



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NUMBER 115 OF 2012

[Formerly Nairobi 1C Number 1914 of 2011]

BETWEEN

DAVID KABORI RIMBERIACLAIMANT

VERSUS

1. SUMMIT COVE LINES COMPANY LIMITED

2. JOSEPH MUTHAMIA KIREMARESPONDENTS

Rika J

Court Assistant: Benjamin Kombe

Akanga Alera & Associates, Advocates for the Claimant

Mokaya Ogutu & Company Advocates for the Respondents

JUDGMENT

1. This Claim was initiated at the Industrial Court at Nairobi, on 14th November 2011. The file was transferred to the Court in Mombasa, and assigned the above registration number.

2. The Claimant avers he was employed by the Respondents as the Lead Project Advisor/ Human Resources and Administration Manager, formally, effective 1st March 2011. His monthly salary was fixed at Kshs. 300,000. The project commenced on 1st March 2010

3. The Respondents, who are a Limited Liability Company and its Managing Director respectively, informed the Claimant that they had secured a big business venture. The Claimant was to set up certain human resource systems and structures to facilitate the Respondents in carrying out the objectives of this big business venture. The Claimant was to recruit Staff for the Respondents. While the Claimant was to prepare Staff contracts, the 2nd Respondent undertook to prepare one for the Claimant

4. The Respondents later on reduced Claimant's monthly salary to Kshs. 150,000. This was for the period 1st June 2010 to 30th September 2010. Although the decision was arbitrary, the Claimant avers he did not contest the decision, owing to the prevailing business situation. Between 1st March 2010 and 31st May 2010, the Respondents were obligated to pay to the Claimant a monthly salary of Kshs. 300,000, but paid only half, with the promise that the other half, would be paid later.

5. On 4th October 2010, the Respondents appointed the Claimant as General Manager, on a monthly salary of Kshs. 200,000. In February 2011, without the consent of the Claimant, the Respondents began to pay the Claimant reduced salary of Kshs. 100,000. Claimant's contract was unfairly and unlawfully terminated by the Respondents in October 2011. He was paid for 8 ½ months, half salary at Kshs. 100,000.

6. On 5th July 2011, the 1st Respondent sent the Claimant on official assignment to Zambia to purchase maize and bring the consignment to Kenya for sale. The Claimant was accompanied by 2 brothers of the 2nd Respondent, and an in-law of the 2nd Respondent. The exercise lasted 59 days, with 33 days spent in Zambia, and 26 in Tanzania. Throughout, the Claimant was paid an inadequate subsistence allowance of Kshs. 2,000 daily, which was upon complaint, improved to Kshs. 3,000. The Claimant was kept away from the maize business by the Respondents, after the consignment arrived in Kenya. The Claimant went on annual leave upon return to the Country, in September 2011. He was not paid his full salary on taking annual leave.

7. While the Claimant was still on leave, on 14th October 2011, the 1st Respondent advised the Claimant that his contract had been terminated owing to diminished business. Other Employees' contracts were similarly terminated. There was no notice, and no adherence to redundancy law under Section 40 of the Employment Act 2007. When the Claimant made demand for his terminal dues, he was advised by the 2nd Respondent to take a trip to the High Court, and the Respondents would meet him there.

8. Against this background the Claimant seeks Judgment against the Respondents in the following terms: -

- i. Salary for September 2011 at Kshs. 146,000.
- ii. Salary for October 2011, to termination on 14th October 2011 at Kshs. 93,333.
- iii. Annual leave at Kshs. 140,000.
- iv. Notice pay at Kshs. 200,000.
- v. Severance pay at Kshs. 166,667.
- vi. Arrears of salary from February to August 2011 at Kshs. 700,000.
- vii. Arrears of salary from March to May 2010 at Kshs. 450,000.
- viii. Subsistence allowance for the period in Zambia and Tanzania at Kshs 767,500.
- ix. Service pay at Kshs. 1,198,000.
- x. Damages for unfair termination.
- xi. Costs.
- xii. Interest.
- xiii. Any other suitable relief.

