



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO.1760 OF 2014**

**MUSILI MAKATI.....CLAIMANT**

**- VERSUS -**

**CANTON BUILDING & CONSTRUCTION LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 30<sup>th</sup> November, 2018)

**JUDGMENT**

The claimant filed the memorandum of claim on 08.10.2014 through Namada & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the respondent's actions complained of above amounted to unlawful and unfair summary dismissal of the claimant from employment.
- b) A declaration that the claimant is entitled to payment of his terminal dues and compensatory damages as pleaded.
- c) An order for the respondent to pay the claimant his due terminal benefits and compensatory damages totalling to Kshs. 1, 215, 000.00 being one month pay in lieu of notice Kshs.22, 500.00; house allowance for 15 years of service Kshs. 607, 500.00; pay in lieu of 9 years' annual leave 1999 to 2008 Kshs. 202, 500; service pay or gratuity for 5 years when NSSF was not remitted 1999 – 2004 Kshs.112, 500.00; 12 months' gross salaries Kshs.22, 500.00 x12 making 270, 000.00 for unfair termination.
- d) The statement of response was filed on 24.12.2015 through Mose, Mose & Millimo Advocates. The respondent prayed that the suit be dismissed with costs.

The parties were in employment relationship under which the respondent employed the claimant as a labourer.

The **1st issue** for determination is the effective date of the employment. The claimant testified that the respondent employed him in 1999 but it was not a limited company. The evidence is that the respondent was incorporated 01.02.2005. There was no dispute that prior to 01.02.2005 the claimant worked for the predecessor of the respondent who the respondent acquired as a going concern. The Court finds that in absence of any other material on record, there was transfer of enterprise to the respondent including the staff and the respondent is liable for the claimant's lawful claims effective 1999.

The **2nd issue** for determination is whether the claimant's contract of service was unfairly terminated. The claimant's evidence is that on 19.09.2013 he suffered some injuries in the course of his duty and employment with the respondent. He later filed a civil case at the Chief Magistrate's Court at Milimani, Nairobi claiming compensation for the injuries sustained. On 25.07.2014 he reported on duty at the assigned respondent's construction site in Kabete and he received a telephone call from the respondent's office that he speaks to a director known as Manu Karai. The said Manu then told the claimant that his employment with the respondent would continue only if he withdrew the pending suit for the injury claim. He was asked to see Manu on 28.07.2014 and he complied. The said Manu also told the claimant that his services were no longer needed and the claimant lost his employment. That was the claimant's account.

The respondent's witness (RW) was the human resource manager Sammy Mwendwa. His evidence was that the claimant left employment voluntarily and that he was not dismissed at all. RW testified that the claimant walked away on 25.07.2014 or 25.06.2014 but he did not see him walking away because the claimant worked at the sites. He admitted that there was a day the claimant met Manu at the office. RW further stated that when the claimant walked away, no disciplinary action was taken against him.

The Court has considered the evidence and finds that the respondent has failed to coherently establish the reason and circumstances of the

separation. RW did not know the date and circumstances of the separation. In the circumstances the Court finds that the claimant's account was credible and the claimant was verbally terminated by Manu on account of filing the suit for injury claims. The termination was unfair because it was without notice and it cannot be said to have been terminated through a fair procedure as envisaged in section 45 of the Employment Act, 2007. Further, the Court finds that section 46(h) of the Act provides that it is not a fair reason to terminate an employee on account of the employee's initiation or proposed initiation of a complaint or other legal proceedings against the employer except where the complaint is shown to be irresponsible and without foundation. In the instant case the Court finds that it was valid for the claimant to file the suit and the termination was unfair.

The claimant had served for a long time without a break, he desired to continue in employment and he did not contribute to his termination. He is awarded 12 months' salaries under section 49 of the Act in compensation for unfair termination. He earned at the rate of Kshs.750 per day and the claimant testified that it was paid at Kshs. 18, 200.00 per month. He is awarded **Kshs.270, 500.00**. He is also awarded **Kshs. 22, 500.00** one month pay in lieu of notice.

The 3<sup>rd</sup> issue for determination is whether the claimant is entitled to the other payments as prayed for. The Court finds as follows:

- a) Pay for leave 1999 – 2008 will fail on a balance of probability because the respondent has filed documentation showing payment for leave in subsequent years and the parties appear not to have had a dispute or grievance about outstanding leave. The prayer will fail.
- b) The claimant prays for house allowance for the period served but the evidence is that the parties agreed on a consolidated daily rate of payment paid at the end of the month. Section 31 (2) of the Act on consolidated pay applied and the prayer will fail.
- c) The claimant prays for service pay for 1999 to 2004 when NSSF was not remitted. It was in 2005 that the respondent was incorporated. It would appear that after the incorporation the respondent complied and started making NSSF contributions. The claimant has not offered an explanation on whether he had made a grievance on the respondent's failure to make the NSSF contributions prior to 2005. Considering all the circumstances of the case, the Court finds that the claim will fail especially that it was an injury ceasing in 2004 and which was time barred both under section 4 of the Limitation of Actions Act and section 90 of the Employment Act, 2007.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- a) The declaration that the respondent's actions complained of by the claimant amounted to unlawful and unfair summary dismissal of the claimant from employment.
- b) The respondent to pay the claimant **Kshs.293, 000.00** by 30.12.2018 failing interest to be payable thereon from the date of this judgment till full payment.
- c) The respondent to pay the claimant's costs of the suit.

**Signed, dated and delivered in court at Nairobi this Friday 30<sup>th</sup> November, 2018.**

**BYRAM ONGAYA**

**JUDGE**