



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 2006 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

PETER MBURU MWENDA.....CLAIMANT

VERSUS

FAITH HOMES OF KENYA.....1ST RESPONDENT

THE CHAIRPERSON, FAITH HOMES OF KENYA...2ND RESPONDENT

THE TREASURER, FAITH HOMES OF KENYA.....3RD RESPONDENT

THE SECRETARY, FAITH HOMES OF KENYA.....4TH RESPONDENT

DR. N. B. FRIDE NILSON.....5TH RESPONDENT

JUDGMENT

This suit was originally filed as a plaint in Milimani Chief Magistrate's Court as Nairobi CMCC No. 1726 of 2007. It was transferred to this court by an order dated 4th June 2013 upon application by the claimant in Industrial Court Misc. Application No. 32 of 2012 and thereafter registered under the present Cause No. 2006 of 2013. The plaint was amended to a statement of claim and filed on 23rd June 2014 to which the respondents filed a reply on 10th July 2014.

In the amended statement of claim the claimant describes the 1st respondent as a non-profit making Christian church based charitable organisation registered in Kenya. The 2nd, 3rd and 4th respondents are described as officials of the 1st respondent and the 5th respondent as a Director of the 1st respondent.

The claimant avers that he was employed by the 1st respondent as an Accounts Clerk and later as a Pastor of Nairobi Faith Church, an entity operating under the 1st respondent in Kariobangi Nairobi in the year 1999.

The claimant avers that on 7th January 2007 he was forced to resign from his position as Pastor of Nairobi Faith Church due to unfavourable working conditions. At the time of resignation he was earning a salary of Kshs.38,000 per month.

The claimant avers that during employment he was never granted 21 days annual leave and that the 1st respondent failed to pay his salary for December 2006 and 7 days worked in January 2007. He prays for leave for 7 years at Kshs.266,000, salary for December 2006 Kshs.38,000 and 7 days worked in 2007 Kshs.8,581, costs and interest.

In the reply to statement of claim which was filed on behalf of only the 1st and 5th respondents, they aver that the 2nd, 3rd and 4th respondents are non-existent.

The 1st and 5th respondents conceded that the claimant was an employee of Nairobi Faith Church until 7th January 2007 when he voluntarily resigned. They however deny owing the claimant the sums claimed.

The 1st and 5th respondents have counter claimed against the claimant the sum of Kshs.114,000 in lieu of 3 months' notice, Kshs.251,955 being monies expended on tutorial fees for the claimant's theology studies at East African School of Theology and Kshs.183,000 that the

claimant obtained from the funds of Nairobi Faith Church to finance an unauthorised trip to Thailand.

The 1st and 5th respondents pray that claimant's claim be dismissed and judgment be entered in their favour in the sum of Kshs.548,955 as claimed in the counterclaim.

I have not seen any reply or defence to the counterclaim.

The claimant testified on his behalf at the hearing. DR. N. B. FRIDE NILSSON and PASTOR JOHN SEWE testified for the respondents.

Claimant's Case

The claimant testified that he was employed as Accounts Clerk on 22nd February 2009. He became a Pastor in 2001. He resigned on 7th January 2007. His last salary was Kshs.38,000 per month. He started preaching while he was still an Accounts Clerk and became a Pastor in 2007. Between January 2004 and July 2007 he studied at East African School of Theology. He attended classes from 8 a.m. to 12.30 p.m. and was in the office from 1 p.m.

The claimant testified that his fees was paid by well-wishers. The 5th respondent supported him and gave him Kshs.25,000, three times on humanitarian grounds. The fees ranged from Kshs.25,000 to Kshs.35,000 per term. At the time of support, the 5th respondent and the claimant had a very good relationship. It is the 5th respondent who recommended him to the East African School of Theology. The recommendation was mandatory for admission.

The claimant testified that he visited Thailand and Philippines in November 2006 while doing a research paper for his graduation on culture and evangelism. He wanted to do research in a Buddhist Country. His trip was funded by well-wishers through several fundraisers at the Church.

While he was away a lot of things happened and upon his return he tendered his resignation because the environment at work was hostile and not conducive. By the time he resigned on 7th January 2007 he had not received his salary for December 2006. He testified that the Church did not object to his trip.

He prayed for judgment as set out in his claim.

