



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NO 118 OF 2012
TRANSPORT & ALLIED WORKERS UNION.....CLAIMANT
VS
COMARCO PROPERTIES (EPZ) LIMITED.....RESPONDENT
JUDGMENT

Introduction

1. The claimant union filed this suit on 4.4.2011 on behalf of Mr. Onesmus Njimia Mureithi (herein referred to as the grievant). The claim was amended by a supplementary claim dated 5.12.2011 and filed on 6.12.2011. The claimant accuses the respondent of failure to pay the grievant his terminal dues plus commission in respect of a contract he secured for the Company at Lamu Port. The summary of the reliefs sought is as follows:-

- (a) One month salary in lieu of Notice being Kshs. 160,000.**
- (b) Service pay of Kshs. 3,520,000.**
- (c) Commission of Kshs. 4,271,882.50**
- (d) 42 days leave being Kshs. 196,000.**

2. The respondent filed her defence on 27.4.2011 admitting that the grievant was her employee from 23.2.1982 to 31.12.2008 when he voluntarily retired. She also admitted that he started as a junior officer earning Kshs. 5,000 per month but rose to become Executive Director earning Kshs. 160,000 per month. She further admitted that she has changed her name severally to reach the current name.

3. The respondent has however denied liability to pay the terminal dues claimed by the grievant and averred that the grievant was paid all his dues in full upon his voluntary retirement. In addition the respondent has denied liability to the commission claimed by the grievant and further denied that she entered into any consultancy agreement with the grievant to pay him a commission of 2% of any contract he secured for her.

4. The suit was heard by several other Judges of this court and its predecessor and a judgment entered in favour of the claimant on 20.3.2015. However the respondent appealed to the Court of Appeal and the judgment was set aside on 22.4.2016 and the suit referred back to this court for retrial by a different Judge.

5. The suit was heard on 17.6.2016 and 20.6.2016 when the claimant testified as Cw1 and the respondent called Nuru Suleiman Hemed and James Okaya Amwayi as Rw1 and Rw2 respectively. Thereafter both parties filed written submissions.

Claimant's case

6. Cw1 stated that he was employed by the respondent in 1982 when she operated as Divecon Company Limited. His first position was Contracts Logistics Manager. That thereafter the said employer formed several other companies including the respondent herein.

7. Cw1 further explained that his salary was reviewed steadily upto kshs. 160,000 per month as at 1.12.2004 when his services at Divecon were terminated and the MD accepted to pay him Kshs. 3,680,000 as his terminal dues. That the dues were calculated at the rate of one month salary per year for 22 years he had served. He produced email by him and responded to by the MD dated 7.2.2005 to support the said allegation.

8. Cw1 went on to state that the said dues were never paid and instead the MD told him to continue working. That he continued working until 2006 when he was promoted to Executive Director and was deployed to the respondent but the salary remained Kshs. 160,000 per month. That he worked as such until 2008 when he was called to a Board meeting where he was told that from 1.1.2009 he was to work as a Marketer for the Comarco Construction Company Limited and that his mode of payment was to change from salary to commission. That the commission was to be assessed at the rate of 2% of the value of every contract he secured.

9. Cw1 produced a Memorandum of Discussions dated 23.10.2008 between the Management for Comarco Construction Limited and email by the MD, Mr. Peter Philips dated 18.11.2008 to support the said change of status from salaried employee to a commission agent. He assessed his total length of his service for the respondent from 1982 to 2008 to be 27 years. However, he was paid Kshs. 616,348 as gratuity for only 4 years as opposed to the 27 years served.

10. Cw1 explained that he started to look for contracts immediately after discussing the matter with the respondent's management and on 13.11.2008, he saw an advertisement for rehabilitation of a Jetty in Lamu in the Standard Newspaper for that day and wrote email to the MD. The MD confirmed that Cw1 could pursue the contract for the respondent. Cw1 pursued the contract and secured it from the Ministry of Works on 19.1.2009. The value of the Contract was Kshs. 213,594,123.70 and the respondent did the job and got more contracts as a result. When Cw1 requested for his commission, he was sacked and denied entry to the respondent's office. His commission was Kshs. 4,271,884 being 2% of the said contract value. He prayed for the said commission plus gratuities as prayed in the suit.

