



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 599 OF 2017

[FORMERLY MOMBASA CHIEF MAGISTRATES' COURT CIVIL CASE NO 1540 OF 2012]

PATRICK MUTUA MBITHI.....CLAIMANT

VS

KENYA MARITIME AUTHORITY.....RESPONDENT

JUDGMENT

Introduction

1. This matter has travelled a long litigation path. It was initially filed at the Chief Magistrates' Court at Nairobi (Milimani) as **CMCC No 4790 of 2010**. By an order issued by **Okwengu J** (as she then was) on 29th September 2011, it was transferred to the Chief Magistrate's Court at Mombasa where it was registered as **CMCC No 1540 of 2012**.

2. By a further order issued by **Rika J** on 23rd February 2017, the matter was transferred to this Court.

3. The Claimant's claim is by way of a Complaint dated 2nd August 2010 and filed in court on 3rd August 2010. The Respondent filed a Statement of Defence on 6th September 2010, to which the Claimant responded on 10th September 2010.

The Claimant's Case

4. In his Complaint dated 2nd August 2010 and filed in court on 3rd August 2010, the Claimant states that he was employed by the Respondent on 12th September 2006, in the position of Finance and Administration Manager.

5. The Claimant further states that he ceased being an employee of the Respondent in or about June 2007, by which time he had outstanding salary arrears/entitlements and/or dues amounting to Kshs. 317,064, which the Respondent failed and/or refused to pay him.

6. The Claimant claims that the Respondent has, at all material times, admitted owing the said amount of Kshs. 317,064.

7. The Claimant therefore claims the sum of Kshs. 317,064 plus costs and interest.

The Respondent's Case

8. In its Statement of Defence dated 24th August 2010 and filed in court on 6th September 2010, the Respondent states as follows:

a. That on or about 28th February 2007, the Claimant, in dereliction of his duty as the Finance and Administration Manager at the time, failed to duly submit to the Kenya Revenue Authority (KRA) the end of year Pay as You Earn (PAYE) returns, for the year 2006, which were due by 28th February 2007;

b. That the Claimant, by virtue of his position as Finance and Administration Manager, knew or ought to have known of the mandatory statutory requirement in the Income Tax Act that the returns had to be submitted on or before 28th February 2007;

c. That the submission of annual returns was a task that fell directly under the Claimant's docket as Finance and Administration

Manager and the Claimant's dereliction of duty, negligence and/or lack of attention to his duties caused the delay in submission of the returns;

d. That by virtue of his position, the Claimant owed the Respondent a duty of care, which duty the Claimant flagrantly breached and thus exposed the Respondent to fines and penalties by KRA in the sum of Kshs. 1,629,166;

e. That owing to the matters averred, the Claimant was dismissed from duty on 15th June 2007, by the Respondent's Board of Directors.

9. The Respondent denies being indebted to the Claimant in the sum of Kshs. 317,064 or any other sum.

10. The Respondent states that the Claimant did not clear with the Finance Department when he left and the Respondent is therefore legally entitled to exercise a lien over any funds that may be due to the Claimant, pending his making good the loss that arose directly from his negligence.

Determination

11. When the parties appeared before me on 30th July 2020, they elected to dispense with the matter by way of written submissions. The Claimant filed his submissions on 14th October 2020. From the record, the Respondent did not file any submissions.

12. The Claimant filed a copy of the Respondent's letter dated 31st October 2008 addressed to him as follows:

"Dear Sir,

RE: DERELICTION OF DUTY, NEGLIGENCE AND/OR LACK OF ATTENTION RESULTING IN A LOSS TO THE KENYA MARITIME AUTHORITY OF KSHS. 1,629,166.00

The Kenya Maritime Authority has resolved to address you as I hereby do on its behalf:

On or about the 28th February, 2007, in dereliction of your duty as the Finance and Administration Manager at the time failed to duly submit to the Kenya Revenue Authority (KRA) the end of year Pay as you earn (P.A.Y.E) returns which were due by that date. As the Finance & Administration Manager you knew or ought to have known of the mandatory statutory requirement, by virtue of the Income Tax Act (Cap 470) that the returns had to be submitted on or before 28th of February 2007.

The submission of Annual returns was a task that fell directly under your docket as the Finance and Administration Manager and your dereliction of duty, negligence and/or lack of attention to your duties caused the delay in submission of the returns. The Authority states that, by virtue of your position, you owed it a duty of care, which duty you flagrantly breached and thus exposed the Authority to fines and penalties by Kenya Revenue Authority in the sum of Kshs. 1,629,166.00.

Please be informed that in these circumstances the Authority has withheld a sum of Kshs. 317,064.00 which would have been due to you in accumulated salary arrears, and applied the same to offset part of the loss it has incurred pending your clearance upon terms set by the Authority. A sum of Kshs. 89,050.00 being the tax due on the sum of Kshs. 317,064 has already been remitted to KRA, which sum the Authority also demands against you. The Authority hereby demands from you the sum of Kshs. 1,401,152.00 in full and final settlement of the amount due from you in the foregoing circumstances.

TAKE NOTICE that unless the Authority receives **WITHIN FOURTEEN (14) DAYS** of the date hereof, your written admission of liability and the said sum of **Kshs. 1,401,152.00** in full payment, the Authority shall institute requisite legal proceedings against you, at all times holding you liable for the costs thereby incurred and other consequences ensuing there-from without any further demand or notice.

Yours Faithfully,

(signed)

Mr Ousa Okello (Legal Officer)

For DIRECTOR-GENERAL"

13. By this letter, the Respondent admits withholding the Claimant's salary arrears in the sum of Kshs. 317,064.00, as a lien against a loss of Kshs. 1,629,166.00 allegedly incurred by the Respondent as a result of the Claimant's dereliction of duty.

14. Vide ***Judicial Review Miscellaneous Application No 288 of 2010***, the Claimant sought an order of certiorari to remove into the High Court and quash Certificate of Surcharge Number 141 of 2010 issued against him on 23rd February 2010, surcharging him in the sum of Kshs. 1,629,166.

15. On 23rd November 2011, the High Court (**W. Korir J**) quashed Certificate of Surcharge Number 141 of 2010, issued against the

Claimant. There is no record of this decision being reversed.

16. It follows therefore that as at 23rd November 2011, the basis upon which the Respondent had withheld the Claimant's dues in the sum of Kshs. 317,064.00 had evaporated. From that date, the Respondent had no basis to continue withholding these dues.

17. In the circumstances, I must agree with the Claimant that the Respondent's failure to release his dues was and remains unlawful.

18. I therefore find for the Claimant and enter judgement in his favour in the sum of **Kshs. 317,064.00** in accrued salary arrears.

19. Because the Respondent continued to withhold the Claimant's dues even after the High Court had nullified the Certificate of Surcharge, I direct that interest on the withheld sum will accrue at court rates from the date of the judgment by the High Court being 23rd November 2011.

20. The Respondent will meet the costs of this case.

21. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 10TH DAY DECEMBER 2020

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Mr. Muli for the Claimant

Miss Makuto for the Respondent