



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1827 OF 2014

JOB BERNARD MAKANGA.....CLAIMANT

- VERSUS -

MULTIMEDIA UNIVERSITY OF KENYA.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 29th March, 2019)

RULING

The claimant filed the memorandum of claim on 16.10.2014 through Liko and Anam Advocates. The claimant prayed for judgment against the respondent for:

- a) Payment of full October 2014 salary and full November 2014 salary as required in the contract of employment plus all other allowances.
- b) Payment of gratuity for two years.
- c) Declaration that the claimant issued adequate notice as per his contract of employment.
- d) A permanent injunction restraining the respondent from harassing, victimizing the claimant in any way because of his resignation notice or filing this suit.
- e) An order directing the respondent to issue the claimant with a certificate of service for the period worked.
- f) General damages for discrimination, intimidation and harassment suffered by the claimant while in serving his notice.
- g) Interest on (a) and (b) above at Court rates.
- h) Costs of the suit.
- i) Any further or other relief that the Honourable Court may deem just and fit to grant.

The amended memorandum of claim was filed on 21.06.2015 and the claimant prayed for:

- a) Payment of full October 2014 Salary and full November 2014 salary as required in the contract of employment plus all other allowances.
- b) Payment of gratuity for two years calculated as follows. Total months worked 27, gratuity on basic salary 118, 256 x27 months = Kshs.3, 192, 913.00, gratuity rate is 31% which gives Kshs.989, 802.72.
- c) Payment of full November 2014 salary Kshs.269, 467.00.
- d) Total Kshs. 1, 259, 269.72.
- e) Declaration that the claimant issued adequate notice as per his contract of employment.
- f) Declaration that the respondent's act of forcibly taking the claimant's office and allocating it to another person and destroying the

claimant's personal effects amounted to unfair labour practice.

g) An order directing the respondent to issue the claimant with a certificate of service for the period worked.

h) General damages for discrimination, intimidation and harassment suffered by the claimant while in serving his notice.

i) Interest on (b) and (c) above at Court rates.

j) Costs of the suit.

k) Any further or other relief that the Honourable Court may deem just and fit to grant.

The respondent opposed the suit by filing on 17.09.2015 the respondent's amended memorandum of reply through Miller and Company Advocates. The respondent prayed that the claimant's suit be dismissed with costs.

On 20.04.2018 counsel for the respondent attended Court in absence of counsel for the claimant and indicated that the respondent wished to settle part of the claim towards compromising the suit and upon his submission, the Court ordered:

1) That prayer (a), (b) and (e) of the claim be settled by the respondent subject to the claimant going to clear with the respondent personally within 30 days from today.

2) That parties to negotiate compromise on prayers (f), (g) and (h).

3) That the matter be mentioned on 30.05.2018 at 9am with a view of recording consent.

4) That costs in the cause.

The parties engaged in negotiations and both counsel attended Court on 01.11.2018 and it was ordered by consent:

1) That judgment be and is hereby entered for the claimant against the respondent for payment of full October 2014 salary and full November 2014 salary as required in the contract of employment plus all other allowances.

2) That payment of gratuity for two years.

3) That a declaration be and is hereby issued that the claimant issued adequate notice as per his contract of employment.

4) That a declaration be and is hereby issued directing the respondent to issue the claimant with a certificate of service for the period worked.

5) That parties to agree on costs failing to be taxed in usual manner.

6) That parties to agree on quantum of the sum of money payable under the judgment failing respective computations be filed and served by 30.11.2018 for mention on 04.12.2018 at 9.00am to record quantum.

It appears parties failed to agree on the quantum and submissions were filed for the claimant on quantum on 27.11.2018. It was urged for the claimant as follows:

1) The last gross monthly salary was Kshs.269, 467.00 so that for 2 months of October and November 2014 the due amount was Kshs.538, 934.00 under order No.1.