11. On cross examination Cw1 confirmed that from 1982-2004 he was employed under Divecon Company Limited. That from 2004-2005 he was under Kenya Marine Contractors (EPZ) while from 2006-2008 he was with the respondent. That finally he worked as a Market Consultant for the Group of Companies where Mr. Peter Philips was the owner and the MD.

12. Cw1 admitted that he was never terminated from employment but he discussed retirement with the MD and later with Board where it was resolved that he was to move to Comarco Construction Company Limited as a Consultant. That no Commission Agreement for 2% was written down but he relied on the emails from the MD dated 18.11.2008.

13. Cw1 contended that the Kshs. 616,348 was given as part payment of his service pay for the period between 1982 and 2008. That the company had no enough money to pay the whole amount for his service pay. He however denied that he was paid Kshs. 2 million after the Kshs. 616,348.

14. Cw1 further contended that he did his best to secure the contract for the Company at Lamu Jetty. That he traced the tender from the Newspaper, reported to the MD and got permission to pursue the contract and thereafter worked with Rw2 who was the Civil Engineer for the company. He denied that on

19.1.2009 he was given a contract by the MD and tore it.

15. Cw1 concluded by clarifying that Divecon Limited changed her name to Consolidated Marine Contractors Limited registered in Singapore. That thereafter the respondent took over the operations in Mombasa.

Defence case

16. Rw1 works for the Kenya Marine Contractors as the Executive Assistant to the MD since August 2012. Previously she worked with the Company since 1996 as a Reception, Accounting Finance, HR, Project Management before her current position which combines with Finance and Administration. She found Cw1 working for the Kenya Marine after her predecessor had closed down. She confirmed that Cw1 became Director of the respondent from 2006 to 2008 and she related with him well.

17. RW1 explained that Cw1 requested for retirement and he was paid Kshs. 2 million cash as service pay. That in January 2009, she drew a cheque for kshs. 2 million on request by the MD and the same was cashed by Albert Jakolo. That Mr. Jakolo gave the money to her and she took it to the MD who was in his office with Cw1. She further contended that Cw1 was paid Kshs. 140,000 being salary for December 2008 plus other dues totaling to Kshs. 616,348. Interestingly however, Rw1 changed her evidence to say that the Kshs. 616,348 was part of the Kshs. 2 million for which a payslip was issued for purposes of declaring tax on request by the Cw1. That the said Kshs. 2 million was the terminal dues from Kenya Marine Construction and the respondent.

18. Rw1 further contended that Cw1 was paid all his dues after leaving Divecon Limited and before moving to Kenya Marine Construction. That before his retirement in 2008 Cw1 had been sick for a year and all his medical bills were met by the respondent who also paid all his salary. That Cw1 was also allocated company car which he has to date not returned.

19. Rw1 confirmed that after the retirement the claimant signed a consultancy agreement with Comarco Construction Limited in February 2009 but Cw1 took the contract away before she made copies. She concluded by contending that Cw1 had signed a Discharge agreement with the respondent and other sister companies and as such he has no further valid claim.

20. On cross examination, Rw1 admitted that she had no payment vouchers to prove that Cw1 received kshs.2 million from the MD. She further admitted that she just took the money to the MD where Cw1 was waiting. That the kshs.2 million was the whole terminal dues to Cw1 but she did not give the formula of how it was calculated.

21. Rw1 further contended that Cw1 signed a Consultancy contract for a commission of 2% of the contract value but he destroyed. She however admitted that Cw1 enjoyed a good relationship with the MD. She admitted that Kenya Marine Construction Ltd. and the respondent were operating from the same place and are under the same management.

