



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 204 OF 2017

FREDRICK NYAMAI MUTUNGA.....CLAIMANT

VERSUS

HUSSEIN ASHUR AHMED T/A

AL JAZEERA PROPERTIES LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This is an employment dispute between Fredrick Nyamai Mutunga and his former employer Hussein Ashur Ahmed trading in the name and style of Al Jazeera Properties Limited.
2. The Claimant’s case is documented by a Memorandum of Claim dated 6th March 2017 and filed in court on 14th March 2017. The Respondent’s defence is contained in a Response dated 30th March 2017 and amended on 30th October 2018.
3. When the matter came up for hearing, the parties testified on their own behalf and further filed written submissions.

The Claimant’s Case

4. The Claimant states that he was employed by the Respondent as a caretaker earning a monthly salary of Kshs. 6,000 from 10th November 2000. He adds that he worked until 19th January 2017 when his employment was terminated.
5. The Claimant avers that his employment was terminated when he requested for a salary increment. He submits that the termination was unlawful and unfair and now claims the following:

- a) Salary arrears for 16 years.....Kshs. 3,209,856
- b) One month’s salary in lieu of notice.....22,718
- c) Gratuity for 16 years.....181,744
- d) Salary for 19 days in January 2017.....14,388
- e) Public holidays worked.....266,464
- f) Leave pay for 16 years.....363,488
- g) Compensation for unfair termination.....272,616
- h) Accumulated off duties.....581,376
- i) Costs plus interest

The Respondent’s Case

6. In its Response as amended on 30th October 2018, the Respondent admits having engaged the Claimant as a general labourer in the year 2015 at a mutually agreed monthly salary of Kshs. 6,000.

7. The Respondent states that its property management business was registered on 8th December 2008 and commenced operations on 2009. In 2015, the Claimant was stationed at Plot Number XI/780, Sparki Almas House but due to complaints by tenants about the Claimant's violent behaviour and dishonest and rude nature, he was moved to Plot No 466/XVI, Majengo Msaji in 2016.

8. The Respondent states that the tenants at Plot No 466/XVI, Majengo Msaji also complained about the Claimant's negative behaviour. On 16th January 2017, the Claimant was called to the Respondents' office and informed of the complaints by tenants. The Claimant is said to have taken an advance of Kshs. 3,000 before leaving never to return.

9. The Respondent denies terminating the Claimant's employment and states that the Claimant was offered to be moved to another property.

10. The Respondent states that following a complaint to the KUDHEIHA Workers by the Claimant, the Respondent paid him Kshs. 50,000 in full and final settlement of his claim.

Findings and Determination

11. The first issue for determination in this case is whether the Claimant's claim is properly before the Court in light of proceedings before KUDHEIHA Workers which culminated in payment of Kshs. 50,000 to the claimant.

12. In support of its defence against the Claimant's claim, the Respondent produced a Certificate of Payment dated 9th February 2017 by which the Claimant was paid Kshs. 50,000 in settlement of his final benefits from his former employer.

13. The Claimant admitted having lodged a complaint with KUDHEIHA Workers. He further admitted having received some money from the Union although he feigned ignorance as to the source and purpose of the money. He also disputed the figure of Kshs. 50,000 specified in the Certificate of Payment.

14. In *Elizabeth Wanjiru Njogu v Kangei Nyakinyua Building Co Limited (Cause No 385 of 2011)* this Court rendered itself thus:

“A party who voluntarily submits himself to ADR and even reaps the benefits thereof cannot come to court and question the process if they did not take issue during the process. The court will only interfere with the process and/or outcome of ADR if manifest miscarriage of justice has occurred or where the Constitution or any written law have been contravened.”

15. From the evidence on record, the Claimant himself initiated an Alternative Dispute Resolution process by reporting his dispute to the Union. He participated in the ADR process and finally reaped benefits from it. He did not raise any issues regarding the process and did not point out to the Court any instances of violation of the law. To allow him to make the same claims before the Court would be tantamount to allowing him a second bite at the cherry, which is a clear case of abuse of the court process.

16. For the foregoing reasons, the Claimant's entire claim fails and is dismissed.

17. Each party will bear his own costs.

18. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 14TH DAY OF MARCH 2019

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JUDGE

Appearance:

Mr. Gekonde for the Claimant

Ms. Mohamed the Respondent