



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 263 OF 2011

MERITA AKINYI OMBUOR.....CLAIMANT

VERSUS

SKYJET AVIATION UGANDA LIMITED.....RESPONDENT

(Before Hon. Lady Justice Maureen Onyango)

JUDGMENT

The Claimant, Merita Akinyi Ombuor filed a Memorandum of Claim on 24th February 2011, which was amended on 23rd March 2015 against the Respondent, Skyjet Aviation Uganda Ltd. She avers that she was employed by the Respondent as the Chief Executive Officer (CEO) through an appointment letter dated 16th November 2009 for a period of 5 years renewable by mutual consent. That on 24th November 2009, the Respondent bought her an electronic air ticket from Air Uganda to enable her fly from Nairobi to Entebbe to report to her new job. That Clause 6 of her appointment letter entitled her to a consolidated salary of USD 5,000 in the first 3 months from the date of appointment; free running Company Car; and Medical & Insurance Cover, outpatient cover at USD 1400 per annum and inpatient cover at USD 30,000 per annum. That she had worked for 2 months when the Respondent failed and/or refused to pay her as provided by the letter of appointment and that upon asking for the payment of her salary via email on 17th December 2009, the Respondent only paid her USD 1,000 in December 2009 and USD 1,000 in January 2010. That the Respondent has since then never made payments to her and that she mitigated her situation by securing employment on 29th August 2013 after being in the cold for 45 months.

That a fundamental term of the contract was that either party could terminate the contract by giving 6 months' notice and that she still holds the position of CEO even though the Respondent has unlawfully prevented her from reporting to work. That she continues to work for the Respondent from her Nairobi home as instructed by the Chairman, Mr. Garang Deng and the acting Director, Mr. Akol Ayil as evidenced by her Annexure III. That since her contract with the Respondent is still in force her monthly salaries and allowances continue to accrue until the said contract is lawfully terminated as per law.

She claims from the Respondent as here under:

- a) Unpaid Salary for the 45 months (USD 5000 x 45) USD 225,000
 - b) Pension Fund Contribution for 45 months (USD 500 x 45) USD 22,500
 - c) House Allowance (USD 1000 x 45) USD 45,000
 - d) Reimbursement of our client's use of an independent vehicle for 2 months approximately USD 2,000
 - e) Refund of unpaid Medical and Insurance Cover for 12 months (Inpatient at USD 30,000 & Outpatient at USD 1,400) USD 31,400
 - f) Notice period for 6 months (USD 5000 x 6) USD 30,000
- Total USD 355,900**

She prays that an award be entered against the Respondent for USD 357,900, interest at the rate of 14% from the date of appointment, a declaration that the contract of employment is still in force and lastly, costs of this suit.

The Respondent filed its defence on 10th March 2011 and an Amended Statement of Defence on 13th April 2015 denying there was an employment contract for 5 years renewable by mutual consent and all other averments made by the Claimant in her Amended Memorandum of Claim. That the Claim and the pleadings alluding to it are misconceived, vexatious and an abuse of the Court process as the Claimant is a stranger to it. That the Respondent is non-suited as it is not a party to the alleged contract of employment purported to have been signed between it and the Claimant and that it shall be seeking to have this suit struck out or dismissed with costs. That the alleged Chairman of the Respondent is a stranger to it because the company does not have such a position and that it is a stranger to the correspondence between the Claimant and the mentioned individuals. That alternatively, if at all the said contract was executed, then the purported Chairman lacked capacity to do so and/or it was a draft contract unilaterally executed by the Claimant and therefore invalid in law. It contends that it reserves the right to move this Court to compel the Claimant to deposit securities for its costs of defending this suit since it is non-suited and may not recover the same upon dismissal.

Evidence

The claimant testified on her behalf on 30th August 2015 but the respondent closed its case without calling evidence on 11th October 2018 when the case came up for defence hearing. The parties thereafter filed and exchanged written submissions. In her testimony, the claimant reiterated the averments in the amended claim.

Claimant's Submissions

The Claimant submits that the Respondent's defence is mere denials not supported by any witness as none has been presented before court. That the Respondent's list of documents dated 09th January 2013 has also not been presented by any witness and thus lacks any probative value.

She submits that her contract ran its course and was not terminated and neither was she served with a notice of termination as per Section 35 of the Employment Act and that the Respondent is therefore in breach of contract. She relies on the decision of the court in *Ruth Gathoni Kariuki –v- Presbyterian Church of East Africa & Presbyterian Foundation (2012) eKLR* in which it was held that the employment contract was constructively renewable where a contract lapsed and the employer had failed to renew it.

