



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT AT NAIROBI**

**CAUSE NUMBER 1254 OF 2014**

**BETWEEN**

**1. HASSAN EDIN KONO**

**2. ISACKO ABAKANO HARSAMA**

**3. ABDULAHI ISACK AMARU.....CLAIMANTS**

**VERSUS**

**RESOURCE PROTECTION LIMITED.....RESPONDENT**

*Rika J*

*Court Assistant: Lawrence Osotsi*

*Nyandieka & Associates, Advocates for the Claimants*

*LJA Associates, Advocates for the Respondent*

**JUDGMENT**

1. The Claimants filed their Statement of Claim on 28<sup>th</sup> February 2014. They aver that they were employed as Game Rangers by the Respondent. The Respondent operated a Wildlife Conservancy, known as Nguruman Escarpment Laro Conservancy.

2. They were employed in the year 2004. They were sent by the Respondent on unpaid leave of 3 months, on 26<sup>th</sup> October 2012. This was, at the end of 3 months, extended by another 3 months, lapsing 26<sup>th</sup> April 2013.

3. The Claimants visited the Respondent's Offices after this, seeking to know when they would resume duty. The Respondent did not provide them with an answer, and did not pay them any terminal dues.

4. They instructed their Advocate to issue demand upon the Respondent in July 2013. They demanded to be told what their employment status was. There was no response from the Respondent. They aver that their contracts appear to have been terminated without lawful cause and without compensation. They seek Judgment against the Respondent for:-

- a) 3 months' salary in lieu of notice.
- b) 12 months' salary in compensation for unfair termination.
- c) 9 months' salary in lieu of annual leave.
- d) Overtime over a period of 9 years.
- e) Gratuity at 30 days' salary for every complete year of service.
- f) Gun allowance for every complete year of service.
- g) House allowance in arrears over the period of service.

- h) Certificates of Service.
- i) Any other suitable order.
- j) Costs and Interest.

5. The monetary claim totals Kshs. 1,523,816.

6. The Respondent filed its Statement of Response on 28<sup>th</sup> January 2015. Its position is that the Claimants were employed by a Company called Ol Donyo Laro Limited, in 2004. Ol Donyo Laro Limited divested in Wildlife Conservancy, transferring its business and Employees, to the Respondent herein. The 2 Companies are different legal entities.

7. The Respondent was evicted from a parcel of land upon which it carried out its activities, by a Company called Nguruman Limited, after the 2 Companies were involved in a hotly contested land dispute.

8. The Respondent could therefore not sustain its business, and the Claimants had no more work. Parties agreed therefore that the Claimants go on unpaid leave of 3 months, with an option for extension by another 3 months. Upon expiry of the agreed period, the Claimants failed to resume work. The Respondent deemed them to have constructively resigned. They did not at any time enquire from the Respondent, about their employment status. They were to resume duty automatically at the end of unpaid leave.

9. They did not work overtime. They utilized all their annual leave days. The Claim is time-barred. The Industrial Court at Nakuru, not Nairobi, has jurisdiction in the matter, Nguruman Escarpment being at the Rift Valley.

10. The Respondent states: the Claimants are not entitled to 3 months' salary in lieu of notice; they are not entitled to any award under unfair termination as the Respondent did not terminate their contracts at all; they are not owed any annual leave days; they did not work overtime; they were accommodated at the workplace; and are not entitled to gun allowance and gratuity. The Respondent prays the Court to dismiss the Claim with costs.

11. The Claimants filed Reply to the Statement of Response on 8<sup>th</sup> March 2017. They reiterate that they were Employees of the Respondent. They worked for the same Employer, at the same place, and were not aware of any change in Management of the Conservancy. They reported back after unpaid leave, but were verbally dismissed after several visits. The contracts were concluded at Nairobi and the Respondent has registered Offices there. The Industrial Court at Nairobi has jurisdiction to hear and determine the matter.

