



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NUMBER 283 OF 2017

BETWEEN

SALIM RAJAB SUMBA.....CLAIMANT

VERSUS

COUNTY GOVERNMENT OF MOMBASA.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe.

Okanga & Company Advocates for the Claimant

Maina Njanga & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 19th April 2017. He states, he was employed by Respondent's Predecessor, the Municipal Council of Mombasa, as a Mechanic, on 1st March 1982.
2. He was interdicted on 1st October 2005, on the allegation that he was impersonating Municipal Inspectors.
3. He was advised he would appear before the Establishment Committee, where he would be given a chance to defend himself in accordance with rules of natural justice.
4. During interdiction, he would receive half his monthly salary, in accordance with Clause 3 of the Terms and Conditions of Service for Local Government Officers, as read together with Regulation No. 23 of the Public Service [Local Authority Officers] Regulations, Legal Notice No. 201 of 1984.
5. His monthly salary as of the date of interdiction was Kshs. 14,341
6. He complains that after interdiction, he was never called for a disciplinary hearing as promised. He continued to be paid half his monthly salary until the year 2009 when the payment was stopped.
7. He wrote to the Respondent on 20th April 2015 asking why his salary was stopped in 2009, and demanding to be returned to office. There was no reply.
8. He instructed his Advocates who issued 2 demand letters along the same vein as the letter issued earlier by the Claimant in person. The letters elicited no response, culminating in filing of this Claim, in which the Claimant prays for Judgment against the Respondent for:-

[a] Arrears of salary from 2009 to the date of filing the Claim at Kshs. 623,842.

[b] A declaration that the Respondent has violated Claimant's constitutional rights.

[c] Reinstatement of the Claimant.

[d] Costs and Interest.

8. The Respondent filed its Statement of Response on 14th June 2017. It is denied that the Claimant was employed by the Respondent. He was not subjected to any unfair labour practices by the Respondent. The award sought by the Claimant is exorbitant and fabricated. The Respondent prays the Court to dismiss the Claim.

9. Hearing was set for 29th July 2019. The record indicates Respondent's Advocates were served with the Hearing Notice, and acknowledged service, on 6th February 2019. There was no attendance on the part of the Respondent when hearing proceeded on 29th July 2019.

10. The Claimant adopted as his evidence, his Witness Statement and Documents on record. He told the Court he was 55 years at the time of giving evidence.

The Court Finds:-

11. The Claimant gave evidence that he was employed by the Municipal Council of Mombasa. He produced an employment card, ascertaining this. His employment number was 6310. He also exhibited a letter of interdiction signed by the Town Clerk, Franklin Maganju, on 1st October 2005. There is no evidence to discount the position that the Claimant was employed by the Respondent's predecessor, as pleaded in the Statement of Claim.

12. It is similarly not contested through evidence, that the Respondent succeeded the Municipal Council of Mombasa, assuming the assets and liabilities of the Municipal Council of Mombasa. The Respondent is a Successor Employer to the Claimant,

13. The Claimant was interdicted on allegations that he impersonated Council Inspectors. Interdiction was under the Terms and Conditions of Service for Local Government Officers, and Public Service [Local Authority Officers] Regulations. Interdiction was on 1st October 2005.

14. The Claimant was informed he would be taken through a disciplinary hearing. He was not. He was told he would earn half salary during interdiction. The salary was paid in half, until the year 2009, when it was stopped without any explanation.

15. The Claimant was never heard. Interdiction was never lifted. He was kept dangling in the wind. He wrote letters in person and through his Advocates, to the Respondent, asking to be told what his employment status with the Respondent was. He asked to be returned to office. There was no reply. No letter of termination was issued.

16. Interdiction issued to allow the Municipal Council space to investigate and discipline the Claimant. It was not meant to be a penal sanction. It was not to be equated to termination of the Claimant's contract. It was not meant to be indeterminate.

17. The Respondent or its predecessor did not advise the Claimant, even after he repeatedly sought advice, when interdiction would be brought to an end. His half salary was stopped in 2009. He was not advised why. There is no event that happened in 2009, relating to interdiction, that justified stoppage of salary.

