



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 2195 OF 2016

KAHINDI JAMES MANGI.....CLAIMANT

VERSUS

COAST DEVELOPMENT AUTHORITY.....1ST RESPONDENT

THE MINISTRY OF DEVOLUTION AND PLANNING.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday 19th December, 2019)

JUDGMENT

The claimant filed the memorandum of claim on 27.10.2016 through Ochieng, Kokul & Velo Advocates. The claimant prayed for judgment against the 1st and 2nd respondents to pay the claimant all his terminal benefits and other unpaid dues computed as follows:

- a) Three months unpaid salary at Kshs.406, 725 per month Kshs. 1, 220, 175.00.
- b) Gratuity pay withheld for 3 years and 3 months at 31% of salary x 36 months making Kshs.5,126, 175.00.
- c) Transport allowance (moving from Mombasa to Nairobi) Kshs.180,000.00.
- d) Leave days not taken (2 years) making 60 days and allowance Kshs.400,000.00 per year Kshs.1,996,611.00.
- e) Service worked for the Company 3 years 3x406, 725.00 making Kshs.1,220,175.00.
- f) Total claim Kshs.9, 743,136.00.
- g) An order compelling and directing the 1st respondent to produce a breakdown of calculated amount of imprest claims which the respondent owes the claimant and which computation is in the 1st respondent's possession.
- h) Damages.
- i) Costs of the claim.
- j) Interest on a, b, c, d, e, and f above at Court rates.
- k) Any other relief as the Honourable Court may deem just and fit to grant.

The 2nd and 3rd respondents filed the reply to the memorandum of claim on 19.06.2017 through the learned State Counsel Ernest Kioko for the Attorney General. The 2nd and 3rd respondents prayed that the suit be dismissed with costs in favour of the 2nd and 3rd respondents.

The 1st respondent filed the memorandum of response and prayed that the suit be dismissed with costs. Subsequently the Attorney General came on record for all the three respondents and applied to file an amended reply to the memorandum of claim and Counterclaim. The application was allowed and the counterclaim was for a surcharge of over Kshs.29, 000,000.00 and 1st respondent's accrued debt of over Kshs.406, 000,000.00 incurred by the 1st respondent during the tenure of the claimant as the 1st respondent's Managing Director.

In the counterclaim it was prayed that the claimant's cause be dismissed with costs and the claimant to pay Kshs. 29,000,000.00 as surcharged.

The claimant filed the response to the amended memorandum of response and urged that the accrued 1st respondent's debt could not be attributable to him in his personal capacity because it was foreseeable that the 1st respondent could incur debts due to underfunding. The claimant as the Managing Director had notified Parliament about the underfunding and requested for allocation of sufficient funds. Further the claimant pleaded that he appeared before the Ethics and Anti-Corruption Commission and recorded statements about the 1st respondent's affairs and he was unaware about any other investigations by the respondents against him and he denied the allegations of fraud against him as was alleged for the respondents. The claimant further pleaded that the counterclaim was defective and it failed to meet the mandatory provisions of the law.

The hearing was on 14.11.2019 and in the cause of the proceedings the Court entered the following orders by consent of the parties:

- a) By consent partial judgment is entered for the claimant against the 1st respondent for payment of gratuity for 3 years at a sum to be computed and agreed upon by parties and to be recorded in Court accordingly.
- b) By consent the claim on transport allowance dispensed with orders the 1st respondent to carry the claimant's personal belongings from Mombasa to his home in Nairobi by 31.12.2019.
- c) Parties to file submissions on the claims and prayers for:
 - 1) Leave days due.
 - 2) Unpaid salary for 3 months of extension.
 - 3) Imprest claims.
 - 4) Interest and costs.
- d) By consent of the claimant, claim on service pay is dropped.
- e) Claimant to file submissions by 29.11.2019 and respondent by mention on 09.12.2019 at 9.00am or soon thereafter.
- f) Costs in the cause.

The claimant testified to support his case and the respondents' witness was Joyce Ochako, the 1st respondent's Assistant Human Resource Manager (RW).

