



## REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT MERU

CAUSE NO. 52 OF 2018

(Formerly Nyeri ELRC 173 of 2018)

EPHRAIM GAI THO GITHONGORI.....CLAIMANT

VERSUS

TIMAFLOR LIMITED.....RESPONDENT

### JUDGMENT

1. The Claimant herein was employed as a Human Resource Manager of the Respondent in January 2014 until dismissal on 23<sup>rd</sup> March 2016. The Claimant averred that he earned Kshs. 157,200/- a month at the time of termination of the contract. The Claimant averred that he was entitled to adequate notice prior to termination and that the Respondent's actions offended Sections 40, 45, 49 and 50 of the Employment Act and ILO Convention No. 158 Article 48. He thus sought compensation for unlawful and unfair termination of his employment contract Kshs. 1,886,400/- gratuity at the rate of 15 days for each year worked Kshs. 157,200/- and a certificate of service plus costs of the suit. He also sought payment of interest on the sums claimed.

2. The Respondent filed a defence in which it averred that the separation with the Claimant was lawful, procedural, valid and fair and strictly in accordance with the contract. The Respondent averred that the Claimant was paid his terminal benefits in full and signed a disclaimer. The Respondent averred that the Claimant could not give himself a self-appraisal of his performance. It was averred that the Claimant was paid 3 month's salary in lieu of notice which is more than the 1 month envisaged in the letter of appointment. The Respondent thus sought the dismissal of the suit with costs.

3. The Claimant testified in support of his claim and stated that he was dismissed in unclear circumstances and no reason was given for the dismissal. He was denied audience and he sought an explanation, reported to the Labour Officer and filed suit. In cross-examination he testified that each party could give a one month notice to terminate the contract. He confirmed that he signed the disclaimer as he was forced. He stated that he did not attach it as he was not given a copy. He testified that he did not get the payment he was entitled to and that he only received Kshs. 70,040/- only. He stated that he had an amount owed for payment of a medical bill. He testified in re-examination that he signed the disclaimer as he was told to do so as he awaited the final dues.

4. The Respondent called Judy Ndai the Respondent's HR manager. She testified that she knew the Claimant who worked as a HR officer of the Respondent for 2 years 3 months. She stated that his services were terminated and he was paid his terminal dues less statutory deductions and the debt owed to the Respondent. She said that the Claimant was paid Kshs. 122,070/- on 24<sup>th</sup> March 2015 and the other sum of Kshs. Kshs. 70,040/- on termination which tallied with the computation in the final notice. She stated that the sums due were paid at the Labour Office and the sum on the disclaimer was paid after about 3 weeks. In cross-examination she stated that the payment was made at the Labour Office. She testified that the Claimant was dismissed on the spot by the general manager at the Boardroom where the reason for dismissal was given. She conceded that the letter did not give the reason on the letter and in re-examination stated that the termination was reduced to a normal termination.

5. The Claimant submitted that the letter of dismissal did not give a reason and that the letter was in breach of Section 43 of the Employment Act which obligates the Respondent as employer to give a reason. The case of **Javan Were Mbango v H. Young & Co. (EA) Ltd [2012]**

**eKLR** was cited in support of this contention while the case of **JWN v Securex Agencies (K) Ltd [2018] eKLR** was cited for the arguments on unfair termination. The Claimant submitted that the court should be guided by the two cases and find that the dismissal was unfair and that the Claimant is entitled to compensation. On the quantum on compensation the Claimant cited the case of **Linus Barasa Odhiambo v Wells Fargo Limited [2012] eKLR** and the case of **Jane Njeri Wanyoike & 23 Others v Pan Africa Insurance Company Limited & 2 Others [2017] eKLR** was cited for the proposition that it is well settled that a disclaimer cannot negate the rights of employees.

