



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 234 OF 2019**

**SERGII GERGEL.....CLAIMANT**

**-VERSUS-**

**ARFA AFRA LTD T/A IMAX AFRICA LTD.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 8th November, 2019)

**JUDGMENT**

The claimant filed the statement of claim on 08.04.2019 through Maranga Nyangute & Company Advocates. The claimant prayed for judgment against the respondent for:

a) A declaration that the claimant's services were wrongfully, un-procedurally, unlawfully, and unfairly terminated in the circumstances and the claimant is entitled to compensation of his terminal dues as detailed in the sum of Kshs. 3, 577, 680.00 being:

- i. Salary for 4 months for the year 2016 (120,000 x 4) Kshs.480, 000.00.
- ii. Salary for 12 months for 2017 Kshs.120, 000 x 12) Kshs. 1, 440, 000.00.
- iii. Salary for 11 months in 2018 (120,000 x 11) Kshs.1,320, 000.00.
- iv. 1 month salary in lieu of notice Kshs.120,000.00.
- v. NSSF Kshs.10, 080.00.
- vi. NHIF Kshs.47, 600.00.
- vii. House Allowance Kshs.40,000.00 per month for 4 months Kshs.160, 000.00.

b) Damages for unfair, wrongful, and un-procedural termination.

c) Cost of the suit and interest at Court rates from the time of filing the claim till full and final payment.

d) Any other relief that the Honourable Court may be pleased to grant.

The claimant's case is that the respondent employed him as a manager of the respondent's cinema in Kisumu County effective 30.08.2016 for an indefinite period. The claimant was paid monthly Kshs.120, 000.00 plus other benefits. The claimant pleads that he worked until 16.11.2018 when his services were terminated. The termination letter was served on 16.11.2018. Prior to the termination, it is the claimant's case that he agreed with the respondent not to pay the salaries but to withhold the same for purposes of the claimant's savings. Upon termination the claimant states that the respondent failed to pay the salary arrears. The claimant states that the respondent is trying to get him out of Kenya without paying the final dues.

The parties are not in dispute on the fact of the claimant's employment.

The **1st issue** for determination is whether the termination of the claimant's employment was unfair. Clause 2 of the employment contract dated 30.08.2016 stated that during the continuance of the employment contract hereby created but subject to the provisions governing the

employment period of the contract, Mr. Sergii may terminate the contract if he resigns or is removed from office or otherwise disqualified from serving as a Director of this Corporation. The petitioner's directorship ended by the resolution of the respondent's board made at the meeting held on 12.11.2018. The resolution was conveyed to the claimant by the respondent's letter dated 16.11.2018 and the letter further stated that the claimant's services were no longer needed. The termination was signed by the claimant's witness No.2 (CW2) the then outgoing respondent's CEO one Oleksii Sirkov and, the incoming CEO one Natalia Baydan. The claimant testified that he was employed as a director and it was agreed that if the directorship ended then the employment ended. The Court finds that the contract ended when the resolution to revoke the claimant's directorship was made. It was not an unfair termination. The claimant is not therefore entitled to any compensation under section 49 of the Employment Act, 2007. He is however entitled to one month pay in lieu of the termination notice under section 35 of the Act making **Kshs.120, 000.00**. While making that finding the Court finds that the monthly pay was Kshs.120, 000.00 as per the signed agreement and parties were bound by the written agreement. The allegations by the claimant and CW2 that the salary varied cannot be trusted. The evidence by CW 2 was that he could not recall the exact salary but it was may be around Kshs.200, 000.00 per month. Such evidence by CW 2 who said was the CEO at the material time cannot be relied on to defeat the agreed monthly pay as written in the contract of service. In any event the statement of claim was not amended to change the prayers and claims.

While making that finding the Court agrees with the submissions made for the claimant that the respondents alleged gross misconduct but proceeded to invoke the contractual clause. However the claimant relied upon the termination letter and there is no reason for the Court to be blind to that particular evidence that clearly shows the circumstances of the termination. In any event, the respondent's exhibits disclosed that the claimant did not have a clean record of service which when considered under section 49 of the Act would be a serious contribution by the claimant to the termination of the contract thereby justifying a completely diminished chance for award of compensation.

The **2nd issue** for determination is whether the claimant is entitled to the other remedies as prayed for. The claimant stated in his witness statement that he asked the respondent to withhold the monthly salary as a saving until he would need it. In his oral testimony he stated that the respondent had financial problems and he agreed to be paid last. In cross-examination he stated that he did not ask the CW 2 to withhold the salary till the end of the contract but that the respondent had financial problems and so he had not been paid. He then stated that he agreed orally with the CEO that he gets paid when he really wanted the money. CW 2 then testified that when he was the CEO the employees were only two, the claimant and Kintai and in 2017 there was a financial crisis due to elections so that it was agreed that junior employees be paid. The Court finds that on a balance of probability the contradictory evidence for the claimant cannot be trusted. CW 2 testified that the employees were only two then again that junior employees were to be paid first. CW 2 testifies that the pay was withheld due to 2017 financial difficulties arising from the election crisis yet the claimant claims for salary arrears beginning 2016. CW2 was not exact on the months the salaries were withheld and CW 1 offered no evidence on the subject. The Court finds that the claimant also failed to testify about the date of the alleged agreement. Thus the claimant has failed to prove and to justify the claims for salary arrears and the same is declined.

CW2 testified that the claimant was housed. The claimant offered no evidence about the 4 month house allowance claimed and the justification including why he fixed the same at the amount as claimed. The prayed will fail.

The claimant offered no justification for the prayers on NHIF and NSSF. The evidence to support the prayers was not provided. The prayers will fail. In any event the claims may be pursued under the relevant statutory provisions.

As submitted by MMS Advocates for the respondent, the respondent has not been shown to have instigated the summoning of the petitioner by the immigration department and in any event, the Court's award in the suit would not turn upon a finding on that issue one way or the other.

The Court has considered the parties' margins of success and each will bear own costs of the suit.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- a) Payment of **Kshs.120, 000.00** in lieu of notice by 15.12.2019 failing interest to be payable thereon at Court rates from the date of this judgment until full payment.
- b) Each party to bear own costs of the suit.

**Signed, dated and delivered in court at Nairobi this Friday, 8th November, 2019.**

**BYRAM ONGAYA**

**JUDGE**