Respondent's Case

RW1 Dr. Nilsson Fride testified on behalf of the 1st and 5th respondents. He testified that he is the Founder and Director of Faith Homes Kenya. He testified that he did not authorise the claimant's trip to Thailand and Philippines, that the claimant travelled without his knowledge of the date of travel or the return date. The money for funding of the trip was raised by Faith Homes Church. He testified that the claimant resigned unceremoniously without handing over and that before he left the claimant had taken valuable church equipment. He testified that the claimant resigned and left without giving notice as required by his terms of service.

RW1 testified that he paid the claimant's fees at East African School of Theology in the sum of Kshs.50,000 in 2004, Kshs.75,000 in 2005 and Kshs.25,000 in 2006. He testified that the 1st respondent had counterclaimed for refund as the claimant did not work for it after graduating but registered his own church by the name House of Tehila.

RW1 testified that during the period the claimant was studying he was not working and had agreed to forfeit his annual leave. He testified that he did not approve overnight prayers (Kesha) which the claimant alleged he conducted as part of his work during the period he was in college. He denied that the claimant is entitled to any pay in lieu of leave as claimed.

On the salary for December 2006 and January 2007 RW1 testified that the claimant was to be paid after submitting an account as requested in the 1st respondent's letter dated 2nd December 2006 which the claimant did not respond to. He testified that the claimant's employment was not terminated, that it is the claimant who owes the respondent notice and the other monies as claimed in the counterclaim.

RW2 PASTOR JOHN SEWE testified that he joined the 1st respondent as a member of the church in 1986 before the claimant was employed and became a Pastor after resignation of the claimant. He testified that he participated in the fundraising for the claimant's trip to Thailand from mid-October to mid November 2006. That when the claimant came back from the trip there were some issues that necessitated a meeting on 6th December 2006 to streamline operations of the church.

In particular the meeting discussed how tithes and offerings were to be banked and how church equipment were to be used. It was agreed at the meeting to change signatories to the church bank account. The claimant was removed as a signatory because of issues of accountability. The meeting was chaired by Dr. Fride Nilsson, the 5th respondent.

He denied that Faith Homes owed the claimant any money.

Under cross-examination, RW2 stated that he participated in fundraising for the claimant's school fees and trip to Thailand. He testified that on 2nd December 2006 the claimant was issued with a letter to account for church facilities and his salary for December 2006 was withheld until he gave an account. The claimant did not respond to the letter. He testified that the letter of resignation was sent to the Board of Elders and Deacons and not to Faith Homes of Kenya.

The issues for determination are the following –

1. Whether the claimant resigned or was constructively dismissed by the respondent.
2. Whether the claimant is entitled to the remedies sought.
3. Whether the respondent is entitled to the remedies in the counter –claim.

Constructive Dismissal

The claimant has in the amended statement of claim averred that he was forced to resign from his position as Pastor Nairobi Faith Church due to unfavourable conditions. In his evidence the claimant stated that he was frustrated at work, that when he returned from overseas he found conditions were bad, that his salary for December was withheld, his car searched at the entrance and his office turned upside down.

The person the claimant sued are Faith Homes of Kenya whose Director and Founder is also sued as 1st and 5th respondents respectively. His letter of resignation was not addressed to them. He did not mention them in his letter of resignation which was sent to the Board of Elders and Deacons of Faith Church Nairobi. The persons named as the 2nd, 3rd and 4th respondents are described as officials of the 1st respondent but the 5th respondent stated that those offices are non-existent. It is not clear who frustrated the claimant and what action he took to raise his frustrations with the persons concerned.

The letter of resignation is dated 7th January 2007, just over a month from the time the claimant received the letter dated 2nd December 2006 signed by Dr. N. B. Fride Nilsson, Director Faith Homes of Kenya. The letter is reproduced below

“2nd December 2006

Pastor Peter Mburu

Nairobi Faith Church

P.O. Box 14507

NAIROBI

Dear Peter Mburu

RE: ACCOUNTABILITY OF CHURCH FACILITIES, FINANCIAL STATEMENTS AND IMPROVEMENT OF CHURCH LEADERSHIP

The above matter refers.

I kindly refer you to a lengthy discussing we had yesterday, Friday 1st December 2006 in regard to various issues affecting the Nairobi Faith Church. In the light of full responsibility, accountability and proper management of the church resources and equipment the following should be taken seriously.

