



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 851 OF 2015

JOSEPH MWAMBODZE NYOTTA.....CLAIMANT

VS

CAPEX LIFE ASSURANCE CO. LTD.....RESPONDENT

JUDGMENT

Introduction

1. This is a claim for kshs.2,193,550 being the terminal benefits plus compensation for unfair termination of the claimant's employment contract by the respondent in October 2015. The respondent has denied liability and averred that it is the claimant who voluntarily left his employment as the National Sales Manager for the respondent at Nairobi and requested to return to his former Agency Business in Mombasa.

2. The suit was heard on 30.6.2016 when the claimant testified as Cw1 and the respondent called Mr. Benjamin Okeyo Ambong'o as Rw1. Thereafter both parties filed written submissions.

Claimant's case

3. Cw1 stated that he was employed by the respondent as the National Sales Manager on 1.2.2015. That his salary was kshs.120,000 and he worked well until 30.6.2015 when he wrote a request for transfer from Nairobi to Coast Province (Mombasa) which according to him had a lot of potential. That the request was allowed and he relocated to Shanzu office Mombasa where he worked until October 2015. However to his surprise he was not paid the salary for July, August, September and October and as such he brought this suit.

4. On cross examination, Cw1 confirmed that before joining the respondent on 1.2.2015, he was an Independent Agency Sales Manager in Mombasa. That after being employed by the respondent as her National Sales Manager, he moved to the respondent's Head office in Nairobi. He however denied that he transferred to Mombasa as an Independent Contractor and insisted that he was transferred to Mombasa as the respondent's National Sales Manager. He further contended that the two letters by the respondent dated 30.6.2015 allowing his transfer were served on him on 30.7.2015, one month after the date of transfer. He admitted that the letters stated that he was to be invited to re-negotiate his Agency Post Contract but the same was never done.

Defence case

5. Rw1 is the respondent's Chief Operation Officer. He confirmed that Cw1 was operating as an Independent Sales man based in Mombasa between 1990 and 2014 but on 1.2.2015, he was employed by the respondent as her National Sales Manager and relocated to the Head Office in Nairobi because that was his work station. That Cw1 worked well until 30.6.2015 when he requested for transfer to Mombasa where he previous operated as an agent because he could not cope with the challenges of being the National Sales Manager.

6. According to Rw1 such request for transfer to Mombasa meant that he was vacating his office as the National Sales Manager to go back to his business as Independent Agent because the respondent had no office in Mombasa then. He therefore denied that the claimant was sacked by the respondent and maintained that the claimant is not entitled any compensation for unfair termination.

Analysis and Determination

7. There is no dispute that for many years, the claimant operated as an independent sales agent in Mombasa until 1.2.2015 when he was employed by the respondent as her National Sales Manager based at her Head office in Nairobi. That after the said appointment the claimant relocated to Nairobi and worked until 30.6.2015 when he wrote to the respondent requesting for transfer to Coast Province (Mombasa) where he opined there was a lot of business potential. There is also no dispute that the request was accepted by the respondent by two letters dated 30.6.2015. The issues for determination are:-

(a) Whether the claimant vacated his office as the National Sales Manager or he was terminated by the respondent.

(b) Whether the claimant is entitled to the reliefs sought.

Resignation vs termination by the respondent

8. The claimant contends that he requested for transfer to Mombasa in the same capacity of the National Sales Manager for the respondent. The respondent maintains that Cw1 resigned from his said position by requesting to be allowed to leave his work station at Head office in Nairobi to work from Mombasa where the respondent had an office. Under section 47 (5) of the Employment Act, the burden of proving unfair termination of employment lies with the employee. After considering the evidence presented to the court, I find that the claimant has not proved on a balance of probability that the respondent terminated his employment unfairly. Similarly, I find that the respondent did not prove on a balance of probability that the claimant voluntarily resigned from his position of the National Sales Manager when he requested for transfer to work from Mombasa in Coastal Province on 30.6.2015.

9. After considering all the evidence adduced, I am of the opinion that the termination of the claimant's employment was a deal mutually agreed between him and the respondent when they both realized that it was not possible for the claimant to overcome the challenges of working as the National Sales Manager both in Nairobi and Mombasa. The reason for the foregoing opinion is the letter by the respondent to the claimant dated 30.6.2015 which was produced by the claimant as exhibit 4 which states that:

“The management is pleased to confirm that you will be paid your June salary for the position of National Sales Manager in full on 6.8.2015. The July salary will however be paid at a later date as agreed during the meeting between yourself and the Management.

As agreed we will continue to engage with you as you rebuild the Mombasa Agency and give support wherever is necessary. We will however shelve the issue of office space until we confirm that the Agency will be able to meet its recurrent expenditure. We now charge you to build a formidable team to jumpstart the branch at Mombasa.

At the appropriate time you will be invited to a renegotiation of the post of Mombasa Agency meanwhile we wish you well”

10. It is clear from the above letter that the parties agreed that the claimant will be paid salary upto July 2015; claimant was to rebuild the Mombasa Agency, the respondent would continue engaging him; the issue of office space would be stayed pending confirmation that the Agency could meet its recurrent expenses, and the Post of Mombasa Agency would be renegotiated at the appropriate time. In my view the said letter reflects a mutually negotiated agreement between the parties herein. On a balance of probability, I find that the parties agreed mutually to end the claimant's contract of employment and enter into a contract for services in which the claimant would henceforth serve the respondent as an Independent Sales Agent for commission and retainer. None of the two parties should therefore be blamed for the termination of the employment contract either by resignation or unfair termination because it was terminated by a mutual agreement.

Reliefs

11. In view of the foregoing the claims for salary in lieu of notice and compensation for unfair termination are dismissed. I however award kshs.120,000 being salary for July 2015 as agreed and confirmed by the respondent by the letter dated 30.6.2015 (exhibit 4). I also allow the claim for leave earned between February and July 2015 on pro rata basis. Under the contract of employment Cw1 was entitled to 21 days annual leave and as such in the 6 months served, he earned 10.5 leave days which translates to kshs.48,461.55. However the claimant prayed for kshs.33,550, which I hereby grant.

Disposition

12. For the reasons stated above, I enter judgment for the claimant in the sum of **kshs.153,550** plus costs and interest from the date of filing the suit.

Signed, dated and delivered this 14th day of October 2016.

ONESMUS MAKAU

JUDGE