



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

**AT NAIROBI**

**CAUSE NO.1028 OF 2017**

**DICK W WASWA.....CLAIMANT**

**VERSUS**

**BUFFALO BICYCLE KENYA LIMITED.....RESPONDENT**

**RULING**

The claimant by application and Notice of Motion dated 5<sup>th</sup> June, 2017 and seeking for orders that;

a) [spent];

b) Spent;

c) *The court be pleased to order that the claimant is entitled to serve the reminder [remainder] of the one year contract of employment with the respondent and/or in the alternative that the respondent do pay the claimant his entitlement of the reminder [remainder] of the one year contract of employment of Kenya shillings seven Million Two Hundred and Seventy Thousand (Kshs.7, 270,000.00) plus all benefits.*

d) *Costs of the application be provided for.*

1. The application is supported by the claimants Affidavit and on the grounds that he was employed by the respondent on 14<sup>th</sup> April, 2014 as the Kenya Country Director for a one year contract. The respondent has been renewing the one year contract since. The contract expired on 14<sup>th</sup> April, 2017 but was deemed renewed when the respondent allowed the claimant to continue in service. the claimant has remained in office but has no contract for the period of 2017 to 2018 and it has been over two months since but the respondent is keen to terminate the employment. Such action of termination is in breach and violation of the contract between the parties. The claimant was promised that the contract would be renewed as the President of the organisation is in America but this has not been concluded. As the respondent has since allowed the claimant to remain in office, they are estopped from terminating his employment.

2. in reply the respondent filed the Replying Affidavit of Adema Sangale, Vice President of the respondent and avers that in the Memorandum of Claim the claimant asserts that the respondent has shown intention to terminate his employment on account of redundancy and or restructuring. The allegation made by the claimant that there was breach of contract of employment is not based on any discernible fact and the claim has not state what action of the respondent he is aggrieved with. There is no allegation that the respondent lacked a valid reason for his termination of employment.

3. Ms Adema also avers that if the allegation is that the respondent dismissed the claimant from employment, he does not state when this happened or if he was issued with a letter for the same. If the allegation is that the respondent intends to dismiss the claimant from employment there is no claim as to how this has been manifested. The allegation that the respondent has refused to pay terminal dues is not supported by any evidence as the claimant's employment has not been terminated and thus the dues payable not assessed for the respondent to be accused of refusing to pay the same.

4. The claimant is still in the respondent's employment and the allegation of procedural unfairness in effecting termination of the same is not stated. There is therefore no material for the court to issue the orders sought. The claim is largely speculative since employment is on-going.

5. Ms Adema also avers that the facts in issue in that in April, 2014 the claimant entered into a contract of employment with the respondent to hold office of Country Director with a contract for a year. In April, 2015 upon the lapse of his contract the parties herein entered into another one year contract which ended in April, 2016 and a new contract was agreed upon and ending April, 2017.

6. No senior officer of the respondent was aware that the claimant's contract was ending on 14<sup>th</sup> April, 2017 and the claimant brought this to the attention of the deponent on 25<sup>th</sup> April, 2017. The continued work by the claimant after this period was an innocent lapse within the respondent.

7. On 2<sup>nd</sup> June, 2017 the respondent issued the claimant with a Notice of Probable Redundancy and informing the claimant that there is the risk that his role would be declared redundant and the reason why this was probable is that in line with statutory requirements, the notice set in play a 30 days consultative process with the first meeting being held on 6<sup>th</sup> June, 2017 but the claimant's advocate wrote to the respondent stating that the claimant would not attend. On 12<sup>th</sup> June, 2017 the claimant was invited for another consultative meeting for 13<sup>th</sup> June and he indicated he would not attend. The respondent has therefore not declared the claimant's position redundant as alleged.

8. The position held by the claimant is at risk of being declared redundant due to an on-going restructuring process that was necessitated by evaluation of the respondent's market performance and long-term financial viability. The respondent has the managerial prerogative to restructure its operations to support long term financial viability and would be severely unfair for the court to halt this process based on the claimant's misplaced apprehension that his services will be unlawfully terminated. Once consultations are complete, there will be positions lost and where redeployment is not possible or agreeable to the claimant, retrenchment will be the only resort.

9. Ms Adema also avers that on 31<sup>st</sup> May, 2017 she called the claimant for a meeting and he was informed of a probable redundancy and reasons thereof. The claimant became verbally abusive and reacted in a manner tending towards violence and given this misconduct he was required to act in a civil and professional manner.

