



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1725 OF 2011
KENNETH ONYANDO.....CLAIMANT

VERSUS

GROFIN SERVICES (PTY) LIMITED.....RESPONDENT

Mr. Osiemo for claimant

Mr. Kuria for respondent

JUDGMENT

1. This suit was commenced vide a memorandum of claim on 7th October 2011. The claimant seeks equivalent of 12 months salary as compensation for unlawful and unfair termination of employment, interest and costs of suit.
2. The respondent is Grofin Services (Pty) Limited incorporated in South Africa with a presence in East Africa. The East Africa Regional Office is registered in Kenya.
3. The claimant was employed by the respondent as the Country Director, Kenya on 1st July 2005. The contract of employment signed by the parties was produced as exhibit 2.
4. The contract is between the claimant and Grofin Kenya. By a letter dated 20th October 2006, the employment of claimant with Grofin Kenya was terminated from 1st November 2006. The claimant was in the same letter appointed in Grofin East Africa as a Regional Director. The letter stated that the new appointment did not negate any service period or benefits accrued during the agreement with Grofin Kenya.
5. By a letter dated 28th October 2008, the claimant was redesignated General Manager Kenya effective 1st November 2008. The terms and conditions of service remained the same. The deployment to East Africa was done by Human Resource Director, Grofin Capital Mr. Johan Rossouw and the redesignation to General Manager Kenya was done by Regional General Manager Guido Boysen.
6. By a letter dated 18th March 2011, by Mr. Guido Boysen on a letter head of Grofin Services (Pty) Limited, the employment of the claimant as the General Manager Kenya was terminated with effect from 17th June 2011. The claimant was given three months' notice and was paid outstanding leave balance.

7. During the notice period, salary was paid on a monthly basis. The letter was silent on the reasons(s) for the termination. The claimant aggrieved by the decision wrote a demand letter dated 5th July 2011 through Company Odero Osiemo and Company Advocates.

8. The claimant sought reasons for the termination, severance pay and compensation for the unlawful termination of employment equivalent to twelve (12) months monthly salary of Kshs.500,000 paid to the claimant.

9. The claimant testified under oath in support of the claim and was cross-examined by counsel for the respondent.

Defence

10. The respondent's defence is that the claimant has sued the wrong party as the contract of employment dated 27th October 2008, exhibited by the claimant was entered into between the claimant and Grofin Kenya Limited and not with the respondent Grofin Service (Propriety) Limited, a limited liability company incorporated in South Africa on 3rd July 2008, originally under the name of RZT Zelpy 5520 (Proprietary) Limited. The certificate of incorporation was produced as annexure 3 in the respondent's list of documents filed on 12th July 2013.

11. That the respondent is engaged in business as Fund Managers lending money to small and medium size enterprises (SMEs). Such companies include Grofin Kenya, Grofin South Africa, Grofin Uganda, Grofin Tanzania, Grofin Rwanda, Grofin Nigeria and Grofin Ghana, etc.

12. That the respondent provides support services to these companies for a fee. Therefore, the companies are clients of the respondent company.

13. That the companies are separate legal entities from the respondent even though they bear the name Grofin.

14. That the respondent's East Africa Regional Office is not registered in Kenya.

15. The respondent denies having ever employed the claimant and as evidenced by the contract document Grofin East Africa, employed the claimant from 1st November 2006 and for the rest of the period was employed by Grofin (Kenya) Limited.

16. The claimant understood he had entered into two separate agreements but not with the respondent.

17. Grofin Mauritius Limited was incorporated on 10th December 2004 and was later changed to Grofin East Africa Limited on 22nd April 2005.

18. The respondent further acknowledge that the letter of termination of employment of the claimant was by one Guido Boysen designated as Chief Executive officer but without indicating Chief Executive Office of which entity.

19. Respondent denies that Mr. Guido Boysen was the Chief Executive Officer of Grofin Services (Proprietary) Limited, South Africa and restate that the claimant was not employed by the respondent.

20. These averments were confirmed by the testimony of RW1 Nomonde Brook Sibelegwana in her witness statement dated 24th July 2017 which she adopted as her evidence in chief before court.

21. The respondent prays that the suit be dismissed with costs.

Determination

22. The issues for determination are as follows: -

- (i) Whether the claimant was employed by the respondent or whether the respondent has any legal responsibility to the claimant in this matter.
- (ii) What remedies if at all, is the claimant entitled to.

Issue i

23. It is without a doubt that the contract of employment produced in court was between the claimant and Grofin Kenya Limited. It is also common cause that this initial contract was terminated by a letter dated 20th October 2006 in which the claimant was appointed to serve a separate company, Grofin East Africa from 1st November 2006. The contract was terminated by one Johan Rossouw Human Resource Director, Grofin Capital on a letterhead of Grofin Kenya Limited.

