



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1088 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

GEORGE MWANGI KARUGA.....CLAIMANT

VERSUS

NAIROBI CITY WATER AND

SEWERAGE COMPANY LIMITED.....1ST RESPONDENT

NAIROBI CITY COUNTY.....2ND RESPONDENT

JUDGMENT

The Claimant in his Statement of Claim dated and filed on 30th June 2014 alleges refusal/failure by the Respondents to pay accrued salaries, benefits and allowances and service pay owed to the Claimant.

The Claimant claims from the Respondents a collective sum of Kshs.9,692,207 being accrued salaries, benefits, allowances and service pay for the period the Claimant was under suspension between October 2002 to June 2011 and is made up as follows:

i. Basic Pay as per last payslip (August 2013) Kshs.41,221

House Allowance Kshs.16,500

Commuter Allowance Kshs.4,000

Gross Pay per month Kshs.61,721

ii. Salaries, Benefits and Allowances in Arrears

From October 2002 to May 2011

(8 years x 61,721 x 12 months) Kshs5,925,216

November 2002 and December 2002;

61,721 x 2 months) Kshs.123,442

January to May 2011: 61,721 x 5 months Kshs.308,605

iii. Annual leave allowances for 8 years calculated at:

Basic Pay x 41,221 x 8 years Kshs.329,768

iv. Personal/Laptrust

Employee Contribution: 9,811.97 x 12 x 8 Kshs.941,949.12

November 2002 and December 2002:

9,811.97 x 2 months Kshs.19,623.94

v. Christmas Bonus: 4,000 x 8 years Kshs.32,000

vi. Terminal Golden Handshake Kshs.150,000

vii. Salary Difference Kshs.1,398,696

viii. Service Pay for 15 years worked

61,721/30 x 15 x 15 Kshs.462,907

Grand Total Kshs. 9,692,207.06

The Claimant also claims for costs of the suit and interest as well as any other relief that this Court may deem fit and just to grant.

The 1st Respondent in its Memorandum of Reply dated 18th August 2014 and filed in Court on 20th August, 2014 avers that the Claimant has never and/or was never in the 1st Respondent's employment until the year 2011 when the Claimant's suspension was lifted and he was reinstated back to duty and subsequently transferred to the 1st Respondent, a limited liability company that is separate and distinct from the 2nd Respondent.

The 1st Respondent further avers that the Claimant's reinstatement was conditional pursuant to a letter dated 9th June 2011 by the 1st Respondent which dictated that the period the Claimant was away would be treated as unpaid leave and that the 1st Respondent would not pay the same, which condition the Claimant seems to have agreed to as he reported to work as directed without making any claim for the salary withheld during suspension.

The 1st Respondent contends that on 30th July, 2013, the Claimant applied for early retirement on medical grounds having not reached retirement age. The request was accepted by the 1st Respondent with 30th August, 2013 communicated as the Claimant's last working day.

The 1st Respondent further contends that it did not refuse to pay the Claimant's accrued salary, benefits and allowances for the period he was under suspension. It avers that the Claimant was in-fact not its employee during the period he was under suspension.

The 1st Respondent avers that the Claimant has no legal basis to claim the collective sum of Kshs.9,692,207 for accrued salary, benefits, allowances and service pay for the period he was under suspension as he was suspended with no pay and that he was aware that the period he was under suspension was treated as unpaid leave which he did not protest.

The 1st Respondent urged the Court to dismiss the Claimant's Statement of Claim with Costs.

The 2nd respondent filed a notice of appointment and notice of preliminary objection not did not file a defence to the claim.

Evidence

On 22nd May 2017, the Claimant (CW1) in his testimony stated that he worked for both Respondents herein. He further stated that he was employed by City Council in May 1999 to October 2002 in the position of Revenue Officer earning a monthly salary 16,000 per month.

CW1 further stated that he received a suspension letter following his being charged with a criminal offence. Further, that the criminal case was concluded on 10th November 2008 and the Claimant was acquitted.

CW1 testified that following his acquittal he was reinstated in June 2011 and deployed to work for the 1st Respondent which was wholly owned by the County Council of Nairobi earning a monthly salary of Kshs.61,421/-.

CW1 further testified that he was asked by the Respondent to treat the period he was away as unpaid leave which he did not agree to. CW1 averred that he worked for 2 years and had to apply for early retirement on medical grounds after his doctor recommended so, which request was accepted by the Company.

On cross examination CW1 confirmed that as per his letter of appointment dated 25th February 1999 his employer is the Nairobi City Council and that he commenced duty on 5th May 1999. He further stated that he worked for Nairobi City Council for about 4 years before he was suspended on suspicion of fraud but he was acquitted.

