



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI**

**CAUSE NO. 43 OF 2016**

**(Formerly Civil Suit No. 461 of 2006 in the Principal Magistrate's Court at Murang'a)**

**JUSTIN MWANGI KIMUHU.....CLAIMANT**

**VERSUS**

**NEW MURARANDIA FARMERS CO-OPERATIVE**

**SOCIETY LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday, 13<sup>th</sup> May, 2016)

**JUDGMENT**

The plaint was filed on 27.11.2006 through Kirubi Mwangi Ben & Company Advocates for the plaintiff. The plaintiff prayed for judgment against the defendant for:

- a. Payment of Kshs. 811, 726.00 (amended to Kshs.811, 725.90 per amended plaint dated 15.04.2011).
- b. Payment of terminal benefits.
- c. Costs and interest of the suit.
- d. Any other or better relief the honourable court may deem fit to grant.

The defence was filed on 19.12.2006 through J.N. Mbutia & Company Advocates. The respondent prayed that the suit be dismissed with costs.

The respondent employed the claimant as the senior recorder on 01.07.1997. The plaintiff served as a recorder until November 2000. In May 2003 the plaintiff received a notice of compulsory leave. At that time the plaintiff was serving as the acting secretary manager having been appointed to act effective November 2000. As of May 2003 the plaintiff's gross monthly pay was Kshs. 8, 611.10 being the salary for a senior recorder. The plaintiff's case was that in 2000 a secretary manager earned Kshs. 13, 267.75 per month and his salary was not adjusted accordingly throughout his service as an acting secretary manager.

The plaintiff's further testimony was that on 7.05.2003 he received a notice for compulsory leave pending investigations into the respondent's affairs. The collective agreement in force at the material time did not provide for such compulsory leave but provided for suspension as per clause 7 of the agreement. The clause on suspension was that suspension could not last for more than 90 days. The letter of 07.05.2003 addressed to the claimant by the respondent stated as follows:

**"RE: UNPAID COMPULSORY LEAVE**

**You are by means of this letter instructed to proceed on unpaid compulsory leave with effect from 8<sup>th</sup> May, 2003 pending an inquiry which is going on in the New Murarandia Co-operative Society Ltd. By means of the same letter you are instructed to hand-over your office to the new Ag.Secretary Manager on 19<sup>th</sup> May 2003 at 9.00am.**

**Your dues will be dealt with after the inquiry. A.G.M. Minute No. 4/2002/2003 of the meeting held on 7<sup>th</sup> May, 2003 refers.**

**Yours faithfully,**

**Signed**

**Felix W. Muiruri**

**Chairman”**

The claimant's testimony was that in June 2004 the inquiry was completed and the findings were that 28 employees be surcharged and the claimant admitted that he was individually liable to be surcharged Kshs. 119, 383.80 and which he was willing to pay. The claimant lamented upon end of the inquiry in June 2004 he had not been recalled back to work and he had not been dismissed from work .Thus he filed the suit.

The respondent's case was that the claimant was no longer in the respondent's employment. The respondent submitted that the compulsory leave was a suspension within clause 7 of the collective agreement and the claimant's employment ended upon lapsing of 90 days from the date of the compulsory leave, 8.05.2003. It was submitted that there would be no presumption in favour of the claimant that he was still in the employment of the respondent as at time of hearing of the suit. The respondent's further case was that the reasonable position was that termination took place without a proper notice.

The **1<sup>st</sup> issue** for determination is whether the claimant's employment ended 90 days from the effective date of compulsory leave, 08.05.2003, or that the claimant remained in the respondent's employment throughout after compulsory leave up to including the time of determination of the suit. The parties are in agreement that the compulsory leave be construed as suspension lasting for a maximum of 90 days under the collective agreement. Once the 90 days lapsed, it is the opinion of the court that the claimant was entitled and ought to have considered himself terminated from employment in view of the respondent's fundamental and material breach of the agreement that a suspension shall not persist beyond 90 days. Thus the court returns that the claimant was constructively terminated upon lapsing of 90 days from the date of the compulsory leave which between the parties was construed to mean a suspension for not more than 90 days.

The **2<sup>nd</sup> issue** for determination is whether the claimant is entitled to the remedies as prayed for. The court makes findings as follows:

- a. The claimant has established that he served as an acting secretary manager from November 2000 to the time of compulsory leave in May 2003. Indeed, the letter of compulsory leave acknowledges that the claimant was to handover to a new acting secretary manager. In absence of any other material before the court, the court returns that the claimant is entitled to the difference in remuneration making **Kshs. 170, 858.65** per paragraph 6(d) of the amended plaint.
- b. The court has found that the claimant was entitled to 90 days of half pay while on suspension under clause 7 of the collective agreement and to release of withheld money if he was dismissed. The court has found that the claimant was constructively terminated upon lapsing of the 90 days. The court has considered that the parties are in agreement that the claimant was emplaced on a compulsory leave and the court finds that an award of 3 months for that period of leave otherwise deemed to be suspension as between the parties and being Kshs. 13, 267.75 times 3 months making

**Kshs.39, 803.25** will meet the ends of justice.

- c. The court finds that the claims for house allowance, medical allowance, NSSF, transfer allowance, unpaid vouchers travel and reimbursement, annual salary increase, and salaries for 37 months were unfounded and were not established by evidence and they will therefore fail.
- d. The claimant admitted that he owed the respondent the sum of **Kshs. 119, 383.80** as surcharged and the court finds that the respondent is entitled to deduction of that legitimate debt found due in the respondent's favour by the Commissioner for Co-operatives per section 73 of the Co-operative Societies Act. In such circumstances the amount is deducted from the dues awarded to the claimant in this judgment in arriving at the payable money in the final orders.
- e. The court further finds that the parties were not in dispute about salary increments while the employment relationship subsisted and the claims for salary increment were not justified as they were unfounded.

In conclusion judgment is entered for the claimant against the respondent for:

1. The respondent to pay the claimant a sum of **Kshs.91, 278.10** by 01.07.2016 failing interest at court rates to be paid thereon from the date of filing of the suit till full and final payment.
2. The respondent to pay the claimant's costs of the suit.

**Signed, dated and delivered** in court at **Nyeri** this **Friday, 13<sup>th</sup> May, 2016.**

**BYRAM ONGAYA**

**JUDGE**