



**REPUBLIC OF KENYA**

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

**CAUSE NO.789 (N) OF 2009**

**FRANCIS MBUGUA MUTHIGA.....CLAIMANT**

**VERSUS**

**ECHUKA FARM LIMITED.....RESPONDENT**

**JUDGMENT**

1. The claimant is a male adult and the respondent a limited liability company. In January, 2006 the claimant was employed by the respondent as a Farm Manager at the respondent's farm located in Laikipia Central District at a salary of Kshs.18, 000.00 per month. There was no written contract of letter of appointment issued to the claimant.

2. The claimant worked diligently for the respondent until 11<sup>th</sup> August, 2009 when the respondent's director, Thuo Chege wrongfully and unfairly terminated his employment without notice, reasons or hearing. The claimant was only informed that the respondent company had sold the farm and was thus declared redundant but he was not paid his terminal dues and salary outstanding.

3. During the period of employment the respondent failed to pay statutory dues; the claimant did not take his annual leave; unpaid salary had accumulated to Kshs.506, 000.00. The claims are for;

- a) *Outstanding salary Kshs.506,000.00;*
- b) *Unpaid NSSF contribution Kshs.16,500.00;*
- c) *Unpaid NHIF contribution Kshs.16,800.00;*
- d) *Severance pay Kshs.42,955.00;*
- e) *Notice pay for 3 months Kshs.54,000.00;*
- f) *Outstanding leave Kshs.63,000.00;*
- g) *Damages Kshs.216,000.00;*
- h) *Expenses incurred following up on the case Kshs.26, 000.00.*

4. The claimant is also seeking his costs of the suit.

5. The claimant testified in support of his claim. Upon employment by the respondent he was put in charge of his farm in Laikipia to oversee and supervise operations, the workers manage the cattle, grow fodder and ensure payments were done for the operations and salaries. He kept a record of all his activities. He also had a cash record of all payments and expenses. He took in casual employees and paid for their service. He took a record of salaries. The respondent's director Mr Thuo came to the farm and said he had sold it and all staff were retrenched. The claimant had gone for several months without a salary and since he was paying all other employees, he expected the respondent to take account and pay his terminal dues which was not the case. He was promised his dues and benefits and visited Mr Thuo at his home in Limuru, he was partly paid but to date all his dues have never been settled hence the claim before court for his terminal dues. The termination was unfair and compensation is due. His salary would be paid but there was always a balance outstanding and unpaid. Other workers Gitau and Eunice were also not paid. They left the respondent's employment and when they made demand, their terminal dues were paid. On 31<sup>st</sup> July, 2009 the respondent closed the Laikipia farm.

6. The claimant also called Mr Edot Silale as his witness and who testified that he was employed by the respondent as the Night Guard where

there were cattle and farm implements. There was a problem with salary payment and when Mr Thuo the director came he would leave the claimant with cash to pay the casual employee but this was not always enough. Some employees were never paid. He left the respondent's employment after the farm was sold.

#### Defence

7. In response the respondent's case is that there was only an agreement with the claimant that he watches over the property in Laikipia and for his consideration had a licence to work the land and eke a living for himself. The claimant was not contracted as an employee with a salary as alleged. There was no redundancy declared by the respondent since the claimant was not an employee but a licensee. The claimant made away with the master roll for the respondent, petty cash vouchers and farm diary dip account and details of livestock numbers which records demonstrate the consideration of the claimant from the respondent which he appropriated. The claim should therefore be dismissed with costs.

8. In evidence, the respondent sole witness was Albert Thuo Chege, manager of the respondent. He testified that the claimant was a farm manager as one of the respondent's farms in Ndaragwa Farm as an employee. Silale was also an employee in the farm. The claimant was responsible for all the employees but he remained a licensee at the farm. The farm was far out in Laikipia while the witness was in Nairobi and to manage the farm the claimant was hired as a licensee. The farm was not able to make money and the claimant used farm income to meet his costs and expenses. There was no agreement and in some months there were losses and the witness had to supplement for salaries.

9. Mr Thuo also testified that Samuel Gitau and Eunice Kioko were his employees who were paid a salary. It was an advantage for the claimant to be a licensee than an employee.