12. 1<sup>st</sup> and 3<sup>rd</sup> Claimants gave evidence during the Service Week at Nairobi on 19<sup>th</sup> October 2018. The 2<sup>nd</sup> Claimant and Respondent's Human Resource Manager Samson Nguyai Leisido gave evidence on 2<sup>nd</sup> April 2019, bringing the hearing to a close. The file was forwarded to the Trial Judge resident at Mombasa, on 25<sup>th</sup> June 2019 for preparation of Judgment.

13. The Claimants adopted in their oral evidence, their Pleadings and Witness Statements, as summarized by the Court above.

14. Cross-examined, they told the Court that they signed Unpaid Leave Document. They were not recalled at the end of the extended period. They visited Respondent's Offices at Wilson Airport but were not returned to work. They lived in a bush. They were not accommodated by the Respondent. They were subscribed to N.S.S.F. The leave record filed by the Respondent showed the number of days owed. They used to be paid gun allowance for some months. They were paid for the period 2008 to 2012, but not for the period 2004 to 2008. They do not know what is gratuity. They stayed at the camp for 1 week. They spent most of their time in the wild. They did not have letters of termination. Redirected the Claimants explained they were not able to avail all relevant documents to the Court, because the documents were burnt during a civil strife, in their ancestral County of Moyale. They took annual leave from 2008.

15. Samson Nguyai Leisido confirmed that Ol Donyo and the Respondent are sister Companies which employed the Claimants. Before October 2012, there was a Ruling in a land dispute involving the Conservancy. Respondent's Adversaries in the dispute started burning Respondent's houses. The Respondent feared the violence would lead to death of its Employees. It was also not able to pay Employees their salaries. It was agreed, between the Claimants and the Respondent that, the Claimants take unpaid leave of 3 months, which could be extended by another 3 months. Clause 2 of the Unpaid Leave Agreement, states the Claimants would remain Employees of the Respondent, since the Respondent did not terminate their contracts. The Claimants were at liberty to work elsewhere for the period of unpaid leave. None of them went back after the extended period of unpaid leave. Leisido conceded on cross-examination that he was not there when the letters of employment issued in 2004. The letters of employment did not have a provision for unpaid leave. 25 Employees went on unpaid leave. About 16 returned. 2 were still in employment at the time Leisido gave evidence. The camp was burnt to ashes in 2014. Most Employees left after this. The law allowed the Respondent to send the Claimants on 6 months of unpaid leave. The Respondent did not take advantage of the Claimants' illiteracy. The Claimants were free to look for work elsewhere in the period of unpaid leave. The Respondent was not chasing them away. The Respondent was bankrupt and could not sustain the Claimants. Redirected, Leisido told the Court that unpaid leave was taken through the agreement of the Parties.

**The Court Finds:-**

16. The Claimants were employed by the Respondent as Rangers, in October 2004. The Respondent is a Company involved in Wildlife Conservancy. The Claimants' contracts issued in the name of the Respondent, and were signed by Respondent's Officers and by the Claimants. The contracts state that the Claimants would work as Rangers, at Respondent's Nguruman Escarpment Laro Conservancy. There is no doubt that the Claimants were Employees of the Respondent. If there was another Company called Ol Donyo Laro Limited, it has not been shown to in any way, have employed the Claimants. Leisido explained there was one business, and 2 Companies, one running the Conservancy, the other running a Lodge within the Conservancy. The arrangement between the Companies is not a matter that should

concern the Employees.

17. The Parties signed a strange document titled 'Unpaid Leave of Absence' in October and November of 2012, which effectively signaled termination of employment.

18. The 1<sup>st</sup> Claimant signed the document on 19<sup>th</sup> November 2012; the 2<sup>nd</sup> Claimant on 26<sup>th</sup> October 2012; and the 3<sup>rd</sup> , on 1<sup>st</sup> November 2012.

19. Pay slips for October 2012, exhibited by the Respondent, show 1<sup>st</sup> Claimant last earned a monthly gross salary of **Kshs. 21,309**; 2<sup>nd</sup> Claimant Kshs. **21,209**; and 3<sup>rd</sup> Claimant Kshs. **19,775**.

