



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF
KENYA AT NAIROBI

CAUSE NO 211 OF 2016

ALEXANDER IRUNGU WANJIRU.....CLAIMANT

VERSUS

THE REGISTERED TRUSTEES OF

THE SISTERS OF MERCY.....RESPONDENT

RULING

1. By a motion dated 8th March, 2017 the claimant sought orders among others that respondent be ordered to pay the claimant his severance pay amounting to Kshs 7,984,668 being equivalent to twelve months salary at the time of termination as provided in the contract of employment pending the hearing and determination of the main claim.

2. This application is founded on clause 8 of the claimants contract dated 15th July, 2017 which provided that;

“One month’s notice of intention to terminate service must be given in writing by either party. If the employer terminates employment before the expiry of the contract a severance payment equivalent to at least twelve (12) monthly salary calculated on your monthly salary at the time of termination is to be paid and shall fall due for payment on the day after leaving employment. In turn you may forfeit your salary for the period by which your notice takes short of one calendar month”.

This cause is without prejudice to the management’s right to terminate the employment summarily.

3. In support of this prayer counsel for the claimant, Mr Wesonga submitted that the payment of severance pay was not pegged on lawfulness of the termination or any other factor. Counsel contended that the respondent having a superior bargaining power would have inserted a rider to clause 8.

4. Mr Ciuri for the respondent on his part submitted that it was inept or inequitable for the applicant to seek determination of the suit in piecemeal by interlocutory applications. This according to counsel was a waste of invaluable judicial time. Counsel further submitted that the respondent’s statement of response dated 22nd February, 2017 impugned the validity of clause 8 of the applicant’s contract of employment and pleaded particulars of deceit or fraud.

5. The issue of validity of clause 8 of the applicant’s contract of employment has therefore been joined. A trial with cross-examination of witnesses is therefore necessary to establish the truth or falsity of the alleged particulars of deceit or fraud. Mr Ciuri therefore submitted that the court cannot grant the motion for summary judgement on conflicting affidavits evidence when serious allegations of deceit or fraud have been pleaded. In support counsel relied on the Court of Appeal decisions in Westmount Kenya Ltd Vs Fredrick & Another [2003] KLR 357 where the court held that it was unusual to enter summary judgement when serious allegations of fraud and other wrong doings are made such issues can only be decided during a proper trial and not on conflicting affidavits.

6. The court has carefully reviewed the pleadings herein particularly at paragraph 27 of the memorandum of claim and response thereto made at paragraph 17 of the memorandum of response. Whereas the claimant’s contract of employment at clause 8 appears on the face of it as unequivocal on payment of severance pay, the respondent has made serious allegations over its validity. As a court of law, I need to get to the root of these allegations before I can make any judgement. This would require oral evidence and cross-examination of the claimant over the said clause 8 as well as respondent’s witnesses over the same.

7. Whereas the contract was on the face of it binding on the parties, the allegations of the existence of factors that would ordinarily vitiate a contract are serious and must be inquired into if the court is to do justice in the circumstances. This as I have observed cannot happen through an interlocutory application where evidence is adduced by way of affidavits.

8. The court will in the circumstances dismiss with costs the application dated 8th March, 2017.

9. It is ordered.

Dated at Nairobi this 6th day of July, 2018

Abuodha J. N.

Judge

Delivered at Nairobi this 6th day of July, 2018

Abuodha J. N.

Judge

In the presence of:-

.....for the Claimant

.....for the Respondent