



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

CAUSE NO. 2240 OF 2014

(Formerly HCCC 722 of 2008)

Before Hon. Lady Justice Maureen Onyango

JOHN MUREITHI KIARIE.....CLAIMANT

VERSUS

KARANGI COFTEA LIMITED.....1ST RESPONDENT

JORDU INVESTMENT LIMITED.....1ST RESPONDENT

JUDGMENT

The plaintiff filed suit on 5th December, 2008, through a plaint dated 3rd December, 2008, amended on 19th February, 2015, seeking payment of unpaid commissions, unpaid salaries and terminal benefits arising out of a contract of employment with the Defendants with effect from July, 2006. He had been engaged as the General Manager of the defendants' business and office affairs and/or manager of the private affairs of the Directors of the Defendants at an agreed monthly salary of Kshs.60,000/=.

Further the claimant avers that by a contract dated 1st September, 2006, the 1st Defendant appointed him as the Management Agent of the 1st Defendant's property known as Kajewa Flats and the 2nd Defendant's flats known as Jamena Flats, that both contracts were for a term of 1 year subject to renewal with agreement of the parties. The claimant was to be paid a commission of 3.1% of the total monthly receivable rent per month.

The Plaintiff avers that he managed Kajewa Flats for a period of 24 months from July 2006 to 25th March 2008 when the Contract was unilaterally terminated without notice. He avers that he was not paid commission for the 24 months and he is owed a sum of Kshs.666,624 in respect of Kajewa Flats and Kshs.857,280/= for Jamena Flats.

He further contends that in or about July, 2006 he entered into an oral agreement for the management of the Defendants other properties namely Muthaiga Flats, Pangani Flats, Lavender Flats in similar terms as those of Kajewa and Jamena Flats. He alleges that he is owed Kshs.348,192 for Muthaiga Flats, Kshs.110,496/= for Pangani Flats and 102,672/= for Lavender Flats.

The Plaintiff further avers that in 2007, the Defendants hired him to assist with the process of subdivision and sale of the Defendants property known as Kahungu Farm and it was agreed orally that he would be paid a 5% commission upon the successful sale of each subdivided plot. It is his contention that he sourced for buyers, negotiated and concluded sales worth 48,000,000 but the defendants refused to pay the agreed commission of Kshs.2,400,000.

That on or about 25th March, 2008, the Defendants verbally ordered the Plaintiff to proceed on compulsory leave without disclosing the reasons thereof and thereafter wrongfully terminated the Plaintiff's employment as general manager without notice vide a letter backdated to 20th March, 2008 received by the Plaintiff on 21st April, 2008.

In the Memorandum of Claim dated 19th February, 2015, the Claimant prays for: -

- (a) A declaration that the Claimant's dismissal from the Respondents employment was unprocedural, unfair and unlawful.
- (b) As against the 1st Respondent the sum of Kshs.694,400/= together with interest thereon

- (c) As against the 2nd Respondent the sum of Kshs.893,000/= with interest thereon at court rates.
- (d) As against the 1st and 2nd Respondents jointly and severally the sum of Kshs.561,360/= together with interest thereon at court rates.
- (e) As against the 1st Respondent the sum of Kshs.2,400,000/= together with interest thereon at Court rates.
- (f) As against the 1st and 2nd Respondents jointly and severally the sum of Kshs.4,460,000 together with interest thereon at Court rates.
- (g) As against the 1st and 2nd Respondent's' jointly and severally, the sum of Kshs.60,000/= per month being the agreed monthly salary as general manager from 1st June, 2013, until the date of judgment and payment by the Respondents and/or being adequate compensation for wrongful termination of employment.
- (h) Costs of the suit together with interest thereon at Court rates.
- (i) Any other relief as this Court will deem fit and just to grant.

The defendants filed a joint Memorandum of Defence on 25th March 2015, wherein the Respondents state that they had an informal arrangement with the Claimant to work together which was formalised in September 2006. The Claimant was to manage two of the Respondents' premises known as Kajemwa and Jamena Flats for a term of one year.

They aver that the management contracts were never operationalised even for a single day because the Claimant did not have the capacity to operate as an agent and as such the parties confined themselves to the informal agreements for some time. The Claimant was thereafter retained as an employee of the Respondents and the management contracts remained redundant and were never revived.

The Respondents contend that to enable the Claimant perform his duties effectively, he was assigned an office at Parkside Hotel Building, provided with a vehicle fully fuelled and maintained by the Respondents. He operated as other employees at a fixed salary of Kshs.60,000/=.

They deny the existence of a management contract and an employment contract and aver that any communication done by the Claimant was done in his capacity as an employee of the Respondents and for a brief period as general manager.

They also deny entering into any agreement with the Claimant to manage Muthaiga Flats, Pangani Flats and Lavender Flats at a commission of 3.1%. Further that they deny hiring the Claimant to assist in any subdivision and sale of their property known as Kahungu Farm at 5% commission upon successful sale of each sub-divided plot.

The Respondents aver that the decision to terminate the claimant's contract was informed by his involvement in activities that made the Respondents lose faith in him as indirectly admitted in his statement attached as Appendix 5 of the Respondents' documents. That on 21st August, 2007, the Company paid cash bail of Kshs.200,000/= to the High Court for release of 4 staff members. The case was dismissed on 3rd March, 2008 and the Claimant collected the cash bail which had been deposited under his name and deliberately failed to disclose and refund the amount to the 1st Respondent. That the Respondents discovered this after 2 weeks which led to his instant termination as the Claimant had taken the money and converted it to his own use. They urge the Court to dismiss the suit with costs.

Claimant's Evidence

The Claimant put up 3 witnesses one Mburu Kiboko CW1, One Gabriel Munene Kibicha and himself. The Claimant reiterated his evidence as set out in the Memorandum of Claim. CW1 in evidence stated that he conducted plumbing work on various properties owned by the Defendants namely Parkside Hotel, Karangi Hotel, Ndanga Hotel, Pangani Flats, Lavender Flats, Muthaiga Flats, Kajewa Flats, Jamena Flats, Karangi Coffee Estate, Kibenda Tea Estate, Gitare Tea Estate and the residential houses of the Directors of the Defendants. That he was supervised at all times by the Claimant and at no time did he deal with the directors of the Defendant Companies.

CW2's evidence was that he was a manager of the 1st Respondent at Ndanga Hotel in Ruiru but he left employment in 2008. CW2 stated that he would send weekly reports to Claimant and meet him once a week on Fridays. That on the instruction of the Claimant, CW2 would carry construction materials and other goods to and from Muthaiga Flats, Kajewa Flats, Jamena Flats and other business locations. That to the best of his knowledge the Claimant was involved in the management of all businesses of the Respondents.

Respondents' Evidence

The Respondent put up 2 witnesses: RW1 was one Edward Kamau Maina, the CEO of the 1st Respondent. He stated that sometime in 2006, the Claimant approached one of its Director's for employment opportunities with the Company. That the claimant was allowed to informally run some errands for the Company whenever there was opportunity to do so. In August, 2006, the 1st Respondent thought of appointing an agent to manage two of its flats and as such appointed the Claimant to do so on a contract of 1 year at a commission rate of 3.1%.

That the Claimant did not have the capacity to operate as agent for he did not have his own office, staff and other facilities. The Respondents thus retained him as an employee at a salary of Kshs.60,000 per month. The issue of payment of the commission therefore never arose during the pendency of the contract because he never performed the duties of an agent.

That the other flats alleged to have been managed by the Claimant were managed by the employees of the Respondents in the cause of their employment. That the Claimant was terminated for converting into his own use Kshs. 200,000/= belonging to the Respondents.

RW2 was one Luke Kinyanjui Ngethe who was appointed by the Respondents Directors to be the selling agent of subdivisions of part of LR No. 9754 Kahungu Farm at the cost of Kshs.170,000/= per acre which he did and he deposited payments in the Respondent's Bank Account as per evidence provided.

Claimant's Submissions

It is submitted on behalf of the Claimant that he was lawfully employed as General Manager of the Respondent and at the same time entered into a management contract of the Respondents flats for which he was never paid. He submits that the same was proved in evidence and the claims for payment in lieu thereof should be allowed.

Counsel for the Claimant also submits that the provisions of section 45(1) and (2) were not adhered to and the Court should find the procedure for terminating the Claimant unlawful.

Respondents' Submissions

It is submitted that the contracts to manage Kajemwa and Jamena Flats ran from September 2006 to 20th March 2008 and did not attract any extra commission other than the salary paid to the claimant of Kshs.60,000/= per month. That the Claimant never issued a separated invoice for any other duty besides his salary of Kshs.60,000/= and other benefits.

That there was no evidence produced to indicate that the Respondent owed the Claimant any commission even at the time of termination. That the Claimant operated under the employer-employee relationship thus the separate claim for commission is unjustified. Further the claim that he was contracted in relation to Kahungu Farm is unsupported by evidence and should not be allowed.

On the procedure followed to terminate the Claimant they submit that the Claimant was terminated for converting a sum of Kshs.200,000/= to his personal use. He was arrested by the police and thereafter he surrendered Kshs.200,000 and other properties belonging to the Respondents. That this was gross misconduct warranting summary dismissal. That the termination took effect in March 2008, whereas the Employment Act, 2007, came into effect on 2nd June 2008.

They submit that the Claimant was paid all his dues and the Claim for unpaid dues should not be allowed. The compensation for wrongful termination should not be granted as the termination was lawful. That the claim for payment of salary from the date of termination till the date of judgment has no basis in law and should be disallowed.

The claim for 6 months' notice pay should not be allowed for the reason that the claimant was dismissed for gross violation of the terms of his employment warranting summary dismissal and in any event the Employment Act Cap 226 (repealed) provided for one month's notice.

That the claim for one month's leave and bonus has no basis as the special relationship between the Claimant and the Respondent did not provide for these benefits and as such they should fail. The Respondents urge the Court to dismiss the suit with costs.

Determination

The issues for determination are the following –

1. Whether the claimant was both an employee and a commission agent
2. Whether the Claimant's termination was unprocedural, unlawful and unfair
3. Whether the Claimant is entitled to the remedies sought

On the issue whether the claimant was both an employee and commission agent, it is the respondent's case that it signed a management contract with the claimant but the same was not implemented as the claimant did not have the capacity to operate as a management agent. It is the respondent's case that they instead engaged him as an employee.

The claimant's witnesses and his evidence do not support his engagement as a commission agent. All letters that have been produced in court support the claimant's employment and not engagement as a management agent. These include receipts for rent received in the name of the respondents.

There is further no evidence that the claimant was engaged as a commission agent to sell the respondent's land at Kahungu Farm Rongai. On the contrary the respondents produced evidence that one LUKE K. NGETHE who testified as RW2 was the one engaged to sell the land.

I find that the claimant was an employee of the respondent and that he has not proved that he was engaged as a management agent or as commission agent.

On the second issue, the Claimant avers that the Respondents' directors verbally ordered him to proceed on compulsory leave without pay and hand over company property in his power and possession without disclosing the reasons and later terminated him with effect from 20th

March, 2008. The Respondents on the other hand stated that the Claimant was terminated for converting a sum of Kshs.200,000/= to his personal use. He was arrested by the police and thereafter he admitted withholding the Kshs.200,000 and other properties belonging to the Respondents which he agreed to give back to them. This amounted to gross misconduct warranting summary dismissal. The termination letter dated 20th March, 2018, sets out the reason for termination and as such the Claimant was aware of the accusations against him.