The Claimant further relies on the case of *Fred Mudave Gogo –v- G4S Services (K) Ltd [2014] eKLR* where the court stated that a fundamental element of a contract of employment is that the employee renders his services for remuneration at the employer's business. That if the employer fails to pay the employee or if the employee fails to render his services then the employment contract is considered to have been breached. That an employment contract creates rights and responsibilities between parties and that the Claimant herein thus fulfilled her contractual obligations when she reported to work. She prays for a declaration that the Respondent breached the contract of employment.

Respondent's Submissions

The Respondent submits that the purported contract of employment is not signed even by the purported Chairman of the Board of the Respondent and that the same cannot therefore constitute a written contract of employment. That the Claimant admitted in cross-examination that the airline was not operational and that she was paid USD 1000 in cash by one Mr. Akol, payment which was made in Kenya and not by the Respondent. This means that she was in Kenya and only visited Uganda once and that she never worked from Uganda where the Respondent Company is based. That her evidence on record is inconsistent with the background of airline business and does not connect her in any way to the Respondent and she thus could not have been employed by the Respondent.

That the Claimant has not discharged the burden of proof of employment by the Respondent but that if this Hon. Court may be minded to consider her an employee of the Respondent, then the only time of engagement between the Claimant and Mr. Akol was between November 2009 and January 2010. That since then, she did not engage with the purported Respondent's agent Mr. Akol and therefore her employment constructively stood terminated from the end of January 2010. That since the Claimant alleges she served for 2 months, nominal damages for 4 months based on the sum of USD 1,000 received by her from Mr. Akol is reasonable as no payslip has been produced to show salary or other monies she received as an employee.

Determination

The first issue for determination is whether there is a valid written contract of employment between the Claimant and the Respondent. The second issue for determination is whether the Claimant is still an employee of the Respondent. The third issue for determination is whether the Claimant is entitled to the reliefs sought.

The contract of employment produced in this court is indeed only signed by the Claimant while the said Mr. Garang Deng who is indicated as the Chairman of the Board did not sign the contract. It is noted that the claimant did not comment on the documents filed by the respondent which include the Memorandum and Articles of Association of the respondent, none of which refer to Mr. Garang Deng as either Chairman of the respondent or a Director thereof. The foregoing notwithstanding, a contract of service need not be in writing as was held by the Court of Appeal in *Kenya Airways Limited –v- Satwant Singh Flora [2013] eKLR*. In that case, the court quoted *Halsbury's Laws of England (4th Edition), Volume 16 (1A) page 11, paragraph 15* stating that:

“In general a contract of employment need not be in any particular form. A contract of employment may thus be inferred from conduct which shows that such a contract was intended although never expressed, as where there has in fact been service of the kind usually performed by employees.”

Further Section 2 of the Employment Act defines a contract of service to include the following –

“contract of service” means an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of this Act applies;

The issue for the court to consider is therefore if from the conduct of the

parties as may be gleaned from the evidence and documents filed by the claimant an employment relationship may be inferred.

I have gone through the email correspondence between the parties especially those as page 42 and 43 of the claimant’s bundle. In her email sent on 16th December 2009, the claimant wrote as follows –

“From: merita ombuor <meritaombuor@yahoo.com>

Subject: MY SALARY

To: "Akol Emmanuel" <akolncb@yahoo.com>

Cc: fobunga@yahoo.com, henry.obonyo@gmail.com

Date: Wednesday, December 16, 2009, 10:57 AM

Dear Akol.

I hope my email finds you in good health. I am fine and trying to wrap up a few plans before the industry closes on Friday this week for the holidays.

This email is to enquire about my salary. I started work on 16th Nov 2009 and since then I have dedicated my 100% efforts, time and resources in ensuring necessary preparations are made for the launch of Skyjet operations hopefully by 15th January,

I had expected that by end of Nov I would be paid my half month salary of USD2500 and as is universal practice get my December salary by 23rd to enable my family and I celebrate Xmas.

May I know when I can collect my salary so that I can meet my family obligations. I await to hear from you soonest.

I wish you all a Merry Xmas and lovely new year.