24. By a letter dated 28th October 2008, one Guido Boysen, the claimant was redesignated, General Manager Kenya effective 1st November 2008. Mr. Guido Boysen was at the time Regional General Manager. This letter again was on a letterhead of Grofin Kenya. This letter did not purport to reinstate the initial contract of service between the claimant and Grofin Kenya Limited.

25. The letter of termination dated 18th March 2011 purported to terminate the employment of the claimant “*at Grofin Kenya.*”

26. The letter is written by Mr. Guido Boysen in his capacity as Chief Executive Officer on a Grofin Service (Pty) Limited, the respondent. It is important to note that the same Guido Boysen had redesignated the claimant “*General Manager Kenya*” by a letter dated 28th October 2008. The said Guido Boysen then was the Regional General Manager of Grofin East Africa. In the said letter, Boysen had stated the reason for redesignation to be “*based on the company’s structure change which support our strategy to grow our operations in the existing countries of operation.*”

27. It is clear that the said Mr. Guido Boysen had now been elevated from Regional General Manager to Chief Executive Officer Grofin Services (Pty) Limited.

28. From its action, it can correctly be inferred that the claimant served as General Manager Kenya for and on behalf of Grofin Services (Pty) Limited which was the employer of the claimant. The letter by advocate of the respondent dated 14th July 2011 in response to the claimant’s demand letter is in itself an admission that the respondent was the employer of the claimant.

29. The respondent cannot be heard to rely on the initial contract between the claimant and Grofin Kenya entered into on 1st July 2005 because the said contract was terminated by the respondent by a letter of termination dated 20th October 2006 and superseded by an appointment in Grofin East Africa from 1st November 2006, which appointment was also changed to that of General Manager Kenya apparently as was finally confirmed by the letter of termination from Grofin Service (Pty) Limited.

30. The respondent paid the terminal benefits including three months’ notice pay and payment in lieu of leave to the claimant as per the letter of termination.

31. The court finds that the respondent had similar obligation to provide a valid reason for the termination of the employment of the claimant in terms of Section 43 of the Employment Act, 2007 and also the respondent was bound under Section 41 of the Act to give the claimant opportunity to show cause in writing and/or at a hearing convened by the respondent for the purpose of demonstrating why his employment ought not to have been terminated.

32. The respondent contravened Sections 41, 43 and 45 of the Act by the omission to do the above. The court finds that the termination of employment of the claimant was wrongful and unfair for the failure by

the respondent to provide the claimant with a valid reason of termination and for failure to follow a fair procedure in effecting the termination.

33. The claimant suffered loss and damage by fact of the illegality committed by the respondent and is entitled to compensation in terms of Section 49 (1) (c) of the Act, as read with Section 49 (4) of the Act.

34. The claimant received contractual notice upon termination which is a mitigating factor. The claimant was also paid terminal benefits in the form of leave pay upon termination. This was also a mitigating factor.

35. The claimant wished to continue working but lost the source of his income unlawfully. The claimant lost employment through no fault of his own since none was attributed by the respondent to him.

36. Furthermore, the claimant lost the benefit of getting severance pay because the termination was not termed a retrenchment by the respondent which would have entitled him to payment of equivalent of 15 days salary for each year of service in terms of Section 40 of the Act. This is an aggravating factor since the claimant lost his employment for operation reasons though this is not admitted by the respondent.

37. Furthermore, the respondent which operates many listed companies sought to complicate this matter by denying that it was the employer of the claimant. This aspect added pain and suffering to the claimant after having served the respondent and its affiliate loyally. Indeed the respondent admitted in its letter that the benefits of the claimant were not affected by his movement from one company to the other which fact amplifies the finding that this was indeed one employer under different names with the headquarters in South Africa from which office the letter of termination emanated.

38. This in the court's view is an appropriate case for the court to award the claimant compensation equivalent to five (5) months' salary in the sum of Kshs (500,000 x 5) 2,500,000 for the unlawful and unfair termination of employment. It is not sufficient to simply give or pay the contractual notice in the current labour law dispensation. The statute specifically mandates that valid reason(s) be given for a termination and the procedure of termination be fair.

39. Courts must uphold the statutory law of Kenya as it is and not use the master servant common law of yore to defeat the statutory rights of employees negotiated by the tripartite partners and enacted by our parliament in line with the national obligations mandated by the International Labour Organization (ILO) in its various core conventions, declarations and recommendations on decent work agenda.

40. In the final analysis, judgment is entered in favour of the claimant against the respondent in the sum of Kshs.2,500,000.

41. Award is payable with interest at court rates from date of judgment till payment in full.

42. Costs to follow the outcome.

Dated, Signed and Delivered on this 24th Day of November 2017

MATHEWS NDERI NDUMA

JUDGE