- i. The plat form is the property of Faith Homes of Kenya and can only be authorized by the Head Office. Hence money collected in the past for the same must be accounted for.*
- ii. No church equipment should be hired out because of the money involved for repair or replacement.*
- iii. All money raised in or through the church such as tithe, church offerings, fundraising, Sunday school offerings and home cells money must be accounted for by receipting and banking.*
- iv. Fundraise for the alt 2 years should be accounted for.*
- v. Private hiring of church to outsiders must be accounted for and money banked should be receipted etc.*
- vi. A comprehensive and all-inclusive inventory list both mobile and immobile must be made.*
- vii. Payment of PAYE, NSSF and NHIF payments must be done as per the law of the land.*
- viii. There should be prompt and regular maintenance and repair if the church facilities e.g. rain gutters, broken louvre glasses, ceiling leakages, toilets, sinks and toilet flashers.*
- ix. The Nairobi Faith Church account signatories should be changed for transparency, accountability and efficiency.*

x. Church elders and deacons must sit, act and decide together as a group. Unless delegation has been given to an individual and confirmed by the whole group.

As a good shepherd we expect you to continue with the good work in the Kingdom of God, 'For a good shepherd gives his life for the sheep'.

God bless abundantly as diligently and faithfully serve Him with the understanding that you will give an account to God of everything you do with His precious souls.

Yours faithfully

SIGNED

Dr. N. B. Fride Nilsson

Director

Faith Homes of Kenya"

It would appear as if what the claimant was complaining about were the issues addressed in the letter. He did not produce any evidence of any mistreatment or frustration that would justify constructive dismissal.

In the submissions filed on behalf of the claimant he relied on the case of **Maria Kagai Ligaga -vs- Coca Cola East and Central Africa Limited** in which the court set out the ingredients of constructive dismissal as follows-

- a. The employer must be in breach of the contract of employment.
- b. The breach must be fundamental as to be considered a repudiatory breach.
- c. The employee must resign in response to that breach and
- d. The employee must not delay in resigning after the breach taken place otherwise the court may find the breach waived.

In the present case the only issue that may be construed as breach of contract was the withholding of salary of the claimant for December 2006. As explained by RW2 John Sewe, the claimant had failed to account for tithes and offerings as well as equipment which he only returned after he had resigned and after a report was made to the police.

I do not find the claimant's case to qualify to be constructive dismissal and further he has failed to connect the 1st and 5th respondents who are the only ones who responded to the claim with the frustrations alleged.

I therefore find that the claimant resigned from employment of his own free will following a fall out over his failure to account for funds and equipment of Faith homes Church.

Remedies

The claimant prays for salary for December 2006 and January 2007 from

1st to 7th. He is entitled to the same as he was in employment for the period. I award him Kshs.46,867 on account of the same.

The claimant further prayed for leave for the period he worked for the respondent. Having been in training from January 2004 to January 2007 when he resigned he is not entitled to annual leave. Further the claimant testified that he was on a trip to Philippines and Thailand in October/November 2006 was this not part of his leave?

I find that in the circumstances of the claimant who was a Pastor, was in charge of the Church, was in training for the last 3 years of his service and on a trip for one month in October/November 2006 is not entitled to the claim for leave. The prayer for leave is dismissed.

Counter Claim

The 1st and 5th respondents prayed for 3 months' salary in lieu of notice. According to the claimants contract he was obliged to give 3 months' notice or pay in lieu which he did not. I therefore award the respondent Kshs.114,000 being 3 months' salary in lieu of notice.

The respondents further prayed for Kshs.251,955 expended on tutorial fees for the claimant while studying at East African School of Theology. I find that the fees paid to the claimant was not intended to be a loan as the same was given to him as a donation as expressed in the letter dated 18th April 2006 in which the 5th respondent informed the claimant of his inability to assist in the payment of claimant's fees. In the 5th paragraph thereof the 5th respondent writes –

“I was very sorry to read about your school fees and the strict deadlines to meet your educational obligations especially as I cannot just now be of any help to you in the way you suggest.”

The claimant also produced documents that show that there were fundraisings at the church for payment of his school fees. RW2 further confirmed that there were fundraisings at the church in which he participated to raise fees for the claimant.

The same applies to the trip to Thailand and Philippines. Both respondents confirmed church fundraisers specifically for the trip and the claimant produced evidentiary proof of the collections.

In the end I made the following findings and determinations –

1. The claimant’ resignation was not a constructive dismissal.
2. I enter judgment in favour of the claimant against the respondent in the sum of Kshs.46,861 on account of salary for December 2006 and 1st to 7th January 2007.
3. I enter judgment in favour of the 1st respondent in the sum of Kshs.114,000 on account of pay lieu of notice.
4. Each party shall bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 4TH DAY OF MAY 2018

MAUREEN ONYANGO

JUDGE