



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1409 OF 2012

(Before Hon. Justice Mathews N. Nduma)

EDWIN ANYANGA NOBALLA.....CLAIMANT

=VERSUS=

YOUTH ENTERPRISE DEVELOPMENT FUND BOARD.....RESPONDENT

J U D G M E N T

1. The suit started vide a Statement of claim filed on 16th August, 2012 in which the Claimant prays for terminal benefits to wit:-

(a) 41 days in lieu of leave Kshs.160,543.70.

(b) Leave allowance (Grade 6) Kshs.7,200.

(c) Accrued salary and salary arrears for September, 2011 to March 2012 and

(d) Pension (contributory scheme) Kshs.444,102. The pension has already been paid and receipt acknowledged in court.

Facts of the Claim

2. The Claimant was employed by the Respondent as a Commercial Infrastructure Officer and later as a Transport and logistic officer earning Kshs.117,475 a month, gross salary at the time of resignation.

3. On or about 22nd March 2012, the Claimant tendered his resignation from employment to the Respondent and stopped working immediately.

4. Paragraph 23 of the contract provided that either party was at liberty to terminate the contract by giving a three (3) months notice or payment of equivalent of three months basic salary in lieu of such notice.

5. The Claimant testified under oath in support of particulars of claim.

6. The Claimant stated that he resigned due to the oppressive environment and witch hunt which had culminated in his being summoned on 19th March, 2012 to appear before a disciplinary committee. The Claimant resigned to pre-empt the fait accompli.

7. The Claimant had served the Respondent for 3 years and 4 months. The Claimant had accumulated 71 days leave and forfeited 30 days in lieu of notice.

8. The Claimant prays to be paid his terminal dues set out in the statement of Claim which are due and owing to him.

Response

9. The Respondent filed Memorandum of defence on 13th September, 2012 in which is admitted particulars of employment of the Claim.

10. On 3rd January, 2012, the Respondent instituted disciplinary proceedings against the Claimant for unsatisfactory job performance, late reporting and absenteeism and alleged misuse of Respondent's resources.

11. A disciplinary committee was set up by a letter dated 13th February, 2012 and Claimant was summoned to appear before it on 19th March, 2012 and subsequently on 22nd March, 2012.

12. The Claimant resigned on 22nd March, 2012 before appearing before the disciplinary committee.

13. The Respondent stated that the Claimant is not entitled to the reliefs sought. However, the respondent admits that pension is due and owing to the Claimant.

14. That the Claimant should be paid three months' salary in lieu of notice as provided in the Letter of Appointment and the rest of the Claim be dismissed with costs.

15. The Respondent called RW 1 Truphena Omung'ala in support of its case. RW1 confirmed the averments set out in the statement of defence and tendered the documentary evidence in support of Respondent's case. Both parties filed final submissions.

Determination

16. The issues for determination are:-

(i) Whether the Claimant was entitled to tender resignation as he did.

(ii) What remedies is the Claimant, if at all, entitled to.

Issue i

17. In terms of clause 23 of the letter of appointment of the Claimant by the Respondent dated 25th November 2008, either party could terminate the contract of employment by giving the other party three month's prior notice or on payment of an equivalent of three (3) months basic salary and house allowance only in lieu of such notice. The Claimant tendered his resignation on 22nd March, 2012 and was perfectly entitled to do so provided he served three months' notice or paid equivalent of three (3) months basic salary and house allowance in lieu of notice.

18. There is no evidence whatsoever from the Respondent that the disciplinary process instituted against the Claimant was concluded and adverse decision made prior to the receipt of the resignation letter by the Claimant.

19. The Respondent did not make any counter claim against the Claimant and therefore the Claimant is entitled to all terminal benefits due to him by fact of the contract of employment following his resignation less payment of the equivalent of three (3) months basic salary and house allowance. The court so finds.

Issue ii – Terminal benefits.

1. Pension

With regard to the terminal benefits sought by the Claimant, the Respondent testified, which fact was admitted by the Claimant that he had been paid pension due in the sum of Kshs.429,555 less withholding tax from ICEA lion. The Claim for Pension has no merit and is dismissed.

2. Leave Days.

The Claimant has proved on a balance of probabilities that as at the time of resignation he was owed 71 days leave. Leave days due and owing are a statutory right under section 28 of the Employment Act. The purported forfeiture of leave days not taken was not proved by the Respondent and in any event has no basis in law. The Claimant had already forfeited 30 days in lieu of notice in his letter of resignation. The Claimant seeks payment of 41 days salary in lieu of balance of the untaken leave days. The Respondent has made no counter claim for payment in lieu of notice. The Claimant has proved on a balance of probabilities that he is owed Kshs.160,543.70 in lieu of 41 days leave not taken. The court awards him accordingly. The Claimant did not go on leave and is therefore not entitled to payment of leave allowance which is paid to facilitate an employee going on leave.

3. Arrear Salary

The Claimant seeks payment of unpaid salary between September 2011 to March 2012 in the sum of Kshs.152,034. In the statement of claim, there are no averments explaining the issue of the claimed arrear salary. There is also no documentary nor oral evidence substantiating this claim. The Claim for payment of arrear salary has not been proved on a balance of probabilities and the same is dismissed.

20. In the final analysis, judgment is entered in favour of the Claimant as against the Respondent for Kshs.160,543.70 in lieu of 41 untaken leave days. There being no counter claim by the Respondent, the court cannot off-set in favour of the Respondent in respect of two months

resignation notice.

21. The amount is payable with interest at court rates from date of filing suit till payment in full.

22. The Respondent to pay 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:

Mungai Kalande & co. Advocates for Claimant

Waweru Gatonye & Co. Advocates for Respondent

Daniel Ngumbi: Court Clerk