On further cross examination CW1 stated that following the staff meeting on 31st December 2010 he was reinstated and transferred to

Nairobi Water and Sewerage Services (1st respondent herein).

CW1 stated that when he reported to duty at the 1st Respondent's office he was issued with another letter dated 9th June 2011 which he received under duress.

CW1 further stated that he was duly paid his salary after he served his notice for early retirement which was duly accepted by the 1st Respondent. CW1 averred that he was not paid his terminal benefits at the time of separation and that is the reason why he filed the instant claim.

On further cross examination by Counsel Moku (Advocate on Record for the 2nd Respondent) CW1 stated that he was charged in Court and was eventually acquitted of any wrongdoing. However, CW1 admitted that he had not supplied a copy of the proceedings and Judgment of the Criminal Case for the Court to scrutinize.

CW1 further stated that despite stating in his Statement of Claim at paragraph 4 that the 1st Respondent Company was formed as a subsidiary of Nairobi City County he had no documentation to prove this assertion.

CW1 averred that despite the 8 year period of his suspension he now seeks compensation even though he never worked. He further testified that Christmas bonuses were issued to employees at the close of each year as a matter of tradition although the same was not captured in CW1's terms of service.

On Re-examination CW1 confirmed that the date of his employment is 5th May 1999 by Town Clerk of Nairobi City County. He further stated that his reinstatement was done by Nairobi City County and he was transferred to Nairobi Water and Sewerage Company. CW1 averred that he sued both NCC and Nairobi Water and Sewerage Company because they are one and the same.

On further re-examination CW1 stated that he took up the job after reinstatement because he needed the job. He further confirmed that immediately he resumed he did letters requesting for payment of his salary for the duration he was under suspension and was never paid.

CW1 stated that Christmas bonus is traditionally paid to all employees at the end of every year of service. That is why he is claiming the same. Also he claims handshake as the Respondent paid its employees the money and therefore he is entitled to the same.

The 1st Respondent's case was heard on 7th May 2018. RW1 (**Monica Oyieyo**) the Industrial Relations Officer with the 1st Respondent testified on behalf of the 1st Respondent. It was her evidence that the Claimant was employed by the 2nd Respondent on 25th February 1999.

RW1 further stated that the Claimant was suspended from duty on 28th March, 2002 due to gross misconduct on suspicion of defrauding the City Council of Kshs.9 million. The Claimant was charged in Court and was later acquitted. She further testified that upon his acquittal, the Claimant was reinstated by the 2nd Respondent on 19th July 2011 and was transferred to work for the 1st Respondent.

RW1 testified that the 1st and 2nd Respondent are separate legal entities. She further stated the transfer of service was pursuant to transfer of operational assets between the 1st and 2nd Respondents under the agreement which came into force after the reinstatement of the Claimant. RW1 further testified that the 1st Respondent is not liable for pension and arrears of statutory deductions that accrued before the Claimant was transferred and that such a claim should be borne by the 2nd Respondent.

RW1 stated that on 30th July 2013 the Claimant applied for early retirement on medical grounds, which request was allowed by the 1st Respondent by a letter dated 28th August 2013 and the Claimant was advised to contact payment office before the date of retirement regarding his terminal benefits.

On cross examination RW1 stated that the Claimant was suspended on 28th March 2002. She further stated that the 1st and 2nd Respondent entered into an agreement on 4th March 2004 and that what was subject to transfer is indicated in the said agreement.

On further cross examination RW1 stated that the Claimant was an employee of Nairobi Water and Sewerage Company until the time of his early retirement and that the Claimant was first employed by the NCC. She however admitted that at the time of transfer no new contract was issued to the Claimant by the 1st Respondent.

On re-examination RW1 stated that when the Claimant was reinstated his letter of reinstatement included terms and conditions for reinstatement, among them time he was away on suspension was treated as unpaid leave and he was placed on six months' probation upon reinstatement, which conditions the Claimant agreed to when he accepted reinstatement.

The 2nd Respondent closed its case without calling any witness.

Parties thereafter filed and exchanged written submissions.

Claimant's Submissions

In the written submissions the Claimant reiterated the contents of the Statement of Claim and his oral evidence in Court.

It is submitted by the Claimant that his Claim ought to be settled jointly and severally by the 1st and 2nd Respondents herein as the agreement signed between the two Respondents is clear that the 1st Respondent was taking over both liabilities and assets of the 2nd Respondent.

The Claimant submitted that the claim is justified in all items as pleaded as no rebuttal of his claim has been established by both Respondents. He urged the Court to allow the same as prayed.

