



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT MERU

CASE NO. 35 OF 2018

(Formerly Nyeri ELRC Case No. 4 of 2012)

MOSES K. ANAMPIU.....CLAIMANT

VERSUS

KATHERI FARMERS CO-OP SOCIETY.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent asserting that he was the secretary manager of the Respondent when his services were terminated on 10th April 2008. He sought salary arrears from January to April 2008, house allowance, yearly increment, 103 leave days and one month salary in lieu of notice. He sought the payment of his terminal dues and costs of the suit.

2. The Respondent filed a defence in which it asserted that the Claimant was not an employee at any given time of the Respondent. It was averred that the Respondent had no collective bargaining agreement binding it to the Claimant. It was averred that the Claimant was responsible for the collapse of the Respondent's operations due to pilfering and mismanagement and it was the collapse precipitated by the Claimant that led to the end of the relationship. It was averred that the suit was vexatious and an abuse of the court process.

3. The Claimant testified at length on his claim and stated that he was employed by the Respondent though at present he was a hustler. He stated that his termination was contained in the correspondence to the District Co-operative Officer and copied to him. He stated the termination was effective 11th April 2008. He said that the Society had a CBA which he produced as an exhibit. He testified that there was a suit that he had filed in the lower court and the court ruled it had no jurisdiction. He thus sought payment in lieu of notice, terminal benefits and unpaid leave for 103 days plus the costs of the suit. He testified that the letter of demand was sent by registered post. He stated that the leave balance as at 14th February 2006 was 31 days per the minutes of the same date.

4. In cross-examination he stated that he filed the present suit when the previous suit was struck out on 12th September 2012. He testified that from 11th April 2008, 3 years ended on 11th April 2011. He stated that he was the secretary manager and he was to pay the employees and also pay himself. He stated that the society did not collapse during his tenure. He testified that the period of hiatus was about 6 months and that the months with no operations were not mismanagement. He stated that he was to take half the leave days in 2006 and the balance later. He said that he was the custodian of the records of the society and that he did not hide anything. He testified that he was working without pay and did not raise it when he was working and there was no discussion on salary arrears. He said the basic was 17,900/- plus house allowance. He stated that the CBA was registered and he had obtained a copy from the union. He did not have a receipt from the union. He denied manufacturing the audit report though he did not have the receipt from the firm that did the audit. He denied taking the records away.

5. In re-exam he stated that he did not manufacture documents for the case and that he did not mismanage the Respondent when he was in charge. He testified that he could not sign for cash alone and had to co-sign with the chairman and the treasurer.

6. The Claimant called the auditor who testified that he did the audits for 2007, 2008 and 2009. He confirmed it was his signature on the document produced as the 2008 audit report. He stated that he was paid in cheque and did not issue a receipt and that he got Kshs. 150,000/- for the years cumulatively. He did not describe the accruals – debts on the audit reports and confirmed that in 2008 there was a loss as the expenses of the society exceeded their earnings for the year. He stated that the audit report was not for a specific individual and that a sum of Kshs. 542,000/- was owed for salaries and wages. He testified that the report was forwarded as required though he confirmed it was not on letterhead or bearing stamps of the Respondent

7. The Respondent called the current chairman Wilson Gichuru Mburugu who testified that the Claimant was not irregularly dismissed. He stated that there was a collapse during the Claimant's tenure and the Claimant as secretary manager was responsible for safeguarding the funds and ensure the farmers were paid. He did not know where the money given by Meru Dairy Union for the payment of farmers went. He

stated that when he took over there were no records and that the Claimant was the custodian of the records and the records were missing. He testified that the Claimant caused the collapse of the Respondent as farmers were not paid from December 2006 till 2008 April or thereabout. He stated that a sum of Kshs. 1,477,808.15 was unpaid to creditors and that the cheque of Kshs. 1,317,000/- was cashed. He said that the secretary manager had access to the funds at the bank as he was a signatory. He testified that he did not know the other signatories by name and the treasurer and chairman would sign. He stated that there was no audit report at the society when they took over and there is no receipt or counterfoil evidencing payment of the auditor's fees. He said the audit report is suspect as they did not call for an audit and the auditor never sought payment of fees from the Respondent.

8. In cross examination he stated that he did not know of the letter of appointment as he had not seen it or heard of it. He said that he was not even aware of the CBA. He testified that they did not report and he had not heard of any report to the Police alleging fraud and he had not heard of any investigation. He stated that the Claimant was not an employee and he did not know of the date of dismissal. He stated that the minutes of 2008 resolved that there would be no dealing as long as the Claimant was there. He was not aware that the dismissal was on 11th April 2008. He stated that farmers could not deliver milk as long as the Claimant was there and so the Claimant was asked to leave. He testified that no money could be withdrawn by an individual and he did not know how the money had been squandered. He stated that there were no records and that the refund cheque of Kshs. 1,317,000/- was paid but the funds were not at the bank and that they could not access the bank account. He did not have the bank statement and stated there may have been a report to the Police though he did not know if any was made as there were no records. He stated there was no OB report and they could not tell what documents were lost.

9. In re-examination he testified that he was sure the Claimant was trusted at the bank because he had worked for long and that the people who should have reported the theft were the secretary manager, the chairman and the treasurer but they could not report as they were the culprits. He stated there was no CBA discussed at the meeting and that the Claimant came to the farmers meeting and the farmers were upset. He stated that the Claimant did not speak and did not oppose the minutes.