20. The Respondent explained in its evidence that there was a land dispute at its Conservancy, where its adversary burnt down its houses, endangering the lives and livelihoods of the Employees. The Respondent was unable to sustain the Employees in employment. The 'Unpaid Leave of Absence' was supposed to be a way out for the Respondent, in its relationship with the Employees, in the turbulent times brought about by the land dispute.

21. The Claimants were supposed to proceed on unpaid leave of 3 months. The period could be extended at the discretion of the Respondent, for another 3 months. The Claimants took initial leave of 3 months. This was, on expiry, extended in writing by the Respondent, to the end of April 2013.

22. The Agreement states that when the Claimants were on unpaid leave, they remained Employees of the Respondent, but were at liberty to take up employment elsewhere. It is not clear whether they would remain Employees of the Respondent, if and when they took up employment elsewhere.

23. No notice or other terminal benefits would be paid to the Claimants as no termination had taken place, the Agreement states. The Agreement goes on to say that when an Employee was recalled, he would not lose any privileges or benefits.

24. This Agreement is ambiguous, garbled and incoherent. It does not clarify the intention of the Respondent in sending the Claimants home indefinitely. Did the Respondent intend to continue employing the Claimants and being bound by the existing terms and conditions of employment?

25. There is no evidence that the Respondent recalled the Claimants as suggested in the Agreement that the Respondent would. The Claimants gave evidence of their sustained efforts to report back, after the period of their imposed and extended unpaid leave. There is no evidence of recall. The Respondent sent them home and extended their unpaid leave, in writing. It would be expected that there would be recall, or at worst letters of termination in writing. Instead, the Respondent chose to take the Claimants in circles, not advising in clear language understood by the Claimants, if their contracts had been terminated, and for what reasons. There is no evidence given by the Respondent to convince the Court that the Claimants deserted. The Respondent just devised a way of terminating Claimants' contracts without taking responsibility for that decision. There appears to have been no intention to recall the Claimants. The Witness for the Respondent suggested that the Respondent was bankrupt, asking in Court rather rhetorically: what do you do in bankruptcy?

26. The Court does not think that a level-headed Employer, even in real bankruptcy which the Respondent did not show it was in, would do what the Respondent did.

27. The Court is persuaded, it was the Respondent who terminated the Claimants' contracts. Termination was not based on valid reason. If part of the Conservancy was burnt down by its enemies, disabling Respondent's revenue streams, the correct approach in law would have been for the Respondent to declare redundancies. It ought to have terminated the Claimants' contracts formally, in a legal and orderly manner, and released them to seek employment elsewhere. It was foolhardy of the Respondent, to place the Claimants at liberty to get employment elsewhere, while still holding onto the Claimants, and misleading them that they were on unpaid leave and were going to be recalled at the end of such leave. Termination was unfair under Sections 41, 43 and 45 of the Employment Act 2007. ***It is declared that termination was unfair and unlawful.***

28. They are granted the prayer for compensation for unfair termination. They had worked for 9 years. There is nothing on record to suggest their records were blemished. They told the Court they are residents of Moyale, an arid region, and expected they would go on serving the Respondent as Game Rangers, and sustain their families back home. The Respondent employed a most devious ploy in terminating Claimants' contracts. They are allowed equivalent of 12 months' salary in compensation for unfair termination, worked out as follows: **1<sup>st</sup> Claimant - Kshs. 255,708; 2<sup>nd</sup> Claimant – Kshs. 254,508; and 3<sup>rd</sup> Claimant – Kshs. 237,300.**

29. The Claimants seek 3 months' salary in lieu of notice. They were in employment from 2004 to April 2013 when the 2<sup>nd</sup> period of unpaid leave lapsed. They worked for approximately 9 years each. Their letters of appointment, exhibited by the Respondent, provided for notice of 1 month for Employees who worked for periods not exceeding 5 years; 2 months' notice for those who worked for 5 to 10 years; and 3 months' notice for those who worked for over 10 years. ***The Claimants fell in the median category, and are granted 2 months' salary each as notice pay at Kshs. 42,618, Kshs. 42,418 and Kshs. 39,550 respectively.***