22. Rw2 is the MD for Comarco Construction Company Limited. He has worked there since 1980. He confirmed that Cw1 was his former colleague since 1980s at Divecon Limited which changed to become the respondent and then Kenya Marine Construction. That all the said companies were owned by Divecon Limited. He further confirmed that Cw1 had good working relationship and that earned him promotions even to the rank of Director.

23. Rw2 explained that in 2008 the Board of Directors decided to engage Cw1 as a Consultant for Comarco Construction Company Limited after retirement. That the consultancy agreement was discussed between the Group MD Mr. Phillips and Cw1 after the termination of the claimant's services at the respondent. Rw2 further contended that Comarco Construction Company deals with Marine Construction and her clients include the Kenya Government, Parastatals and Non-Governmental Organization. That the procedure of getting the contracts is done by bidding.

24. Rw2 denied Cw1 could secure any contract from the Government. He however admitted that Cw1 approached the Group MD, Mr. Phillips and informed him about the Lamu Jetty contract, but RW2 clarified that all the technical work was done by the Technical Team. He therefore denied that Cw1 was entitled to the 2% commission of the said contract value. He however stated that if the MD Mr. Phillips is willing to pay the commission to the claimant, then he had no objection because after all the claimant was also a fellow Director of the Company.

25. On cross examination Rw2 admitted that on 23.10.2008 the Board of Directors agreed with Cw1 that he was to be paid 2% commission of the value of the contracts he got and he (Rw2) was to get 25% commission. That the reason for commission to the claimant was because he was no longer full time employee but a pay for every contract he introduced to the company. He confirmed that Cw1 had very good relationship with the MD Mr. Phillips. Rw2 however did not know whether Cw1 was given a written contract for the 2% commission but he alleged that the secretary told him that Cw1 was given but he tore it.

26. Rw2 admitted that Cw1 brought the Newspaper to his office and showed him the tender for the Lamu jetty and thereafter he (Rw2) took over the matter and bought the tender documents and made the application for the tender. That the contract value was Kshs. 213,000,000 and he got a commission of 25% of the said value. That the reason for the huge pay to him was because he had become the MD for the Comarco Construction Company vide a Board appointment on 23.10.2008.

Analysis and Determination

27. After considering the pleadings, evidence and submissions presented to the court, I find no dispute in the fact that the grievant was employed by the respondent and her predecessor companies. That the claimant retired from the respondent on 31.12.2008 and was paid Kshs. 616,348 as his terminal dues. That effective 1.1.2009 he became a consultant for Comarco Construction Company limited, a sister company to the respondent and that the consultancy fees to the grievant was 2% of the contract value.

28. The issues for determination are:-

(a) Whether the claimant has Locus standi to represent the grievant in this suit.

(b) If the answer to (a) above is yes, whether the grievant is entitled to the payment of the terminal dues sought in the suit.

(c) Whether the grievant is entitled to the commission of Kshs. 4,271,882.50 in respect of the Lamu Jetty contract which he introduced to Comarco Construction Company Limited.

(d) If the answer to (c) is yes, whether the respondent should be held liable to pay the commission to the grievant.

Locus standi

29. The respondent has submitted that the claimant has no legal mandate to represent the grievant in this dispute because the grievant is not a unionisable employee. That the proceedings before the court are flawed because section 14 (1) of the Labour Relations Act (LRA) does not grant the claimant any standing to represent the grievant herein. That under section 22 of the Employment and Labour Relations Court Act (ELRCA) does not give jurisdiction to this court to determine disputes between parties who are improperly before it.

30. To support the foregoing objection she urged the court to consider the fact that the grievant stated off as a Logistics Manager and retired in the position of a Director. That the grievant was excluded from joining or being represented by the claimant union because he was a manager. That the respondent relied on clause 11 of the Industrial Relations Charter (Revised 1984) to support her contention that the grievant was excluded from being represented by claimant union. The defence therefore urged the court to dismiss

the suit for being defective and an abuse of the Court process.

