



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.316 OF 2016

ERNEST KIBET TORMOI.....CLAIMANT

VERSUS

KENYA FARMERS ASSOCIATION LIMITED.....RESPONDENT

RULING

1. The claimant by application and Notice of Motion dated 13th February, 2019 and brought under the provisions of Articles 48, 50 and 159 of the Constitution, 2010 and Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016 is seeking for orders that;

The judgement of the court delivered on 7th February, 2019 be reviewed in the following terms;

a. The award for termination benefits be reviewed from 6 years to 13 years of service making a cumulative amount of Ksh.1,630,464;

b. The award of the respondent of Ksh.578, 482.15 together with interest being alleged overdrawn salary at Moi's bridge be set aside.

c. The claimant be granted interest on all the liquidated awards.

d. The claimant be granted costs of the suit.

Costs of the application be awarded to the claimant.

2. The application is supported by the annexed affidavit of the claimant and on the grounds that in the court judgement delivered on 7th February, 2019 the court erroneously applied a multiplier of 6 years instead of 33 years while computing the termination benefits and it was not contested that the claimant worked for the respondent for 33 years. Even where the claimant resigned from the respondent in the year 2006 the same was not completed for the reason that there was no payment of terminal dues. The resignation was constructively caused by the respondent due to frustrations directed at the claimant. The award of Ksh.38, 006.00 instead of Ksh.49, 408.00 used by the respondent was by error.

3. Other grounds are that there is neither a Provident Fund nor a retirement fund for the benefits of the respondent's employee and the only retirement benefit for the claimant is payment of one month salary for each year worked.

4. The court partially allowed the counter-claim and awarded the respondent Ksh.578, 482.15 with interest being the alleged overdrawn salary at Moi's Bridge branch. There was no evidence by the respondent to prove the same and the claimant never admitted owing the same and the court formed a view that there was an admission. That even where this was the case, the claimant made a general admission of having drawn an advance of Ksh.587, 482.15.

5. The issue of the overdrawn salary advances was introduced midway the disciplinary proceedings and the claimant did not have sufficient opportunity to exonerate himself. He was cleared before he left his branch and such advances should not be recovered from him as they go back to the year 2012 and are time barred under section 90 of the Employment Act, 2007.

6. The claimant is also seeking to be awarded interests on the liquidated claims made. The costs due in the suit should have followed the cause.

7. In reply the respondent filed Response to the Notice of Motion in the form of Objections and on the grounds that the claimant worked for the respondent until he resigned on 7th July, 2006 and upon reapplication he was offered new employment on 27th November, 2006 on contract basis and such contract expired on 30th September, 2010. He was paid the terminal dues owing at the end.

8. The claimant was then employed on permanent basis vide letter dated 14th April, 2010 at a monthly basic salary of ksh.30,405.00 and the applied review for the court to undertake a multiplier of 33 years should not arise.

9. The counter-claim awarded with accrued interest as overdrawn salary is correct and which was based on the adduced evidence. The retirement benefits and provident fund schemes were would up in the year 1997 and all employees paid all benefits. The demand for one month pay for each year worked is not justified.

10. Costs awarded by the court are discretionary and this was not an error or omission by the court. The application is without merit and should be dismissed.

11. The claimant made oral submissions in court.

12. The court is allowed to review its orders under the provisions of Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016;

33. (1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—

(a) if there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;

(b) on account of some mistake or error apparent on the face of the record;

(c) if the judgment or ruling requires clarification; or

(d) for any other sufficient reason.

13. The claimant seeks to have the court judgement delivered on 7th February, 2019 reviewed to include terminal benefits assessed for 13 years instead of 6; to remove the orders on the counter—claim directing the payment of Ksh.587,482.15; inclusion on interests on the liquidated claims and costs of the suit.

14. On the issue of review for 13 years instead of 6 years for payment of terminal dues, it came out clearly from the pleadings, the evidence and submissions by the parties that the claimant was under distinct contracts of employment for the entire period of 13 years he worked with the respondent.

15. Paragraph 71 of the court judgement ha a finding that claims going back to the year 2006 when the claimant resigned from his employment are time barred. His claims and the counter-claims in this regard fall under the same provisions.

16. Even where the claimant resigned from his employment due to work frustrations by the respondent, such matter ought to have been addressed within the repealed Employment Act, Cap 226 Laws of Kenya where such related to the period of the years 1982 and ending 2006. Claims therefrom cannot be made part of claims arising upon termination of employment on 27th January, 2016.

17. Equally, the term period from 14th April, 2010 to 27th January, 2016 is not contested in any material way. The claimant was employed on a permanent basis and issued with letter to this effect. at paragraph 20 of the judgement, there is this analysis;

20. On 14th April, 2010 the claimant was offered permanent employment earning Ksh.30, 405.00 per month and a house allowance of Ksh.5, 250.00 and on 1st February, 2012 the claimant was transferred to Narok branch. In October, 2013 an audit was conducted at the branch and upon submissions of the report to the managing director various irregularities were noted and raised with the claimant being;

18. This was the last employment relationship the claimant had with the respondent. any claims arising outside of this period, unless admitted, is subject to the provisions of section 90 of the Employment Act, 2007. The finding therefore that the tabulation of terminal dues relates to 6 years is correct in my view noting the last employment phase of the claimant from the year 2010 to 2016.

19. With regard to the counter-claim and the award of Ksh.587, 481.15 the court noting the varying figures submitted by the respondent and in analysing the evidence in its entirety made reference to the response by the claimant at paragraph 72.

20. The response to amended defence and counter-claim is general and comprise mere denials.

21. counter-claim was addressed on its merits and findings made on the claimed stock shortage while at Embu and findings made with regard to claims for misapplied cash while the claimant was in Narok branch. The claims for overdrawn salary while the claimant was at Moi's Bridge were also analysed and on their merits and there being no evidence to challenge the same in any material way.

22. This being a matter which arose in the counter-claim and there being no tangible evidence by the claimant in this regard and on the claimant's evidence that employees were allowed to take salary advances, the findings found its justification therein.

23. A counter-claim being a suit in itself required the claimant to address as such. The counter-claim was therefore addressed on its merits.

24. On the review on interests on the liquidated claims and costs, indeed it is a provision under Rule 29(3) of the Employment and Labour Relations Court (Procedure) Rules, 2016 to order for the payment of interests on any liquidated claims. the Rule provides that;

3. Where a suit involves a liquidated amount that is claimed and specified at the time of filing a statement of claim and the Court orders that the amount claimed or part of the amount be paid to the claimant, it may, in addition to that order, direct that interest be paid on the liquidated amount awarded at Court rates.

25. On this basis, on the Balance of salary between April, 2014 and October, 2014 at Ksh.285, 923.00; and Salary due up and until 27th January, 2016 at Ksh.998, 685.00 there is interests due from the date of filing suit and until paid in full with interest payable at court rates.

26. On costs, section 12(4) of the Employment and Labour Relations Court Act, 2011 requires the court to order for costs sparingly. The court is invited to orders for costs where this is just. The findings herein on costs shall not be disturbed.

Accordingly, application is only allowed with regard to a review on the interest's payable on the liquidated claims as set out above at paragraph 25 above. Each party shall bear own costs.

Delivered at Nakuru this 28th day of March, 2019

M. MBARU

JUDGE

In the presence of: