



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1300 OF 2018

LEONARD CHIUNDA.....CLAIMANT

- VERSUS -

MSINGI EAST AFRICA LTD.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 30th November, 2018)

JUDGMENT

The claimant filed the memorandum of claim on 10.08.2018 through J.A. Guserwa & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) Reinstatement to his previous position or job without any loss of benefits.
- b) Salary arrears for the entire period the claimant has been out of employment.
- c) In the alternative, an order for payment of the claimant's lawful terminal dues as set out above in paragraph 7 (being salary for July and August USD 26, 017.50; 3 months' pay in lieu of notice USD 39, 026.25; pay for 23.5 accrued leave USD 14, 109.22; one month pay in lieu of statutory redundancy USD 13, 008.75; one month severance pay USD 13, 008.75; 3 months ex-gratia payment USD 39, 026.25; 12 months' compensation USD 13, 008.75 per month making USD 156, 105.00; and total sum claimed USD 292, 696.50.)
- d) Maximum compensation for 12 months.
- e) Damages for discrimination.
- f) Exemplary damages.
- g) Permanent injunction to restrain the respondent from replacing the claimant.
- h) Costs of the suit with interest applicable to the KES equivalent amounts thereon.

The claimant's statement of response was filed on 11.09.2018 through Hamilton Harrison & Mathews Advocates and learned Counsel Mr. Ezra Makori appeared in that behalf. The respondent prayed that the claimant's suit be dismissed with costs to the respondent. The claimant filed the reply to the response on 17.09.2018.

On 29.08.2018 partial judgment by consent of the parties was recorded and entered for the claimant for payment of:

- 1) Salary to the last day of work being the date the interim orders will be discharged.
- 2) 3 months payment in lieu of contractual notice.
- 3) All accrued leave days up to the last day of work.
- 4) Severance pay at the rate of one month salary for each completed year of service.
- 5) Ex-gratia payment equivalent to 3 months salary.

The payment was to be effected by mention date on 31.08.2018 and on that date it was confirmed that in line with the partial judgment the respondent had paid the claimant a sum of USD 131, 187.97 (Kshs. 11, 573, 306.50) in full satisfaction thereof.

On 31.08.2018 it was ordered by consent of the parties:

- 1) That the vacancy accruing from termination of the claimant on account of the challenged redundancy effective today being position of finance and operations director is hereby protected and not to be filled pending the hearing and determination of the residual suit.
- 2) That the defence be filed and served by 11.09.2018 and a reply may be filed and served by 2 days after service of defence.
- 3) That hearing of the suit on 18.09.2018 at 9.00am for one hour before any Judge on the following issues:
 - a) Whether claimant is entitled to compensation for unfair redundancy.
 - b) Whether claimant is entitled to damages for discrimination.
 - c) If the claimant is entitled to be reinstated.

There is no dispute that the respondent employed the claimant effective 01.07.2016 to work as the Interim Finance Director. The appointment was initially by way of secondment from PricewaterhouseCoopers Ltd (PwC). The secondment was for 12 months subject to termination in accordance with the terms of the contract. The respondent then employed the claimant on a permanent contract as the Finance and Operations Director effective 01.07.2007. The respondent served the claimant a redundancy notice dated 12.07.2018. The notice referred to the meeting between the parties held on 13.07.2018 and stated that the claimant was aware that the respondent was realigning its operations so as to accelerate its implementation of its aquaculture interventions. The reason for restructuring was to enable the respondent to achieve maximum results as was required by its Annual Operating Plan 2018/19 by focusing on investment and industry development. Thus reorganisation had resulted in some positions falling away. The position of Director of Finance and Operations held by the claimant no longer existed in the new organisation structure because it had been replaced by the position of Investments and Finance Director requiring a candidate with solid investment background. The claimant was therefore to be declared redundant effective 13.08.2018 and the dues offered included:

- a) Salary to the last day of work.
- b) 3 months payment in lieu of contractual notice.
- c) All accrued leave days to the date of exit.
- d) Severance pay at the rate of 15 days salary for every completed year of service.
- e) Ex-gratia payment equivalent to 3 months salary.
- f) The medical insurance cover to remain in place until December 2018 subject to terms of the policy.

The notice concluded by inviting the claimant to discuss any matter in that regard.

The respondent served the Labour Officer, Nairobi County a notice dated 12.07.2018 conveying that it intended to render the claimant redundant on the stated grounds.

The evidence is that the parties engaged in correspondence and discussions about the looming redundancy after the claimant was served with the redundancy notice. The Court notes that by the letter dated 27.07.2018 the claimant demanded separation package being:

- a) Accrued pay for days worked and leave due.
- b) Payment of 3 months' notice pay (contractual provision).
- c) Payment of 1 month redundancy notice (statutory provision).
- d) Severance pay at the rate of 1 month pay for every year worked.
- e) 12 months' salary as compensation (statutory provision not in your current offer).
- f) 6 months ex-gratia payment.

By that letter the claimant indicated that he was keen to settle the matter amicably and he hoped that the respondent would be agreeable to his terms of separation or would make a better offer.

The parties met on 07.08.2018 and the minutes show as follows:

- a) The position of Finance Manager had been established and the respondent was willing to consider the deployment of the claimant to that position but on fresh terms and grading because the position would be answerable to Investment and Finance Director. Further the respondent would be willing to engage the claimant on consultancy basis on need basis and if the claimant expressed interest.
- b) The claimant informed the meeting of his interest to continue having commercial collaborations with the respondent and willingness to separate amicably upon the following terms which.

The respondent agreed on separation terms as follows:

- a) Salary to the last day of work.
- b) 3 months payment in lieu of contractual notice.
- c) All accrued leave days to the date of exit.
- d) Severance pay at the rate of 15 days salary (if separation not amicable) and 1 month (if separating amicably) for every completed year of service.
- e) Ex-gratia payment enhanced to 4 months salary but claimant insisted on 4 months.
- f) The respondent rejected the 12 months compensation as the position held by the claimant had ceased to exist.

The **1st agreed issue** for determination is whether the claimant is entitled to compensation for unfair redundancy. It is submitted for the claimant that the redundancy was unfair in terms of sections 40, 43, and 45 of the Employment Act, 2007. The material particulars of unfairness are not stated. As submitted for the respondent, the Court finds that respondent restructured its operations and the office held by the claimant being Director of Finance and Operations was abolished and its duties taken up by the new offices of Finance Manager and the Investment and Finance Director. The evidence is that the claimant was served the statutory notice and the notice was served upon the area labour officer as provided for in section 40 of the Act. The parties negotiated the separation and the claimant was offered redeployment to the new and lower office of Finance Manager but he declined. He was also offered consideration for consultancy on need basis subject to amicable separation but the same appears to have become unavailable as the claimant filed suit. The Court finds that the redundancy was genuine as per section 43 of the Act and the procedure in section 40 of the Act was complied with. The redundancy was not unfair both in substance and procedure.

The **2nd agreed issue** for determination is whether the claimant is entitled to damages for discrimination. It was submitted for the claimant that he was the only one targeted and singled out for redundancy. That out of the 4 Managers in December 2017, he was the only one singled out for redundancy. Further, the employees working under the claimant were given alternative deployments or re-designated and such targeting called for condemnation and compensation. It is submitted that the claimant is awarded Kshs.10, 000, 000.00 in discrimination. As submitted for the respondent the Court finds that the evidence was that the claimant was the only Finance and Operations Director in a single post establishment in the respondent's organisation. The officers working under him or in other Director positions were substantially different. The Court returns that the claimant has failed to show that he was treated differently and adversely so, in comparison to persons in circumstances similar to his. The allegations for discrimination will therefore fail.

The **3rd agreed issue** for determination is whether the claimant is entitled to be reinstated. The Court finds that indeed the office of Director Finance and Operations was abolished, the redundancy was not unfair, and the parties negotiated possibilities of retention on redeployment and re-designation to lower position of Finance Manager but the same failed to materialise. The position having been abolished the Court returns that practicability for implementing an order of reinstatement was thereby diminished.

The Court follows the holding in **Professor Elijah Biama –Versus- University of Eldoret & 2 Others [2014]eKLR** thus, **“The 1st issue for determination is whether the petitioner has valid claims under the contract of service as the Principal of Chepkoilel University College. The court finds that upon the elevation of the Chepkoilel University College to a fully fledged university under the name University of Eldoret, the office of Principal as held by the petitioner was thereby abolished. The abolition of the office, in the opinion of the court, was an overriding circumstance that superseded any claims by the petitioner to continued employment in the office of Principal.”**

The Court also follows the holding in **Professor Joseph Mungai –Versus- Kirinyaga University College [2018]eKLR**, thus, **“Further, as submitted for the respondent, the respondent has since been chartered to a fully fledged University so that the position held by the claimant has since been abolished and there would be no vacancy in that regard.”**

Further in **Professor Gitele J. Naituli –Versus- The Multimedia University of Kenya and Another [2018]eKLR**, the Court held, **“As submitted for the respondent, the position of Deputy Principal (Finance and Administration) Multimedia University College of Kenya no longer exists following the undisputed elevation of the former college to a fully fledged university. The Court finds that in view of that material fact, an injunction as prayed for will not issue and cannot issue to restrain the removal of the claimant from an office that has ceased to exist.”** Thus the prayer for injunction as was made will also fail.

The Court has considered all the circumstances of the case including the consent that was recorded and the interim orders that were initially granted in the matter. The Court returns that each party shall bear own costs of the suit.

In conclusion judgment is hereby entered for the parties for determination of the suit with orders that the claimant's case on the agreed issues for determination fails with orders that each party to bear own costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday 30th November, 2018.

BYRAM ONGAYA

JUDGE