



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO. 189 OF 2016**

**ROBERT M. MWACHENGO.....CLAIMANT**

**VERSUS**

**SALAMA BEACH HOTEL**

**T/A TEMPLE POINT RESORT LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant brought this suit on 1.3.2016 against Temple Point Resort Limited alleging that his employment had been unfairly terminated and prayed for Kshs.3,230,688 made up of salary in lieu of notice, severance pay and compensation for unfair termination. The said Respondent filed defence denying any employment relationship with the Claimant and contending that the Claimant was employed by Salama Beach Hotel Limited, a separate legal entity from herself.

2. On 17.8.2016, the Claimant applied for leave to amend the claim by substituting the Respondent with Salama Beach Hotel Limited t/a as Temple Point Resort Limited. The amendment was allowed by consent on 7.10.2016. Thereafter the parties agreed to adopt their respective witness statements and documentary evidence and dispose of the suit by written submissions which I have carefully considered herein.

**Claimant's Case**

3. The Claimant stated that he was employed by the Respondent, Salama Beach Hotel Limited on 1.3.2014 as HR Manager earning Kshs.70,000 per month made up to Kshs.60,000 basic salary and Ksh.10,000 House Allowance. On 1.8.2014 his salary was increased to Kshs.122,532 done to his good performance of his duties. He worked until 7.8.2015 when his employment was terminated without prior notice on ground that the occupancy situation and future bookings were at its lowest. However, he learnt that the Respondent replaced him with another HR Manager soon after his lay off.

4. Aggrieved by the way things turned, he brought this suit contending that his termination was unfair and it breached of section 35, 40, 41, 43 and 45 of the Employment Act. He therefore prayed for the reliefs sought in his suit. He submitted that under Regulation 18 of the **Regulation of Wages (Hotel and Catering Traders) Order**, no person can be employed on temporary or seasonal terms of employment for more than 6 continuous months. The Regulation further provides that if the seasonal employee completes six continuous months of service, the seasonal terms of employment are deemed to have converted to regular terms of employment. He cited the decision of this court in **Kenya Union of Domestic, Hotel, Educational Institutions and Hospital Workers vs Wild Waters Entertainment Park [2016] eKLR** which involved similar facts and the Court upheld the provision of the said Regular 18.

**Defence Case**

5. Mr. Ravi Rohra, the General Manager of Temple Point Resort Limited denied any privity of contract between his company and the Claimant either for employment or otherwise. Referring to the documentary evidence produced by the Claimant namely contract of employment and pay slips, he contended that employer for the Claimant was Salam Beach Hotel Limited and not Temple Point Resort Limited. He therefore denied liability on the point of Temple Point Resort Limited to pay the damages sought by this suit.

6. In her submissions and in addition to the foregoing, the Respondent contended that the suit is incompetent and fatally defective because Salama Beach Hotel Limited cannot trade as Temple Point Resort Limited, another Limited liability company. She cited Court of Appeal decision in **Agricultural Finance Corporation vs Lengeta Limited [1985] eKLR at 770** where it was held that a contract affects only practices to it and it cannot be enforced by or against a stranger, even if the contract is made for his benefit and purports to give him rights to sue or make him liable.

7. The Respondent has further submitted that the Claimant is guilty of material non-disclosure for having failed to disclose that after his discharge, he was paid his terminal dues and even signed Certificate of Payment dated 15.8.2015 by which he discharged his employer Salama Beach Hotel Limited from any further claims.

### **Analysis and Determination**

8. There is no dispute that the Claimant was employed by Salama Beach Hotel Limited at Watamu from 1.3.2014 to 7.8.2015 when his contract of employment was terminated. The issues for determination are:

- (a) Whether the suit is incompetent and fatally defective;
- (b) Whether the Claimant's employment contract was unfairly terminated;
- (c) Whether the reliefs sought should be granted.

### **Incompetence**

9. The Respondent has contended that the suit is fatally defective because the Respondent sued is a limited liability company allegedly trading as Temple Point Resort Limited, another limited liability company with separate legal personality. It has not been denied that the two are separate legal persons. It has also not been explained whether the alleged two companies are related.

