



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO 424 OF 2014**

**FRANCIS OKUKU OYUGI.....CLAIMANT**

**VERSUS**

**KENYA WINE AGENCIES LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This is a fairly old matter, having been filed in the High Court at Nairobi as Civil Case No 613 of 2006. Pursuant to a preliminary objection on the question of jurisdiction, raised by the Respondent, **Gikonyo J** in a ruling delivered on 10<sup>th</sup> February 2014, directed that the file be transmitted to this Court for hearing and disposal.

2. The matter was mentioned before the then Principal Judge of this Court, **Nduma J** on 28<sup>th</sup> March 2014, who referred it to me for allocation of a hearing date. I began hearing the matter on 17<sup>th</sup> November 2015 and it turned out to be a difficult trial for two reasons; first, the Claimant was in poor health and second, Counsel appearing for the parties made numerous objections in the course of trial.

3. On 28<sup>th</sup> January 2016, I made an *ex tempore* ruling on admissibility of unpleaded documentary evidence. Counsel for the Respondent, being dissatisfied with my ruling, applied for leave to challenge it in the Court of Appeal, which I granted. On 15<sup>th</sup> February 2016, Counsel for the Respondent informed the Court that he had instructions to file a formal application for stay of proceedings pending determination of the intended appeal.

4. I gave directions setting timelines on the filing of and response to the application for stay of proceedings but it would appear that no such application was ever filed. In the meantime, I was transferred from Nairobi Station and as often happens, the file was re-allocated to **Makau J** who took over my part heard matters. He mentioned the matter on 18<sup>th</sup> March 2019 and directed that it be fixed for hearing before me during the Nairobi Station Service Week in April 2019.

5. On 4<sup>th</sup> April 2019, with new Counsel appearing on both sides, I was informed that the Claimant was too ill to testify. Counsel for the parties therefor agreed that the matter be dispensed with by way of written submissions. I directed the parties to appear before the Deputy Registrar in Nairobi on 4<sup>th</sup> June 2019, for confirmation of filing of submissions. By the time the file was transmitted to me for writing of judgment, only the Respondent had filed submissions.

6. With this background in view, I need to state that this judgment is based on the pleadings and supporting documents filed by both the parties as well as the submissions filed by the Respondent.

**The Claimant's Case**

7. The Claimant's case is documented by a plaint dated 8<sup>th</sup> November 2006 and amended in 2011. He states that on 30<sup>th</sup> June 2003, the Permanent Secretary, Ministry of Trade and Industry advised him of his appointment as the Respondent's Managing Director. His appointment was published in the Kenya Gazette No 4740 of 18<sup>th</sup> July 2003.

8. The Claimant took up his appointment and worked until 17<sup>th</sup> June 2005, when he was directed by the Permanent Secretary, Ministry of Trade and Industry to proceed on leave effective 20<sup>th</sup> June 2005, pending investigations into alleged financial mismanagement by the Efficiency Monitoring Unit of the Office of the President.

9. On 11<sup>th</sup> May 2006, the Respondent terminated the Claimant's contract of employment effective 30<sup>th</sup> September 2005. The termination was confirmed vide Gazette Notice No 3358 of 12<sup>th</sup> May 2006, which revoked the Claimant's appointment from 2<sup>nd</sup> May 2006.

10. The Claimant avers that upon termination of his employment contract, the Respondent failed to pay him his final dues including accrued salary, benefits and gratuity.

11. The Claimant's claim against the Respondent is as follows:

- a) Net balance on salary for June to April 2006.....Kshs. 2,104,156.90
- b) Pay in lieu of leave up to 30<sup>th</sup> April 2006 (net of tax).....284,516.13
- c) Leave travelling allowance for 2004-2006 (net of tax).....132,300.00
- d) Gratuity (18<sup>th</sup> June 2003-30<sup>th</sup> April 2006 net of tax).....1,426,635.00

12. The Claimant also asks for costs plus interest.

### **The Respondent's Case**

13. In its amended Statement of Defence and Counterclaim, the Respondent admits having employed the Claimant as pleaded by him. The Respondent however states that the Claimant was negligent in the performance and execution of his duties. The Respondent therefore maintains that the Claimant's dismissal was justified.

14. The Respondent accuses the Claimant of abuse of office and breach of fiduciary duty, citing the following particulars:

- a) Undertaking fraudulent, unauthorised actions and expenditures;
- b) Exercising his powers for improper purposes;
- c) Misappropriation of funds;
- d) False accounting and manipulation of the Respondent's accounts;
- e) Failing to ensure that proper accounts were kept contrary to the Companies Act;
- f) Acting in contravention of Board directives.

15. The Respondent concludes that the Claimant's acts and/or omissions amounted to gross misconduct and further states that as a consequence of the Claimant's conduct, it has suffered loss and damage. The Respondent therefore claims from the Claimant the sum of Kshs. 6,222,636.01 by way of counterclaim.

16. The Respondent also claims general damages for breach of fiduciary obligations.

### **Findings and Determination**

17. Although in the body of his claim, the Claimant makes allegations of wrongful dismissal, he made no prayer for either compensation or damages. In fact, all the Claimant asks for is accrued salary and benefits.

18. It is not in contest that at the time the Claimant's employment was terminated, the Employment Act, 2007 had not come into effect. In the written submissions filed on behalf of the Respondent on 10<sup>th</sup> June 2019, reference was made to the decision in **Ezekiel Nyangoya Okemwa v Kenya Marine & Fisheries Research Institute [2016] eKLR** where my brother **Rika J** held that in causes of action arising prior to enactment of the Employment Act, 2007, recourse cannot be to that law but rather to the law governing the applicable contract of employment.

19. The Claimant himself did not cite any particular breach of his contract of employment and having made no prayer in that regard, the Court will not engage in that direction.

20. What remains for determination is whether the Claimant has proved his claims for accrued salary and benefits. In his amended plaint, the Claimant gives several figures, which he seeks from the Respondent. He however did not lead any evidence to support these claims.

21. Looking at the specific claims, they are in the nature of special damages and the way to prove such claims is well established. In **Ouma v Nairobi City Council [1976] KLR Chesoni J** (as then was) stated thus:

**“for a plaintiff to succeed in a claim for special damages he must plead it with sufficient particularity and must also prove it by**

*evidence.”*

22. Earlier on *in Bonham Carter v Hyde Park Hotel Limited [1948] 64 TLR 177*, Lord Goddard C.J rendered himself in the following terms:

***“Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court saying, ‘this is what I have lost, I ask you to give me these damages,’ they have to prove it”***

23. This remains good law and more recently the Kenyan Court of Appeal in *Godfrey Julius Ndumba Mbogori & another v Nairobi City County [2018] eKLR* confirmed that indeed a claim for special damages must not only be specifically pleaded but must also be proved with a degree of certainty and particularity.

24. The Claimant did not prove any of his claims which therefore fail and are dismissed.

25. What is good for the goose is good for the gander. Much like the Claimant, the Respondent did not lead any evidence to support its counterclaim against the Claimant. The counterclaim therefore also fails.

26. In the end, both the Claimant’s claim and the Respondent’s counterclaim are dismissed with each party bearing their own costs.

27. It is so ordered.

**DATED AND SIGNED AT NAIROBI THIS 16<sup>TH</sup> DAY OF JULY 2019**

**LINNET NDOLO**

**JUDGE**

**DELIVERED AT NAIROBI THIS 26TH DAY OF JULY 2019.**

**MAUREEN ONYANGO**

**JUDGE**

Appearance:

Mr. Mulaku h/b Mr. Namada for the Claimant

Mr. Obuya for the Respondent