31. In addition, she has submitted that the claimant's claim for commission is not an employment contract but a contract for services which cannot be adjudicated upon by this court. The claimant never responded to the objection by the respondent either by pleadings, evidence or submissions.

32. I have carefully considered the objection by the respondent against the pleadings and evidence and confirmed that for the entire period that the grievant worked for the respondent and her predecessors, he was in the management position. That his first position of appointment in 1982 was Contracts Logistics Manager and he retired while in the position of an Executive Director for the respondent in 2008. He therefore was not qualified to be a unionized employee under clause 11 of the Industrial Relations Charter (Revised 1984) which provided that:

“The following will be excluded from union representation:

(a) Persons who are formulating, administering, coordinating and/or controlling any aspects of the organization policy...”

33. The foregoing guideline has however not barred managers from joining and enjoying representation by union in their Industry, after they lose their managerial positions. In this case, the representation of the grievant started after losing his managerial position in the respondent. There is no dispute that the union representing him is the one mandated by the law to represent workers in the Motor and transport industry. Under section 31 of the Labour Relations Act, former employees are qualified to be members of a trade union that is licensed to represent workers in the industry they were working.

34. In that regard and in view of the fact that the objection being raised was not pleaded or raised in time to enable the claimant to respond to it, I decline to uphold the objection by the defence on ground of standing. Allowing the preliminary objection on an issue which was not pleaded and therefore not forming part of the issues for trial would prejudice the claimant's case. Whereas I appreciate that Preliminary Objection on a point of law can be raised at any time before judgment, I never the less also find that the respondent's preliminary objection being raised as the last point in her closing submission was an afterthought and an affront to the Constitutional right to fair hearing because the claimant will not have any chance to respond to the same before judgment. In event it is trite that objections to suits should be raised at the earliest opportunity possible as opposed to the latest opportunity possible.

35. Likewise, I decline to allow the preliminary objection in relation to the claim for commission from the Lamu Jetty contract. Although I appreciate that the claim is founded on a contract for services as opposed to contract of service, I also take judicial notice that it has become the practice in this court to adjudicate and determine disputes which are incidental to employment disputes. That the court has not shied away from determining disputes between the employer and employees which would otherwise have been separated and referred to other courts. A good examples of such joinder of causes of action is tort of malicious prosecution being tried with claim for terminal dues if the two causes of action arose from the same facts or incidence. Another example is claim for damages in respect of occupational injuries or disease and terminal benefits when the causes of action arise from the same incidence.

36. The said practice has been occasioned by the desire to ensure that justice is done without delay and without undue regard to procedural technicalities. The courts have also considered that we are in a new constitution dispensation and the litigants should not be quickly sent away from the seat of justice just because they have not fully appreciated the institutions established under the new legal regime.

37. If the objection was to be allowed, the court would make direction that the two causes of action be separated and then the claim for commission would be transferred to a subordinate court for trial. Such drastic decision would make the administration of justice very expensive and cause logistical nightmare to both the litigants and the court. The fact that the parties herein came to this court in 2011, it would be pretentious for the defence to tell the court that it has no authority to render its judgment because of some procedural technicalities which were never raised in time. Consequently, the answer to the first issue for

determination is in the affirmative.

Terminal dues

38. The grievant prayed for service pay based on one month salary for every year served from 1982 to 2008 being Kshs. 3,520,000 based on a salary of Kshs. 160,000 per month. In addition he prayed for his leave for years 2004 at Kshs. 160,000. He relied on email correspondence dated 7.2.2005 between himself and the MD by which the said sum of Kshs. 3,680,000 was agreed. The MD has not testified to deny the said email. The court therefore treats the contention by the claimant as unrebutted because the Rw1 and Rw2 were not privy to the same and could not contest it competently.

