



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1493 OF 2017

SAMUEL UCHE AJAEGBU.....CLAIMANT

- VERSUS -

EAGLE VET KENYA LIMITED.....RESPONDENT

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

JUDGMENT

The claimant filed the statement of claim on 31.07.2017 through Nyamwata & Associates. The suit was against the respondent as the 1st respondent and one Ezekiel Onyango as the 2nd respondent. By Court order, the 2nd respondent ceased to be a party to the suit. The said Ezekiel Onyango is a co-director of the respondent together with a Nigerian national one Anthony Obidulu. The two directors hold equal shares in the respondent and Ezekiel Onyango is the respondent's managing director. The evidence was that Anthony Obidulu being ordinarily resident in Nigeria, it became necessary that the claimant is employed by the respondent partly to take care of the said Anthony Obidulu's interests in the respondent company which ordinarily carries out its business in Kenya. Anthony Obidulu is the founder and chairman of the respondent.

The claimant's case is based on the second amended statement of claim filed on 22.12.2017. The claimant prayed for judgment against the respondent for:

- a) Declaration that the termination of employment by the respondent's managing director is unfair and unlawful.
- b) Declaration for reinstatement or compensation for the remainder of the five (5) year contract and loss of opportunity.
- c) Special damages of USD 180,000.00 per annum times 3.5 years remainder of contractual term amounting to USD 630, 000.00 against the respondent.
- d) General damages.
- e) Cost of this Application.

The respondent filed the memorandum of response to the second amended statement of claim and counterclaim on 28.02.2013 through Ochieng' K & Associates. The respondent prayed that the claimant's claims be dismissed with costs and that the counterclaim should be granted with costs awarded to the respondent. The counterclaim is as follows, "**14. The Respondent further states that during the employment the Claimant took as his residential house a Flat No. 12, Jacaranda Court, Five Star Gardens Phase I, Syokimau. The Respondent fully furnished the Claimant's residence under express and implied agreement that the furnishings remained the property of the Respondent and in the event that the Claimant ceased to be an employee of the Respondent, the furnishings and the items therein as provided by the Respondent would be immediately returned to the Respondent, full particulars of which are well within the Claimant's knowledge and are provided with the respondent's list of documents.**" The respondent therefore counterclaimed against the claimant for the immediate return of the said furnishings.

The claimant was employed by the respondent at a monthly salary of USD 3, 000 and a monthly house allowance of Kshs.35, 000.00. The contract of employment was by the letter dated 07.12.2015 and the claimant was to hold the position of Financial Controller. The contract was to be valid for 5 years.

The claimant's case is that in the month of June 2017, the respondent's managing director deleted the claimant's name from the payroll. Consequently, the claimant was not paid the agreed monthly salary for June 2017 and house allowance for July 2017. It was the claimant's case that the respondent's managing director further threatened to withhold the claimant's future monthly salary and allowance. In such circumstances, the claimant filed the suit. On 31.07.2017, the Court ordered the respondent to pay the claimant the salary for June 2017 and

the house allowance for July 2017.

The claimant served the Court order on 31.07.2017 and it is his evidence that the respondent's managing director then issued an email that the claimant's employment had been terminated. The termination letter dated 31.07.2017 stated as follows:

“Dear Samuel Uche Ajaegbu,

Termination of your employment

I am writing to inform you that your employment with Eagle Vet Kenya Ltd as the Financial Controller has been terminated with immediate effect.

Reasons for the summary dismissal include among others:

- **Insubordination and engaging in acts aimed at undermining the Managing Director including making false allegations and reporting the same to the police knowing very well the same were false.**
- **Causing a serious and imminent risk to the reputation, viability or profitability of the Employer's business by colluding to stall the operations of the company by working for Al Grain Foods Kenya Ltd, a Company that deals in cutlery, contrary to your work contract and work permit issued by the Government of Kenya.**
- **Absenting yourself from work on various occasions to attend to your personal work without permission from the Company.**
- **Wilful or deliberate behaviour by you that is inconsistent with the continuation of your contract of employment.**

In the above circumstances your continued employment during a notice period would be unreasonable as we consider that your actions constitute serious misconduct warranting summary dismissal. The company will pay your accrued entitlements and any outstanding pay up to and including your last day of employment which is 31st July 2017.

