



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 449 OF 2018

DR. ISAAC MUMINA MUTUA.....CLAIMANT

VERSUS

THE EAST AFRICAN PORTLAND CEMENT COMPANY LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Wednesday 31st July, 2019)

JUDGMENT

The claimant filed the statement of claim on 29.03.2018 through M. Mutinda & Associates Advocates. The amended statement of claim was dated 06.04.2018. The claimant prayed for judgment against the respondent for:

- a) A declaration the termination of the claimant's contract by the respondent was illegal, unlawful, and null and void.
- b) A declaration that the claimant's contract impliedly renewed and extended for 5 years from 05.11.2017 hence the claimant is entitled to salary.
- c) Three months' salary in line of notice Kshs.407, 925.0012 x3 making Kshs.1, 223, 775.00.
- d) Gratuity at 31% for each completed years of service Kshs.407,925 x 12 x 5 x 31% making Kshs.7, 587, 405 less Kshs.2.2 M paid thus, Kshs.5, 387, 405.00 claimed.
- e) Salary for 5 years from 05.11.2017 to 04.11.2022 at Kshs.717, 925.00 x 5 making Kshs.43, 075, 500.00.
- f) Costs and interest on c, d, and e above.

The respondent filed the statement of defence on 17.05.2018 through Daly & Inamdar Advocates. The respondent prayed that the claimant's suit be dismissed with costs.

It is not in dispute that by a contract dated 01.10.2012 the respondent employed the claimant as the Head of ICT (Job Group 2) for a period of 5 years. The contract was renewable provided the claimant requested for renewal at least 6 months before the expiry date. The claimant reported on 05.11.2012 so that the contract was lapsing on or about 05.11.2017. Six (6) months prior to the lapsing date was about 05.05.2017. On 22.05.2017 the claimant wrote to the respondent's Managing Director seeking renewal of the contract. The letter was received by the respondent on 23.05.2017. The Court observes that the request for renewal was about 17 days late. On 09.11.2017 the respondent's Head of Human Relations conveyed to the claimant that a decision had been made that his contract would not be renewed as per clause 4 of the letter of appointment. It was conveyed that his last day at work had been 04.11.2017. Further, he would be paid all his terminal dues up to that date less liabilities owed to the respondent. His accumulated 20 leave days would be compensated for as per the company policy.

Clause 4 on renewal of appointment stated, **“The parties to this contract may renew the contract on terms and conditions to be agreed in writing. Should you wish to be reappointed in the same position, you will be required to make a written request at least six (6) months before the expiry date of this contract.”**

The final dues paid to the claimant up to 05.11.2017 were in the sum of Kshs.8, 017, 083.13 including 31 % gratuity Kshs.8, 017, 083.13; 20 leave days Kshs.339, 937.50; salary up to 04.11.2017 Kshs.89, 740.63 and after lawful deductions he was paid a net of Kshs.5, 215, 204.00 . The claimant's case was that he was assigned duties beyond the date the contract was lapsing on 05.11.2017 and therefore he was unfairly terminated when it was conveyed to him that the contract had lapsed.

The claimant testified that he had written an earlier letter on 24.04.2017 asking for renewal of the contract so that his letter of 22.05.2017 was a reminder letter. In cross examination he admitted that the letter of 22.05.2017 never referred to an earlier letter of 24.04.2017 and he admitted that in his witness statement he did not refer to his purported letter of 24.04.2017. The claimant also testified that out of practice the respondent had an obligation to renew the contract.

The Court has revisited the evidence. The claimant in his witness statement is clear that he requested for renewal by his letter dated 22.05.2017 delivered on 23.05.2017. The letter of 22.05.2017 does not state that it was a reminder letter to an earlier letter of 24.04.2017. The Court finds that the claimant applied for renewal outside the agreed time of at least 6 months prior to the date the contract was lapsing. Further the Court returns that there was no evidence that the claimant had done an earlier letter for renewal dated 24.04.2017. The Court finds that as submitted for the respondent, even if the request to renew had been done within the agreed time, clause 4 of the letter of appointment gave the respondent discretion to renew. Thus the Court considers that even with a timely application the respondent only had a duty to reply renewing or not renewing. If the respondent had received a timely request and failed to reply promptly, at best the claimant would be entitled to three months' pay in lieu of notice in terms of clause 6 of the letter of termination which prescribed such pay in event of either party terminating. There being no such timely request, the Court returns that the claimant's contract of service lapsed by effluxion of the contractual 5 years. The claimant's suit will therefore fail, the claimant having been paid all the contractual terminal dues including gratuity and the contract being fully performed.

The claimant says he was assigned beyond the contractual term but the Court returns that such alleged assignments were not established at all and the parties in the present case were bound by the written contract which was fully performed and nothing more left of the contract of service.

The Court has considered that the respondent had failed to reply the claimant's belated request for renewal and the Court further notes that the communication on separation as agreed came after lapsing of the contract which may have led the claimant to be misled that he had a valid claim. In that consideration each party will bear own costs of the suit.

In conclusion the claimant's suit is hereby dismissed with orders that each party shall bear own costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Wednesday 31st July, 2019**.

BYRAM ONGAYA

JUDGE