18. The Claimant's contract was never expressly terminated.

19. He prays for salary arrears up to the date of filing the Claim. In the view of the Court, he deemed his contract was no longer sustainable, on the date of filing the Claim. He did not ask for salary up to the date of Judgment. The Court would, based on this prayer, and in the absence of any evidence from the Respondent showing termination of the Claimant's contract, deem termination to have taken place at the time of filing the Claim. The Claimant acknowledged, by his prayer for salary arrears up to the date of filing the Claim, and no more, that there was a meeting of minds, and mutuality of discharge of obligations, between the Claimant and the Respondent.

20. Consequently the Court agrees that the Claimant is entitled to arrears of half of his salary from 2009 to 2017 [7 years and 3 months], and grants the prayer, at Kshs. 623,842.

21. The default by the Respondent, in responding to Claimant's letters seeking advice on his employment status, clearly infringed on Claimant's right to fair labour practices, given under Article 41 of the Constitution. Although this is not a Petition made under the Constitution, Rule 7 [3] of the E&LRC [Procedure] Rules, 2016, allows Parties to seek the enforcement of any constitutional rights and freedoms, or any constitutional provision, in a Statement of Claim or other Suit filed before the Court. **It is declared that the Respondent has violated the constitutional rights of the Claimant under Article 41 of the Constitution.**

22. The prayer for reinstatement is not reasonable and legally sustainable. First, the Claimant's contract was not really terminated by the Respondent. He was placed on indefinite interdiction. Termination as the Court has stated, can only be notional, deemed to have taken effect from the date the Claimant states he was no longer entitled to a monthly salary. It is not legally sustainable to grant the Claimant an order of reinstatement, in a situation where actual termination has not been established. The Claimant ought perhaps to have asked the Court to declare that he is still an Employee of the Respondent, which is different from a prayer for reinstatement. Indefinite interdiction cannot amount to constructive dismissal. Constructive dismissal, as held in the **Court of Appeal decision, Coca Cola East & Central Africa Limited v. Maria Kagai Ligaga [2015] e-KLR**, requires the Employee to take the initiative and resign, believing himself to have been fired, by dint of a hostile work environment imposed on the Employee by the Employer. The Claimant herein, did not resign. Second, even if his contract was expressly terminated, the Claimant took too long before seeking the remedy of reinstatement. The Employment Act allows the Court to grant reinstatement at most 3 years from the date of termination. He last worked for the Respondent's predecessor in 2005. His

salary was stopped altogether in 2009. He approached the Court in 2017, which is not a reasonable period, in considering whether the Claimant should resume duty. Lastly, the Claimant is now close to the mandatory retirement age for Public Servants. It would not make sense to reinstate him in the sunset of his years, if reinstatement was factually and legally permissible, in the first place.

23. He is granted the prayer for costs.

24. The salary of an Employee is protected under Part 1V of the Employment Act 2007. It must be paid as and when it falls due. If withheld pending the outcome of disciplinary proceedings, it must not be withheld indefinitely, and the disciplinary process must take place, to enable Parties take stock of their mutual obligations and rights at the end of the employment relationship. The Employer in this Cause has not shown reasons why Claimant's salary was withheld, while no disciplinary hearing was taking place. It has not been shown why the salary was stopped unilaterally in 2009. Interest is regulated in the E&LRC under Rule 29 E&LRC (Procedure) Rules, 2016. It is not regulated by the Civil Procedure Rules, as some decisions of various Courts have recently held. The Employee must be compensated for his abstinence, or in other words, for not immediately accessing his remuneration, when he ought to have accessed it. Section 17 of the Employment Act requires wages and salaries are paid in real time. The rate of interest applicable is entirely left to the discretion of the E&LRC. In exercise of this discretion, the Court must be alive to the same factors applicable in wage determination such as cost of living indices, inflation, currency devaluation and loss of purchasing power. ***Interest is allowed on arrears of salary, at 14% per annum from 2009, till payment is made in full.***

IN SUM, IT IS ORDERED:-

[a] It is declared that the Respondent violated the constitutional rights of the Claimant under Article 41 of the Constitution.

[b] The Respondent shall pay the Claimant his withheld half salary for the period 2009 to 2017, at Kshs. 623,842.

[c] Costs to the Claimant.

[d] Interest allowed on arrears of salary, at 14% per annum from 2009, till payment is made in full.

Dated and delivered at Mombasa this 13th day of December 2019.

James Rika

Judge