



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA AT MERU**

**SUIT NO. 17 OF 2018**

**(Formerly Nyeri ELRC 170 of 2016)**

**JUSTUS KIBAARA KIBAL.....CLAIMANT**

**VERSUS**

**MT. KENYA EAST FARMERS CO-OP LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant was the secretary manager of the Respondent for about a decade. He requested for early retirement on 15<sup>th</sup> July 2015 and the Respondent accepted the retirement at a meeting held on 28<sup>th</sup> August 2015. At the time of his retirement, he was earning a basic salary of Kshs. 19,175/- and he had earned salary arrears, staff provident fund, employment benefits and he had outstanding leave. He was owed NSSF arrears as well and he averred that he was denied his hard earned benefits. He sought the payment of the terminal dues amounting to Kshs. 1,203,300/-, certificate of service and costs of the suit.

2. The Respondent averred in its defence and counterclaim that the Claimant was required to properly execute his duties with responsibility and outmost trust. The Respondent averred that the Claimant had engaged in financial malpractices by altering figures on cheques leading to the institution of criminal charges at Nkubu for the offence of obtaining a sum of Kshs. 1,500,000/- from the Respondent fraudulently. The Respondent averred that having breached the fiduciary duty bestowed upon him, the Claimant was not entitled to the reliefs he was seeking and that his suit should be dismissed with costs. By way of counterclaim, the Respondent averred that the Claimant voluntarily retired in August 2015 and the Respondent discovered that the Claimant had defrauded it of colossal sums of money to the tune of Kshs. 1,500,000/-. He was charged at Nkubu Law Courts in an ongoing criminal trial for the theft and the Respondent averred that the Claimant was in breach of his fiduciary duty. The Respondent claimed the embezzled sum of Kshs. 1,500,000/- from the Claimant together with interest and costs thereon. In his reply to defence and defence to counterclaim, no admission was made as to the alleged embezzlement or fraudulent acquisition of funds amounting to Kshs. 1,500,000/-. The Claimant averred that he was a stranger to the allegations set out in the counterclaim and that the Respondent was not entitled to the prayers sought in the counterclaim and he thus sought the dismissal of the defence and counterclaim with costs and entry of judgment in his favour.

3. The Claimant testified as did the current and past chairman of the Respondent as well as the County Co-operative Officer Zachary Njeru and members of the Respondent's management committee. The Claimant testified that he was presently a bishop at New Apostolic Church. He stated that he was entitled to terminal benefits upon his early retirement as the secretary manager of the Respondent and that the refusal to pay terminal dues was unmerited. The Claimant in cross-examination stated that he was not involved in the fraudulent activity and that he did not get a copy of the audit report. He denied altering the figures though he was the one who went to the bank to withdraw the funds and was a signatory. In re-examination, he stated that he learnt of the audit at the Police Station and that the report before the court was tailor made for this suit. He stated that the cheques were authorized and the money was withdrawn from the banks and no forgery was alleged.

4. The Respondent's first witness Lucas Daudi Muthamia testified that he was the current chairman of the Respondent and that the cheques the Claimant cashed were altered and used to withdraw more than had been approved. Before he could be cross-examined, objection was taken on the evidence being a report the witness was referred to made by the County Co-operative Officer Z. G. Njeru. I permitted the summoning of the witness vide an *ex tempore* ruling and deferred the cross-exam of the first witness for the defence till Z. G. Njeru had testified.

5. The County Co-operative Officer Zachary Gitonga Njeru testified that he audited the Respondent and established funds had been spirited out of the Respondent's account through alteration of the amounts and figures on the cheques. He stated that the amount on the counterfoils was at variance with the sum on the cheque and that the Claimant was the payee. In cross-examination he stated that there was a basis for his conclusion that the Claimant had defrauded the Respondent and that there was basis for his findings. He conceded that he did not ask for an explanation from the Claimant as he audited the books of the Respondent. In re-exam he stated that he made the recommendations contained in the report and that he suggested the Respondent introduce systems in place to bar such fraud in future.

6. The witness who had been stood down Mr. Muthamia was recalled and reminded of the oath he had taken. He continued to testify and

stated that the Claimant was charged for the fraud. He stated that at the time of the fraud he was not an official but an ordinary committee member and was the chairman when the last cheque was issued. He stated that the amount the Claimant withdrew from the bank was not the officials had approved. He stated that some of the documents were before the lower court and therefore he did not have the vouchers. In reexamination he testified that when he signed the cheque it was for 23,900 and it was altered to read 123,900/- in words and figures. The other witnesses Stephen Kirimi Muregi, Godfrey Mutwiri M'Aburi Alikajero M'Raachi and they all testified that the sums approved and what they signed for were altered. They conceded in cross-examination that they did not have the vouchers prepared to support the payments.

7. The parties filed submissions and the Claimant submitted that he had proved his case and that the Respondent's 5 witnesses had not rebutted his testimony and that they had attempted to justify withholding the Claimant's dues by making allegations that the Claimant altered the amounts on the cheques. The Claimant submitted that the Respondent had miserably failed to prove the counterclaim. The Claimant thus urged the court to grant him the remedies sought. The Respondent did not file any submissions.

8. The Claimant and the Respondent each had a burden to prove their respective suits. The Claimant was seeking to recover his terminal dues while the Respondent sought to recover the sum lost due to illegal actions by fraudsters. The County Co-operative Officer made a damning revelation. He stated that the Claimant was the beneficiary of the sums that were stolen as his audit permitted him to establish that the variations were made on the cheques without basis. The Claimant was the secretary manager. He is the payee on the cheques. He was a signatory. Despite the fact that the vouchers were not produced, it is amply clear that he was the recipient of the funds and even if he disbursed the illegal proceeds he handled them. On a balance of probabilities I find that he was involved in illegal activities at the Respondent and the Respondent is therefore entitled to recover the sum of 1,500,000/- from the Claimant. His suit was not proved on a balance of probabilities as he did not show how the sums he alleges are due to him were payable. He did not avail his NSSF records to show the nonpayment of his arrears as averred. His suit is therefore dismissed with no order as to costs.

9. In the final analysis I enter judgment for the Respondent against the Claimant on the counterclaim for:-

- a. Kshs. 1,500,00/-
- b. Costs and
- c. Interest on the sums in a) and b) from the date of this judgment till payment in full.

It is so ordered.

**Dated and delivered at Meru this 9<sup>th</sup> day of November 2018**

**Nzioki wa Makau**

**JUDGE**