



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 1551 OF 2015

SOLOMON WECHE MAKHOTSA.....CLAIMANT

VERSUS

IMARA STEEL MILLS LIMITED.....RESPONDENT

RULING

1. By motion dated 7th March 2016 the respondent seeks the orders of this Court to the effect that:-
 - (a) That this Honourable Court be pleased to find that this matter has been amicably settled and the respondent was discharged by the claimant from further claims.
 - (b) A declaration that the claim is frivolous and vexatious the claim having been fully settled.
 - (c) Cost of application together with cost of this claim be in the cause.
2. The application was based on the grounds that:-
 - (a) The claimant entered into amicable negotiations with the respondent wherein the amount payable to him was mutually agreed.
 - (c) The claimant was represented by an Advocate of the High Court of Kenya.
 - (c) The claimant was being dishonest as it had not disclosed that it was paid the amount agreed and a discharge voucher executed by him absolving the respondent from further claim.
 - (d) The claimant was seeking to unjustly enrich himself.
3. The application was further supported by the affidavit of Mania Njuguna Advocate who deponed on the main that:-
 - (a) That on or about the 22nd April 2015, the respondent received a demand letter from the claimants erstwhile Advocates Mumia & Njiru Advocates claiming that the claimant was unlawfully dismissed from his employment by the respondent.
 - (b) That upon receipt of the said demand letter, the respondent engaged their law firm to correspond to the claimant erstwhile Advocates letter and find a way of resolving the matter.

- (c) That after a meeting that was held in their offices on the 4th May 2015, settlement was arrived at as was evidenced by the letter from his lawyers.
- (d) That the terms of settlement were set out in their letter dated 4th May 2015 and sent to the claimant's Advocates on the same date.
- (e) That upon confirmation that the settlement as discussed was acceptable, they drafted a discharge voucher for execution by the claimant which he did on the 26th May, 2015.
- (f) That the claimant accepted the payment under cheque number 005136 and 005137 drawn in his favour in full and final settlement.
- (g) That the claimant had been silent about this negotiations in his pleadings and had not disclosed that he had received any payment in respect of the claims he had instituted and concealed the fact that he executed a discharge voucher.
- (h) That the claimant is seeking unfair and unjust enrichment having been paid his dues as agreed between him and the respondent.
- (i) That the claimant had not demonstrated any undue influence, coercion or fraud exerted or exercised upon him to enable this court to re-open the settled claim.
- (j) That the claimant's concealment of this said fact it itself is a demonstration of lack of bonafides in his claim.
- (k) That there is no new claim that had been disclosed to his pleadings that was not addressed in the settlement as clearly demonstrated by the settlement letter.

4. In response to the application Ms. Mumia for the claimant deponed in the main as follows:-

- (a) That he is a partner in the firm of Mumia & Njiru Advocates the firm that was initially involved in this matter before it came to court and currently the advocates on record for the claimant.
- (b) That it is true that when the claimant was terminated from employment, as a law firm we tried to settle this matter out of Court.
- (c) That in his spirited resolve to have that mat settled, he even wrote an email to the respondent's directors on the 30th of April, 2015 informing them that he had spoken to his senior colleague and he thought that they should consult with the Federation of Kenya Employers about the true position of the matter herein since they were members of the federation.
- (d) That at the meeting he had with Mr. Mumia on the 4th of May 2015, he brought out the email that he had written to this client on the 30th of April and warned him that he would take action against him at the Law Society as well as sue him in the civil courts for having defamed him to his client. He apologized and informed him that he was willing to write another email to his client and retract his statement. But he warned him not to write any email to his client.
- (e) That at his office, when we had the meeting, he asked him for the Employment Act and he brought out Cap 226 which clearly has been repealed and asked me to show him where the Act states that the claimant is entitled to compensation for unfair termination.
- (f) That he agreed that the claimant is entitled to his contractual payment based on his contract and the same was sated as such in his letter dated 8th of May, 2015. Where he wrote; "Our client was amenable to the proposed pay as per his letter in so far as the same constitutes the provisions of his contract". This showed that the claimant would still seek his rights under the law at sections 41, 43,

45, and 49 of the Employment Act not under the contract. In the said letter, he did not state that the claimant was waiving his rights for suing for unfair termination.