30. There are annual leave records exhibited by the Respondent, discounting the prayer for annual leave pay over a period of 9 years. The Claimants were not clear in their evidence on annual leave, and said nothing to contradict the documents provided by the Respondent on this item. The 2<sup>nd</sup> Claimant testified that he started going on annual leave in 2008. 3<sup>rd</sup> Claimant testified he was not claiming annual leave. The 1<sup>st</sup> Claimant agreed there were documents exhibited by Respondent with specific number of leave days taken and owing. The prayer for annual leave over a period of 9 years is rejected.

31. They have not shown that they worked excess hours. No specific dates have been supplied to the Court when they worked excess hours. The contracts they signed state that their monthly salaries were inclusive of compensation for any excess hours worked. They have no reason to pursue compensation for excess hours, as such compensation was considered, and included in the monthly salaries paid to the Claimants. The Claimants were at any rate, not able to show that they worked overtime. This item is rejected.

32. There is no provision made in the contracts signed by the Parties, for gratuity. The prayer for gratuity equivalent of 1 month salary for every complete year of service has no legal, contractual or policy foundation and is rejected.

33. There was provision for gun allowance from December 2008. The Claimants were paid Kshs. 2,000 monthly. They seek Kshs. 24,000 for every of the 9 years. It does not make sense, firstly because they received gun allowance of Kshs. 2,000 from December 2008 to their end of service. Secondly, it was not a benefit created by the law, contract or policy, before December 2008. The Claimants did not show that because this item was introduced in December 2008, the Respondent had an obligation to pay the item from 2004. It is not a benefit captured in the contracts concluded in 2004. It is rejected.

34. They claim house allowance of Kshs. 5,000 monthly, for 9 years. They did not establish where this rate is taken from. They lived within the Conservancy. When they were not residing at the camp, they were in the bush looking after wild animals. That was their place of work and abode. The Respondent provided the Claimants with reasonable housing accommodation within the Conservancy, the Claimants' workplace. They were issued guns, to ensure they and the animals they shared their space with, were reasonably safe. Whether in the camp, or out in the wild, they were within the workplace, with access to relatively speaking, reasonable housing accommodation. The contracts, in any event, state that the salaries paid to the Claimants included sufficient sums to enable the Claimants obtain reasonable housing accommodation. The Court is of the view that the Respondent discharged its obligation under Section 31 of the Employment Act, in full. The prayer for house allowance in arrears has no merit.

35. ***The Respondent shall release to the Claimants their respective Certificates of Service, under Section 51 of the Employment Act 2007.***

36. ***Costs to the Claimants.***

37. ***Interest allowed at 14% per annum, on notice pay, from 26<sup>th</sup> April 2013, when the Respondent indicated to the Claimants, that their extended unpaid leave would come to an end. Interest allowed at 14% per annum, on compensation for unfair termination, from the date of Judgment, till payment is made in full.***

IN SUM, IT IS ORDERED:-

***a) The Respondent shall pay to the Claimants 2 months' salary in lieu of notice totaling Kshs. 124,586 and equivalent of 12 months' salary in compensation for unfair termination totaling Kshs. 747,216.***

***b) Certificate of Service to issue.***

***c) Costs to the Claimants.***

***d) Interest allowed on notice pay at 14 % per annum from 26<sup>th</sup> April 2013 till payment is made in full.***

***e) Interest allowed on compensation for unfair termination, at 14% per annum from the date of Judgment, till payment is made in full.***

Dated and signed at Mombasa this 3<sup>rd</sup> day of July 2019.

James Rika

Judge

Dated, signed and delivered at Nairobi this 12<sup>th</sup> day of July 2019.

Byram Ongaya

Judge