



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 741 OF 2014

(Before Hon. Justice Mathews N. Nduma)

CHURCHILL ONGALO.....CLAIMANT

VERSUS

KENYA KAZI SECURITY SERVICES LIMITEDRESPONDENT

J U D G M E N T

1. The Claimant initially filed cause No.488 of 2013 which was heard and determined by the court and the court made the following orders:-
 - a) The letters of appointment dated 26th March 2013 and 16th April 2013 that altered the Claimant's terms of service were quashed;
 - b) The Claimant's contract of employment dated 10th May, 2012 was declared to be in force and the Respondent was required to designate a schedule of duties and responsibilities to the Claimant in terms of this contract; and
 - c) The Respondent was to honour the terms of the Claimant's contract of employment dated 10th May, 2012 until the contract was otherwise lawfully terminated by either party.
2. The Respondent complied with the said orders and subsequently declared the Claimant redundant in terms of section 40 of the Employment Act, 2007.
3. The dispute before court in the present matter is whether the redundancy declaration was for a valid reason and in terms of a fair procedure.
4. It is the Claimant's case that the declaration of redundancy was contrary to the provisions of section 40; that it was not done in good faith and it was meant to circumvent the judgment of the court in cause no. 488 of 2013 by not placing the Claimant in a managerial position commensurate with specific duties and responsibilities he had been recruited for in this first place, placed as a management trainee with a view to graduate to a full manager for the purposes, and portfolio, initially intended.
5. The Claimant's case is that the declaration of redundancy must be viewed in this light and grant the Claimant the reliefs sought in the Memorandum of Claim dated 6th May, 2014 and filed on 7th May, 2014 to wit:
 - a. Injunction Orders against the Respondent restraining and barring the Respondent from attempting to declare redundant and or terminate the Claimant.
 - b. Declaration that the Respondent's actions, omissions and/or attempts to declare redundant and or terminate the Claimant is wrongful, collous, unlawful, arbitrary, illegal, un-procedural, unconscionable, wrongful and uncontractual.
 - c. The Claimant also claims for orders for reinstatement and payment of all accrued but unpaid salary for the period he has been kept off work.
 - d. The Claimant further and in the alternative claims for payment of damages of 1 year's salary (280,000.00 x 12) amounting to Kshs.3,360,000 for wrongful, illegal, un-contractual and unlawful termination of employment and/or redundancy and unpaid salary at monthly rate of Kshs.280,000.00 upto retirement age of 60 years (280,000 x 12 x 13) amounting to Kshs.43,680,000.00.
 - e. Cost of this suit and interest.

6. The brief facts of the employment history of the Claimant is that on 10th May, 2012 he was employed by the Respondent as a Management Trainee at a monthly salary of Kshs.280,000. The Claimant completed the management training on 10th May, 2012. By a letter dated 26th March, 2013 the Claimant was deployed as a Relationship Manager Corporate Accounts which portfolio was largely in Sales and Marketing field. The Claimant had an engineering background and declined the offer, leading to the initial suit and orders.

7. The Claimant alleged breach of initial terms of employment contract.

8. Upon delivery of Judgment, the Respondent recalled the Claimant from leave and gave him a letter dated 28th April, 2014 titled “*Notice of intention to terminate contract of employment on account of redundancy*”. The notice was effective 2nd June, 2014.

9. The Claimant was to remain on paid leave until the said 2nd June, 2014.

10. The Claimant’s case is that he was neither re-deployed nor given specific and relevant duties in compliance with the Judgment of the court that was not appealed against. That the procedure provided for under section 40 of consultation with a retrenchee was not adhered to and the notice was defective as it gave the date of termination a priori. The Claimant prays for the reliefs sought.

Response

11. Respondent filed a Statement of Response on 25th August, 2014 in which it states that, pursuant to the Judgment of the court, it had two options; to assign him duties as per his contract of employment or to terminate his contract of employment lawfully. That it was impossible to assign the Claimant duties that were compatible with his letter of appointment dated 10th May, 2012 since he had served his training term and was due for substantive appointment in any department because management trainees receive all round trainee and could be deployed to any department after which he is to be deployed to the available managerial position. The Respondent on two occasions offered the Claimant employment in managerial position, which were available, which offers the Claimant accepted only to repudiate the acceptance later. The court had also quashed these appointments pursuant to a suit by the Claimant. He could no longer be retained as a Management Trainee. The only option available therefore was to declare the Claimant redundant in terms of section 40 of the Employment Act, 2007.

12. On 27th March, 2014 before the Judgment was delivered, the Claimant in the presence of other employees uttered abusive words, expletives against the Group Standards Executive.

13. On 1st April, 2014 he was issued a show cause letter. The Claimant did not accept nor respond to the letter.

14. The Claimant’s conduct became incompatible with his contract of service and was instructed to proceed on leave awaiting disciplinary action. The Claimant continued to earn his salary during this period.

15. On 22nd April, 2014, in order to comply with court orders, the Claimant was recalled from leave and was called by County Human Resource Manager to a meeting on 28th April, 2014 to discuss the way forward. The Claimant did not attend the meeting and the letter notifying him of the Respondent’s decision to declare him redundant was sent to him. The Ministry of Labour was notified of the decision on 29th April, 2014. The injunction in place was discharged on 11th August, 2014.

16. The Respondent followed all procedures of redundancy under section 40 including payment of severance pay. The Claimant was paid Kshs.458,406 as his terminal dues. He also served a month’s notice with full pay.

17. The Claimant is not entitled to the reliefs sought and the suit be dismissed with costs.

Determination

18. The issues for determination are:-

(i) Whether the declaration of redundancy by the Respondent was in line with section 40 of the Act.

(ii) Whether the Claimant is entitled to the reliefs sought.

Issue i

19. The court has considered the pleadings, oral testimony by the Claimant and the rebuttal by RW 1 Willis Ayieko Onyango and the final submissions by the parties and the court is of the considered view that, the Respondent had no appropriate position to which to deploy the Claimant after the judgment of the court in cause no. 488 of 2013. That the judgment did not bar the Respondent from exercising its management prerogative, in terms of the Law to declare the Claimant redundant.

20. The Respondent therefore declared the Claimant redundant lawfully and followed all the requirements under section 40 of the Employment Act 2007 in that a one month notice was given to the Claimant, he was invited to a meeting to discuss the matter with the Group Human Resource Manager, which the Claimant declined to attend. The Ministry of Labour was duly notified of the redundancy and the Respondent paid all terminal benefits due to the Claimant including payment of severance pay.

21. Accordingly, the Claimant has failed to discharge the onus placed on him by section 47(5) as read with sections 106, 107, 108 and 109 of

the Evidence Act, Cap 80 Laws of Kenya to show on a balance of probabilities, that the declaration of redundancy was unlawful and unfair. The suit lacks merit and is dismissed. This disposes of the 2nd issue since no remedies are available to the Claimant.

22. Considering the history of this case, the court finds it appropriate for each party to bear their own costs of the suit.

Dated and Signed in Kisumu this 12th day of October, 2018

Mathews N. Nduma

Judge

Delivered and signed in Nairobi this 26th day of October, 2018

Maureen Onyango

Judge

Appearances

Mr. Odawa for Claimant

Mr. Makori for Respondent

Daniel Ngumbi – Court Clerk