(g) That had the respondent read his letter dated 8th May 2015 carefully, the respondent would have noted that the claimant is restricting himself to accept payments based on the provisions of his contract only which were as of right and not negotiable at all.

(h) That the payment given to the claimant was purely his right which was expressly provided for in his contract. The payment was therefore not negotiated since the same had been provided for by his contract.

(i) That from the meeting of 4th May, 2015, I noted that the respondent did not in any way wish to compensate the claimant for unfair termination and that is why he wrote the letter dated 8th May 2015 the way that he did.

(j) That in their meeting of 4th May 2015 they did not discuss the discharge voucher at all. Otherwise the same should have formed the contents of his letter dated 8th May, 2015.

(k) That he was informed by the claimant which information he verily believe to be true that when he went to collect his terminal dues payment, he was informed that if he could not sign the discharge voucher, then he could not be given the cheques for his terminal dues.

(l) That he was informed by the claimant which information he verily believe to be true that he signed the discharge voucher because he was desperate to have his terminal dues noting that he had not received his salary for the month of April and he had immediate pending obligations to fulfil and his elderly father was also sick and had come from upcountry for treatment in Nairobi.

5. Without getting into the factual details of the application and its surrounding circumstances the issue the Court is called upon to decide appear to be one. That is whether upon executing the discharge voucher dated 26th May, 2015 the claimant became debarred from laying any additional claim against the respondent for the termination of his services.

6. The applicant has contended he could not since he voluntarily signed the discharge voucher and further to do so the claimant would be seeking unjust enrichment against the respondent.

7. The claimant on the other hand contended that the discharge voucher and the ensuing payment was in respect of his terminal dues as per the contract of employment but did not bar him from seeking compensation for unfair termination of services the subject matter of the present suit.

8. The payment to the claimant comprised of:-

- (a) Salary for 21 days
- (b) Leave entitlement (25) days
- (c) Pay in lieu of notice (3 months pay)
- (d) Refund for money for purchase of vehicle

9. These payments were stated to be made in accordance with the claimants contract of employment dated 4th September, 2013, clause 8 (b) thereof.

10. Section 3 (6) of the Employment Act provides as follows:-

3(6) subject to provisions of this Act, the terms and conditions of employment set out in this Act

shall constitute minimum terms and conditions of employment of an employee and any agreement to relinquish vary or amend the terms herein set shall be null and void.

11. Section 45 (1) of the Act further provides that “no employer shall terminate the employment of an employee unfairly. Subsection 2 of the same section provides that

(2) A termination of employment by an employer is unfair if the employer fails to prove

(a) that the reason for termination is valid

(b) that the reason for termination is fair reason

(i) to the employees conduct capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(iii) that the employment was terminated in accordance with a fair procedure.

12. The plain reading of section 3(6) of the Act cited above would seem to interdict any agreement to relinquish, vary or amend the terms set by the Act as minimum. Protection from unfair termination of employment is one of the rights an employee enjoys from the Act. The claimant is of the view that his services were unfairly terminated. To prevent him from pursuing this statutory right on the premise of a term in a discharge voucher would offend the provisions of section 3(6) of the Employment Act and to that extent null and void.

13. From the foregoing the Court reaches the inevitable conclusion that the Notice of Motion dated 7th March, 2016 must fail and is hereby dismissed with costs.

14. It is so ordered.

Dated at Nairobi this 9th day of September 2016

Abuodha Jorum Nelson

Judge

Delivered this 9th day of September 2016

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha Jorum Nelson

Judge