



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 74 OF 2015

EUNICE MWIKALI MUNYAO..... CLAIMANT

VERSUS

ELYS CHEMICAL INDUSTRIES LIMITED RESPONDENT

JUDGMENT

Introduction

1. This claim is brought by Eunice Mwikali Munyao, against her former employer, Elys Chemical Industries Limited. The Claim is contained in a Statement of Claim dated 23rd January 2015 and filed in court on 26th January 2015. The Respondent filed a Memorandum of Defence on 10th March 2015.

2. When the matter came up for hearing, the Claimant testified on her own behalf and the Respondent called its Human Resource Manager, Mary Gesare.

The Claimant’s Case

3. The Claimant states that she was employed by the Respondent in January 2008, in the position of Accounts Assistant. Her monthly salary rose from Kshs. 20,000 to Kshs. 32,200 as at 16th June 2014, when her employment was terminated.

4. The Claimant states that the termination of her employment was without justification and due procedure. She now claims the following:

- (a) Unpaid leave for 1 year.....Kshs.32,200
- (b) Salary in lieu of notice.....32,200
- (c) Damages for unfair termination.....384,400
- (d) Service pay.....16,100
- e. General damages
- f. Costs plus interest

The Respondent’s Case

5. In its Memorandum of Defence dated 9th March 2015 and filed in court on 10th March 2015, the Respondent states that the Claimant was employed on an annual fixed term contract, renewable upon performance review. The Claimant's final contract was renewed to run for eleven months from 19th May 2013 until 18th April 2014.

6. The Respondent avers that in the course of her employment, the Claimant would be notified of the termination of her contract after which she would be issued with a new contract on fresh terms. The Claimant signed all termination notices issued to her by the Respondent.

7. The Respondent further states that upon expiry of her eleven months' contract, the Claimant was issued with a two months' extension, with the caveat that one month would serve as notice period. After the two months, the Claimant's contract was not renewed and it therefore came to an end by effluxion of time.

8. The Respondent pleads that no reasons needed to be given for non-renewal of the Claimant's contract, as the contract clearly stipulated that it could be renewed at the Respondent's discretion. The Respondent adds that upon expiry of the contract, the Claimant's final dues were tabulated but the Claimant declined to collect them.

9. Regarding the claim for service pay, the Respondent states that the Claimant was paid service pay upon expiry of each contract. This would be reflected as arrears in the Claimant's pay slip of the first month of the renewed term.

Findings and Determination

10. There are two (2) issues for determination in this case:

- a. Whether the termination of the Claimant's employment was lawful and fair;
- b. Whether the Claimant is entitled to the remedies sought.

The Termination

11. The Claimant states that her employment was terminated verbally without notice and without any justifiable cause. The Respondent on the other hand, maintains that the Claimant's employment contract came to an end and the employment therefore lapsed by effluxion of time.

12. It is not in contest that the Claimant served on renewable fixed term contracts. The last such contract dated 19th May 2013, came to an end on 18th April 2014. The Respondent states that after expiry of this contract, the Claimant was granted a two months' extension, with one month serving as notice period. The Claimant's employment therefore came to an end on 18th June 2014.

13. In support of its position, the Respondent produced a letter dated 18th April 2014 addressed to the Claimant, indicating that her contract had been extended for two months from 19th April 2014 up to 18th June 2014. The Claimant however denied receiving this letter and there was no evidence on record that the letter was indeed served on her. This was in contrast to previous letters issued to the Claimant, whose receipt she duly acknowledged, by affixing her signature.

14. In *Dierks v University of South Africa [1991] 4 BLLR [LC]*, the Court set out the following as the criteria for establishing reasonable expectation for renewal of a fixed term contract:

- a. Evaluation of all surrounding circumstances;
- b. Significance of contractual stipulations;
- c. Past practice or custom;

- d. Availability of the position;
- e. The purpose or reason for the concluded fixed term;
- f. Inconsistent conduct;
- g. Failure to give reasonable notice;
- h. The nature of the employer's business.

15. As held by **Rika J** in *Margaret A. Ochieng v National Water Conservation and Pipeline Corporation [2014] eKLR*, an employee on fixed term contract should not expect an automatic renewal. The flip side is that a fixed term contract is not inimical to renewal. Ultimately, the Court will consider the legitimacy of the employee's expectation based on the unique circumstances of each case.

16. In the case now before me, the Respondent kept the Claimant beyond the fixed contractual term running from 19th May 2013 to 18th April 2014. According to the Respondent, this was on the basis of a two months' extension, which the Claimant contests. Applying the criteria set out in the *Dierks Case* (supra), the Court was unable to understand why the Respondent chose to depart from the established practice of issuing an eleven months' contract.

17. Further, this appears to be the only time when the Claimant did not sign a contract. The Respondent's Human Resource Manager, Mary Gesare testified that the Claimant declined to sign the letter dated 18th April 2014 and in doing so, exhibited hostility. Gesare was however unable to explain under what circumstances the Respondent decided to keep an employee who had declined to sign the only document evidencing the terms of her stay, beyond 18th April 2014. Moreover, Gesare was equivocal on the exact date when the letter was issued to the Claimant. On the one hand, she stated that it was prepared and given to the Claimant on 14th April 2014, yet it was dated 18th April 2014.

18. Taking all these factors into account, the Court rejected the two month extension theory advanced by the Respondent. The only logical conclusion therefore is that the Claimant's contract, having expired on 18th April 2014, was renewed on similar terms, by conduct of the parties.

19. It follows therefore that at the time the Claimant's employment was terminated, she had served only two months of her contract which was to run from 19th April 2014 until 18th March 2015. In the absence of any reason for the premature termination of this contract, the Court finds that the Claimant's employment was unlawfully and unfairly terminated and she is entitled to compensation.

Remedies

20. In light of the foregoing findings, I award the Claimant, eight (8) months' salary in compensation. In making this award, I have taken into account the Claimant's length of service as well as the Respondent's conduct in the termination transaction. I further award the Claimant, one (1) month's salary in lieu of notice as well as salary for days worked in June 2014.

21. No basis was laid for the claims for leave pay, service pay and general damages which therefore fail and are dismissed.

22. In the ultimate, I enter judgment in favour of the Claimant in the following terms:

- (a) 8 months' salary in compensation.....Kshs.257,600
- (b) 1 month's salary in lieu of notice.....32,200
- (c) Salary for 16 days in June 2014 (32,200/30x16).....17,173

Total.....306,973

23. This amount will attract interest at court rates from the date of judgment until payment in full.

24. The Claimant will have the costs of the case.

25. These are the orders of the Court.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 3RD DAY OF
NOVEMBER 2017**

LINNET NDOLO

JUDGE

Appearance:

Mr. Olonde for the Claimant

Mr. Nyaencha for the Respondent