The only issue for determination is whether respondents are entitled to the prayer for Kshs.29, 000, 000.00 in the Counterclaim and whether the claimant is entitled to the residual claims after the consent orders entered at the hearing of the suit. The court makes findings as follows:

- 1) On 17.12.2018 the application dated 22.11.2018 and filed 03.12.2018 for leave to file amended reply to the memorandum of claim was allowed by consent of the parties and the respondents were ordered to file and serve the amended statement of response and a further list and copies of documents together with the witness statement by 21.12.2018. The respondents filed the witness statement on 28.12.2018. The case came up for hearing on 16.05.2019 and the Court directed thus, "**It turns out that the record of pleadings is not clear. Mention on 29.05.2019 for the claimant to confirm pleadings relied on.**" The Court has revisited the record and it appears the respondents failed to file and serve the amended statement of response and counterclaim. Even if the respondents rely upon the amended statement as was annexed to the application, the same appears not signed and is incomplete. The Court finds that the purported counterclaim would fail for want of proper pleading. Further as per the claimant's testimony, it was not established for the respondents why the claim of Kshs.29, 000.000.00 was being attributed to the claimant. Further the respondents failed to rebut the claimant's case that the respondents had failed to exhibit the mandatory certificate of surcharge prescribed under the State Corporations Act and the relevant hearing prior to the surcharge had never taken place. The Court finds that the relevant surcharge process has not been shown to have been followed and the Court finds that the respondents have failed to prove the alleged counterclaim. The Court finds that prior to the imposition of the surcharge it has not been established that the claimant was accorded due process. It will therefore fail.
- 2) RW testified that the 1st respondent gave the claimant a three months extension to facilitate the handover process. The resolution was not that the same was subject to approval by the Cabinet Secretary. RW testified that the decision was not communicated to the claimant by letter and the extension was impaired for want of approval by the Cabinet Secretary. The Claimant admitted that the appointing authority for the 1st respondent's Managing Director was the Cabinet Secretary. The Court returns that the purported extension for three months was invalid for want of the approval by the Cabinet Secretary. The prayers for salary, allowances and gratuity over that period will therefore fail. In any event the claimant confirmed that for the 3 months of purported extension of the tenure of the service, he never reported on duty. Accordingly, the prayers will fail under that heading.
- 3) The Court finds that the imprest claims were in the nature of special damages. The claimant was therefore required to specifically plead the amounts and particulars thereof and further he was required to strictly prove the same. It was not sufficient for the claimant to simply say the particulars of the claims were in the respondents' knowledge without seeking to comply with the rules of discovery and to accordingly plead the particulars and to strictly prove the same. The prayer will therefore fail as unjustified and not established at all.

4) On leave days RW testified that for a year of service the maximum days the claimant could carry forward was 15 days. The Court has considered the evidence and returns that for the 1st of the 2 years the claimant served he carried forward 15 days. He is awarded 30 days for the 2nd year served making 45 days of leave. He is therefore awarded 1.5 monthly salaries in lieu of the untaken but due leave days and as per the contract of service and provisions of section 28 of the Employment Act, 2007. The same is awarded accordingly to be computed by the parties and filed in Court for recording of the amount due. The claim for leave allowance was not justified and the same will therefore fail.

5) The claimant has significantly succeeded in his claims and is awarded the costs of the suit including the purported counterclaim.

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

- 1) As per the consent at the hearing, payment of gratuity for 3 years at a sum to be computed and agreed upon by parties and to be recorded in Court accordingly.
- 2) As per consent at the hearing, the claim on transport allowance dispensed with orders the 1st respondent to carry the claimant's personal belongings from Mombasa to his home in Nairobi by 31.12.2019.
- 3) Payment of 1.5 monthly salaries in lieu of the untaken but due leave.
- 4) The amount due under (1) and (3) above be computed by the parties and filed in Court in 7 days and to form part of the final decree.
- 5) The decretal sum in (4) above be paid by the 1st respondent to the claimant by 01.04.2020 (less PAYE) failing interest to be payable thereon at Court rates from the date of lapsing of the contract of service on 15.02.2016 till full payment.
- 6) The 1st respondent to pay the claimant's costs of the suit including the purported counterclaim.

Signed, dated and delivered in court at Nairobi this Thursday, 19th December, 2019.

BYRAM ONGAYA

JUDGE