9. The Respondents filed their Statement of Response on 29th November 2011. They state that the Claimant has been a longtime friend of the 2nd Respondent. The Claimant was sacked from Kenya Railways, and had fallen on hard times. He was in a deplorable situation, heavily in debt and unable to make ends meet. Consequently the Claimant kept approaching the 2nd Respondent, asking for money to help him make ends meet.

10. The big business venture alluded to in the Claim, was a public-private partnership between the 1st Respondent and the Municipal Council of Mombasa. The 1st Respondent engaged the Claimant for purposes of advising the Respondents in the running and management of the partnership. The 1st Respondent was contracted to collect parking fees for the Council, and was entitled to retain a percentage of the collections, as consideration. The partnership was resisted and fought by other stakeholders such as Kenya Transport Association. The partnership did not work as projected, and the 1st Respondent ended up making loss of over Kshs. 100 million, a fact known to the Claimant.

11. Resistance to the partnership climaxed in a Suit at the High Court in Mombasa, initiated by Transport Association. The Suit ended in favour of the Association and against the partnership. The business over which the Claimant was recruited came to an end. The 1st Respondent did not have an obligation to retain the Claimant.

12. The 2nd Respondent states as Managing Director of the 1st Respondent, he did not employ the Claimant, and cannot be held accountable for the obligations of the 1st Respondent.

13. On 4th February 2011, after the decision of the High Court, the Claimant wrote to all Staff, advising:

“... following a Court Order by the High Court Mombasa, in Constitutional Petition Number 6 of 2011, suspending all our business operations, it has become necessary to close all our operations, in compliance with the Court Order.

Consequently, all Employees are required to take leave of absence without salary with immediate effect, until further notice.”

14. There was no employer-employee relationship with regard to maize business. The Parties in this transaction had entered into a profit sharing partnership. The Claimant was to be paid 6.7% of the net proceeds from sale of the maize. The Claimant handled importation dishonestly, resulting in loss of Kshs. 2,252,814 to the 1st Respondent. The Respondents pray the Court to dismiss the Claim with costs.

15. The Claim was dismissed by the Court on 27th September 2013, after the Advocates failed to attend Court for the hearing. The original file went missing thereafter, leading to an order for reconstruction of the file, recorded on 6th February 2015. The Claim was reinstated through a Ruling of the Court delivered on 26th June 2015, upon the application of the Claimant.

16. **The Claimant** gave evidence on 27th February 2017 and 26th July 2018. Financial Consultant Reuben Jomeli Dianga gave evidence for the Claimant on the latter day, when Claimant's case rested. The 2nd Respondent gave evidence for the Respondents on 4th December 2018, when hearing closed. The matter was last mentioned on 4th February 2019, when Parties confirmed filing of their Closing Submissions.

17. In his evidence in chief, the Claimant repeated the averments contained in his Statement of Claim.

18. On cross-examination, he affirmed that the 2nd Respondent was his longtime friend. The 2nd Respondent engaged the Claimant specifically for the ticketing business the Respondents had entered into with the Municipality of Mombasa. The Claimant recruited Staff for the project. The project collapsed after Judgment was delivered at the High Court Mombasa. The Claimant issued termination of contract letters to Employees of the Respondents, after collapse of the project. Termination was on account of the Judgment of the High Court. The Claimant did not agree that his own employment was unsustainable, after collapse of the project. The Claimant accepted the salary paid to him. He was not aware of any Claim filed by any of the former Employees of the Respondents, alleging termination was unfair.

19. On the Zambia maize project, the Claimant told the Court he travelled with relatives of the 2nd Respondent. The trip was in June 2011, while the ticketing project was ended by the Judgment of the Court, delivered way back in May 2011. The trip was not a private arrangement.

20. On redirection, the Claimant told the Court he released the Employees who he had recruited. The Respondents in turn ought to have released the Claimant. He was instead sacked through a text message.