10. In 2009 the respondent's farm was sold and Mr Thuo explained to all employees and parted ways on a high note. There is no other suit filed save for the one by the claimant. The operational books of account in the custody of the claimant belong to the respondent and he had custody. Other managers left their records with the respondent. When the claimant's contract ended there was accounts taking and from his pocket, the witness paid what was due to the claimant.

11. The claimant visited Mr Thuo at his Limuru home to seek for a similar job as he had in the respondent farm. While at the respondent farm the claimant had his own income and was able to survive from it over the years.

12. In cross-examination, Mr Thuo testified that the claimant remained the manager in charge of the farm. No employee had been issued with a written contract of employment. The licensee agreement held with the claimant as verbal. From the master roll, all salaried employees were paid their dues in cash but each signed for it. When the claimant was paid, he signed for the same. The Ndaragwa farm generated revenue but none from Echuka Farm.

13. The respondent has employees in the farm but since most are illiterate, no written contracts are issued. The respondent has never issued employment contracts.

14. At the close of the hearing, both parties filed written submissions.

15. The claimant submits that he was an employee of the respondent and not a licensee. He was not issued with a written contract nor was he issued the alleged licensee agreement. No employee had a written contract of employment. All salaries were paid in cash.

16. The respondent's witness testified that the respondent farm was running at a loss and thus was sold and all employees parted ways. He however did not pay the claimant his terminal dues. There was no notice leading to the sale and termination of employment by redundancy when the farm was sold. Such resulted in unfair termination of employment through redundancy and the provisions of section 40 of the Employment Act, 2007 were not adhered to. Section 45 of the Act also provides that where employment is terminated unfairly, such should be compensated by compensation and terminal dues assessed and paid.

17. The claimant relied on the cases of **Mary Mutanu Mwendwa versus Ayuda Ninos De Africa-Kenya (Anidan K) [2013] eKLR** and **Thomas De La Rue versus David Opondo [2013] eKLR**.

18. The respondent submits that in accordance with section 107 and 109 of the Evidence Act, Cap 80 Laws of Kenya the claimant's case is contradictory, impossible to understand and without evidence. The claims made have no justification. The computation of given figures have no basis and are untenable. The claimant did not have a contract or agreement with the respondent to support his allegations of employment.

19. The respondent also submits that there was no employment relationship between the parties to justify the claimant filing this suit before the court. The respondent's witness Mr Thuo testified that the claimant was a licensee over his land and was able to earn his upkeep from the proceeds of the farm. The claimant failed to explain how he was able to survive without a salary for the years at the respondent farm. Without evidence on the source of his income, he cannot claim there was employment but a different arrangement as held in **Kennedy Ouru Okise versus James Finley (K) Limited [2016] eKLR**. The claimant cannot have his terms of contract rewritten by the court by making his claim as held in **National Bank of Kenya Ltd versus Pipeplastic (K) Ltd [2002] 2 EA**.

20. There was no termination of employment on account of redundancy. Such allegations are not supported. The documents filed by the claimant are inconsistent and with great discrepancies and should be disregarded and the claims dismissed with costs.

Drawing from the pleadings, the evidence of the parties and written submissions, the issues which emerge for determination are;

Whether there was unfair and wrongful termination of employment;

Whether there is a case of redundancy;

Whether there are any remedies available.

21. Before going into the issues set out above, the respondent has submitted that the claimant has failed to abide the provisions of section 107 and 109 of the Evidence Act, Cap 80 Laws of Kenya. That the claimant has failed to submit evidence in support of his claims.

22. It is not in dispute that from January, 2006 to 31<sup>st</sup> July, 2009 the claimant and the respondent had a relationship with regard to the respondent farm in Ndaragwa Laikipia. On the one hand the claimant asserts that he was an employee of the respondent and on the other hand the respondent asserts that he was a licensee therein. The claimant filed various books of accounts with regard to his management of the respondent farm and which include salary payments for casual employees and to himself. He called a witness, a Night Guard who was employed at the respondent farm and who testified that they were all the employees of the respondent and Mr Thuo the general manager. The respondent did not file any records save to call Mr Thuo as the witness.

23. It is trite that the Evidence Act Cap 80 does not apply to proceedings before this court. The law requires the employer to keep all work records of an employee and when a suit such as this is filed to produce such records. See section 10(6) and

(7) of the Employment Act, 2007.