39. It has also not been disputed that the respondent never paid the said dues and instead the grievant was told to continue working. That he was later deployed to the respondent in 2006 where he worked until 2008 when he retired. The claimant has however not adduced any evidence to prove that after termination of the grievant's services in 2004, he was reinstated. It is therefore not clear whether he was reinstated to the earlier contract of employment or whether he was re engaged under a fresh contract. The burden of proving that relationship is on the claimant but she has not discharged that burden on a balance of probability. Consequently the court will make the reasonable presumption that the grievant was re-engaged under a new contract from 2005 to 2006 before he was deployed to the respondent where he worked until 2008.

40. The grievant has contended that he was only paid Kshs. 616,348 after retirement. Rw1 has however contended that the grievant was paid Kshs. 2,000,000 after retirement in 2008. She explained in details how she was told by the MD that the claimant had agreed on a settlement of his terminal dues in the sum of Kshs. 2,000,000 and that the claimant had requested to be paid in cash. That again at the grievant requests only Kshs. 616,348 was documented for purposes of taxation.

41. After evaluating the all the material presented to the court, I find on a balance of probability that after retirement the grievant who enjoyed good relationship with the MD entered into concessions including the terminal dues to be paid to him and also engagement of the grievant by Comarco Construction Company Ltd as a Consultant on commission basis. That as a result of the said compromise, the grievant was to be paid Kshs. 2,000,000 and thereafter earn a commission of 2% of the value of every contract he introduces to Comarco Construction Company Ltd.

42. However, the MD and his companies breached the deal by first paying to the grievant only Kshs. 616,348 and secondly refusing to pay him the commission of 2% of the value for the Lamu Jetty contract. Consequently I award to the grievant Kshs. 1,383,652 being the balance outstanding from the agreed gratuity of Kshs. 2,000,000. The said sum will attract interest at court rates from 1.1.2009 when the settlement agreement was reached. In making the said award, I have dismissed the discharge agreement signed between the grievant and the Comarco group of companies because it does not state the sum of money that was paid to the grievant. Consequently save for purposes of showing that compromise was reached, the settlement agreement was worthless and unenforceable because the respondent never provided any sufficient consideration in exchange for the discharge of claims by the grievant.

43. As regards the claim for salary in lieu of notice and leave, I reiterate that the parties made a compromise on 1.1.2009 to settle the grievant's dues at a total sum of Kshs. 2,000,000 in respect of notice, salary, leave and any other claims arising from the grievant's employment by the Comarco group of companies. Consequently the grievant will have to be contended with the award of Kshs. 1,383,652, above, plus interest, as his only outstanding terminal dues from the respondent and her sister companies.

Commission for Lamu Jetty contract

44. Rw2 has contended that the respondent is different from Comarco Construction Company Limited. That the grievant never secured the Lamu Jetty contract for Comarco Constructions Company. That all he did was to see the advertisement in a Newspaper then notified the Group MD Mr. Phillips. That thereafter the process of applying for the contracts was done by the Technical group of the company. He therefore

did not see any justification for paying any commission to the grievant. He however stated that he had no objection if the MD Mr. Phillips accepted that the commission be paid to the grievant.

45. The grievant has on the other hand contended that he did his duty by spotting the advertisement and notifying the MD and thereafter he worked with Rw2 in ensuring that the contract was awarded. He produced the email correspondences between him and the MD Mr. Phillips dated 18.11.2008 to prove that the MD and the Board had agreed to pay the grievant 2% of every contract he secures for Comarco construction company Ltd.

46. After considering all the materials presented to the court in relation to the claim for commission, I find that the grievant is making a reasonable claim only that it is being directed at the wrong person. Had the claimant enjoined Comarco Constructions Company Limited as a respondent herein and the said company been given a chance to defend herself, then I could have made a final determination. However I will not condemn the said company unheard. In view of the foregoing I find that the claim for commission is improperly directed against the respondent and I dismiss it.

Disposition

47. For the reason stated above, I enter judgment for the claimant in the sum of **Kshs. 1,383,652** plus costs and interest as directed above.

Signed, dated and delivered on this 7th day of October, 2016.

ONESMUS MAKAU

JUDGE