10. Since the Notice of probable redundancy the claimant has made two attempts at stealing the respondent's property. On 3<sup>rd</sup> June, 2017 which was not a working day, the claimant accessed the respondent's office and carried away an office printer worth Kshs.42,000.00 and replaced it with another printer. This was noted by the office cleaners and when the CCTV footage were viewed it was clear the claimant carried the printer with him. This matter was reported to Kilimni Police Station. On 9<sup>th</sup> June, 2017 the claimant returned the printer having been tipped of police investigations against him. He casually stated that he had borrowed the printer and was thus returning it.

11. On the same date, 3<sup>rd</sup> June, 2017 the claimant called the respondent's officer Driver Mr Joseph Maina and instructed him to replace the claimant's two-year old personal bicycle with one of a better quality from the office. He claimant made several calls to the driver in an effort of theft. The driver declined noting the illegality in the claimant's demands.

12. In view of the matters set out, the orders sought should not be granted. The application should be

dismissed with costs.

13. The claimant filed his Supplementary Affidavit dated 6<sup>th</sup> July, 2017 and avers that Ms Adema as the vice president of the respondent indicated to him on 31<sup>st</sup> May, 2017 that he had already been declared redundant and by letter dated 2<sup>nd</sup> June, 2017 this was only meant to cover up the illegality as she went ahead to discuss terminal dues noting the contract of service had not been renewed. The proposed consultative meetings could not take place as the same would have been *sub judice*.

14. The claimant also avers that it is wrong for the respondent to state that he is guilty of misconduct without any evidence. As the Country Director of the respondent, the claimant is aware of the cash flow and sales and can confirm that the business has been good and with near break-even in 2016 and thus there would be no need to restructure, downsize or declare anyone redundant. From the 2016 Audited financial results the respondent business improved based on statements submitted to the Registrar of Companies.

15. The fact of formal renewal of the contract of service was severally discussed with the respondent and the last such meeting being on 24<sup>th</sup> May, 2017 and there was no indication that the same would not be renewed. Ms Adema indicated the president had been too busy to finalise. The claimant did several reminders on the same.

16. The respondent has now resulted into frustrating, harassing, intimidation and extreme vexing in an effort to force the claimant to resign from his employment. The respondent blocked the claimant from the drop box communication platform, his credit card was stopped, and has been removed from email communications. Ms Adema advised staff not to talk to the claimant or heed any directions from him, door locks have been changed, additional security has been set and contrary to court orders of 14<sup>th</sup> June, 2017 the respondent has removed most duties from the claimant especially financial and operations responsibilities, withdrawn company car and general office management.

17. The claimant also avers that The work environment has been made hostile so as to achieve its objectives of frustrating the claimant. On 19<sup>th</sup> June, 2017 the claimant was summoned at Kilimani Police Station to answer accusations of attempted stealing as he had taken away the printer to print overdue statements and lawyer demand letter for Nakumatt outstanding payments which were urgently required as they face liquidity crisis and there was no power in the office. This was not the first time the claimant had done so and in this case he returned the printer before he knew he had been accused of stealing. The allegation of stealing a bicycle is made in an attempt to malign the claimant.

18. The orders sought ought to be granted as the respondent appears keen to make it impossible for the claimant to work.

19. In reply to the claimant, the respondent through a Supplementary Affidavit dated 13<sup>th</sup> July, 2017 and sworn by Ms Adema avers that the meeting held with the claimant on 31<sup>st</sup> May, 2017 followed a teleconference with the president and there was no indication that the claimant that his position had already been declared redundant. The discussion was on the possibility of the position of country director being eliminated due to restructuring of the respondent business operations and poor financial performance. The redundancy process followed the law and the requisite notices were issued on 2<sup>nd</sup> June, 2017. Such does not stop the termination of a fixed term contract.

20. The respondent business has been poor and has discussions with its global partners which has nothing to do with the renewal of the claimant's contract as he continues at work as the redundancy is addressed. The order for *status quo* only stopped the termination of the claimant's employment and due to the pending suit, the employment relationship has been highly strained.

21. The claimant also filed another Supplementary Affidavit dated 19<sup>th</sup> July, 2017.

22. Both parties made their oral submissions in court.

23. Each party has filed a list of authorities.

#### Determination

24. In view of the Notice of Motion filed by the Claimant and dated 5<sup>th</sup> June, 2017 and noting the detailed affidavit in reply and supplementary, the list of authorities filed and the oral submissions by the parties, the substantive issue before court is whether the claimant should be allowed to serve the remainder of the one year contract of employment with the respondent and or in the alternative whether he should be paid his entitlement of the remainder of the one year contract amounting to Kshs.7,270,000.00.