21. **Reuben Jomeli Dianga** told the Court he knows the Parties in this dispute. He worked for the Respondents for about 5 months, in 2010. He confirmed that the Claimant was employed by the Respondents, as stated in his Claim. Cross-examined, the Witness told the Court he was consulted by the Respondents whenever it was necessary to do so. He was on a retainer fee. He was involved in the contract between the 1st Respondent and Mombasa Municipal Council. Dianga left after the project collapsed. He was not sacked.

22. **The 2nd Respondent**, repeated the contents of Respondents' Pleadings, in his evidence in chief.

23. Cross-examined, he stated that the 1st Respondent was registered in 2002. The Claimant was not a Director or signatory to Respondents' bank accounts. The 2nd Respondent did not think it necessary to write the Claimant a letter of termination. The Claimant was a good and honest Employee. The Claimant was to receive 6.7% of the net profit after sale of maize. The transaction did not realize a profit, and no one received any dividend. Redirected, the 2nd Respondent stated he could not handle the ticketing contract alone, because of his low level of education. He engaged the Claimant to help him in performing the contract with Mombasa Municipal Council. The Claimant advised the Respondents, on termination of Employees after Judgment of the High Court. He expected the Claimant to advise the Respondents, on termination of the Claimant's own contract.

The Court Finds:-

24. The Claimant and the 2nd Respondent were friends for a long time. Out of this friendship, the 2nd Respondent invited the Claimant, to help the 2nd Respondent and his Company, the 1st Respondent herein, to set up personnel, managerial and administrative structures to operate a parking ticketing business, the Respondents had successfully procured from the Municipal Council of Mombasa.

25. The Claimant was Lead Project Advisor/Human Resource and Administration Manager. He was entrusted the role of employing other staff. The project commenced on 1st March 2010. The Claimant recruited other staff. Unfortunately the project did not roll out and continue successfully to the end as expected. The revenue collection and profit margin did not meet expectations. Other stakeholders in the Municipality resisted the project.

26. The Claimant was to receive a salary of Kshs. 300,000 monthly. He did not receive this. He states at paragraph 11 of the Statement of Claim that he accepted a lower monthly salary of Kshs. 150,000, 'out of own understanding of the circumstances.' He understood the project did not meet expectation. He confirmed in his evidence that he did not object to revised, inferior, monthly salary.

27. The most significant challenge to the project came in the form of ***Constitutional Petition Number 6 of 2011 at the High Court in Mombasa, filed by Kenya Transport Association against the Municipal Council of Mombasa and Summit Cove Lines Limited [1st Respondent herein]***. In a Judgment delivered on 20th May 2011, the High Court [Hon. Justice J.B. Ojwang'] ordered *inter alia*:

i. I declare as unlawful, null and void, the existing public-private partnership, between 1st and 2nd Respondents, regulating motor vehicle parking, collection of parking fees/ charges, and clamping of motor vehicles, within Mombasa County, for having been secured in breach of the Constitution and the law.

ii. An order is hereby issued prohibiting Respondents, their Servants, Employees, Agents or otherwise howsoever, from collecting parking charges/ fees on the basis of the existing public-private partnership recorded in Gazette Notices Nos. 4728 of 11th July 2003; 5727 and 5728 of 15th August 2003; 1594 of 2010; and 11859 of 2010.

28. This was the death knell of the business over which the Claimant was engaged by the Respondents. The Claimant concedes he advised the Respondents to release Staff, as there was no more work for them. The Claimant wrote termination letters to the Staff.

29. It would not be expected that the Claimant is retained as an Employee of the Respondents, without the project over which he was the Lead Project Advisor. The Judgment of the High Court brought everything to an end. Employment relationships could not be sustained, without the presence of the public-private partnership, between the 1st Respondent and Municipal Council of Mombasa.

30. The Claimant was a close friend of the 2nd Respondent; he was at the head of the public-private partnership; the 2nd Respondent was not familiar with the operations of the public-private partnership; and trusted the Claimant entirely, to advise and lead in the implementation of the project. The Claimant was keenly aware of the difficulties encountered by the Respondents in the project.

