



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 268 OF 2014

KENNETH WANJOHI KAREITHI.....CLAIMANT

VERSUS

OLYMPIA CAPITAL HOLDINGS LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 24th May, 2019)

JUDGMENT

The claimant filed the memorandum of claim on 25.02.2014 through Ombati & Company Advocates. The claimant prayed for judgment against the respondent for:

- 1) Kshs. 11, 229, 398.30 as particularised in paragraph 2.10 (January 2014 salary Kshs. 700,000.00; February 2014 salary 11 days Kshs. 256, 667.00; 28 days leave Mather + Platt Kshs. 466, 667.00; one month ex gratia pay Kshs. 700,000.00; one month pay for gratuity Kshs. 700,000.00; one year salary for compensation for unfair termination Kshs. 8, 400, 000.00; and Safaricom bill January 2014 (actual) Kshs.6, 064.30).
- 2) A declaration that the termination of the claimant's employment was unlawful, illegal, unfair and wrongful.
- 3) Damages for unlawful, illegal, unfair and wrongful termination of claimant's employment.
- 4) Costs of the suit.
- 5) Interest on 1, 2, and 3 above.
- 6) Any other relief as the Court may deem just.

In the alternative and without prejudice to the above the claimant prays for summary judgment and orders against the respondent for:

- 7) Kshs. 441, 985.50 in respect of dishonoured.
- 8) Kshs.550.00 bank charges in respect of dishonoured cheque.
- 9) Cost and interest.
- 10) Any other or further order or relief as the Honourable Court deem fit.

The respondent filed a defence and counterclaim on 26.03.2014 through Kibungei & Company Advocates. The respondent prayed that the claimant's claim be struck out or dismissed with costs to the respondent and judgment be entered for the respondent against the claimant for:

- a) Kshs. 233, 750.00 (being payment of invoice dated 29.01.2014 to Forbes Africa Magazine in the sum of Kshs.233, 750.00 exclusive of VAT – following a negotiation of 50% discount between the respondent and the said Forbes Africa in respect of the advertisement caused by the claimant unilaterally and unprocedurally)
- b) Cost of the cause and interest thereon.

- c) Declaration that the claimant's termination was lawful, fair and justified in the circumstances.
- d) Declaration that the claimant was paid all his lawful terminal dues as entitled.
- e) Any other or further relief as the Honourable Court may deem fit to grant.

The evidence is that the claimant was employed by the respondent's subsidiary company known as Mather and Platt Kenya Limited. By the letter dated 12.05.2012 Mather and Platt Kenya Limited employed the claimant as the Chief Executive Officer (CEO) for Commercial Sales and Services of the Company at a gross pay of Kshs. 500, 000.00 per month. The employment was effective 14.05.2012. By the letter dated 19.09.2012 the respondent informed the Capital Markets Authority that the claimant had been appointed the CEO for the respondent effective 19.09.2012.

The claimant wrote the letter dated 24.05.2013 resigning as the CEO for Mather and Platt Kenya Limited so as to commence and focus on the service as CEO for the respondent. The letter gave 3 months notice period as stipulated in the terms of service between the claimant and Mather and Platt Kenya Limited. The evidence is that for the duration of 8 months the claimant served as CEO of the 2 companies, the arrangement was that Mather and Platt Kenya Limited pays Kshs. 500, 000.00 per month and the respondent tops with Kshs. 200, 000.00 per month making Kshs. 700, 000.00 per month. Mather and Platt Kenya Limited accepted the claimant's resignation by the letter dated 22.08.2013. The resignation was to take effect on 30.08.2013.

By the letter dated 04.09.2013, the respondent appointed the claimant to the position of CEO on full time basis at Kshs. 700,000.00 gross monthly pay.

The letter dated 11.11.2013 was on termination of the claimant's employment. The letter conveyed that the termination was effective 11.11.2013 and the claimant would be entitled to 3 months' notice. The claimant had served for 2 months and 11 days.

To answer the **1st issue** for determination, the Court returns that the evidence is clear that the parties were in a contract of service and the respondent employed the claimant by the letter dated 04.09.2013 and prior to that letter, the claimant had served on secondment as CEO for the respondent while also serving as the CEO for Mather and Platt Kenya Limited.

The claimant testified that after the termination letter he worked for part of November and December 2013. On 19.12.2013 he was blessed with a baby and he went on paternity leave. In early January he got back to the office to handover but he did not handover because he was told not to go to the office. The claimant exhibited the letter dated 04.12.2013 on his supplementary list of documents filed on 03.04.2017. It is the letter by the respondent, "**To Whom It May Concern**". Paragraph 6 of the letter stated, "**We recently undertook a Group HR restructuring process which unfortunately affected his role hence this mutual separation and we wish to confirm that he had no disciplinary case or any other negative reason for his exit other than this restructuring.**" The claimant testified that he never objected to the mutual separation until filing the suit and all correspondence prior to filing the suit were about computation of final dues and not that the separation had been unfair. The respondent's witness (RW) was the respondent's CEO. His evidence was that prior to separation he discussed with the claimant and the board was involved. There had been a difference in strategy and parties mutually agreed to separate. The Court has considered that evidence and returns that the termination was not unfair or unlawful because it was by mutual agreement.

To answer the **2nd issue** for determination, the Court returns that the separation was by mutual agreement and understanding and it was not unfair. Thus the claimant's prayer for a declaration in that regard and for payments based on the alleged unfair termination will collapse.

The Court has considered the counterclaim in which the respondent claims Kshs. 233, 750.00 being payment of invoice dated 29.01.2014 to Forbes Africa Magazine in the sum of Kshs.233, 750.00 exclusive of VAT – following a negotiation of 50% discount between the respondent and the said Forbes Africa in respect of the advertisement caused by the alleged claimant's unilateral breach of procurement rules. RW testified that the procurement rules and policies that were allegedly breached had not been filed. RW did not explain any material respect and particulars of the alleged breach of policy. While stating that the same was an expense not budgeted for, RW did not exhibit the budget that may have been approved. The Court reckons that there had been no disciplinary proceedings initiated and continued against the claimant by the respondent in that regard. The evidence is that the advertisement was published and the respondent benefited. The duties vested in the claimant by the letter of appointment dated 12.05.2012 included, "**participate in company matters of selling and marketing of its products, services and good name with the purpose of achieving annual sales and growth targets and goals.**" The Court returns that the advertisement was lawfully and procedurally undertaken by the claimant within that duty as was duly vested. Thus the counterclaim will fail and the respondent is instead liable to pay the claimant a sum of **Kshs.233, 750.00** that were unfairly deducted from the claimant's dues per the respondent's computation dated 18.02.2014. There was no dispute that claimant had been paid a sum of Kshs. 441, 985.50 as computed plus bank charges for bouncing cheque as was claimed. The payment was after filing the suit. The alternative prayer in the memorandum of claim having been fully provided for in this Court's findings, there remains no further issue for determination in the present suit. The respondent will pay the claimant's costs of the suit.

To answer the **3rd issue** for determination, the counterclaim will fail and a refund of the amount deducted will issue accordingly.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- a) The respondent to pay the claimant a sum of **Kshs.233, 750.00** by 01.07.2019 failing interest to be payable thereon at Court rates from the date of filing the suit till full payment.
- b) The counterclaim is dismissed.
- c) The respondent to pay costs of the claimant's claim and counterclaim.

Signed, dated and delivered in court at **Nairobi** this **Friday 24th May, 2019**.

BYRAM ONGAYA

JUDGE