(6) *The employer shall keep the written particulars prescribed in subsection*

(1) *for a period of five years after the termination of employment.*

(7) *If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.*

24. In addressing a similar matter, the court in the case of **Samwel Shilumba Kwayumba versus Tushar Shar Cause No.484 of 2013** held that;

*The rationale and the requirement for an employer to keep all work records is to be found under section 8, 9 and 10 of the Employment Act, 2007 which creates a mandatory duty upon the employer to issue an employee with a contract of service spelling out the terms and conditions of employment. Where it is not practically possible to issue such an employment contract immediately, such should be issued within 2 months of commencement of employment.*

*An employment contract does not protect the employee only. Such a contract protects both parties to an employment relationship. It is therefore to the great disadvantage of the respondent as the employer where the claimant was employed and then failed to issue him with a written contract of service as in proceedings such as this the word of the claimant must be believed.*

25. In this case where the respondent asserts that the claimant was not an employee but a licensee over his farm, no license agreement has been produced. Also, the evidence that there were other employees, Mr Silale as a Night Guard, Eunice Kioko and Samuel Gitau, no work records have been produced to prove that indeed the respondent had these persons as employees as against the claimant who was a licensee.

26. Without any records by the respondent and the Evidence Act Cap 80 not being applicable to proceedings before this court, the evidence of the claimant must be believed. Jurisdiction of this court is not challenged.

27. Even in a case where the claimant had a relationship with the respondent other than employment, upon the claimant moving the court as the employee of the respondent, the burden shifted to the respondent to prove that there was no such relationship. Such burden has not been discharged. In the respondent relying on the case of **Kennedy Ouru Okise**, cited above, the facts therein are fundamentally different from the claim herein as it related to the nature of contract under which the employee was placed. The relevance and application herein is therefore lost.

28. The court finds the claimant was an employee of the respondent.

29. The respondent's witness Mr Thuo testified that following revenue losses at the Ndaragwa Farm and Echuka farm was not generating any income on 31<sup>st</sup> July, 2009 he opted to sell the farm. He paid all his workers. The payments were made in cash and the employees aligned vouchers. No records of payments have been submitted.

30. As noted above, section 10 of the Employment Act, 2007 has far reaching effect where an employer fails to abide the provisions of section 8 and 9 of the Act. Once an employee is hired or engaged for whatever task, the law vests the responsibility upon the employer to issue a written contract. Such can be for a fixed term, seasonal contract or as alleged a licence to occupy the farm. The written agreement then becomes a key and useful record to support the employer's assertions. Without such records, and in terms of section 10(7) of the Employment Act, 2007 the court must believe the employee.

31. Where the respondent sold its farm on account of no revenue, and such resulted in the layoff of its employees, the law under section 40 of the Employment Act, 2007 defines such as a redundancy. Section 2 of the Act defines *redundancy* as follows;

*“redundancy” means the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the*

*practices commonly known as abolition of office, job or occupation and loss of employment;*

32. There was loss of employment by involuntary means through no fault of the employee and the respondent had to terminate employment because revenue was low and I take it they could not pay salaries and meet other costs. Due to no fault of the claimant and following such revenue losses, a decision was made to sell the farm and pay off employees. The claimant was not paid on the basis that he was taken to be a licensee a matter addressed above, he was an employee.

33. With regard to termination of employment arising out of a redundancy, the elements applicable have also been addressed by the Court of Appeal by restating the law and I find the same to be relevant to refer herein. In Kenya **Airways Limited versus Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR** the court held that;

*It is convenient to begin by setting out the provisions of the Employment Act (EA), the Labour Relations Act (LRA) and the Collective Bargaining Agreement (CBA) relating to redundancy. Both section 2 of EA and LRA define redundancy thus:*

...

*Section 40 of the EA deals with termination of employment on account of redundancy and provides:*

...

*Section 43(1) of the EA provides that in any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for termination and where he fails to do so, the termination shall be deemed to be unfair termination within the meaning of sections 45. Section 43(2) provides:*

*43. (2) the reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.*

*Section 45(1) of EA prohibits an employer from terminating the employment unfairly and Section 45(2) stipulates what is unfair termination. It provides:*

...

