



**REPUBLIC OF KENYA**

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

**CAUSE NO. 908 OF 2014**

**RAPHAEL SHITIMU ASIBWA.....CLAIMANT**

**v**

**YARA EAST AFRICA LIMITED.....RESPONDENT**

**JUDGMENT**

1. Raphael Shitimu Asibwa (Claimant) was employed as a Warehouse Manager by Yara East Africa Ltd (Respondent) through a letter dated 16 June 2006.
2. On 25 November 2013, the Claimant wrote to the Respondent giving notice of resignation, effective 27 December 2013. The reason given by the Claimant was that he intended to take up dog breeding and pursue further education.
3. The Respondent requested the Claimant to extend the notice in order to ensure a smooth transition and the Claimant, through a letter dated 21 December 2013 agreed to serve up to 30 January 2014.
4. On 29 May 2014, the Claimant instituted legal proceedings against the Respondent alleging that he held 2 different substantive managerial roles for 13 months without requisite remuneration.
5. The Claimant sought Kshs 1,430,000/- being the remuneration he claimed he was entitled to for the dual role(s) and Kshs 425,328/- as gratuity/service pay.
6. In a Response filed on 22 July 2014, the Respondent contended that the contract provided that the Claimant's designation and duties could be altered at its discretion, the remuneration was commensurate with the responsibilities of the Claimant and that *service pay* was not payable because the Claimant was registered with and contributions were made to the National Social Security Fund.
7. The Cause was heard on 10 May 2018. The Claimant and the Respondent's Administration Manager testified.
8. The Claimant filed his submissions on 28 May 2018 while the Respondent filed its submissions on 6 June 2018.
9. The Court has considered the pleadings, evidence and submissions.

**Constructive dismissal**

10. The Claimant pleaded and contended that he resigned because he held 2 different positions without appropriate remuneration despite several requests, and thus the Respondent had created a hostile work environment for him.
11. During testimony, the Claimant however did not disclose which person he addressed the requests to and or demands for appropriate remuneration for the 2 roles.
12. The Claimant produced a copy of the resignation notice. The notice did not make any reference to a hostile work environment or requests for increased remuneration for the 2 roles.
13. For constructive dismissal to found, an employee should demonstrate that the employer's conduct was a significant breach going to the root of the contract (see *Western Excavating (ECC) Ltd v Sharp* (1978) IRLR 27).
14. In the case at hand, the Claimant's contract expressly provided that the designation and duties could be changed at the discretion of the Respondent.

15. Considering that provision, the failure of the Claimant to disclose which person he complained to or made a request to and the reasons given in the resignation notice, it is the view of the Court that this was not a case of constructive dismissal.

#### **Gratuity/Service pay**

16. The Claimant was registered with the National Social Security Fund.

17. According to copies of the Claimant's pay slips filed in Court, the Respondent made deductions from the Claimant's salary and paid the same into the Claimant's account with the National Social Security Fund.

18. In terms of section 35(5) & (6) of the Employment Act, 2007, the Claimant is therefore not entitled to *service pay*.

19. If the Claimant was entitled to *gratuity* pursuant to contractual agreement, he did not show or prove such entitlement.

#### **Dual role**

20. The Claimant was engaged as a Warehouse Manager. Clause 2 of the contract provided that his designation and duties could be changed at the discretion of the Respondent.

21. Clause 10 on its part provided that the terms and conditions of contract could be changed from time to time.

22. The Claimant was also issued with a job description. Among the responsibilities included *health and safety*.

23. Around January 2013, the Respondent designated the Claimant as Health Environment and Safety Qualities Manager/Inventory Manager. There was no change in remuneration.

24. Apart from contending that he was added more responsibilities/duties and that remuneration was not commensurate with the double roles, the Claimant did not provide during testimony or in his submissions, the foundation to this head of claim and or relief.

25. Therefore, and on the basis of the contractual power reposed in the Respondent to vary the designation and duties of the Claimant, the Court finds that the Claimant did not prove this head of claim or that he was entitled to any relief therefrom.

#### **Conclusion and Orders**

26. In conclusion, the Court finds and holds that the Claimant did not prove his case to the required standard, and orders that the Cause be dismissed with no order as to costs.

**Delivered, dated and signed in Nairobi on this 29<sup>th</sup> day of June 2018.**

**Radido Stephen**

**Judge**

#### **Appearances**

For Claimant Ms. Mungoni instructed by P. Sang & Co. Advocates

For Respondent Ms. Bonyo instructed by Obura Mbeche & Co. Advocates

Court Assistant Lindsey