6. The Respondent's submissions were to the effect that the Claimant signed a disclaimer on 11<sup>th</sup> April 2016 which was unequivocal. The Respondent submitted that the Claimant could not be heard to dispute the disclaimer as he had not raised the same in his pleadings. The case of **Mamta Peeush Mahajan [Suing on behalf of the estate of the late Peeush Premal Mahajan] v Yashwant Kumari Mahajan [Sued personally and as Executrix of the Estate of the late Krishan Lal Mahajan] [2017] eKLR** was cited for this proposition. The Respondent cited the case of **Katiwa Kanguli v Bamburi Cement Limited [2015] eKLR** for the argument that a discharge such as the one executed herein constituted an unequivocal representation that all the dues had been paid and short of proving that this representation was secured through fraud, duress, mistake, undue influence or representation the employee cannot be allowed to disown it as the doctrine of promissory estoppel applies. Reliance was also placed on the cases of **Trinity Prime Investments Ltd v Lion of Kenya Insurance Company Limited [2015] eKLR** and **Kyangavo v Kenya Commercial Bank Ltd & Another [2004] eKLR**. The Respondent submitted that the cases the Claimant had relied on were distinguishable from the case before the court and that the Claimant was estopped from bringing the claim due to the discharge he had executed, that the claim was an afterthought and an abuse of the court process fit for dismissal with costs.

7. I have considered the rival arguments, the pleadings and the case law cited as well as the law. In this case, the Claimant, a HR practitioner to boot, signed a discharge whose terms and effect were a waiver of all claims against the Respondent. The Court of Appeal (Visram, Karanja, Koome JJA) in the decision in **Coastal Bottlers Limited v Kimathi Mithika [2018] eKLR** which overturned the reasoning in **Jane Njeri Wanyoike & 23 Others v Pan Africa Insurance Company Limited & 2 Others (supra)**, held as follows:-

*21. In our minds, it is clear that the parties had agreed that payment of the amount stated in the settlement agreement would absolve the appellant from any further claims under the contract of employment and even in relation to the respondent's termination. It is instructive to note that the respondent never denied signing the said agreement or questioned the veracity of the agreement. Further, from the record, we do not discern any misrepresentation on the import of the said agreement or incapacity on the respondent's part at the time he executed the same. It did not matter that the amount thereunder would be deemed as inadequate. As it stood, the agreement was a binding contract between the parties. In **Trinity Prime Investment Limited vs. Lion of Kenya Insurance Company Limited [2015] eKLR** this Court, while discussing the import of a discharge voucher which is more or less similar as the agreement in question observed:*

*"The execution of the discharge voucher, we agree with the learned judge, constituted a complete contract. Even if payment by it was less than the total loss sum, the appellant accepted it because he wanted payment quickly and execution of the voucher was free of misrepresentation, fraud or other. The appellant was thus fully discharged."*

*22. All the ELRC was required to do was to give effect to the intention of the parties as discerned from the settlement agreement. Our position is fortified by the sentiments of Sir Charles Newbold P. in **Damondar Jhabhai & Co Ltd and another vs. Eustace Sisal Estates Ltd [1967]***

*EA 153 that:-*

*"The function of courts is to enforce and give effect to the intention of the parties as expressed in their agreement. In the English Court of Appeal case above - **Globe Motors Inc & Others vs TRW Lucas Electric Steering Ltd & Others (supra)** - Lord Justice Beatson stated as follows:-*

*'Absent statutory or common law restrictions, the general principle of the English law of contract is [that parties to a contract are free to determine for themselves what obligations they will accept]. The parties have the freedom to agree whatever terms they choose to undertake, and can do so in a document, by word of mouth, or by conduct.'*

*23. Giving effect to the parties' intention meant that the ELRC could not entertain the suit filed by the respondent. This is because the respondent had waived his rights to make any further claim in relation to his relationship with the appellant.*

8. I am in agreement with the reasoning of the Court that the execution of the discharge voucher constituted a complete contract. The Claimant herein accepted it after he had even complained at the Labour Office and I find that the execution of the voucher was free of misrepresentation, fraud or coercion. The Claimant alleged that he was forced to sign the discharge but this assertion was not pleaded at all as required in such a scenario in order to dislodge the discharge. The Respondent in my view therefore was thus fully discharged and does not need to answer the claim as it was an abuse of the court process. It would be a waste of judicial time to consider any other aspects as this singular attack resolves the matter as there was no viable claim in light of the disclaimer signed. The suit is dismissed with costs to the Respondent.

It is so ordered.

**Dated and delivered at Meru this 8<sup>th</sup> day of November 2018**

**Nzioki wa Makau**

**JUDGE**