



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1840 OF 2014

CONSOLIDATED WITH

CAUSE NO 1845 OF 2014

AND

CAUSE NO 1893 OF 2014

AND

CAUSE NO 1897 OF 2014

MICHAEL KARERI MWANGI.....1ST CLAIMANT

THOMAS ONCHIRI NYANDIKA.....2ND CLAIMANT

THOMAS OGUNDO NYAMBANE.....3RD CLAIMANT

EVANS NYANDORO MAUTI.....4TH CLAIMANT

VERSUS

APEX STEEL LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. By a consolidated claim brought by separate Memoranda of Claim, the Claimants have sued their former employer, Apex Steel Limited for unlawful and unfair termination of employment. The Respondent filed separate Statements of Response. Cause No 1845 of 2014 was selected as the lead file.

The Claimants' Case

2. The 1st Claimant, Michael Kareri Mwangi filed a Memorandum of Claim on 16th October 2014 stating that he was employed by the Respondent as a Crane Operator from April 2007 until 2nd January 2014, when his employment was terminated. He states that there was no reason for the termination and that he was not subjected to due process. He claims the following:

- a) One month's salary in lieu of notice..... Kshs. 14,400

- b) House allowance for 6 years..... 250,000
- c) Severance pay for 6 years..... 51,400
- d) Leave pay for 6 years..... 86,400
- e) 12 months' salary in compensation..... 172,800
- f) Costs plus interest

3. In his Memorandum of Claim filed on the same date, the 2nd Claimant, Thomas Onchiri states that he was employed by the Respondent from September 2006 until 2nd January 2014, when his employment was terminated. He avers that the termination was without cause and in violation of due procedure and therefore claims the following:

- a) One month's salary in lieu of notice..... Kshs. 12,825
- b) House allowance for 7 years..... 220,000
- c) Severance pay for 7 years..... 53,865
- d) Leave pay for 7 years..... 89,775
- e) 12 months' salary in compensation.....153,900
- f) Costs plus interest

4. The 3rd Claimant, Thomas Ogundo Nyambane filed his claim on 28th October 2014. He states that he was employed by the Respondent as an Ergot Processor, from August 2011 until 2nd January 2014 when his employment was terminated without cause and in violation of due procedure. He claims the following:

- a) One month's salary in lieu of notice..... Kshs. 13,680
- b) House allowance for 6 years..... 70,000
- c) Severance pay for 6 years.....16,416
- d) Leave pay for 2 years.....27,600
- e) 12 months' salary in compensation.....196,992
- f) Costs plus interest

5. The 4th Claimant, E vans Nyandoro Mauti also filed his claim on 28th October 2014. He states that he was employed by the Respondent as a Cleaner from September 2011 until 2nd January 2014 when his employment was terminated without cause and in violation of due procedure. His claim is as follows:

- a) One month's salary in lieu of notice.....Kshs. 12,960
- b) House allowance for 27 months.....67,500
- c) Severance pay for 2 years.....15,552
- d) Leave pay for 2 years.....25,920
- e) 12 months' salary in compensation.....155,520

f) Costs plus interest

The Respondent's Case

6. In its Statements of Response filed in court on 13th May 2015, the Respondent states as follows:

a) That the 1st Claimant, Michael Kareri Mwangi was employed as a casual employee in the Furnace Section from April 2007. He was subsequently engaged on several fixed term contracts of 11 months each running from 4th January 2010 to 30th November 2010; 3rd January 2011 to 30th November 2011; 3rd January 2012 to 30th November 2012 and 3rd January 2013 until 30th November 2013;

b) That the 2nd Claimant, Thomas Onchiri Nyandika was employed as a casual employee in the Furnace Section from December 2006. He was subsequently engaged on several fixed term contracts of 11 months each running from 4th January 2010 to 30th November 2010; 3rd January 2011 to 30th November 2011; 3rd January 2012 to 30th November 2012 and 3rd January 2013 until 30th November 2013;

c) That the 3rd Claimant, Thomas Ogundo Nyambane was employed on a two (2) months' fixed term contract from 1st October 2011 to 30th November 2011 and on subsequent fixed term contracts of 11 months each running from 3rd January 2012 to 30th November 2012 and 3rd January 2013 to 30th November 2013;

d) That the 4th Claimant, Evans Nyandoro Mauti was employed on a three (3) months' fixed term contract from 1st September 2011 until 30th November 2011 and on subsequent fixed term contracts of 11 months each running from 3rd January 2012 to 30th November 2012 and 3rd January 2013 to 30th November 2013.

