



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 581 OF 2014

JOEL P. N. MBATA.....CLAIMANT

VS

DOSH IRON MONGERS LIMITED

CELLO THERMOWARE LIMITE.....RESPONDENTS

JUDGMENT

Introduction

1. The claimant was employed by the respondent on 5.3.1997 as an Accounts Clerk and worked as such until 19.4.2012 when he resigned after serving the employer with a termination notice on 20.3.2012. He was however not satisfied with the terminal dues paid and brought this suit on 17.11.2014 claiming salary in lieu of notice, accumulated leave, severance pay, salary underpayment, Certificate of service, compensation for wrongful termination, and compensation for discrimination by the respondent with respect to medical cover.

2. The respondents have denied liability to pay any of the claims by the claimants and averred that it is the claimant who terminated his own employment through resignation. In addition the respondents aver that after the resignation they paid the claimants all his dues and he acknowledged the same as full and final settlement and discharged the respondents from any further claims. They therefore prayed for the suit to be dismissed with costs.

3. The hearing of the suit was dispensed with and the parties adopted their pleadings and documentary evidence filed as their respective cases and proceeded to file written submissions.

Analysis and Determination

4. There is no dispute that the claimant was employed by the first respondents as Accounts Clerk from March 1997 to 2008 when the second respondent was registered and took him over as her employee and gave him a new employment number. There is further no dispute that the claimant continued working until 20.4.2012 when he voluntarily resigned by his letter dated 20.3.2012 citing his family reasons. There is also no dispute that after the resignation the claimant was issued with a certificate of service dated 19.4.2012 and was paid his terminal dues which was acknowledged by the discharge voucher also dated 19.4.2012. The only issue for determination is whether the reliefs sought should be granted.

RELIEFS SOUGHT

Salary in lieu notice and compensation for termination

5. The claimant is not entitled to salary in lieu of notice and compensation for wrongful termination of his employment because it is him who voluntarily resigned by his letter dated 20.3.2012. Under section 49 of the Employment Act the said remedies are only availed to an employee who is unfairly or wrongfully terminated by the employer. Consequently I dismiss the prayer for salary in lieu of notice and compensation for wrongful termination.

Accumulated leave

6. The claimant has prayed for leave for 14 years served. The respondents have however contended that the claimant was given his leave during the periods when the business was closed down during renovations. After careful consideration of the pleadings and the evidence placed before it, I agree with the respondents that there times when she closed down the business for renovations during which times the claimant among other employees went for leave. I however note that such periods were not sufficient to cover the annual leave days as they only covered Easter Holidays and Christmas week or so. Consequently I find that the claimant never utilized all his leave days during his tenure of office. However the particulars of the outstanding leave days were never pleaded and evidence tendered to prove the actual leave days outstanding and for that reason the claim for leave is dismissed.

Severance pay

7. The claimant prayed for severance pay for 15 years at the rate of 15 days pay per year of service. The said remedy is only availed to an employee whose employment is declared redundant under section 40 of the Employment Act. In this case however, it is the claimant who voluntarily resigned and I consequently dismiss the claim for severance pay.

Underpayment

8. The claim for underpayment was not particularized and substantiated by evidence. Even the counsel for the claimant never made any submissions on the same. Consequently I dismiss that claim.

Compensation for discrimination

9. The claimant contended that he was unlawfully excluded from the respondents' staff insurance cover in violation of Article 41 of the Constitution, section 5 of the Employment Act and the ILO convention No.189. He therefore prayed for compensation by way of damages. The respondents have however denied the alleged discrimination and contended that the claimant was fully covered and enjoyed the benefits of the respondents' medical scheme.

10. After careful consideration of the material presented to the court, I find that the claimant was excluded from the respondents' medical scheme up to June 2010 when he was included in the invoice dated 2.6.2010. The cause of action arose before 2010 and the suit herein was filed on 17.11.2014. Under section 90 of the Employment act a claim founded on employment contract becomes time barred after the lapse of three year from the date the cause of action arose. Consequently the claim for discrimination was filed outside the statutory limitation period and before the promulgation of the Constitution being relied upon and it is therefore dismissed.

Certificate of service

11. The claimant was issued with a certificate of service dated 19.4.2012 and as such the prayer for another certificate is without merits. I therefore dismiss it.

Disposition

12. For the reasons stated above, the suit is dismissed with no orders as to costs.

Signed, Dated and Delivered this 18th day of November, 2016

ONESMUS MAKAU

JUDGE