



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

CAUSE NO. 154 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

DR. THOMAS OMBUYA OMAO GETABUCLAIMANT

-Versus-

COUNTY GOVERNMENT OF NYAMIRARESPONDENT

J U D G E M E N T

The Claim herein was filed by the Claimant against the Respondent seeking the following remedies:-

1. The claimant be paid Amount he could have earned if he could not have been terminated unfairly for the remaining part of contract i.e. fifty one (51) months (Kshs.144,925 x 51) =Kshs.7,391,175/-.
2. Three months in lieu of notice Kshs.144,925 x 3 =Kshs.434,775/-.
3. Damages for wrongful dismissal Kshs.144,925 x 12 =Kshs.1,739,100/-.
4. House Allowance he could have earned had his contract not been unfairly terminated i.e. fifty one (51) months (Kshs.40,000 x 51 =Kshs.2,040,000/=.
5. Commuter allowance entitlement for the remainder part of the contract i.e. fifty one (51) months (Kshs.16,000 x 51 =Kshs.816,000/=)
6. Severance pay at three months' pay for each completed year i.e. for salary equivalent of fifteen (15) years (Kshs.144,925 x 15 =Kshs.2,173,875/-)
7. A declaration that the termination of the contract between the claimant and the respondent is and remains unlawful, therefore null and void.
8. Certificate of Service.
9. Costs of the Cause.

The Respondent filed a defence denying the allegations in the memorandum of Claim and pleaded that the termination of the Claimant's employment was justified and was due to gross misconduct as well as behaviour bringing the County Government into disrepute.

The parties thereafter engaged in negotiations of out of court settlement and on 2nd March, 2016 recorded a partial settlement in the following terms -

(i) Judgement be entered in favour of the claimant for payment of 12 month's salary as compensations for wrongful termination.

(ii) Judgement be entered in favour of the claimant for payment of three month's salary in lieu of notice for wrongful termination.

(iii) Costs be to the claimant.

Parties then requested for a further mention date to agree on the outstanding issues in the claim which were:-

(i) Payment of gratuity.

(ii) Terminal leave entitlement.

(iii) Interest.

This court fixed the case for mention on 16th March 2016 to record consent on final settlement failing which parties were directed to file written submissions. Parties were unable to agree and the remaining issues were argued by way of written submissions.

The only issues for determination are therefore whether the Claimant is entitled to the prayers for gratuity, terminal leave and interest.

In the written submissions filed on behalf of the Claimant it is argued that both gratuity and terminal leave are provided for in the Employment Act while the Respondent argues that the Claimant's termination having been lawful he is only entitled to what has already been agreed upon by the parties in the consent recorded by the court on 2nd March 2016. The claimant relied on the case of **Fred A. Odhiambo v Attorney General & Another [2013] eKLR** while the Respondent relied on the case of **Absalom Ajusa Magomere v Kenya Nut Company Limited [2014] eKLR**.

Gratuity and terminal leave are not provided for in the Employment Act. The Claimant would therefore only be entitled to the same if provided for in his employment contract. In the excerpt from the case of **Fred A. Odhiambo v Attorney General** relied upon by the Claimant, the court stated that the gratuity and terminal leave paid to the Claimant were "also an entitlement of the Claimant."

I have perused the Claimant's contract and find no reference to either gratuity or terminal leave. The Claimant has not made any reference to any other terms and conditions applicable to him in which there is provision for either gratuity or terminal leave. In the circumstances, I find that he has not proved that he is entitled to the same. Indeed the claimant did not pray for gratuity and terminal leave in his Memorandum of Claim. A party is bound by his pleadings and cannot be awarded what he did not pray for unless the parties in their submissions leave no doubt that they intend the issue to be determined by the court or it is incidental to the issues for determination. In the case of *Odd Jobs v Mubia* [1970] EA 476 the court held that a party cannot be awarded what has not been prayed for. The same are dismissed.

With respect to the prayer for interest, the claimant has not stated what the interest he seeks is in respect of. The court is therefore unable to determine whether or not he is entitled to the same. the prayer is dismissed as it has not been proved.

For the foregoing reasons the claimant's prayers for payment of gratuity, terminal leave and interest are all declined and judgement is entered in terms of the consent agreement recorded on 2nd March, 2016.

Dated, Signed and Delivered this 8th day of September, 2016

MAUREEN ONYANGO

JUDGE