



**REPUBLIC OF KENYA**

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

**AT NAIROBI**

**CAUSE NO. 1967 OF 2015 CONSOLIDATED WITH CAUSES 1968 AND 2051 BOTH OF 2015**

**PETER MIGWI.....1ST CLAIMANT**

**STEPHEN KARIUKI.....2ND CLAIMANT**

**ARNORLD MUTURI.....3RD CLAIMANT**

**-VERSUS-**

**LUSTMAN & CO. (90) LIMITED.....RESPONDENT**

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

**JUDGMENT**

The claimants filed their separate suits against the respondent through S.M. Kilonzo & Associates Advocates. The respondent managed properties owned by the National Social Security Fund (NSSF). The 1st claimant worked as a plumber and the 2nd claimant as an electrician. The respondent's case was that the 1st and 2nd claimants were employees of the NSSF and not the respondent so that the 1st and 2nd claimant's suit were unsustainable as based on the alleged contract of service with the respondent. The claimants' case was that they were each employed by the respondent on 15.06.2011 and each terminated on 07.09.2015 having served for 4 years 3 months.

The respondent filed response to the claims through Sisule Munyi Kilonzo & Associates Advocates. The respondent made a counterclaim against the 3rd and 1st claimant.

The **1st issue** in the case is whether the claimants were employees of the respondent. By the letter of termination dated 07.09.2015 the respondent informed each of the claimants that it had lost the contract to manage Hazina and View Park Towers. The letter addressed to the 1st claimant conveyed that there was a resident plumber at the Mombasa NSSF building the respondent had been assigned to manage. The letter stated he had worked for the respondent since 15.06.2011 and his service was good. As he would not move to Mombasa, it was hoped that the incoming agent manager would employ him. His dues would be paid after consultations with NSSF. The 2nd claimant was similarly told in the letter of 07.09.2015 that the resident electrician at Mombasa would not be replaced and it was believed that the incoming management agent would absorb him and his final dues would be handled in consultation with NSSF. The 3rd respondent received the letter dated 07.09.2015. It advised him about the lost Hazina and View Park Towers contract and that there being no place to deploy him the employment relationship would end effective 30.09.2015.

The Court returns that the letter addressed to each claimant dated 07.09.2015 was clear that the parties were in employment contracts and which were ending on 30.09.2015.

The **2nd issue** for determination is whether the termination was unfair. The 3rd claimant testified that the claimants' expectation was that they would be taken to another property upon the respondent being unsuccessful to retain the contract to manage Hazina and View Park properties. If there was no property to move to then they would agree on the exit plan. In his view redundancy provisions would apply. In cross-examination the 3rd claimant stated that the contracts of service were based on availability of a building or property to manage.

The Court has considered the evidence. The claimants knew they would cease to work for the respondent if the respondent lost the agency contract to manage the property for NSSF. The 3rd claimant had been inherited from the management agent he worked for prior to the respondent winning the contract with NSSF. Accordingly the Court returns there was no unfair termination. In terms of section 35 of the Employment Act, 2007 each claimant was only entitled to **one month pay in lieu of termination notice** which is awarded accordingly.

The **3rd issue** is whether the claimants are entitled to the other remedies as prayed for. The Court returns that there was no evidence that the claimants took leave for the 4 years of service. Each is **awarded 4 months' pay in lieu of annual leave** for the 4 years of service as per

section 28 of the Act. Each is also entitled to a certificate of service as per section 51 of the Act.

The **4th issue** is whether the respondent is entitled to the counterclaims against the 2nd respondent and the 3rd respondent. The respondent counterclaimed Kshs.7, 000, 000.00 against the 3rd claimant for lost contract to manage the buildings. The respondent's own letter of termination indicated that the 3rd claimant was a good worker and there was no disciplinary case about the alleged occasioning of loss of the contract. The evidence was that the respondent placed the tender but lost it. The counterclaim is found not established and it is unjustified. It will fail. The 3rd respondent showed that in his tenure the NSSF had awarded the respondent Hazina Shopping or Trade Centre and NSSF Mombasa so that he had delivered in that regard.

Against the 1st claimant the respondent counterclaimed for an overpayment of Kshs.38, 099.00. The 1st claimant testified that it was pay for work outside official duties at Hazina premises so that in September 2015 he earned normal pay per payslip and there was no overpayment. The Court returns that there is no reason to doubt the claimant's account because the respondent offered no payslip or basis of alleged overpayment. Further there was no demand for refund of the alleged overpayment during the employment or demand to pay prior to the counterclaim. The Court finds that the respondent has failed to establish the counterclaim especially that the basis of the alleged overpayment and error to pay was not established at all.

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

- a) The respondent to pay each claimant **five months' salaries** (less PAYE) by 31.12.2019 failing interest to be payable thereon at Court rates from the date of filing the suit till full payment; and the computed pay for each claimant to be part of the decree herein.
- b) The respondent to deliver the respective certificates of service by 01.12.2019.
- c) The dismissal of the counterclaims with costs.
- d) The respondent to pay the claimants' costs of the suit.

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

**BYRAM ONGAYA**

**JUDGE**