REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1935 OF 2014 COSOLIDATED WITH CAUSE NO. 1936 AND CAUSE NO. 1937

BOTH OF 2014

ERIC ODHIAMBO OWADE.....1ST CLAIMANT

JOSEPH KILONZO NG'AA.....2ND CLAIMANT

DENNIS OKOTH BOWA.....3RD CLAIMANT

- VERSUS -

PROFESSIONAL CLEANING CARE LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 8th June, 2018)

JUDGMENT

Each of the claimants filed the respective statement of claim on 31.10.2014 through Ojienda & Company Advocates. Each claimant prayed for judgment against the respondent for terminal dues on the headings of pay in lieu of annual leave; 12 months' pay for compensation for unfair termination; pay for public holidays worked; and pay for overtime. As per amended statements of claims filed for each claimant on 21.03.2017, the 1st claimant prayed for Kshs.467, 013.00 plus the unremitted NSSF dues from 2004 to April 2009; the 2nd claimant Kshs.342, 597.00; and the 3rd claimant Kshs.413, 003.50. The claimants also prayed for costs of the suit, interest and any other or further relief that the Honourable Court may deem fit and just to grant in the circumstances.

The respondent filed on 19.05.2015 the statement of response through Obura Mbeche & Company Advocates to oppose the statements of claims. The respondent prayed that the suits be dismissed with costs.

The parties are not in dispute that the claimants were employed by the respondent as cleaners and for the period prior to the termination the claimants served as process minders whose job was to clean. The respondent was subcontracted by a company known as Ecolab East Africa (Kenya) Ltd to provide cleaning services at the East Africa Breweries Limited sometimes in 2010. The subcontract for cleaning services was renewed over time and the last of such renewal was ending 31.08.2014. The respondent had employed the claimants to render cleaning services under the subcontract and in that regard the respondent had to terminate the contracts of employment effective 31.08.2014.

Thus, each of the claimants received a notice of termination of employment as per the letter dated 31.07.2014 explaining that the respondent's contract for provision of cleaning services at the East Africa Breweries Limited would expire at the end of August 2014. Each claimant was to receive a one month's notice effective 01.08.2014 and the last day at work would be 31.08.2014.

The **1st issue** for determination is whether the termination was unfair. The Court has considered the material on record. The claimants have filed some of the contracts of employment that they concluded with the respondent. A clear term of contract was that the claimants would remain in employment of the respondent for so long as the contract for provision of cleaning services by the respondent to the company the claimant was deployed to clean subsisted. The Court returns that as submitted for the respondent, the respondent was entitled to terminate the claimants' respective contracts of employment by giving a one month notice as per the terms of the contract. The Court returns that the reason for termination was genuine as envisaged under section 43 of the Employment Act, 2003 and the procedure of serving one month notice had been agreed upon. It is clear that two of the claimants had been in the respondent's service under other contracts for cleaning services other than with East Africa Breweries Limited. The Court considers that such engagement in the previous service did not mean that the parties' intention that the claimants remain in employment for so long as the contract for cleaning services between the respondent and its customers subsisted was thereby thwarted. The Court returns that the contractual intention and agreement on the tenure of services subsisted throughout the relationship and if the employee was lucky to get turned over to such new respondent's customer, then the condition equally applied.

As submitted for the respondent the Court follows **Enforce Security Group –Versus- Mwelase Fikile & 4 Others DA24/15** for the

opinion that the lapsing of the subcontract to provide cleaning services was a legitimate event that would by agreement, give rise to automatic termination of the employment contracts; and further, the fact that the respondent had an option to render the claimants redundant or to consider other options instead of relying on the automatic termination clause cannot be used to negate the clear terms agreed to by the parties. As per the circumstances in that case as they are in this case, there was no evidence that the respondent had engaged in a clandestine move to dismiss the claimants and the clear proximate cause for the termination of the contracts of service was the lapsing of the subcontract for provision of the cleaning services. In the words of RW's testimony, "**The only reason we terminated was that there was no other opening for them. We desired to retain them but there was no opening elsewhere. So we terminated.**"

The Court returns that the termination was not unfair because it was in accordance with the agreed termination clause and upon attaching of the agreed precondition for the end of tenure of service. Accordingly, the claimants would not be entitled to the 12 months' compensation for the alleged unfair termination.

While making that finding the Court has considered the respondent's operational needs and system as envisaged in section 45 of the Employment Act, 2007. The Court finds that it would be oppressive and unfair to say the termination in the present case was on account of redundancy whereas it was a clear case of tenure of service based on availability of work if, the respondent concluded a contract for service to provide cleaning services to a contracting customer. In any event, the parties were in a clear agreement and understanding and the Court should not rewrite or change the parties' own intention. The nature of the respondent's enterprise supports the kind of arrangements the parties agreed upon on the tenure of the contract of service. Thus section 40 of the Act on redundancy did not apply and instead the terms of contract as read with section 35(5) of the Act on termination by giving the requisite notice applied.

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

a) It was submitted for the claimants that they would be entitled to service pay or severance pay on account of section 40(g) of the Employment Act, 2007 and their termination being on account of redundancy. The Court has found that it was not termination on account of redundancy and the prayer for severance pay will therefore fail. Further, the claimants were members of NSSF and they are not entitled to service pay in any event in view of the provisions of section 35 (6) (d) of the Act.

b) The claimants' witness (CW) testified in cross examination that he had either been paid in lieu of annual leave or he had applied and been granted annual leave days. He confirmed that at termination he was paid cash in lieu of due annual leave. That being the evidence, the respondent is not liable to pay for annual leave days as claimed. As submitted for the respondent, the balance of probability has tilted in favour of the respondent.

c) The claimant's witness (CW) and the respondent's witness (RW) gave similar testimony that the claimants worked 3 days on day shift, 3 nights on night shift, and then took 3 days of off duty or rest days. As submitted for the respondent, CW testified that when the claimants raised a grievance in that regard, the supervisor informed them that the days on offs covered for the overtime. Further, the contract of service expressly provided thus, **"....You will get off days as arranged from time to time by the Managers on site for compensation of any extra hours.**" Accordingly, the Court returns that the claimants are not entitled to pay for overtime as prayed because they were bound by the express agreement on compensation of any extra hours worked. The Court has considered the two extra off days and returns that the two days more than adequately compensated the claimants for the extra hours worked. As submitted for the respondent and as was held in **National Bank of Kenya Ltd –Versus- Pipeplastick Samkolit (K) Ltd and Another (2001)eKLR**, a court of law cannot re-write a contract between the parties and parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved.

d) The Court has considered all circumstances of the case including that two of the claimants had served on other respondent's cleaning assignments other than the last subcontract with Ecolab East Africa (Kenya) Ltd to provide cleaning services at the East Africa Breweries Limited. The Court returns that each party will bear own costs of the suit.

In conclusion judgment is hereby entered for the respondent against the claimants for dismissal of the claimants' respective suits with orders that each party to bear own costs of the suit.

Signed, dated and **delivered** in court at **Nairobi** this **Friday 8th June, 2018.**

BYRAM ONGAYA

JUDGE