



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT

NAIROBI

CAUSE NO. 193 OF 2015

FATUMA HASSAN.....CLAIMANT

VERSUS

SPORTS STADIA MANAGEMENT BOARD.....RESPONDENT

JUDGMENT

Introduction

1. The claimant brought this claim on 17.2.2018 seeking the following reliefs:

- (a) A declaration that the Claimant's termination was wrongful.
- (b) The sum of Kshs.188,065.80/= terminal benefits and/or special damages.
- (c) Cost of the suit plus interest at Court rate until payment in full.

2. The facts of the case are that the claimant was employed by the respondent as an Auxiliary Staff from 27.1.2012 earning Kshs.14,000 per month. On 18.2.2014 she received a letter from the respondent terminating her contract summarily prompting her to refer the dispute to the Ministry of Labour through her union. After conciliation the union and the respondent signed a Memorandum of Agreement dated 18.8.2014 in her favour. Under the Memorandum, the respondent agreed to pay the claimant one month salary in lieu of notice, salary for days worked, accrued leave days, gratuity at 31% as per the HR manual plus 6 months compensation. The agreement was signed by the union's and the respondent's representatives and it was witnessed by the conciliator. Thereafter the respondent failed to pay the agreed dues and the claimant served a demand letter and finally brought his suit.

3. The respondent filed defence on 3.2.2016 denying the alleged unfair summary dismissal and averred that the claimant's contract of services lapsed after an effluxion of time and after being served with a notice of non-renewal. That the claimant referred the issue for conciliation through her union and it was resolved through the agreement alluded to by the claimant in her statement of claim. She prayed for suit to be dismissed with costs for lack of merits since all what the claimant should have done was to enforce the agreement signed during the conciliation proceedings.

4. In answer to the response the claimant reiterated her averments in the claim and averred that the suit herein was necessitated by the respondent's refusal and/or failure to settle the dues agreed during the conciliation process.

5. The issues arising from the pleadings are:

- (a) Whether the suit is incompetent,
- (b) Whether the claimant's contract of service herein lapsed by effluxion time or it was unfairly terminated;
- (c) Whether the reliefs sought should be granted.

6. The suit was heard on 14.3.2019 when the claimant testified as Cw1 but the respondent called no witnesses. However, after the hearing both parties filed written submissions.

Evidence by Claimant

7. Cw1 testified that he was employed by the respondent as Auxiliary earning Kshs.14,000 per month. She started as a casual employee in 2005 and on 27.1.2012 she was given a written contract for 6 months which was renewed consecutively until the last one was terminated on 18.2.2014 by a letter which stated that the contract was not going to be renewed.

8. Cw1 further testified that after the termination, she was not paid her dues and as such, she notified her union after which the union told her that her dues were discussed but nothing was paid. That she then served a demand letter through her lawyers.

9. Cw1 explained that her contracts were renewed every time it expired. That as at the date of termination she had 5 leave days and 5 off days outstanding. That she also had one day salary unpaid, that is for 17.2.2014. She therefore prayed for compensation because the termination was without prior notice or hearing.

10. In cross examination, Cw1 admitted that she was employed under fixed term contract and that by letter dated 13.2.2014 the employer stated that her contract was not going to be renewed. She denied ever rejecting the dues agreed under the Agreement dated 18.8.2014 between her union and the respondent. She maintained that it is the employer who failed to pay her the same

Claimant's submission

11. The claimant submitted that her termination was unfair because after the lapse of her contract she continued working until 18.2.2014 when she was served with the letter for non renewal dated 13.2.2014. That in her view the contract had already been renewed under similar terms by the conduct of the parties. That terminating the contract without prior notice or reason was unlawful and relied on *Margaret A. Ochieng Vs National Water Conservation and Pipeline Corporation [2014]eKLR* where Rika J found that the fixed term contract had been renewed by conduct of the parties on similar terms after expiry, the employee was entitled to compensation for premature termination of the renewed contract.

