



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO.1140 OF 2017

(Formerly HCCC No. 555 of 2003 at Nairobi)

DORON WEBER..... PLAINTIFF

- VERSUS -

JAMES ISABIRYE.....1ST DEFENDANT

MUGOYA CONSTRUCTION COMPANY LIMITED.....2ND DEFENDANT

(Before Hon. Justice Byram Ongaya on Friday 22nd June, 2018)

JUDGMENT

The plaintiff filed the plaint on 09.06.2003 through Kaplan & Stratton Advocates. The amended plaint was filed on 29.10 2003. The plaintiff prayed for judgment against the defendants jointly and severally for:

- a) Unpaid salary (US\$ component) @ US\$ 5,000 per month for one month in the period February 1998 to June 1999 US\$ 5000.00.
- b) Unpaid salary (US\$ component) @ US\$ 5,000 per month for the period July 1999 to June 2000 US\$ 60,000.00.
- c) Unpaid salary (Kenya shilling component) @ Kshs.120,000 per month from November 1999 until June 2000 Kshs.960,000.00.
- d) In alternative and without prejudice to (b) and (c) above salary arrears for 6 months plus 3 months' salary in lieu of notice effective from 31st December 1999 making US\$45,000.00 and Kshs.600,000.00.
- e) Unpaid salary (US\$ component) @ US\$ 5,000.00 per month from July 2000 to ½ July 2003 US\$ 60,000.00.
- f) Unpaid salary (Kenya shillings component) @ Kshs.120, 000 for 2003 ½ July Kshs. 60,000.00.
- g) Unpaid 3 month's salary in lieu of notice Kshs.360, 000.00 plus US\$ component 15,000.00.
- h) Interest on unpaid salary as at 15th September US\$ 44, 126.
- i) In alternative to (e) above, interest on the unpaid salary (US\$ component) at Court rates for the period in arrears until payment in full or alternatively from the date of suit until payment in full.
- j) Interest on the unpaid salary (Kenya shilling) component at Court rates for the period in arrears until payment in full or alternatively from the date of filing suit until payment in full.
- k) Payment to the plaintiff of all other outstanding salary arrears as at the date of judgment.
- l) The cost of 5 air tickets to Israel in 2002 and 2003 @ Kshs. 50,000.00 making Kshs.250, 000.00.
- m) Costs of the suit and interest thereon.

n) Such other or further relief that the Court may deem fit and just to grant.

The 1st defendant filed an amended statement of defence on 14.01.2004 through Oraro & Company Advocate. He prayed that the plaintiff's suit against him be dismissed with costs. The 2nd defendant filed an amended statement of defence on 14.01.2004 through Oraro & Company Advocates. The 2nd defendant prayed that the plaintiff's suit against it be dismissed with costs.

The plaintiff's case as pleaded is that by an agreement on or about 15.02.1998 the 1st defendant being the majority shareholder in the 2nd defendant company agreed to employ him. In alternative, the plaintiff pleads that by a verbal agreement between the 1st defendant as the managing director of the 2nd defendant and the plaintiff on or about 15.02.1998, the plaintiff was employed by the 1st defendant on behalf of the 2nd defendant.

It is the plaintiff's further case that during the employment he worked in various capacities as follows:

- a) As site agent or Project Manager on the defendants' Kipsak – Kaptumo Road Project from the 15.02.1998 to the end of December 1999.
- b) On 01.07.2000 he was appointed as the site agent or Project Manager of the defendants' Nyeri – Marua – Kiganjo Road Project and he worked in that capacity until April 2002.
- c) On 01.03.2002 he was appointed Contracts Manager in charge of civil works and roads and he held that position until his termination on or about 10.07.2003.

The plaintiff pleaded that during the employment period it was agreed between the parties that the plaintiff was to be paid, net after taxes and other deductions, a salary of US\$ 5,000 and Kshs.120, 000 both payable at end of every month. Further that the contract could be terminated by either party giving the other three months notice or three months' salary in lieu of notice. Further, he would be entitled to medical cover, air travel to Israel 3 times a year or air travel of equivalent value to any destination, a fully serviced car and a residential house with utilities.

It was further pleaded for the plaintiff that the defendants had jointly and severally breached the contract of service as follows:

- a) Repeatedly failing to pay the plaintiff's salary as agreed from time to time during the employment.
- b) For one month from February 1998 to June 1999 the defendants did not pay US\$ 5000.
- c) In October 1999 to 01.07.2000 the plaintiff worked on Nyeri – Marua – Kiganjo Road Project but from July 1999 to June 2000 US\$ salary component not paid amounting to US\$ 60,000.00; November 1999 to June 2000 Kshs.960,000.00; at end of December 1999 employment was terminated but plaintiff reemployed from 01.07.2000 so that for 6 months from 31.12.1999 to 01.07.2000 he claims unpaid salary US\$ 45,000.00 and Kshs.600,000.00; July 2000 to May 2003 US\$ component salary not paid amounting to US\$ 130,000.00; for April and May 2003 Kshs. component of salary not paid making Kshs.240,000.00; cost of 5 air travel tickets to Israel @ US\$ 1,320.00 not reimbursed making Kshs.6,600.00; for June and half July 2003 Kshs. component of salary not paid Kshs. 180,000.00 (at time plaintiff was constructively terminated); May, June and half July US\$ component salary not paid making US\$ 12, 500.00; and after constructive termination 3 months' pay in lieu of notice not paid making Kshs.360,000.00 and US\$ 15,000.00.