31. It is improper for the Claimant in the circumstances, to demand from the Respondents unreasonably high employment benefits, arising out of such a frustrated, and eventually failed, project. If the Claimant understood there was no money to pay him salary as had been promised at the outset, he ought to have understood that the Respondents were not in a position to operate a pension scheme; pay all arrears of salary; grant the Claimant annual leave pay; and notice pay. The ability of the Respondents to sustain an employer-employee relationship with the Claimant depended on the existence of the public-private partnership.

32. It is similarly impracticable to have expected the Respondents to go about invoking redundancy law under Section 40 of the Employment Act, issue redundancy notices and pay redundancy benefits to the Claimant, while the public-private partnership was frustrated by the Judgment of the Court.

33. The maize importation business further supports the view that the relationship between the Claimant and the Respondents was not a conventional employment relationship, warranting a quick resort to the Employment Act 2007.

34. The Claimant travelled with 2nd Respondent's relatives to Zambia and Tanzania, to bring in a consignment of maize. This was unrelated to the public-private partnership. The Claimant did not travel as an Employee of the Respondents; he did so as a confidant and business associate of the 2nd Respondent. He was to share in the profit. This trip and activity would suggest, even when the Claimant was 'employed' by the Respondents, it was not in the context of a conventional employer-employee relationship. It is unusual for an Employer and his relatives, to engage in maize importation business with an Employee, where at the heart of the business, is profit-sharing. The relationship between the Parties was a potpourri of family-friend-business-advisor-employer-employee, multifaceted associations. Each facet, influenced the other.

35. That said, it cannot be denied that in his hat as an Employee under the project, the Claimant was entitled to certain benefits, which on account of the challenges facing the business, and influenced perhaps by other aspects of the Parties' relationship, did not clarify and were never consistently paid to the Claimant as intended. Salaries were frequently adjusted, and not always paid even after adjustment. Various amounts have been pleaded to comprise the monthly salary, at different stages of the relationship. The Court as stated elsewhere, observed that the Claimant acceded to this state of affairs, saying he understood the circumstances, which the Court understands to include, the complexity of his relationship with the Respondents, not just the aspects relating to the financial inability of the Respondents to sustain the Claimant in employment.

36. The Respondents acknowledge the Claimant was employed as a Lead Project Advisor, and was not paid his salary and other benefits as had been intended, owing to the failure of the project.

37. The nature and form of these benefits cannot be ascertained with exactitude, owing largely to the complexity of the Parties' relationship. The 2nd Respondent for instance truthfully states in his evidence, that he expected the Claimant, to advise the Respondents, on Claimant's terms of separation. The Claimant advised on every other Employee's exit, except his own. The 2nd Respondent testified he trusted the Claimant to lead the project, because the 2nd Respondent did not have the technical knowledge to implement a project of this nature. The Claimant is not shown to have given advice uniformly, on exit of Staff across the board, to the Respondents.

38. The best way out of the dispute for the Parties, should have been voluntary settlement. There is evidence that Parties attempted this, but there was wide divergence in proposals and counterproposals, making it impossible to settle. The Claimant proposed he is paid a jaw-dropping Kshs.4,708,167 on 21st February 2012. The Respondent counter-proposed Kshs. 200,000 on 8th June 2012. The Claimant rejected this and made a revised proposal of Kshs. 3,094,000. The Parties' ability to achieve voluntary settlement seems to have been damaged in the smouldering ashes of the public-private partnership.

39. The Court shall for purposes of full and final settlement, having taken into account what is pleaded in Court; the Parties' unique and longstanding relationship; and their proposals and counterproposals before coming to Court, order the **Respondents to pay to the Claimant a global sum of Kshs.700,000.**

40. **No order on the costs.**

41. **No order on interest.**

IN SUM, IT IS ORDERED:-

a. The Respondents shall pay to the Claimant a global sum of Kshs.700,000 in full and final settlement of the Claim.

b. No order on the costs

c. No order on interest.

Dated and delivered at Mombasa this 28th day of March 2019.

James Rika

Judge