Sincerely,

Merita”

In the response on the same page, Akol Emmanuel responded thus –

“From: Akol Emmanuel <akolncb@yahoo.com>

To: merita ombuor <meritaombuor@yahoo.com>

Cc: fobunga@yahoo.com; henry.obonyo@gmail.com

Sent: Thu, December 17, 2009 10:18:54 AM

Subject: Re: MY SALARY

Dear Merita,

This is to acknowledge the receipt of your message herein. I will discuss with Mzee and revert to you once we have agreed on where to get the cash for the said Salary. Kindly note that there is no objection to make the said payment to you.

Wish you nice day.

Regards,

Akol”

The same day, the 17th December 2009, Fredrick Otieno further addressed an email to the claimant as follows –

“From: Fredrick otieno <fobunga@yahoo.com>

To: Merita Ombuor <meritaombuor@yahoo.com>

Cc: Akol Ayii <akolnbc@yahoo.com>

Sent: Thu, December 17, 2009 3:45:03 PM

Subject: Re: MY SALARY

Hello Merita,

Thank you for the email on the subject matter. I would like to emphasize that Skyjet will fly under your stewardship and that any malfeasance over your November salary is receiving great attention. I would also like to take this opportunity to thank you for the contacts you have established to enable Skyjet hit the ground running. Be blessed and like Akol has indicated, Mzee will ensure that the issue is sorted in good time.

Kind Regards

Fred Otieno”

The claimant responded thus –

“From: merita ombuor <meritaombuor@yahoo.com>

To: Fredrick otieno <fobunga@yahoo.com>

Cc: Ako! Ayii <akolnbc@yahoo.com>

Sent: Thu, December 17, 2009 6:19:22 PM

Subject: Re: MY SALARY

Dear Fred/Akol

Thanks so much for the assurance. We are pushing hard for things to work. In fact as soon as Capt Asrat who is doing the operations planning completes the schedule with actual flight times we shall file with all relevant CAAs and ask Akol to proceed with supporting the Sudan sectors with 5th Freedom traffic rights. See the schedule we have arrived at after doing thorough market research involving agents, pax, cargo agents and taking into account we do not want to have route wars with big carriers yet. We shall polish to ensure greater connectivity with European and Far East/Mid east carriers over the three main entry points of NBO/EBB/KRT.

Your comments are most welcome,

Merita”

The emails are a confirmation that the claimant was engaged by the respondent in the terms set out in the contract at page 1, Annexure I of the claimant’s bundle, at least in so far as the salary is concerned.

Further in the submissions filed on behalf of the respondent it is admitted as follows –

“In the alternative, if your Lordship may be minded to consider the Claimant as employee of the Respondent, which is not proved, then, the only time of engagement between the Claimant and Mr. Akol was between November 2009 and January, 2010. The Claimant did not engage with Mr. Akol, the purported Respondent’s agent and therefore her employment constructively stood terminated from the end of January 2010.

In the background of the aforesaid, in the light of the allegation of service for a period of about two (2) months, nominal damages for a period of four (4) months based on the sum of US Dollars 1000 received by her from Mr. Akol is reasonable as no payslip has been produced to show salary or other money.”

From the foregoing, I find that there was an employment relationship between the claimant and the respondent.

The second issue for determination is whether claimant’s contract was renewed and is in place to date.

It was the claimant's testimony that the respondent's stopped communicating with her in February 2010, and was paid last salary in January 2010. For the foregoing, the contract was frustrated and or repudiated by the respondent in February 2010. The claimant thus became entitled to terminate the contract for breach of fundamental terms in February 2010. The contract could not have been presumed to persist beyond February 2010 when the claimant stopped communicating with the respondent and when it is presumed she stopped working for the respondent.

I therefore find that the claimant's contract was terminated in February 2010.

The final issue is whether the claimant is entitled to the prayers sought. Having found that the claimant worked for the respondent from 16th November 2009 to February 2010, she is entitled to salary for the said period in the sum of USD17,500. Her contract having provided for termination notice of 6 months, the claimant is entitled to a further USD30,000 in lieu of notice.

The claimant is not entitled to any of the other prayers in her amended memorandum of claim taking into account that she worked for the respondent for hardly three months. The claims for pension and house allowance were not proved by the claimant. She further did not prove the use of an independent vehicle for two months, or that she is entitled to refund of medical and insurance cover. These prayers are dismissed.

In conclusion, I award the claimant the sum of USD 47,500 less USD2000 paid to the claimant.

Judgment is thus entered for the claimant against the respondent in the sum of USD45,500.

The respondent shall pay claimant's costs and decretal sum shall attract interest at court rates from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6TH DAY OF MAY 2019

MAUREEN ONYANGO

JUDGE