



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 722 OF 2013

DAVID NJOROGE NJENGA CLAIMANT

VS

GETRIO INSURANCE BROKERS LIMITED..... RESPONDENT

JUDGMENT

Introduction

1. By his claim documented by a Memorandum of Claim dated 14th May 2013 and filed in court on 17th May 2013, the Claimant seeks payment of accrued annual leave. The Respondent filed a Reply and Counterclaim on 6th June 2013 to which the Claimant responded on 14th June 2013.

2. By consent of the parties, the matter proceeded by way of written submissions.

The Claimant's Case

3. The Claimant was employed by the Respondent on 1st September 2006, in the position of General Manager. He held this position until 29th February 2012, when he resigned.

4. The Claimant claims that owing to the demands of his office, his annual leave accrued and accumulated progressively over the years of service until his resignation. He states that he was asked by the Respondent, through its Chief Executive Officer not to take his annual leave due to operational requirements.

5. The Claimant maintains that he was called upon by the Respondent, through its Chief Executive Officer, to carry forward his annual leave for the Respondent had reason to believe that the Claimant's absence from duty would hinder its service delivery process.

6. The Claimant further states that it was the Respondent's policy to pay for accrued and accumulated leave earned and not taken. He therefore had a legitimate expectation that he would be paid for his accrued leave.

7. The Claimant pleads that at the time of resignation, he had ninety four (94) days of accrued annual leave. He therefore claims the sum of Kshs. 673,857 being payment in lieu thereof. He further claims costs plus interest.

The Respondent's Case

8. In its Reply and Counterclaim dated 6th June 2013 and filed in court on even date, the Respondent states that the Claimant was a shareholder and director of the Respondent Company. The Respondent further states that the Claimant's letter of appointment was superseded when he acquired the Respondent's shares and thereafter became a director of the Company.

9. The Respondent avers that the Claimant issued his resignation notice on 29th February 2012 with 1st March 2012 being the effective date.

10. The Respondent admits that the Claimant was entitled to annual leave of 28 days but states that the letter of appointment did not allow deferment in taking the said leave nor payment in lieu thereof.

11. The Respondent states that the Claimant was not denied annual leave. Indeed, the only time he applied to go on leave, he was allowed to do so for the applied period of 11 days.

12. The Respondent maintains that the Claimant was no ordinary employee as he was also a shareholder and director of the Respondent. This would explain why he chose not to go on leave so as to dedicate more of his time to the Company in order to increase the shareholders' wealth.

13. By way of counterclaim, the Respondent claims the sum of Kshs. 190,000 from the Claimant, being one (1) month's salary in lieu of notice. The Respondent further claims Kshs. 536,910 being loss incurred on account of the Claimant's negligence.

Findings and Determination

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

- a) Whether the Claimant is entitled to the sum of Kshs. sum of Kshs. 673,857 in leave pay;
- b) Whether the Respondent has made out a proper counterclaim against the Claimant.

The Claimant's claim

15. The Claimant claims the sum of Kshs. 673,857 being accrued leave pay for ninety four (94) days. The Respondent's defence is not that the Claimant had not earned these leave days; it is that he was not entitled to accumulate them. I understand the Respondent to be saying that because the Claimant had not utilized his leave days, he had forfeited them.

16. The Court did not find any legal basis for the Respondent's proposition in this regard. In *John Kyalo Mulela v Pan African Logistics Ltd [2017] eKLR Rika J* stated thus:

“There is no provision in the Employment Act, which supports forfeiture of annual leave. Annual leave is either utilized by the Employee, or paid for in cash by the Employer. Forfeiture of annual leave is a term which is alien to the Employment Act 2007.”

17. At any rate, there was nothing in the Claimant's letter of appointment to suggest that he would forfeit any unutilized leave days. All the letter provided was that the Claimant was entitled to 28 days in annual leave. Further, there was no evidence to support the Respondent's averment that the claimant's terms of employment shifted when he became a shareholder and director of the Respondent

18. In the end, the Court finds the Claimant's claim for leave pay meritorious and allows it.

The Respondent's Counterclaim

19. The Respondent's counterclaim against the Respondent is two-fold:

- a) Kshs.190,000 being one (1) month's salary in lieu of notice;

b) Kshs. 536,910 being loss incurred on account of the Claimant's negligence.

20. The Claimant wrote his resignation letter on 29th February 2012 indicating that he would be leaving the Respondent's employment on 1st March 2012. It is evident that he did not give notice. He is therefore liable to pay to the Respondent one (1) month's salary in lieu of notice.

21. The claim for loss incurred on account of the Claimant's negligence was not proved and is dismissed.

Final Orders

22. Finally, I enter judgment as follows:

a) In favour of the Claimant: Kshs.595,333 in leave pay

b) In favor of the Respondent: Kshs. 190,000 in notice pay

23. The net effect is that the Respondent will pay to the Claimant the sum of Kshs.405,333 being the difference between the two awards.

24. Each party will bear their own costs.

25. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 13TH DAY OF FEBRUARY 2018

LINNET NDOLO

JUDGE

DELIVERED IN OPEN COURT AT NAIROBI THIS 2ND DAY OF MARCH 2018

ONESMUS MAKAU

JUDGE

Appearance:

Mr. Nyamufor for the Claimant

Mr.Kiprono for the Respondent