

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT MERU

CAUSE NO. 20 OF 2017

(Formerly Nyeri ELRC 505 of 2017)

GILBERT MUGAMBI.....CLAIMANT

VERSUS

MICHIMIKURU TEA FACTORY LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant was employed by the Respondent as a driver from August 2008 till October 2015 and was promoted to logistics assistant on 1st December 2014 until his termination on 10th May 2016. He averred that the dismissal was without notice and the letter of dismissal gave the reason as the duplication of green leaf weights in favour of a colleague. He averred that the allegation related to an issue he had raised earlier concerning the defective weighing machines at the factory. He asserts that the termination was unlawful as it was not done by the Board of the factory who were the employer, he was not given an opportunity to answer any charges levelled against him as is required under the Employment Act and that the issues with the system were due to a technical problem which is not within his area of expertise or in his job description. He averred that although he was an employee of the Factory and the employer had a duty of providing housing or alternatively pay a housing allowance under the Employment Act, there were deductions under the name of quarters. He averred that he was entitled to a commuter allowance as he had been transferred to another station which was not his original station. He thus sought a declaration that the termination of his services was unlawful, the Respondent be compelled to refund the deductions made under the head of quarters, that the Respondent be compelled to pay commuter allowance for the period he worked in the second station and for costs of the suit.

2. The Respondent filed a defence in which it averred that it appointed KTDA Management Services Limited as its managing agent by virtue of a management agreement, to *inter alia*, engage all personnel who were not key personnel required for the purposes of smooth running of the Respondent's business on its behalf. The Respondent denied that the Claimant's services were terminated without notice. The Respondent averred that upon conclusion of the audit in February 2016, it was revealed that the Claimant had overseen the falsification and malpractices of green leaf records in diverse dates between 25th January 2016 and 8th February 2016. He was issued with a show cause letter dated 16th February 2016 and he was requested to show why the weighing ought not be treated as falsifications and he responded through the letter of 19th February 2016. It was averred that in his response the Claimant stated that he weighed the tea leaves 'as the farmers wishes and requests' and used the farmer's weighing scale. The effect of this was that the Claimant was discharging his duties based on the directions of the farmers and not the Respondent. The Respondent asserts that the conduct of the Claimant was a serious breach of his contract of duty as it amounted to dishonest conduct on the part of the Claimant. The Respondent averred that the response was unsatisfactory and invited the Claimant to attend a disciplinary hearing by a letter dated 12th March 2016 and that at the disciplinary committee of the Respondent held on 16th March 2016, the Claimant did not attend or offer any other explanation to the notice to show cause and a decision to terminate the Claimant's services was reached. The Respondent asserts that the Claimant was given an explanation of the termination and he was formally terminated by the letter dated 10th May 2016 and his terminal dues of Kshs. 204,542.95 were paid to him which he acknowledged in the letter of 7th July 2016 and the Claimant confirmed that he did not have any other claim against the Respondent. The Respondent avers that the Claimant's dismissal was fair and in accordance with the law and that the suit was bad in law, fatally defective and otherwise an abuse of the court process and ought to be dismissed with costs.

3. The parties proposed to dispose the suit by way of written submissions and the pleadings, affidavits and documents filed in terms of Rule 21 of the Employment and Labour Relations Court (Procedure) Rules 2016. The Respondent filed their submissions on 26th October 2018 while the Claimant filed his submissions on 31st October 2018. In its submissions, the Respondent submitted that the court should decline the claim by the Claimant as he discharged the Respondent and did not aver the discharge was obtained under duress or by coercion. The Respondent cited the case of **Coastal Bottlers v Kimathi Muthika [2018] eKLR** where the Court of Appeal held that the parties therein had agreed that the payment of the amount would absolve the appellant from any further claims under the contract and even in relation to the respondent's employment. The Respondent submitted that the waiver was a bar to any further claims against the Respondent and acts as an estoppel. The Respondent submitted that the legal burden of proof is upon the Claimant to prove that he is entitled to the payments he has sought in his claim. The cases of **Jennifer Nyambura Kamau v Humphrey Mbaka [2015] eKLR** and **Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR** were relied on for the proposition that the Claimant had a duty to prove the entitlement to the sums sought under the various heads of his claim. The case of **Benson C. Wepukhulu v Ukwala Supermarket [2018] eKLR** was cited for the proposition that the failure to sufficiently prove the allowances were due was cause to deny the grant of the claims made. The Respondent thus urged the dismissal of the claim with costs to the Respondent.

4. The Claimant submitted that justice should be administered without undue regard to technicalities as provided for in Article 159(2)(d) of the Constitution of Kenya. The Claimant submitted that the terminal dues received did not contain the house allowance and that he is entitled to the sum and therefore he should be paid. The Claimant submitted that the court should take judicial notice that usually when a Kenyan is dismissed from employment he/she is usually under duress and coercion thus will thank God and sign anything so that he/she can get anything to keep going and that the phrase used in most letters on dismissal that 'I have no other claim against the company' is too colonial and obvious and thus should be disregarded. The Claimant submitted that he withdrew the claim on commuter allowance and terminal

benefits. He thus urged the court to grant the prayers for house allowance which was not paid amounting to Kshs. 496,020/- for the period of 84 months.

5. The Claimant signed a discharge whose terms and effect were a waiver of all claims against the Respondent. In the case of **Coastal Bottlers Limited v Kimathi Mithika** (*supra*), the Court of Appeal 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 Jihabhai & 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.

6. The court needs not delve any further into the claim or even consider the other aspects as there is no basis for an alternative finding. No matter how attractive the words in Article 159(2)(d) are, they cannot be a panacea for a contract freely executed between parties. The words used to discharge the Respondent are not colonial and I do not buy the argument that upon receiving some payment a party who is dismissed thanks God and takes the sum given so as to move on suggesting that there is a remedy beyond the waiver given. The upshot of the foregoing is that the suit is misplaced on account of the waiver and therefore is accordingly dismissed with no order as to costs.

It is so ordered.

Dated and delivered at Meru this 7th day of November 2018

Nzioki wa Makau

JUDGE