



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 451 OF 2013

JAMES GEITA KABINDU.....CLAIMANT

VERSUS

AUTO SPACE LIMITED.....RESPONDENT

and

HERMAN PATEL.....3rd PARTY

JUDGMENT

1. For determination are the questions, *whether James Geita Kabindu (Claimant) was an employee of the Respondent or the 3rd Party, whether the termination of the Claimant's employment was unfair, whether the Claimant had accrued leave days by time of separation, whether the Claimant is entitled to service pay and compensation.*
 2. The Claimant's and Respondent's testimonies was taken by Nzioki wa Makau J on 12 June 2014 and 22 July 2014 while I took the 3rd Party's witness testimony on 21 June 2018.
 3. The Claimant filed his submissions on 19 July 2018 while the Respondent and 3rd Party did not file submissions as agreed and directed.
- Employment relationship**
4. The Claimant's testimony was that he was initially employed by Farm Auto Spares Ltd which terminated his (and other employees) contract(s) on 21 December 2008 due to restructuring, and that the employees were taken over by the Respondent on 1 January 2009.
 5. The Respondent's director's testimony was that new directors came on board on July 2010 and there was a verbal agreement that the previous directors would take up and or finalise with the Claimant. The Claimant, he stated was retained to facilitate transition after resigning around 30 June 2010.
 6. To demonstrate that the Respondent was the employer, the Claimant relied on a termination letter dated 1 November 2010 and pay slips for January 2010 and October 2010.
 7. The termination letter is on the letterhead of the Respondent, and in the view of the Court that is more than sufficient evidence that the Respondent was the employer of the Claimant.
 8. Apart from the letter of termination of employment, the Claimant's pay slip for October 2010 had the Respondent's logo. The pay slip/logo is secondary evidence of a contractual relationship.
 9. The Respondent's director also confirmed that the Respondent paid the Claimant's remuneration up to October 2010, but on humanitarian grounds.
 10. In the view of the Court, the Claimant produced sufficient employment records to demonstrate that the Respondent was his employer. In the circumstances, it was mischievous of the Respondent to deny being the employer and/or introduce a 3rd party into the proceedings.
 11. For the benefit of the Respondent, it should be alert to the fact that a limited liability company has a juristic life of its own independent from the directors.

Unfair termination of employment

12. The reason given by the Respondent when terminating the Claimant's employment was restructuring.

13. It is therefore only logical to conclude that the separation was for operational requirements or what can be called redundancy.

14. In terms of section 40(1) of the Employment Act, 2007, 1 month advance written notice should have been given to both the Claimant and the local Labour Officer.

15. It was upon the Respondent to show that the notices were given and because that burden was not discharged, the Court finds that there was unfair termination of employment on account of redundancy.

Accrued leave

16. The Claimant sought leave for 2009 to 2010 which he computed as equivalent to Kshs 119,476/-.

17. During testimony, the Claimant stated that he was praying for leave days not taken.

18. The Respondent did not interrogate or rebut the computations by the Claimant and by dint of section 10(3) and (7) as read with section 28 of the Employment Act, 2007, the Court will allow the head of claim.

Service pay

19. The Claimant was making contributions towards National Social Security Fund and therefore is not entitled to service pay.

Compensation

20. Considering the length of the Claimant's employment, the Court assesses compensation equivalent to 2 months gross wages.

Conclusion and Orders

21. The Court finds and holds that the Claimant's employment was unfairly terminated on account of redundancy and awards him and orders the Respondent to pay him

(a) Accrued leave	Kshs 119,476/-
(b) Pay in lieu of notice	Kshs 70,600/-
(c) Compensation	Kshs 141,200/-
TOTAL	Kshs 331,276/-

22. Respondent to bear the costs of the Claimant and 3rd Party.

Delivered, dated and signed in Nairobi on this 23rd day of October 2018.

Radido Stephen

Judge

Appearances

For Claimant Mr. Kariuki instructed by P.K. Njiiri & Co. Advocates

For Respondent Mr. Karimi instructed by Njeru Nyaga & Co. Advocates

For 3rd Party Mr. Muge instructed by M. A. Khan Advocate

Court Assistants Sigulu/Lindsey