You are advised to return all company property in your possession.

Sincerely,

Signed

Dr. Ezekiel Onyango

MANAGING DIRECTOR”

The **1st issue** for determination is whether the summary dismissal of the claimant amounted to unfair termination of employment. The alleged reasons for termination as set out in the termination letter entail alleged misconduct and poor performance. Section 41 of the Employment Act, 2007 prescribes that in event of termination on account of misconduct or poor performance, the employee will be given a notice and a hearing. As was held in **Shankar Saklani –Versus- DHL Global Forwarding (K) Limited [2012]eKLR** a notice and a hearing are mandatory and necessary even in cases of summary dismissal only that in summary dismissal, the notice is permissible to be shorter than is prescribe by statute or contract. In the present case and as submitted for the claimant, the summary dismissal came without notice and there was no disciplinary hearing at all. Without such notice and hearing, it is difficult to show how the respondent ascertained the allegations prior to summarily dismissing the claimant. In the Court's opinion, the purported reasons for termination as set out in the letter of termination remained mere allegations and as at the time of termination, it cannot be said that the respondent had valid or genuine reasons as envisaged in section 43 of the Act. The Court follows **Kenya Union of Commercial Food and Allied Workers –Versus- Meru North Farmers Sacco Limited [2014]eKLR** (Mbaru J) where it was held that section 41 of the Employment act,2007 is couched in mandatory terms and where an employer fails to follow the mandatory provisions and an employee is terminated after such flawed process such termination is ultimately unfair. Again, in **Rebecca Ann Maina & 2 Others –Versus- Jomo Kenyatta University of Agriculture and Technology [2014]eKLR**, (Ndolo J) it was held that whereas each case would be considered on its own merits, non compliance with any provisions of section 41 of the Act rendered any disciplinary action out rightly unfair. Thus the Court returns that the summary dismissal was unfair for want of compliance with section 41 of the Act.

The **2nd issue** for determination is whether the claimant is entitled to the remedies as prayed for. The Court has found that the summary dismissal amounted to unfair termination and the claimant is entitled to a declaration accordingly. There were no submissions made for the claimant on the prayer for reinstatement and the same is deemed to have been abandoned.

The claimant has prayed for 12 months' salary and house allowance in compensation for unfair termination and under section 49 of the Employment Act, 2007. The Court has considered that the claimant had not served for 3.5 years of the 5 years' fixed term contract. The Court has considered that while the respondent's managing director purported to allege that the claimant was absent from duty and appeared to work for Al Grain Limited, the evidence was that the respondent's two directors had an arrangement for the claimant to engage in such work and indeed, the respondent's managing director had facilitated Al Grain Limited to import cutlery. Nevertheless, it is also true that

strained relations between the parties developed when the claimant made adverse reports to the police about the respondent's managing director. Further, it is the Court's opinion that whereas the respondent's two directors understood that the claimant was the representative of one of the director (Anthony Obidulu) in Kenya and that the claimant would sometimes work for Al Grain Limited, the respondent must have through that arrangement lost on the claimant's services as the Financial Controller. The Court reckons that the respondent as an employer was an autonomous legal person separate from its two directors and it was not open for the directors to engage the claimant on their other assignments at the disadvantage of the claimant's service to the respondent. The Court has also considered the Affidavit by Anthony Obidulu sworn on 25.04.2018 where he states that there was no respondent's Board resolution that the claimant be terminated in the manner and upon the purported grounds that were set out in the termination letter. In view of all the factors at play, the Court puts each party's contribution to the claimant's termination at 50%. Thus the claimant is awarded 6 months' gross pay in salary and house allowance making **Kshs.210,000.00** and **USD 18,000** in salary. While making that finding the Court follows **D.K. Marete –Versus- Teachers Service Commission [2013]eKLR**, (Rika J) where it was held that in employment disputes, the remedies are not aimed at facilitating the unjust enrichment of aggrieved employees but they are meant to redress economic injuries in a proportionate way.

