



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 992 OF 2015

RAJIV PREM SHARMA.....CLAIMANT

VERSUS

SUNRIPE (1976) LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. By his Statement of Claim dated 8th June 2015 and filed in court on 9th June 2015, the Claimant has sued the Respondent for unlawful and unfair termination of employment. The Respondent filed a Statement of Reply on 18th September 2015.

2. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Human Resources Manager, Chrispin Kaluku. The parties also filed written submissions.

The Claimant's Case

3. The Claimant states that sometime in December 2013 his Company, Westward Trading Kenya Limited, was contracted by the Respondent to provide services in operations and transport management. In August 2014, the Respondent employed the Claimant in the position of Regional Manager.

4. The Claimant claims that it had been agreed between himself and the Respondent that his terms of service at Westward Trading Kenya Limited would apply in his employment with the Respondent. He cites the following terms in this regard:

- a) Kshs. 232,000 as net pay;
- b) Company car plus car allowance of Kshs. 30,000 p.a;
- c) Salary review in 3 months.

5. The Claimant avers that in October 2014, he was approached by the Respondent's Group Operations Director, Amit Shah who informed him that the Company was experiencing financial constraints. Shah therefore proposed that the parties revert to the original position where the Claimant's Company would be contracted as an independent contractor. As a pre-condition to the proposed reversion, the Claimant was required to resign from his position as the Respondent's Regional Manager.

6. The Claimant states that based on this representation and after several meetings and negotiations, where the Respondent's directors reiterated that he was required to resign in order to resume his status as an independent contractor, he resigned on 5th December 2014.

7. Upon his resignation, the Claimant was issued with a draft service contract which he signed and returned to the Respondent for execution by its directors. The Respondent's directors did not execute the contract but instead called the Claimant and informed him that due to financial constraints, the Respondent had been forced to retrench several workers, including the Claimant.

8. The Claimant claims that the negotiations held between him and the Respondent were an elaborate ruse aimed at terminating his employment through misrepresentation and/or deceit. The Claimant cites the following particulars of fraud, misrepresentation and/or deceit against the Respondent and its directors:

- a) Fraudulently and/or knowingly misrepresenting and/or deceiving him that they would revert to the previous contractual arrangement with Westward Trading Company Limited when they knew that this was untrue;

- b) Fraudulently and/or negligently misrepresenting and/or deceiving him that they would revert to the previous contractual arrangement with Westward Trading Company Limited when they knew that this was untrue;
- c) Fraudulently and/or knowingly causing him to resign to his detriment while they never intended to engage him as an independent contractor but instead wanted to procure his resignation as a means of terminating his employment;
- d) Causing him to alter his position by resigning to his detriment while intending to retrench him thus avoiding to settle his statutory dues or to accord him due process under the Employment Act;
- e) Causing him to lose his source of income while being aware that he had financial commitments.

9. The Claimant's case is that his employment was unlawfully and unfairly terminated in a premeditated, clandestine and malicious manner. He now claims the following:

- a) 12 months' salary in compensation.....Kshs. 2,784,000
- b) Unpaid salary for the month of December 2014.....232,000
- c) One month's pay in lieu of notice.....232,000
- d) Car allowance.....30,000
- e) General damages for loss of income, inconvenience and mental anguish
- f) Costs plus interest

The Respondent's Case

10. In its Statement of Reply dated 14th September 2015 and filed in court on 18th September 2015, the Respondent states that in or about December 2013, it engaged the Claimant's company, Westward Trading Kenya Limited to provide consultancy services for the Respondent's transport fleet.

11. The Claimant subsequently decided to apply for the position of Regional Sales Manager and after negotiations with the Respondent, he was put on the payroll from August 2014 until October 2014. The Claimant thereafter resigned from employment and made a decision to revert to the previous contract of providing consultancy services for the Respondent's transport fleet.

12. The Respondent denies that the terms of the consultancy contract were to apply to the position of Regional Sales Manager, which position was governed by the Employment Act

13. The Respondent further denies that there were any negotiations with the Claimant to revert the employment status back to the consultancy services agreement and contends that it was the Claimant who resigned from employment out of his own volition.

14. The Respondent states that the Claimant opted to resign as the money he received as salary was less than what he received as a consultant. The Respondent denies that the Claimant's employment was unlawfully or unfairly terminated.

15. The Respondent denies knowledge of any draft contract forwarded to the Claimant. The Respondent further denies the allegations of fraud, misrepresentation and/or deceit made by the Claimant.

16. By way of counterclaim, the Respondent claims the sum of Kshs. 240,000 being outstanding balance on a loan of Kshs. 270,000 advanced to the Claimant.

Findings and Determination

17. There are three (3) issues for determination in this case:

- a) Whether the Claimant has established a case of unlawful termination of employment;
- b) Whether the Claimant is entitled to the remedies sought;
- c) Whether the Respondent has made out a proper counterclaim against the Claimant;

Unlawful Termination?

18. On 5th December 2014, the Claimant wrote to the Respondent as follows:

“Dear Sir,

RE: CHANGE OF EMPLOYMENT RELATIONSHIP

Please note that the Terms of my employment and my relationship with Sunripe (1976) Limited have recently changed as per the discussions between myself and the Directors.

I am resigning from the Payroll and will now be working on a Contract Basis with immediate effect.

I would be most grateful if you could do the needful and make the appropriate changes to your records as pertaining to the matter above to expedite this process seamlessly.

Thanking you,

(Signed)

RAJIV SHARMA”

19. The Claimant claims that he was misled by the Respondent to write the aforesaid letter on the false promise that he would be retained on a service contract. On this ground, he lays a claim for the tort of deceit. In the final submissions filed on his behalf on 26th September 2019, reference was made to **Halsbury’s Laws of England [5th Edition] (Vol. 97)** which sets out the following ingredients as constituting the tort of deceit:

- a) Something said, written or done which amounts in law to a representation;
- b) That the representation was made by the defendant;
- c) That the representation was made to the claimant;
- d) That the representation was false;
- e) That the representation was a material inducement for the claimant to act on;
- f) That the claimant in fact altered his position;
- g) That the representation was fraudulent; and
- h) That the claimant thereby suffered damage.

20. A careful reading of the Claimant’s letter dated 5th December 2014 reveals that at the time the Claimant wrote it, the terms of his engagement with the Respondent had already changed from that of an employee to an independent contractor.

21. It seems to me that the Claimant’s letter dated 5th December 2014 was a confirmation of the shift of engagement from employment to contract for service. It would therefore appear that the Claimant’s dispute arises from his engagement as an independent contractor and as held in **Maurice Oduor Okech v The Chequered Flag [2013] eKLR** the Employment and Labour Relations Court lacks jurisdiction to entertain claims arising from a contract for service.

22. For this reason, the Claimant’s claim must fail.

The Respondent’s Counter claim

23. Regarding the counterclaim made by the Respondent against the Claimant, the only thing to say is that the Respondent did not provide any documentary evidence to prove that the Claimant had an outstanding loan balance. The counterclaim therefore also fails.

Final Orders

24. In the end, both the Claimant’s claim and the Respondent’s counterclaim are dismissed.

25. Each party will bear their own costs.

26. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 25TH DAY OF OCTOBER 2019

LINNET NDOLO

JUDGE

DELIVERED AT NAIROBI THIS 25TH DAY OF OCTOBER 2019

MAUREEN ONYANGO

JUDGE

Appearance:

Mr. Kisinga for the Claimant

Mr. Arrum for the Respondent