



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT MOMBASA**  
**CAUSE NO.195 OF 2016**  
**VINAY JUTHALAL SHAH.....CLAIMANT**  
**VS**  
**VITAFOAM PRODUCTS LTD.....RESPONDENT**

**RULING**

**Introduction**

1. The claimant's employment contract was terminated on account of redundancy on 31.1.2016 and his redundancy dues were calculated by the respondent at Kshs.2,010,425. The respondent did not pay the said dues after the claimant completed his clearance and handing over. Instead the respondent notified the claimant that the dues will be paid by installments for 15 months.
2. The claimant refused the proposed scheme of payment because he wanted to leave the country and go abroad where his family was. After exchange of correspondences with the respondent, the claimant instructed his lawyer to serve a demand letter and the respondent replied citing the reason for the failure to pay the dues in lump sum as the lack of funds occasioned by the burning down of his business premises. Consequently, the claimant brought this suit claiming his redundancy dues, compensation for unfair termination and certificate of service.
3. On 20.6.2016 the parties recorded consent judgment in favour of the claimant but disagreed on the issue of costs. With the directions from the court both parties have filed written submissions to dispose that one issue.

**Analysis and determination**

4. The only issue for determination is whether the claimant should be paid costs of this suit. The claimant believes that he is entitled to costs because he is successful party in this suit and that the suit was necessitated by the respondent when she failed to pay all his redundancy dues in lump sum in breach of section 40 of the Employment Act before discharging him.
5. The respondent on the other hand has submitted that she never disputed the claimants claim for redundancy dues or the amount thereof and maintained that the issue was that she was unable to pay the dues in lump sum. That she offered settlement by instalments but the claimant rejected the offer and brought this suit only for the parties to record consent for payment of the same dues by instalments. The respondent submits that the suit was unnecessary because the said settlement was still possible without filing the suit.

6. I have carefully perused all the material presented to the court. It is clear that the redundancy was caused by destruction of the respondent's building and manufacturing plant on 27.6.2015; that the respondent calculated redundancy dues at KShs.2010426 and promised to pay as soon as he finished clearing with the company; that after clearing with the company, the respondent unilaterally told the claimant that the dues will be paid by instalments for 15 months; that the claimant rejected the offer of instalments and demanded lumpsum pay because he was desiring to go abroad to join his family; that no other offer was made even after demand letter was served and as such the claimant brought this suit.

7. I have considered the conduct of the two parties carefully which is evident in their correspondence exchanged before the suit. The record shows that respondent did not deny the claimant's right to payment of his redundancy dues or the amount payable. The problem was inability to pay in lump sum. The question that arises is whether the claimant had a right to sue to expedite his payment in order to travel abroad to join his family. In my view, the answer is yes.

8. The reason for the foregoing is that it was unreasonable and a breach of the law for the claimant to wait for 15 months for payment of his redundancy dues. Under Section 40 of the Employment Act, the employer is barred from terminating his employee on account of redundancy before payment of all his redundancy dues. The section provides in mandatory terms that:

**“40(1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions:**

**(e) ...paid off the leave in cash**

**(f)...paid...not less than one month's wages in lieu of notice**

**(g)...paid...severance pay at the rate of not less than fifteen days pay for each completed year of service.”**

9. The foregoing provision of the Law read in the context of the claimant's desire to travel abroad justified filing of this case. He is therefore entitled to claim costs of the suit. The foregoing view is enhanced by the conduct of the respondent who first insisted on settlement by instalments of 15 months only for her to change after the suit was filed to agree to settle of the dues in less than 5 months. For the foregoing reasons and in line with Section 12(4) of the Employment and Labour Relations Court Act, I order that the costs of the suit shall be to the claimant.

10. However, although the claimant is the successful party herein, considering the fact that the respondent saved the court judicial time which should have been spent doing trial, by admitting the claim, I will exercise my discretion in favour of the respondent by directing that she shall only pay half the costs and interest to the claimant. The judicial discretion exercised has been admitted by both parties in their submissions when they all cited Section 27(1) of the Civil Procedure Act which provides that:

***“(1) subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or***

***judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purpose aforesaid;...***

### **Disposition**

11. For the reasons stated above, I award half costs of the suit to the claimant.

**Signed, dated and delivered at Mombasa this 20<sup>th</sup> day of January 2017.**

**O.N. MAKAU**

**JUDGE**