The claimant prays for general damages on account of cancelled work permit flowing from the unfair termination and the respondent's publication in the print media that the claimant had ceased to be the respondent's employee. The record shows that the claimant mitigated his circumstances by obtaining a Court order so that the work permit was extended pending the hearing and determination of the suit. The Court returns that no clear cause of action was established on account of such publication and claims. The Court further considers that the award of compensation for unfair termination will meet the ends of justice. Similarly, the prayer for payment for unexpired 3.5 years of the fixed term contract will fail because the claimant is a professional as well as energetic and he should be able to acquire alternative gainful employment towards mitigating his circumstances after the termination.

The **3rd issue** for determination is whether the counterclaim should be allowed. The claimant's case is that when he arrived in Nairobi from Nigeria to take up employment with the respondent, the respondent had the obligation to enable him to settle down in Nairobi. Thus the respondent secured him a house and directly paid the house allowance of Kshs.35, 000.00. Further and by way of a settlement gift, the respondent furnished the house. That being the case, the items that were bought to furnish the house belonged to him and could not be recoverable by the respondent.

The respondent's managing director testified that the respondent agreed to help the claimant to settle down. The respondent therefore furnished the house to enable the claimant settle down. The respondent's money was used to purchase the items. Thus, the respondent demanded recovery because it had to account for the items now that the claimant was no longer an employee.

The parties must be bound by their own agreement and it was that the respondent helps the claimant to settle down. There was no agreement that the items bought would be returned or continued to be the respondent's property loaned to the claimant. As submitted for the respondent's co-director one Anthony Obidulu in the submissions filed through Shella Sheikh Associate, the respondent could only recover if the same was provided in the contract of employment but which does not provide for such recovery. The Court returns that there was no contractual provision that the claimant returns the items as counterclaimed and the property in the items passed to the claimant permanently as part of the arrangement that the claimant would be helped to settle down. The counterclaim will therefore fail with costs.

The **4th issue** for determination is whether costs of the suit for initially enjoining the respondent's managing director as a 2nd respondent in the suit should be paid by the claimant. In a ruling delivered on 08.12.2017 by Ndolo J, the Court found that the then 2nd respondent one Ezekiel Onyango being the said managing director was not a necessary party in the suit and proceeded to strike him off and ordered thus, **"11. The costs of the application will be in the cause."**

By a notice of motion dated 30.12.2017 the said initially 2nd respondent sought to review the order by the Court given on 08.12.2017 that the costs will be in the cause. The Court directed that the parties make submissions on the application in the final submissions.

Parties are in agreement that under section 27 of the Civil Procedure Act, Cap. 21, costs are in the discretion of the Court or Judge and, costs follow the event unless the Court or Judge shall for good reason otherwise order.

The application before the Court is one for review that the costs would be in the cause. It is not an application for award of costs. The applicant has not established any ground for review such as fresh evidence or an error on record that would justify reviewing the order as was given in the discretion of the Court at the time the relevant ruling was delivered. For want of a reason for review as set out in the rules of the Court, the Court returns that a review will not be allowed. The Court considers that in the circumstances of the case, the order as made has not been shown to have been manifestly unfair. In any event, during the hearing the said Ezekiel Onyango was an active participant and it turned out that he held a different position on the dispute from that taken by his only co-director Anthony Obidulu. The further evidence was that, the termination of the claimant's employment, which the Court has found to have been unfair, was a unilateral decision by Ezekiel Onyango and not by a resolution of the respondent's board. In such circumstances, the Court returns that the order on costs as was ordered in the ruling by Ndolo J was appropriate and no reasonable justification has been shown to occasion its review – since, if the claimant lost the case, then he would have paid the said Ezekiel Onyango costs by reason of the order in the Ruling by Ndolo J. The application for review will therefore fail and is dismissed with costs.

In conclusion, judgment is hereby entered for the claimant against the respondent for:

- a) The declaration that the termination of the claimant's employment by the respondent's managing director was unfair and unlawful.
- b) The respondent to pay the claimant a sum of **Kshs.210, 000.00** and **USD 18,000** (less tax) by 01.08.2018 failing interest at Court rates be paid thereon from the date of this judgment till full payment.
- c) The respondent to pay the costs of the suit.

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

BYRAM ONGAYA

JUDGE