25. Respondent avers that the claimant's contract of service lapsed on 14<sup>th</sup> April, 2017 and due to an innocent mistake this was not renewed. The claimant has continued to serve in his position. This was followed by the realisation that the respondent required a restructuring and The position held by the claimant was at risk of being declared redundant. the restructuring process was necessitated by evaluation of the respondent's market performance and long-term financial viability.

26. The claimant has challenged the respondent's position on the grounds that his employment has been frustrated to push him to tender a resignation. That the reasons for redundancy keep shifting from poor financial performance to restructuring and that the office will go regional all in an attempt to push him out of his employment. That since the court issued orders for *status quo* the respondent has been harassing him and intimidating him with various allegations without any evidence. His work duties have changed and been removed from internal communications. Office locks have been changed and security surveillance been increased. Credit cards and office can have been withdrawn all meant to frustrate his employment. The claimant has since 18<sup>th</sup> June, 2017 been on compulsory annual leave. The claimant shall suffer irreparable damage and loss if he is declared redundant. His contract has 9 more months to lapse.

27. Where the claimant's contract lapsed and it was not renewed and he continued in the service of the respondent, his employment is protected under section 37 of the Employment Act, 2007. Section 37 must however be read together with section 8, 9 and 10 of the Act. An employment contract whether oral or in writing have the benefit of the provisions of the Employment Act, 2007. Section 10(1) of the Act is more specific as follows;

*(1) A written contract of service specified in section 9 shall state particulars of employment which may, subject to subsection (3), be given in instalments and shall be given not later than two months after the beginning of the employment. [underline added].*

28. In this case, the claimant's written contract lapsed on 14<sup>th</sup> April, 2017 and to date there is no evidence that he has been issued with any new contract of employment. As such and by operation of the law, section 37 of the Employment Act, 2007 apply. The causal nature of his terms of service and being in the continuous service of the respondent, his employment is protected in law. Such employment can be terminated in terms of section 35 of the Act as it has no fixed term. The assertion by the claimant that he is on a fixed term contract of employment and has 9 months to go and should be preserved or a payment in lieu thereof does not arise. The claimant has no fixed term contract since 15<sup>th</sup> April, 2017.

29. The matter of redundancy has arisen since the claimant filed his claim. By notice dated 2<sup>nd</sup> June, 2017 the respondent asserts that due to poor financial performance and need to restructure the business, there notice to the claimant was necessary.

30. It must however be acknowledged that redundancy is well regulate din law, section 40 of the Employment Act, 2007 requires that the employer must issue a general notice to the employees and once the process is complete, issue individual notices. In addressing the question as to the requirement of issuance of notices, the Court of Appeal in **Thomas De La Rue (K) Limited v David Opondo**

**Umutelema eKLR** held as follows;

*It is quite clear to us that section 40(a) and 40(b) provide for two different kinds of redundancy notifications depending on whether the employee is or is not a member of a trade union. Where the employee is a member of a union, the notification is to the union and the local labour officer at least one month before the effective redundancy date. Where the employee is not a member of the union, the notification must be in writing to the employee and the local labour officer...*

31. Putting the above into account, the rationale behind the need to restructure and thus issue the required legal notices, the matter before court at this stage is as set out above. The claimant is still in the employment of the respondent without a written contract, such employment has not been terminated. The prayer seeking payment for the remainder of the term of his contract does not therefore arise. Equally, to go into matters of whether or not the redundancy process is undertaken fairly or unfairly would be to delve into matters essentially not subject of the orders sought in the Notice of Motion. Such would deny both parties the chance to submit evidence in articulating the case. It would also deny the court the crucial chance to look at the matter in whole and thus arrive at a just decision.

**In view of the above analysis, the orders sought shall not issue. Application seeking for orders to have the claimant serve the remainder of his contract term or payment for the remainder of due term is hereby declined. As the interim orders were to preserve employment until this application is heard, such goes with the dismissed application. Costs in the cause.**

Delivered in open court at Nairobi this 28<sup>th</sup> day of September, 2017.

**M. MBARU JUDGE**

In the presence of:

David Muturi & Nancy Bor: Court Assistants

.....

.....