12. In view of the foregoing submissions, the claimant contended that she is entitled to salary in lieu of notice and compensation or unfair termination. She also contended that she is entitled to salary for 17.2.2014, 5 leave days and 5 off days. In the alternative she urged the court to enforce the Memorandum of Agreement dated 18.8.2014 negotiated for her by her trade union. Finally, she contended that the respondent has not adduced any evidence to rebut her contention that there is a Memorandum of Agreement which she has failed to honour.

Respondent's Submission

13. The respondent submitted that the suit herein is incompetent for being filed out of time and without following the prescribed procedure. That the complaint was timeously lodged within 3 months as required by section 47(i) of the Employment Act and an Settlement Agreement was signed before the conciliator on 18.8.2014. That by demand letter dated 9.2.2015, the claimant disagreed with the settlement agreement before the conciliator and brought this suit on 17.2.2015, which was about 6 months from the dated of the agreement. That under section 71(2) of the Act, the claimant was only allowed to file the suit within 3 months from the date of the conciliation agreement. She therefore contended that the delay to file the suit was not justified and relief on *Janet Mwacha Mwaboli Vs Modern Soap Factory [2018]eKLR* where in similar circumstances, Rika J Rejected a claim filed after 3 months from the date of Conciliation Agreement for being incompetent.

14. She further submitted that after resolving the dispute through conciliation, the claimant ought not to have filed the instant suit. To support the foregoing view she relied on *George Okoth Vs Hui Yi Co. Limited [2018]eKLR* where it held that except on account of a vitiating factor being proved, an agreement signed by the parties to conciliation proceedings in the presence of a conciliator, would not normally be swept under the carpet by the Court. Instead the Court would readily uphold it in order to encourage Alternative Dispute Resolution among litigants as required by the constitution.

15. She concluded by urging the Court to dismiss the suit with costs because she never refused to pay the agreed terminal dues but it is the claimant who rejected the same and filed the present suit seeking further reliefs which were not agreed during the conciliation. She contended that the claimant was not entitled to the dues in the settlement agreement before the conciliator but she only accepted to the terms as a show of good faith in appreciating the good work by its employees.

Analysis and determination

16. There is no dispute that the claimant was employed by the respondent on fixed term contract basis, that the last contract was terminated by letter dated 13.2.2014 which was served after the expiry date. That a trade dispute arose regarding the termination and dues payable to the claimant; that the dispute was reported to the Labour office and conciliation done; that the dispute was resolved vide the agreement dated 18.8.2014 setting out the dues payable to the claimant; and that the dues were not paid despite demand notice dated 9.2.2015 necessitating filing of this suit. As stated herein above, the issues for determination are:-

- (a) Whether the suit herein is incompetent and should be dismissed.
- (b) Whether the claimant's contract lapsed by effluxion of time or it was unfairly dismissed;
- (c) Whether the reliefs sought herein should be granted.

Incompetent suit

17. The respondent contended that the suit is improperly before the Court for being brought without following the procedure provide by the law and because the matter was resolved through conciliation before a Labour Officer. However, the claimant has contended that the suit is properly before the Court and it was necessitated by the failure the respondent to honour the conciliation agreement. He therefore urged the

Court to grant the reliefs sought in the suit or in the alternative enforce the agreement signed at the conciliation proceedings.

18. The answer to the question of competence of the suit herein lies in the letter by the claimant's union to the Cabinet Secretary Labour dated 19.2.2014. The letter was written one day after the termination of the claimants contract of service by the respondent. The letter stated as follows:

“Dear Sir

RE: TRADE DISPUTE

In accordance with Section 62 of the Labour Relations Act, 2007 this is to report that there exists a trade dispute between ourselves and M/s Sports Stadia Management Board of P. O. Box Private Bag Kasarani. The issue in dispute is wrongful/unfair termination of:

1. Fatuma Hassan

2. Patrick Wambua

3. Shem Nyamukiga

4. Rosebella Chemurgor

We have made every effort to have the matter settled amicably to no avail and hereby therefore urge you to invoke the requisite powers under the Act that may lead to the settlement of the dispute.

