. The law recognizes oral, as well as written contracts of employment. There is no reason why an oral variation cannot be upheld by a Court of law.

**31. The prayer for acting allowance, over a period of 8 months, at Kshs. 51,988 a month, is allowed. It is noted that the Claimant received Kshs. 100,000 in part payment of acting allowance, leaving a balance of Kshs. 315,904.**

32. The prayer for ‘unpaid salary for September’ is amorphous and incapable of being awarded.

33. The Claimant has not established underpayment of salary. His contract offered him Kshs. 150,000 monthly. The prayer for acting allowance is predicated on a monthly salary of Kshs. 150,000. The Claimant did not come out clearly on his figure of Kshs. 134,385 alleged to have been paid monthly, or the desired amount of Kshs. 154,542 upon which the prayer for underpayment of salary is based. The concept of ‘cumulative salary,’ advanced by the Respondent, was not elucidated by any of the Parties, and remains unclear to the Court. It is safe to go by the contract, and the figure adopted by the Claimant is seeking acting allowance, at Kshs. 150,000 monthly.

34. Annual Leave claim is disputed by the Respondent mainly on the ground that under clause 4 of the contract, when leave was not taken within a qualifying period, it would be forfeited. The Respondent does not appear to dispute that the Claimant was entitled to annual leave or that he did not go on leave on a number of given days pleaded in the Claim. Its position is that he forfeited these days, because he did not take them.

35. The Court does not agree with this argument. Annual Leave under Section 28 of the Employment Act is an entitlement, so long as the Employee has met the qualifying criteria. There is no provision which allows the entitlement to be forfeited. The entitlement is a basic condition of employment, under Section 26 of the Employment Act. It cannot be interfered with through contractual design. The Employer and the Employee can only agree on how accrued Annual Leave is to be utilized. It can be sold to the Employer. There is no room for forfeiture. Any contractual clause that provides for forfeiture is against the spirit and the letter of the law on annual leave. It would go against the basic entitlement to Annual Leave, which is against Section 26 of the Employment Act. The Respondent did on 4<sup>th</sup> September 2013, a few days before the Claimant tendered his resignation, require the Claimant takes Annual Leave. This was said to be the decision of the Management Committee. Why was he not directed to take Leave in the past? Why did not the Respondent invoke the forfeiture clause on this occasion? The Court is persuaded that the prayers for pending Leave, over the period 2011/2012 and 2012/2013 are merited. Clause 4 gave to the Claimant 30 days of Annual Leave. He pleads 20 days for the 1<sup>st</sup> period and 30 days for the second, in total giving him 50 days. **Based on a monthly salary of Kshs. 150,000, Annual Leave pay is allowed at a total sum of Kshs. 288,461.**

36. The Claimant has not demonstrated that he was at work on Public Holidays. He did not in his evidence specify when he so worked.

37. No order on the costs and interest.

**38. The sum due to the Claimant shall be less Kshs. 150,000 owed to the Respondent, and for avoidance of doubt, less PAYE.**

**39. Execution of this Judgment is stayed for 35 days.**

IN SUM IT IS ORDERED: -

**a. The Respondent shall pay to the Claimant: acting allowance at Kshs. 315,904 and annual leave at Kshs. 288,461 – total Kshs. 604,365.**

**b. The sum of Kshs 150,000 owed to the Respondent, together with PAYE tax, be deducted from the sum above,**

**c. No order on costs and interest.**

*d. Execution of this Judgment is stayed of 35 days.*

**Dated, signed and released to the Parties under Covid-19 Ministry of Health and Judiciary Guidelines, at Chaka, Nyeri County, this 28<sup>th</sup> day of August 2020.**

**James Rika**

**Judge**