1st Respondent's Submissions

The 1st Respondent submitted that there was no agreement of employment between the Claimant and the 1st Respondent before 2011 and that the 2nd Respondent was the employer of the Claimant and as such the Claimant should not have sued the 1st Respondent as it was not the Claimant's employer when the cause of action arose.

The 1st Respondent further submitted that the Claimant was suspended by the 2nd Respondent and was not one of the assets transferred to the 1st Respondent. That should there be any obligations to be met the same ought to be by the 2nd Respondent and not the 1st Respondent. The 1st Respondent relied on the Authority of ***Western Pumps Limited Vs Joseph Wanaina Iraya T/A Queen Chick Inn & H.E Daniel Arap Moi, Nairobi HCCC (Milimani Commercial Courts) No. 186 of 2006*** .

The 1st Respondent further submitted that the Claimant has not adduced any evidence to the effect that at the time of his suspension the 1st Respondent was his employer raising a doubt as to whether he has a prima facie case. The 1st Respondent relied on the case of ***Metra Investments Ltd Vs Gakweli Mohamed Wawakah Nairobi Milimani HCCC No. 54 of 2006*** where it was held that:

“As the case is presented there is no evidence that an agreement in writing exists signed by both parties and witnessed as is required by Section 3(3) of the Law of Contract Act and in the absence of such agreement the section is clear that no suit shall be brought for the disposition of an interest in land. The Applicant does not appear therefore to have a prima facie case with a probability of success.”

The 1st Respondent further submitted it did not suspend the Claimant as it was not his employer and therefore it cannot be held liable for the sums that were owed to the Claimant during the period of his suspension.

It is further submitted that the 1st Respondent is not liable to pay the Claimant any benefits or sums as it is not a proper Respondent in this matter as it is not a party to the employment Agreement between the Claimant and the 2nd Respondent nor was it an employer of the Claimant prior to 2011.

In conclusion the 1st Respondent urged the Court to find that there was no contractual relationship between the Claimant and the 1st Respondent herein and that the contractual liability of the 2nd Respondent as regards payment of emoluments during suspension was not transferred to the 1st Respondent herein.

The 1st Respondent urges the Court to dismiss the instant Claim with costs.

2nd Respondent's Submissions

The 2nd Respondent submitted that the instant Claim is statute barred the same having been filed 3 years and 10 days after the cause of action arose. The 2nd Respondent relied on the case of ***Nicodemus Marani Vs Timsales Limited, Industrial Cause No. 204 of 2013*** where Ongaya J. held that:

“no power of the Court has been established empowering the Court to extend time of 3 years prescribed in Section 90 of the Employment Act to justify the Court's entertainment of the suit outside the three year limitation period; that Section 90 of the Employment Act provides a time limitation of 3 years and in an appropriate case, exceptions may exist like is envisaged in Section 39 of the Limitations of Actions Act.”

The 2nd Respondent further relied on the Authority of ***Joyce Wanjiku Muchiko & Another Vs Telkom (K) Limited, Industrial Cause No. 1299 of 2011*** where it was held that claims outside three (3) years are statute barred under Section 90 of the Employment Act.

The 2nd Respondent further submitted that the 1st Respondent is liable to settle the Claim (if any) as it inherited the 2nd Respondent's assets and liabilities as evidenced by the Agreement dated 4th March 2004.

The 2nd Respondent avers that the Claimant is not entitled to pay while he was under suspension due to the fact that at the point of reinstatement, the Claimant agreed that his suspension period would be treated as unpaid leave. It is further submitted that the principle of estoppel bars him from claiming pay while he was on suspension.

The 2nd Respondent further submitted that allowing the instant Claim would amount to unjust enrichment by the Claimant as during the period the Claimant was under suspension, which he now claims payment for he did not render any services to the 2nd Respondent. The 2nd Respondent relied on the Authority of ***Pamela K. Butalanyi Vs University Council for the Kenya Polytechnic University College (2015) eKLR*** where it was held that employment remedies must be proportionate to the injury sustained by the Employee. They are not aimed at

advancing any parties desire for unjust enrichment.

Further the 2nd Respondent avers that the Claimant never indicated that his contract of employment provided for payment of salary while he was under suspension. The 2nd Respondent relied on the authority of *Farida Ali Kibwana Vs Nairobi City County (2018) eKLR* where the Court stated:

“If the Claimant’s contract and/or procedures and policies governing the Respondent’s employees provided for suspension on half pay or not, the Claimant did not demonstrate such provision or allude to the same during testimony or submissions.

The Court’s attention was not drawn to any particular regulations applicable to the Claimant’s case.

The Court finds that this head of Claim was not proved to the required standard.”

The 2nd Respondent further submitted that for the entire 8 year period the Claimant was under suspension he never went for annual leave nor did he make any pension/laptrust employee contributions and can therefore not claim for the same.