This is a matter which arose before the coming into effect of the employment Act, 2007, and therefore the aforesaid provisions do not apply. Employment Act, Cap 226 (repealed) which was the law in force when the cause of action herein arose provided for summary dismissal without a requirement for a hearing.

Section 17(g) which was operational at the time provides for termination of an employee summarily for gross misconduct. Sub-section (g) thereof provides:

“(g)if an employee commits, or on reasonable and sufficient grounds is suspected of having committed a criminal offence against or to the substantial detriment of his employer or his employer's property.”

From the above provision it is clear that a reason for termination did exist and therefore the termination was justified.

As to the procedure followed, the Employment Act, 2007 came into operation on 2 June 2008. In this regard the conduct of the Respondent as far as the procedural fairness requirements are concerned are to be tested only against the prevailing law at the time which was the repealed Employment Act, Cap 226.

Reference is made to the Court of Appeal of Kenya decision in **Kenya Revenue Authority v. Menginya Salim Murgani [2010] e-KLR**. The Court held that prior to 2007, employers had no obligation to observe principles of natural justice in termination of contracts of employment. The Courts have explained that under the old employment law in Kenya, Employers could terminate contracts of employment at will, for good cause, bad cause or no cause. At the time, employment was at the will of the Employer. This thinking stretches far back as exemplified in the 1909 English Case of **Addis v. Gramophone Co. [1909] AC 488**, where the House of Lords ruled that an Employee who was dismissed in a manner which imported obloquy among the commercial community in India, resulting in permanent damage to his reputation, could not recover damages for loss of employability and injured feelings. It was suggested such a pursuit could only be considered in a separate claim for defamation. Decisions in our Courts save for those from the Industrial Court have long upheld this dogma.

The Court further clarified that where the contract of employment, even before the Act of 2007, imposed on the employer the duty to observe principles of natural justice, then the Court could enforce such obligations and damages could be paid for non-observance of the obligations.

The High Court in Civil Case Number 3472 of 1994 between **Geoffrey Muguna Mburugu v. The Attorney- General** and in Civil Case Number 2230 of 2001 between **Lt. Col. Benjamin Mwema v. the Attorney- General**, upheld the duty of the employer to act fairly only in cases where the terms of employment provided for the same.

The claimant's terms did not provide for fair procedure and the position in the case of **Addis –V- Gramophone Company** applied. I find that there was no obligation on the respondent under the legal regime applicable then, to either follow any procedure or apply the rules of natural justice. I find that there was sufficient reasons for summary dismissal of the claimant as he admitted converting the respondent's money to his use as reflected in the statement the claimant wrote after he was arrested on the said grounds.

Remedies sought

The Claimant seeks for commissions earned for managing the Respondents' properties. As already found above, the agreements for commission were never actualised. The claimant thus did not earn commission but was instead on a salary. The Claim for commission only arose after the relationship had broken down and I therefore agree with the Respondents on the point that the Contract never took off. It was thus rescinded by conduct of the parties. The prayer is accordingly dismissed.

Salary from the date of termination to the date of judgment

In the case of **Ezekiel Nyangoya Okemwa v Kenya Marine & Fisheries Research Institute [2016] eKLR** it was observed that employment remedies are guided by the principle of fair-go-all round. Fair base rate would be the rate actually earned by the Claimant at the point of exit, not what he expected he would earn, or what his successor earned.

Further in the Court of Appeal, Civil Appeal No. 25A of 2013 between **Elizabeth Wakanyi Kibe v. Telkom Kenya Limited [2014] e-KLR**, it was held that employees whose contracts of employment are terminated have no reason to sit and wait to enjoy remuneration which they have not worked for.

The prayer for loss of future earnings is therefore not payable in light of the above case law.

In the ultimate, the entire claim fails with the result that the entire claim is dismissed. Each party will bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 30TH DAY OF NOVEMBER 2018

MAUREEN ONYANGO

JUDGE