2) For Order 2 the claimant was employed 25.07.2012 and resigned effective 23.11.2014 so that he had served for 28 months and gratuity due was therefore $118, 256 \times 31\% \times 28$ making Kshs.1, 026, 462.00.

3) Thus under orders 1 and 2 the sum due was Kshs.1, 565, 396.00.

4) There was no computation on orders 3 and 4.

5) For order 5 there had been no agreement on costs and so parties would proceed to tax the bill of costs.

The respondent has filed on 10.12.2018 the notice of motion under section 12(3), (4) and 16 of the Employment and Labour Relations Court Act, No. 20 of 2011 and all other enabling provisions of the law. The respondent has prayed for orders:

a) That there be a stay of execution of the consent order of 1st November 2018 and all other consequential orders emanating therefrom pending the hearing and determination of the application.

b) That the consent order issued by the Honourable Court on the 1st November 2018 be and is hereby reviewed, varied and or set aside to enable the matter to proceed to full trial and a judgment be made after trial.

c) That the costs of the application be in the cause.

The grounds in support of the application are as follows:

a) The respondent offered to compromise the suit through negotiation as ordered on 20.04.2018.

b) The parties arranged that the claimant clears with the respondent and thereafter they mutually agreed that the claimant be cleared and all monies owed to the university including cash, university property not surrendered and unaccounted for imprest be retained. The claimant attended the clearance and the respondent established that the claimant owed a sum of Kshs.146, 829.00 and it was mutually agreed that the sum would be offset from the gratuity that was payable to the claimant so that the net amount payable would form the basis of marking the suit settled. The total sum payable to the claimant was Kshs.455, 740.00 and the matter would be marked settled.

c) The claimant has shifted the goal posts by taking advantage of the negotiated consent and is claiming a higher amount than was agreed upon.

d) It was not intended to pay the claimant full October and November 2014 salary because the claimant resigned from the service of the claimant on 23.09.2014 without notice and was therefore not entitled to the salaries for October 2014 and November 2014 and the matter would need determination at full hearing of the suit.

e) The Court has the power to review, vary, and or set aside the consent order of 01.11.2018 factoring in all the issues explained herein above and in the best interest of justice.

The application was supported by the affidavit of Mumbi Mwhurii, the respondent's legal officer and attached on the application. The applicant further filed on 20.03.2019 the further affidavit of Cornelius Mutangili, the respondent's Registrar - Administration.

The claimant opposed the application by filing his replying affidavit on 06.03.2019 through Liko Anam & Company Advocates. The claimant's case is as follows:

a) The applicant had not been cooperative in facilitating him to clear with the University though the applicant has all along showed interest to settle the dispute as per the correspondence on record between the parties' advocates.

b) After the consent orders of 20.04.2018 he attended and cleared with the respondent.

c) The parties duly entered a consent judgment on 01.11.2018 in presence of the parties' advocates.

d) On 04.12.2018 quantum on order 1 given by consent judgment on 01.11.2018 was recorded thus, "**By consent – (1) Kshs.538, 934.00 is payable by the respondent to the claimant under order 1 given on 01.11.2018. (2) For order 2 quantum be recorded on 11.12.2018 at 9.00am for mention for that purpose.**"

e) After the judgment by consent as ordered on 01.11.2018 the only issue that remained was on quantum on 2 months' pay and 31% gratuity.

f) There was no counterclaim by the applicant alleging that the claimant owed the applicant money as is now alleged.

g) As at resignation the claimant had 45 leave days which he served as part of the due notice to resign per his contract of service.

h) The application dated 10.12.2018 does not meet the threshold required for the Court to interfere with the consent herein as there is neither fraud nor coercion established.

i) The application should therefore be dismissed with costs.