The 1st defendant pleaded that the defendants are separate persons in law and the plaintiff was employed by the 2nd defendant. Thus, he was not the employer. He also denied that the plaintiff was entitled as claimed and as prayed for.

The 2nd defendant admitted that it agreed to employ the plaintiff as a Site Manager at monthly salary of Kshs.120, 000.00 and US\$ 5,000.00 and the employment was on specific projects. Further in June 1999 it was mutually agreed that the plaintiff would go on a one year unpaid leave ending June 2000 and the plaintiff proceeded accordingly. The plaintiff resumed employment in August 2000 to December 2002 and he was fully paid. In January 2003 he absconded duty with a unilateral decision to work one hour each day but which he failed to do and retained the allocated 2nd defendant's motor vehicle. The agreement was that the plaintiff takes one passage to Israel but in 2001 the plaintiff opted to settle in Kenya and the passage arrangement ended. The 2nd defendant denied the plaintiff's claims and pleaded a set off as set out in the defence.

The plaintiff testified to support his case. The defendants did not call a witness. The Court has considered the pleadings, the evidence and the submissions on record. The Court makes the following findings on the matters in dispute.

The **1st issue** for determination is whether the plaintiff was employed by both defendants or by one of them. The plaintiff was not certain whether he was employed by the 2nd or the 1st defendant. That was the plaintiff's case as pleaded and he was bound accordingly. The 1st defendant has stated that the plaintiff was employed by the 2nd defendant and the 2nd defendant has admitted that much. In any event, there was no evidence that the plaintiff worked for the 1st defendant. The Court has considered the letters the plaintiff addressed to the 1st defendant as managing director and returns that they confirm that the plaintiff knew he was employed by the 2nd defendant whose managing director was the 1st defendant. The Court returns that the contract of service was between the plaintiff and the 2nd defendant.

The **2nd issue** for determination is whether the plaintiff is entitled to the remedies as prayed for. The Court makes findings as follows:

- a) The letter at page 38 of the 2nd defendant's list of documents was written by the plaintiff. The plaintiff confirms in the letter that

he agreed to go on unpaid leave up to July 1999. He then requested to be paid the local salary of Kshs.120, 000.00 during the unpaid leave. In alternative it would be paid and then recovered later. The plaintiff in cross-examination confirmed he was on unpaid leave from June 1999 to August 2000. He also testified that during that period the defendants paid the rent at US\$ 244 and which was recovered from his pay when he resumed work. The plaintiff did not seek to claim the recovery of that rent and the Court finds that the same confirms that parties indeed agreed upon unpaid leave. The claimant has not established any reasonable justification for the view that he was entitled to be paid salary during the period of unpaid leave. That claim for payment during the period of unpaid leave per prayers (b) and (c) will fail. Similarly, parties having clearly agreed that the plaintiff was proceeding on unpaid leave for that period, the Court returns that the contract was not ending and therefore the plaintiff is not entitled to pay for three months in lieu of termination notice as purported in prayer (d).

b) The Court returns that the agreement as per the plaintiff's evidence was an agreement for the plaintiff to enjoy, at 2nd defendant's expense, air travel to Israel 3 times a year or other destination of equal value. The Court finds that the agreement was clear that he had to travel at the expense of the respondent. The plaintiff's case was not that he travelled and that he was seeking a refund of the expenses. The Court returns that if the plaintiff did not travel as per the agreement then he has no basis to claim the air tickets. In any event there was no evidence of the value of the air tickets as might have been the case. Prayer (l) in that regard will fail.

c) The Court has considered the letter of 31.01.03 and the plaintiff's evidence that he was not saying that he be in office for 2 hours only but that he was requesting for more work. His evidence was that he stopped working for the defendants in July when he was asked to handover. The Court has considered the endorsement on the letter dated 31.01.03 and returns that indeed the plaintiff was seeking more work which the manager agreed to but appears not to have been done. The circumstances of the letter are such that the work was declining. The Court returns that on a balance of probability the claimant has established that he left employment in July 2003 when he was asked to handover. He is award 3 month's salary in lieu of notice **Kshs.360, 000.00** plus US\$ component **US\$15,000.00** as per prayer (g). While making that finding the Court finds that the rate of pay was not in dispute as per paragraph 2 of the 2nd defendant's amended defence that the plaintiff's salary as a Site Manager was Kshs.120, 000.00 and US\$ 5,000.00 respectively.

d) Taking the plaintiff's evidence into account and in absence of any other material, the Court returns that the plaintiff has established that he was not paid for one month per prayer (a) and is awarded **US\$ 5000.00** as prayed for. He has also established and is awarded **Kshs.180, 000.00** pay for June and half pay for July 2003; and **US\$ 12, 500.00** for May, June, and July 2003. The Court has considered that until termination in July 2003 when he handed over as was requested, the plaintiff remained at work and his evidence was that he was not paid as claimed and per prayers (i) and (j). He is similarly awarded prayer (e) **US\$ 130,000.00**; and prayer (f) **Kshs.240, 000.00** being salaries that were due but were not paid.

The Court returns that there was no evidence to establish the setoff and no submissions in that regard and the setoff will fail.

The Court finds that the contract of service being oral, the 1st defendant was a necessary party and will bear own costs of the suit.

In conclusion judgment is hereby entered for the plaintiff against the 2nd defendant for:

1) The 2nd defendant to pay the plaintiff a sum of **US\$162, 500.00** and **Kshs.780, 000.00** by 01.08.2018 failing interest at Court rates to be payable thereon from the date of the suit till full payment.

2) The 2nd defendant to pay the plaintiff's costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday 22nd June, 2018**.

BYRAM ONGAYA

JUDGE