10. The next defence witness was Erastus Muthuri Murungi who stated that he was a farmer. He testified that the Claimant was the one in charge when the dairy collapsed and that the Claimant left of his own volition when they were elected. The dairy collapsed as the farmers were not delivering milk. He stated that the Claimant did not have the funds to pay the farmers and the Claimant would know where the funds went. He testified that he attended the meeting which the Claimant also attended and the farmers said they would not deliver milk as long as the Claimant was there. He left after escorting the new team to office. He stated that the Claimant was responsible for paying staff and himself and that no other staff had sued for non-payment. He said the Claimant should not sue after the collapse of the dairy and the subsequent revival. He testified that the minutes indicate that the cheque was paid but untraced.

11. In cross-examination he stated that he was not there when the Claimant was employed. He stated that the Claimant paid staff and the money was from milk deliveries. He did not know where the funds were taken and that he presently banks the funds and the signatories were the chairman, secretary and treasurer. He stated that he did not know that the Claimant had been dismissed. He testified that he did not give the Claimant 7 days to resign and that he did not know who the auditor was previously and that presently the auditor was Meru Central.

12. He testified in re-exam that there was no letter of appointment of Kageriki & Associates as auditors he stated that there was no letter at the office on the dismissal or hire of the Claimant and he did not know if the Claimant was a signatory during the Claimant's tenure.

13. The final witness for the defence was Naftaly Mugambi who testified that he was the current chairman of the Respondent. He denied writing the letter of dismissal and he did not sign the letter the Claimant had exhibited as he was not the chairman in 1992.

14. In cross-examination he stated that he was able to read and write and that he became chairman in 2007 and prior to that Joseph Kinoti was chairman. He knew the Claimant worked for the Respondent but he did not know when the Claimant was employed and did not know how long the Claimant had worked. He stated that when he joined the Claimant had been working for some time and that when the refund for the cooler was done the chairman was Kinoti now deceased. There were no records of where the funds went and the Claimant was the secretary treasurer then. He stated that when the Claimant left employment in 2007-2008 the Claimant did not hand over. He could recall that the Claimant left when members said they would not deliver milk for as long as the Claimant was there.

15. In re-exam he testified that the farmers did not want to deliver milk when the Claimant was there. He stated that the Claimant did not pay the funds to the farmers and that the Claimant destroyed the records. He stated a cheque can be cashed if duly signed by signatories. That marked the end of lengthy oral testimony.

16. Parties filed submissions and the Claimant submitted that he was dismissed without notice, no salary was paid in lieu of notice and that he was not paid a year's salary from 2007 to April 2008 and did not receive terminal benefits. He submitted that the CBA was applicable to him. He submitted that he did not desert duty and that he was terminated. He submitted that he did not embezzle the funds of the Respondent and that there was no evidence that he did. He relied on the case of **Paramount Bank Limited v Qureishi & Another [2005] 1 KLR 730** and **The Director General East Africa Posts and Telecommunications Corporation v Jiffunarisi Simba Civil Appeal No. 38 of 1976** (unreported) per Wambuzi, P., Mustafa Ag. V.-P, & Musoke J.A. He submitted he should have received notice of termination and he was not charged in any court so as to lead to the dismissal.

17. The Respondent submitted that the suit was time barred as the Claimant avers he was dismissed in April 2008 and he filed the suit in 2012 4 years later. The Respondent submitted that the suit was time barred as it was filed 3 years after the cause of action accrued contrary to Section 90. The case of **Patrick Koome Kwaria v Board of Management Nkubu Day Secondary School** Meru Cause No. 13 of 2017 (unreported) was cited in support of the arguments on limitation. The Respondent submitted that the evidence adduced was that the operations of the Respondent collapsed when the Claimant was its secretary manager due to financial mismanagement. It was submitted that the Claimant's evidence on the termination was suspect as it was different in material respects from an ordinary letter of appointment as part of it was handwritten and the rest typed and was not authenticated by a stamp or have an acceptance clause. The Respondent relied on the case of **Fredrick Wandera v Letshego Kenya Limited [2017] eKLR** where the court dismissed a claim due to the Claimant's fraudulent activities. The Respondent submitted that the Claimant was not entitled to the sums sought.

18. On limitation the Respondent missed the bus. Under Section 90 of the Employment Act, a cause is limited in terms of that Section. However, the cause of action herein accrued before the Employment Act 2007 came into effect. It came into effect in June 2008 and as such the Claimant had recourse on limitation under the Limitation of Actions Act Section 4(1). The limit before June 2008 was 6 years as the repealed Employment Act did not have a provision on the limitation period. As regards the bona fides of the Claimant's claim, the letter of dismissal is doubtful as it seems to have been forged as the format is somewhat suspect. Part of the document is handwritten while the rest is typed. It was common ground that the records of the Respondent were either destroyed or taken during the Claimant's tenure as the secretary manager. He came across as a conniving person who was clearly the author of the misfortune that befell the Respondent leading to cessation of operations. He cannot benefit from his own unethical actions and as such the suit is not fit for grant as he did not prove he as dismissed or entitled to the relief he claimed. The suit is dismissed with costs to the Respondent.

It is so ordered.

Dated and delivered at Meru this 4th day of October 2018

Nzioki wa Makau

JUDGE