***Section 40(1) of the EA is merely procedural by its tenor. It has to be read together with sections 43, 45 and Section 47(5) of EA. It is implicit from the four sections that to establish a valid defence to a claim for unfair termination based on redundancy, an employer has to prove:***

***(I) the reasons or reasons for termination.***

***(II) That reason for termination is valid and that ... [emphasis added].***

34. In this regard therefore, even where the employer has a valid reason leading to possible termination of some employees or the entire workforce, the employer must nevertheless demonstrate that the termination of employment is attributable to the redundancy. The employment of the affected employees is rendered superfluous due to the redundancy as positions become redundant and not the skills or abilities of the employees. Where the redundancy therefore results in the need to downsize the workforce, the employer must issue individual letters or notices of termination of employment.

35. The respondent's witness Mr Thuo testified that he currently has a farm and has employees who are illiterate. He has not issued them with contracts of employment. I take this is a practice that the respondent has applied and used over time and failure to issue a written contract spelling out the terms and conditions of employment must be read to the benefit of the employees.

36. Section 9 of the Employment Act, 2007 provides as follows;

*(4) Where an employee is illiterate or cannot understand the language in which the contract is written, or the provisions of the contract of service, the employer shall have the contract explained to the employee in a language that the employee understands.*

37. Therefore, based on the clear provisions of the law, I find the respondent failed to address the procedural requirements in the termination of the claimant's employment and also failed to ensure substantive justice in addressing the termination of employment. Such is contrary to section 40 read together with section 45 of the Employment Act, 2007. Termination of employment was unfair. The terminating having arisen from a redundancy, severance pay is payable to the claimant.

Remedies

38. On the finding that the termination of employment was due to a redundancy, severance pay is due to the claimant in accordance with section 40(1) (g) of the Employment Act, 2007;

*(g) The employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days' pay for each completed year of service.*

39. For the four years of service, and on the unchallenged evidence that the claimant was earning Kshs.18, 000.00 per month in salary, the claimant is entitled to a severance pay of at least 15 days' pay for each year and all at Kshs.36, 000.00.

40. In the two tier process of failure to abide the provisions of section 40 and 45 which resulted in unfair termination, the claimant is not entitled to damages but compensation under section 49 of the Employment Act, 2007. Such compensation is hereby awarded at 3 months' salary all being Kshs.54, 000.00.

41. Section 35 of the Employment Act, 2007 provides for service pay where an employer fails to effect statutory deductions and remittance to the relevant agencies. The claimant is seeking for unpaid contributions to NSSF and NHIF. Such monies ought to go to the relevant bodies as they are regulated in law. The court can only award service pay. For the 4 years, the claimant is awarded Kshs.36, 000.00 in service pay.

42. Notice pay due to an employee without a written contract stating terms and conditions of employment is at one month's salary. The claimant is awarded Kshs.18, 000.00 in notice pay.

43. Leave due for the 4 years should be at 21 days with full pay and all being Kshs.74.000.00. The claimant is only claiming for Kshs.63, 000.00 which is hereby confirmed.

44. The outstanding salary is claimed at Kshs.506, 000.00 on the grounds that it remained unpaid and the claimant had to follow up to ensure he was paid. This evidence is not challenged and as noted above, the assertion that the claimant was not paid such salary on the belief that he was a licence over the respondent's farm has been addressed. Such salary is due all at Kshs.506, 000.00.

45. Expenses incurred following payment are claimed at Kshs.26, 000.00 this is equivalent to special damages. There is need for proof. I find none. Such is declined.

**Accordingly, judgement is hereby entered for the claimant against the respondent in the following terms;**

- a) A declaration that the claimant was an employee of the respondent;**
- b) The claimant was unfairly and wrongfully terminated in his employment through redundancy;**
- c) The claimant is awarded compensation at kshs.54, 000.00;**
- d) Severance pay Kshs.36, 000.00;**
- e) Service pay Kshs.36, 000.00;**
- f) Notice pay Kshs.18, 000.00;**
- g) Unpaid leave at Kshs.63, 000.00;**
- h) Unpaid salaries Kshs.506, 000.00; and**
- i) Costs of the suit.**

**Read in open court at Nairobi this 20<sup>th</sup> day of April, 2018.**

**M. MBARU JUDGE**

In the presence of:

Court Assistant:.....

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