The parties filed their respective submission. The Court has considered the material on record and makes findings as follows:

a) As submitted for the claimant in the **Board of Trustees National Social Security Fund –Versus- Micheal Mwalo [2015]eKLR**, the Court of Appeal (Kariuki, Ouko, and Mohammed JJ.A) upheld the legal positions that *prima facie* an order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action and on those claiming under them; and a court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties. The Court of Appeal in that case upheld **Kenya Commercial Bank Ltd –Versus- Specialised Engineering Co.Ltd [1982]KLR 485** where Harris J correctly held inter alia, "**1. A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside the agreement. 2. A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to**

the notice of the other side.” The Court is bound by that holding by the Court of Appeal and returns that the parties’ advocates had authority to bind their clients in the consent orders on record and the applicant has not established any of the established tests for setting aside a consent order.

b) The applicant says it had no intention to pay the salaries for October and November 2014. However, that allegation is clearly contrary to the consent orders as recorded in Court. The Court returns that indeed on 04.12.2018 the parties recorded a consent order that the amount payable for the two months would be **Kshs. 538, 934.00** and parties are bound accordingly. While making that finding the Court reckons that the parties must have taken into account the claimant’s 45 leave days as at the time of resignation and being due and payable under section 35 of the Act. Accordingly, the material on record establish the basis of the 2 months’ pay and the consent as recorded will not be varied by the Court as no justification has been established in that regard.

c) It is clear that the claimant had to clear and the payment would follow after the clearance. The further supporting affidavit of Cornelius Mutangili shows that upon clearance, it was found that the claimant owed the respondent a sum of Kshs. 146, 829.00 and the claimant was entitled to Kshs. 455, 740.00 for gratuity. The unaccounted for amounts making the Kshs. 146, 829.00 are stated in exhibit CM1 as unaccounted imprest of Kshs.40,000.00; the applicant’s laptop issued to the claimant but not surrendered valued at Kshs. 57,000.00; and refunds to staff (Cocotech loan) of Kshs. 49, 820.00. Exhibits CM1 and CM2 on that affidavit show how the respondent has computed gratuity. The details of the computation are clearly spelt out that the claimant was entitled to gratuity for the 26 months actually served because the applicant had the practice of paying 31% gratuity at the end of the tenure of the contract of service. The Court has considered that computation within the consent order of 01.11.2018 that parties agree on the quantum of the sum of money payable under the judgment failing respective computations be filed. The Court considers that the quantum will therefore fall for determination by the Court. The Court has considered the exhibit on the replying affidavit where in clearing the claimant the finance officer scribbled outstanding imprest Kshs. 40,000.00. The Court considers that the claimant did not file a further replying affidavit to dispute the deductions from gratuity as computed for the respondent and which appears to have been part of the reconciliation between the parties during the clearance process. The Court will therefore fix the amount due to the claimant for gratuity at a net of **Kshs. 455, 740.00** as computed by the respondent and as duly established on a balance of probability. While making that finding the Court reckons that the claimant actually worked for 26 months and he will not get the gratuity for 28 months as computed for him on the ground that the pay for October and November was on the basis of his trading in the pending 45 leave days and the compromise by the parties in that regard will not be interfered with by the Court.

d) While making this ruling the Court has reckoned that the outcome of the suit was a give and take compromise between the parties. The Court will therefore give effect to the compromise and the consent as far as possible.

In conclusion the application filed for the applicant on 10.12.2018 is hereby determined with orders as follows:

- 1) The consent orders on record as entered by the parties’ advocates are upheld subject to the orders herein.
- 2) The respondent to pay the claimant a net sum of **Kshs.455, 740.00** for gratuity and as computed by the respondent.
- 3) The respondent to pay the claimant a sum of **Kshs.538, 934.00** (less income tax due) and being pay for November and October 2014 and as per consent order of 04.12.2018.
- 4) The amount in 2 and 3 above to be paid to the claimant by 15.05.2019 failing interest to be payable thereon at Court rates from the date of filing of the suit on 16.10.2014 until full payment.
- 5) The respondent to deliver a certificate of service to the claimant by 15.05.2019 and for the entire period served as prescribed in section 51 of the Employment Act.
- 6) The respondent to pay the claimant’s costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday 29th March, 2019.

BYRAM ONGAYA

JUDGE