Yours faithfully,”

19. The foregoing letter leave no doubt that a trade dispute had been reported to the C.S Labour under section 62 of the Labour Relations Act by the union on behalf of the Claimant herein and others for conciliation. Thereafter the Cabinet Secretary appointed a Conciliator under Section 65 of the Act to assist in resolving the dispute. On 18.8.2014 the dispute was resolved and the union, the Respondent and the Conciliator signed a Memorandum of Agreement as required by Section 68 of the Act. The agreement bound the Respondent to pay the Claimant and her colleagues one month salary in lieu of notice, salary for days worked, leave days outstanding, 31% gratuity as per 2.4.3 of HR Manual and six 6 months compensation.

20. The said agreement was not honoured by the Respondent. The Labour Relation Act does not provide the procedure for enforcing a settlement agreement secured through conciliation by dint of section 68 of the Act. All what is provided for is referral of the unresolved dispute to this Court under section 73 of the Act. I therefore do not agree with the Respondent's contention that the claimant ought to have filed suit under section 47(3) of the Employment Act within 3 months of becoming aware of the Settlement Agreement as required by Section 71(2) of the Employment Act. In my view the procedure and jurisdiction provided under the Employment Act is different and distinct in context from that provided under the Labour Relations Act. The former, in my view, is quasi-judicial where a complaint is lodged by the employee while the latter is consensual where a trade dispute is lodge by a union or employer and the Conciliator is just a facilitation and not the decision maker.

21. In view of the foregoing distinction between the two processes and jurisdiction, I must disagree with ***Janet Mwacha Mwaboli Vs Modern Soap Factory Limited [2018]eKLR*** in so far as it equated a settlement agreement from conciliation of a trade dispute under section 62 of the LRA with a decision of a Labour Officer from a complaint lodged by an employee under section 47(1) of the Employment Act. I however agree with the said decision for rejecting the suit because the dispute had been resolved through conciliation.

22. Having distinguished the two processes, I wish to further find that an agreement signed after conciliation to settle a dispute becomes a binding contract between the parties or the persons they represent. The agreement can only be set aside on the basis of a vitiating factor like mistake, fraudulent misrepresentation, coercion or undue influence. The foregoing was the reasoning in ***George Okoth v Kui Yi Co. Limited [2018]eKLR*** when in dismissing the suit it was held that the dispute had already been resolved through conciliation and the settlement agreement was binding on the parties.

23. In the instant suit, I see nothing in the material presented to the Court by the parties that warrants me to depart from the said decision. The dispute was resolved vide the Settlement Agreement dated 18.8.2014 between the claimant's union and the respondent in the context of Collective Bargaining under the Labour Relations Act and the parties herein are bound by the same. The agreement was not a proposal to them by the Conciliator but a binding Settlement Agreement between the parties herein, which has not been set aside. Consequently, I find and hold that the Respondent herein has no choice but to honour the agreement by assessing the dues agreed under the said Settlement Agreement and pay the same to the Claimant forthwith since the claimant has alleged that the suit herein was necessitated by the default on the part of the respondent to honour the settlement Agreement Holding otherwise would defeat this Court's constitutional duty of encouraging ADR as provided under Article 159(2)(c) of the constitution.

Unfair termination

24. Having found herein above that the dispute was resolved through conciliation under section 68 of the Labour Relations Act, the Court is estopped from adjudicating upon the same afresh. I therefore adopt the Agreement of the parties that found the termination unfair and awarded the claimant six months Salary compensation.

Reliefs

25. I decline to make fresh award herein but just respect the decision of the parties in the Settlement Agreement. Under section 12(3) (viii) of the ELRC Act, the Court has power to grant any relief it deems fit to meet the end of justice. Consequently, considering the facts of this case, I direct the respondent to honour the settlement agreement by computing and paying the agreed dues to the claimant.

Conclusion and disposition

26. I have found that the suit herein was resolved under section 68 of the LRA vide the Agreement signed by the parties herein on 18.8.2014. I have further found that the Act does not provide for the procedure for enforcing a Settlement Agreement or put any time limitation.

Finally, I have found that the settlement agreement is still binding on the parties herein and directed the respondent to honour it forthwith because it is just and fair to do so in the eyes of this Court. Save for the said direction, the suit is dismissed with no costs.

Dated, Signed and Delivered in Open Court at Nairobi this 5th day of July, 2019.

ONESMUS N. MAKAU

JUDGE