10. However, in my view the two entities are related closely because, the Letter Heads for the Respondent bear the name Temple Point Resort on the logo, they use the same telephone, postal and email addresses with Temple Point Resort Limited. From the list of staff members produced as exhibit, it would also appear that the two entities used the same staff in their businesses. The foregoing view is fortified by the copy of the cheque for terminal dues to the Claimant dated 19.8.2015 produced as defence exhibit, which was drawn by Temple Point Resort Limited. The said payment was in furtherance to the Certificate of Payment dated 15.8.2015 between the Claimant and the Respondent and which was produced as defence exhibit.

11. The question that arises is whether the Respondent was trading as Temple Point Resort Limited. From the foregoing analysis it obvious that she did so. Although the defence alleged that temple Point Resort Limited is a limited liability company with separate legal personality from the Respondent, no evidence in from of certificates or otherwise has been adduced to verify that allegation by the defence. Consequently, I find and hold that the suit is properly before the Court and I will proceed to determine it on the merits.

### **Unfair termination**

12. The Claimant was employed under a seasonal contract of 3 months and thereafter one year contract. Although the Claimant alleges that the initial contract has been tampered with, I blame him for not producing a proper contract especially noting that he was the HR Manager and the person in charge of HR records. I consequently make a finding of fact that he was hired on seasonal contracts whose aggregate term was one and a half years and it was to end on 31.7.2015.

13. However according to the Claimant his contract had converted to regular term contract of employment after serving for 6 consecutive months as provided by Regulation 18 of the Regulation of Wages (Hotel and Catering Trade) Order. This Court was faced with a similar dispute in *Kenya Union of Domestic, Hotels, Educational Institutions and Hospital Workers Vs Wild Waters Entertainment Park [2016] eKLR* and I held thus:

*"..... the Court finds that all the grievants herein had become employees on regular terms and did not need renewal of their respective contracts. Their employment contract was the terms provided under the said Regulations. They could only be terminated or laid off as provided for under the law. Erroneously, the Respondent regarded the grievant as mere casual or temporary employees who could be dismissed at will or upon expiry of some contracts ..... Consequently, the*

*Court finds and holds that the termination of the grievants' employment was unfair and unlawful within the meaning of section 45 read with section 35 and 40 of the Employment Act."*

14. The facts of this case are not different from the present case and as such, there is no reason shown that would make me reach a different decision. The Claimant's seasonal contracts automatically converted to regular contract under the said Regulation 18. Therefore, the alleged failure to renew his seasonal contract on account of redundancy was therefore subject to the mandatory provisions of section 40 of the Act. The said section provides for a mandatory procedure breach of which renders the termination unfair. The employer is required to first serve at least one month notice to the employee or his union and the area Labour Officer. Secondly, the employer must conduct a fair selection process to identify the officers to be laid off. Finally, the employment must pay all the accrued leave, salary in lieu of notice and severance pay before the termination is effected.

15. In this case, the Claimant and the area Labour Officer were not served with any Redundancy Notice and the Claimant was not paid salary in lieu of notice and severance pay. The said breach of the mandatory procedure rendered the termination of the Claimant on account of redundancy unfair, and I so hold.

### **Reliefs**

16. Under section 49 of the Act, I award the Claimant Kshs.120,532 and Kshs.482,128 being one month salary in lieu of notice and 4

months' salary compensation for the unfair termination respectively. I have made the said award considering the fact that the Claimant served the Respondent for a short period and also the fact that he did not contribute to the termination through misconduct.

17. The claims for severance pay and General damages are dismissed because the layoff has been treated as unfair termination and adequately compensated herein above under section 49 of the Act.

**Disposition**

18. I enter Judgment for the Claimant against the Respondent for the sum of Kshs.602,660 plus costs and interest. The sum awarded shall be subject to statutory deductions.

**Dated and signed at Nairobi this 23rd day of February, 2018**

**ONESMUS MAKAU**

**JUDGE**

**Delivered at Mombasa this 2nd day of March, 2018**

**LINNET NDOLO**

.....

**JUDGE**