



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1314 OF 2016

JAMES WATHIGO.....CLAIMANT

-VERSUS-

LESUKUT LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 1st November, 2019)

JUDGMENT

The memorandum of claim was filed on 04.07.2016 through Agan Opolo & Alosa Advocates. The claimant prayed for judgment against the respondent for:

- a) 28 months' salary (140, 000.00 x28) = Kshs. 3, 920, 000.00.
- b) Payment of gratuity at the rate of 15 days salary for each completed year of service for 2 years and 4 months worked.
- c) Pay for unpaid and untaken leave 56 days x 492 =Kshs. 39, 360.00.
- d) Service pay for years worked.
- e) Certificate of service.
- f) Any other relief the Court deems fit to grant.
- g) Costs of the suit.

The claimant's case is that he was employed by the respondent at a monthly pay of Kshs.140, 000.00. The evidence is that the claimant was employed by the respondent's sister company known as Macnaughton Ltd as per the letter dated 22.05.2012. He was appointed in the position of Medical Representative. The claimant accepted the appointment by signing on 22.05.2012. The claimant is a pharmacist by profession. Macnaughton Ltd dealt in human medicines and the respondent in animal and livestock medicines. Thus the respondent appointed the claimant in the position of Company Pharmacist effective 04.06.2012 at monthly salary of Kshs.140, 000.00. The letter of appointment replicated terms and conditions as his service with Macnaughton Ltd including taxable company car; personal accident cover; flying doctor membership; medical scheme for self and spouse and a maximum of 4 children; and pension fund. The claimant resigned from the respondent's employment effective 13.02.2015 as per his letter dated 13.01.2015. he asked to be paid for the period of employment.

The respondent filed the reply to the memorandum of claim on 18.08.2016 through Hamilton Harrison & Mathews Advocates. The respondent stated that it never employed the claimant separately as the company pharmacist as alleged. Further the letter exhibited by the claimant was a forgery because clause 4 of the contract of service with Macnaughton Ltd was clear that the claimant would superintend over Lesukut Limited. Further it was unbelievable that the claimant had continued to work for the respondent for over 2.5 years without pay and initiating and continuing a grievance in that regard. Further, the respondent was a veterinary agency and did not operate the business of a pharmacy. The respondent denied the claims and prayed that the suit be dismissed with costs. The claimant filed a reply to defence on 09.09.2016.

The Court has considered the pleadings and the submissions filed for the parties. It is clear that the claimant resigned effective 13.02.2015 and that was the last day of the otherwise continuing and alleged non-payment of monthly salaries throughout the service. The suit was filed on 04.07.2016. Section 90 of the Employment Act, 2007 provides that for continuing injury (such as the continuing failure to pay the alleged monthly salaries in the instant case) the suit must be filed within 12 months from the date of cessation of the continuing injury. The injury

ceased on 13.02.2015 when the alleged monthly salary was due. Accordingly the suit was time barred when it was filed on 03.07.2016. While making that finding the Court has considered that throughout the service, there was no grievance by the claimant about the claims now made in the present suit so that the Court finds that on a balance of probability, the parties were in an understanding that the claimant was essentially employed and paid by the respondent's sister company Macnaughton Ltd with deployment to the respondent as a superintending pharmacist. As parties never urged the point on time barring, each will bear own costs of the suit.

In conclusion judgment is hereby entered for the respondent against the claimant for dismissal of the suit with orders each party to bear own costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday, 1st November, 2019.

BYRAM ONGAYA

JUDGE