Further that his Claim for Christmas bonus, terminal golden handshake and salary difference are highly speculative as nothing was tendered in evidence to prove that the Claimant was entitled to the same. The 2nd Respondent urged the Court to dismiss the same.

With regards to 15 years’ service pay, the 2nd Respondent submitted that the same ought to be dismissed as the Claimant did not render any service to the 2nd Respondent yet service pay is based on very complete year of service.

In conclusion the 2nd Respondent urged the Court to dismiss the Claim herein with costs to the 2nd Respondent.

Determination

Having considered the pleadings, evidence, submissions and authorities cited by the parties, the following are the issues for determination:

1. Whether the Court has Jurisdiction to entertain the instant Claim
2. Whether the Claimant is entitled to the reliefs sought

Jurisdiction

The 2nd Respondent has put in lengthy submissions on the issue of the Court’s Jurisdiction to entertain the instant Claim on account of the Claim being statute barred under the provisions of Section 90 of the Employment Act.

That the said issue is *resjudicata* and the Court *Functus Officio* on the issue of jurisdiction the same having been raised vide the Preliminary Objection as follows:

- i. That the Suit is time barred. Section 90 of the Employment Act provides:

“Notwithstanding the provisions of Section 4(1) of the Limitation of Actions Act, Cap 22, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months after the cessation thereof.”

- ii. The Claimant was suspended on or about 28th March 2002 till 21st June 2011 when he was reinstated. The Cause of action therefore accrued on or about 21st June 2011 when it became due and payable (if any) and the claim became time barred on 20th June 2014. The Statement of Claim was filed on 30th June 2014 which was out of time.

- iii. The Claimant has brought this Claim after expiry of three years and the 1st Respondent shall apply to strike out the suit as being time barred.

Nderi J. in his Ruling delivered on **1st April, 2016** dismissed the Preliminary Objection raised and directed that the suit proceeds on merit for hearing.

The Respondent cannot therefore successfully raise the same issues again. This Court is therefore properly positioned to hear and determine this Claim.

Whether the Claimant is entitled to the reliefs sought

The Claimant has prayed for the following reliefs:-

- a. The sum of Kshs.9,692,207 together with interest from the date of filing this suit
- b. Costs of this suit
- c. Interest on (a) and (b) above
- d. Any other relief that this Court may deem fit and just to grant.

As submitted by the respondents, the Claimant is estopped from claiming payment of his salary during the period he was under suspension given that at the time he was reinstated he was issued with a letter of reinstatement from the 1st respondent dated **9th June, 2011** which reads in part:

“...the period that you were away will be treated as unpaid leave and the company will not pay for the same.”

The Claimant agreed to this condition as he reported to duty as directed in the letter of reinstatement.

Notably, the Claimant made complaints after reporting back to work. However, he seems not to complain about the issue of none payment of dues during the period he was under suspension. This is evident from correspondence produced in court by the claimant.

Under the doctrine of Estoppel the Claimant is estopped from claiming payment of his claim the same as he reported to work on the terms of the letter of reinstatement. In any event, such claims having accrued upon his reinstatement on 9th June 2011, became statute barred on 9th June 2014, this claim having been instituted on 30th June 2014.

On the issue of Christmas bonus, terminal golden handshake and salary difference I agree with Counsel for the 2nd Respondent to the extent that the same are highly speculative as nothing was tendered in evidence to prove that the Claimant was entitled to the same. Secondly, Christmas Bonus was not part of the claimant's terms of service as admitted by him, but rather paid based on exemplary performance of an employee during the year of service and is paid at the discretion of the employer. Given that the Claimant did not render any service he cannot qualify for the claim for payment of Christmas bonus.

Similarly the Claimant is not entitled to terminal golden handshake as he has not proved that under his terms of service he was entitled to the same.

The Claimant is also not entitled to service pay as the same is payment based on every complete year in service and the Claimant was not on duty during the period he claims for compensation.

The claim for service pay is not due as it was not part of the claimant's terms of employment, the same having been introduced in the Employment Act, 2007 which was not in force at the time of claimant's suspension. In any event, the claimant was a member of the respondent's pension scheme and would not qualify even under Section 35(6) of the Employment Act, 2007. In the case of **Pamela K. Butalanyi Vs University Council for the Kenya Polytechnic University College (2015) eKLR** it was held that employment remedies must be proportionate to the injury sustained by the Employee. They are not aimed at advancing any parties desire for unjust enrichment.

The upshot is that the entire Claim fails and is dismissed. Each party to bear their own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF FEBRUARY 2019

MAUREEN ONYANGO

JUDGE