7. The Respondent denies that the Claimants were unlawfully terminated on 2nd January 2014 and states that the Claimants were in employment until 30th November 2013 when their respective contracts lapsed.

8. The Claimants were paid salary up to the last day of work plus gratuity for the period when they were not members of the National Social Security Fund (NSSF). Upon receiving their dues, the Claimants executed acknowledgement, release and discharge.

9. It is the Respondent's case that the Claimants' employment came to an end by effluxion of time as per the terms of their respective contracts. The Claimants are therefore not entitled to service pay. Regarding the claim for house allowance, the Respondent states that the Claimants earned a consolidated salary, which included a housing element.

10. The Respondent avers that the claim for severance pay is without basis as the Claimants were not declared redundant. The Respondent adds that at the time of leaving employment, the Claimants had no leave balances to their credit.

Findings and Determination

11. There are two (2) issues for determination in this case:

a) Whether the Claimants have made out a claim for unlawful termination;

b) Whether the Claimants are entitled to the remedies sought.

Unlawful Termination?

12. The Claimants claim that their employment was terminated without valid reason and in violation of

due procedure. In its defence, the Respondent states that the Claimants' employment came to an end by effluxion of time, upon expiry of their respective fixed term contracts.

13. It is not in contest that the Claimants served on successive fixed term contracts up to 30th November 2013. In defining the beacons of a fixed term contract in **Samuel Chacha Mwita v Kenya Medical Research Institute [2014] eKLR Mbaru J** stated the following:

“Fixed term employment contract, is for example, entered into for a period of six months with a contractual stipulation that the contract will automatically terminate on the expiry date, the fixed term contract will naturally terminate on such expiry date, and the termination thereof will not (necessarily) constitute a dismissal, as the termination thereof has not been occasioned by an act of the employer. In other words, the proximate cause of the termination of employment is not an act by the employer. There is a definite start and a definite end. Thus, the contract terminates automatically when the termination date arrives; otherwise, it is no longer a fixed term contract.”

14. This is the correct legal position as I understand it and as held by **Rika J** in **Margaret A. Ochieng v National Water Conservation & Pipeline Corporation [2014] eKLR** fixed-term contracts do not generally carry expectation of renewal.

15. In his testimony before the Court, the 2nd Claimant, Thomas Onchiri Nyandika argued that because he worked for a few days in December 2013 then his contract had been renewed. The Respondent's Human Resource Manager, Abraham Ombogo Ondara however explained that ordinarily, the Respondent closed the factory for annual maintenance at the end of November and any employees retained in the month of December would be paid for the extra days worked under a separate arrangement. In sum, the Court did not find any intention of renewal of the Claimants' contracts beyond 30th November 2013.

16. I therefore find that the Claimants' employment with the Respondent came to an end by effluxion of time and no claim for unlawful or unfair termination can lie. This dispenses with the claims for compensation and notice pay.

17. From the document placed before the Court, the Claimants were paid a consolidated salary, inclusive of a housing element. The claim for house allowance therefore fails and is dismissed. From the foregoing findings, the Claimants were not declared redundant. The claim for severance pay is therefore without basis and is dismissed.

18. With respect to the claim for leave pay, the Respondent produced records showing that the Claimants were paid for leave days earned under each contract. This claim therefore also fails and is dismissed.

19. In the end, the Claimants' entire claim fails and is dismissed with each party bearing their own costs.

20. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 4TH DAY OF JANUARY 2018

LINNET NDOLO

JUDGE

DELIVERED IN OPEN COURT AT NAIROBI THIS 19TH DAY OF JANUARY 2018

MAUREEN ONYANGO

JUDGE

Appearance:

Miss Ombambia for the Claimant

Mr. Makori for the Respondent