



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 1309 OF 2013

DUNCAN MUCHINA KAMAU.....CLAIMANT

VERSUS

KENINDIA ASSURANCE COMPANY LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. By a Memorandum of Claim dated 15th August 2013 and filed in Court on 16th August 2013, the Claimant has sued the Respondent for unlawful dismissal and failure to pay terminal dues. The Respondent filed a Memorandum of Defence on 23rd September 2013 to which the Claimant responded on 10th October 2013.

2. By consent of the parties the matter proceeded by way of written submissions.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent in the position of Chief Manager, Non-Life Business at a monthly salary of Kshs. 300,000 effective 24th June 2013. He was also entitled to Kshs. 360,000 per annum to be paid on achievement of performance parameters.

4. Prior to his appointment by the Respondent, the Claimant was employed by Phoenix of East Africa Assurance Company as Manager-Underwriting under a contract of employment with a termination notice period of three (3) months.

5. On the Respondent's request, the Claimant resigned from Phoenix of East Africa Assurance Company Limited on 28th June 2013 without giving the requisite notice on the agreement that the Respondent would pay for the notice shortfall on behalf of the Claimant.

6. The Claimant was taken aback when on 2nd July 2013, he received a letter dated 1st July 2013 informing him that the Respondent had withdrawn the offer of appointment on the basis of a background check which had revealed that the Claimant had been surcharged on account Kenya Insurers Sacco Society.

7. The Claimant avers that the Employment Act, 2007 does not provide for withdrawal of employment and that the action taken by the Respondent amounts to summary dismissal without due process. The

Claimant further states that there existed a valid contract of employment which entitled the parties to certain rights and whose terms and conditions did not provide for withdrawal of employment.

8. The Claimant contends that the Respondent did not accord him an opportunity to explain himself regarding the surcharge by the Commissioner for Cooperative Development. He maintains that he was not involved in any loss of funds during his tenure as Chairman of Kenya Insurers Sacco Limited. He adds that he had filed a suit in the High Court challenging the surcharge.

9. The Claimant's former employer accepted his resignation by letter dated 4th July 2013 and demanded the sum of Kshs. 626,340.80 in lieu of notice, the sum he now claims from the Respondent.

10. In addition, the Claimant who is a family man had suffered financial loss rendering him unable to meet his obligations as they fall due.

11. It is the Claimant's case that the Respondent condemned him without hearing him on his representations as to the grounds for withdrawal of the offer of employment. He now claims the following;

- a. A declaration that his dismissal was unlawful and unfair
- b. A sum of Kshs. 360,000
- c. A sum of Kshs. 626,340.80
- d. Kshs. 300,000 being one month's salary in lieu of notice
- e. An order for compensation under the Constitution
- f. Kshs. 3,600,000 being 12 months' salary in compensation
- g. Costs plus interest

The Respondent's Case

12. In its Memorandum of Defence filed on 23rd September 2013, the Respondent admits having offered the Claimant employment as Chief Manager, Non-Life Business vide letter dated 24th June 2013, whose effective date was 8th July 2013.

13. The Respondent withdrew the letter of offer vide letter dated 1st July 2013 upon making a discovery of the Claimant's past acts of fraud and embezzlement of funds belonging to the Kenya Insurers Savings and Credit Cooperative Society, majority of whose members are the Respondent's employees.

14. The Respondent states that this discovery was the result of an independent background check conducted on the Claimant after 28th June 2013, whose aim was to verify the correctness of the information supplied by the Claimant. The Respondent states that the Claimant had willfully suppressed and knowingly withheld the information regarding his dealings with the Kenya Insurers Savings and Credit Cooperative Society.

15. It is the Respondent's position that upon discovery of this negative information on the Claimant, it had no option but to withdraw the offer of appointment which it did by its letter dated 1st July 2013.

16. The Respondent goes on to state that the Claimant was duty bound under the principle of good faith to disclose his past engagements which included such a high profile position as Chairman of the Kenya Insurers Savings and Credit Cooperative Society, whose membership was drawn from the insurance industry in which the Respondent operates.

Findings and Determination

17. There are three (3) issues for determination in this case:

- a. Whether there was a valid employment contract between the Claimant and the Respondent;
- b. Whether by withdrawing the offer of appointment, the Respondent acted lawfully;
- c. Whether the Claimant is entitled to the remedies sought.

Employment Contract

18. It was submitted on behalf of the Respondent that at the time the Claimant's offer of employment was withdrawn, there was no employment contract in force.

19. The letter withdrawing the offer of employment dated 1st July 2013, states as follows:

"Dear Sir,

RE: APPOINTMENT

We refer to our letter dated 24th June 2013, offering you appointment as Chief Manager in our Non-Life Operations. You accepted our offer on 28th June 2013.

Subsequently, from our background checks on your previous engagements, we have learnt that you have been surcharged to repay monies to the Kenya Insurers Sacco Society as you have been found liable for the loss of such monies.

In the light of the foregoing, we regret to inform you that we cannot offer you a position in our Company and we therefore withdraw our offer of appointment.

Yours sincerely,

M.N.SARMA

MANAGING DIRECTOR & CEO"

20. From this letter, it is evident that the Respondent issued the letter of offer of appointment on 24th June 2013 and the Claimant accepted the offer on 28th June 2013. In my view, once the Claimant accepted the offer of appointment issued by the Respondent, the employment contract was duly executed and an employment relationship was created.

21. The Court was referred to its decision in ***Tom Omondi Ngoko v Bank of Africa [2015] eKLR*** to the effect that an employment contract is binding on the parties from the date of acceptance and cannot be vitiated by the mere fact that the employee is not deployed. I find no reason to depart from my decision in the ***Ngoko Case*** and therefore find that at the time the Respondent withdrew the offer of appointment, an employment contract was in force and the Claimant was an employee of the Respondent.

The Withdrawal of Appointment

22. In its letter dated 1st July 2013, the Respondent cites the Claimant's non-disclosure on his dealings with the Kenya Insurers Sacco Society. The Claimant admits that he had served as Chairman of the Sacco on whose account he had been subjected to a surcharge. In my estimation, this was crucial information that the Claimant ought to have disclosed to the Respondent more so because the Sacco membership was drawn from the Respondent's industry.

23. For this reason, it seems to me that the Respondent was justified to withdraw the offer of appointment. I also find that the Claimant was duly notified of the withdrawal of offer and the reason thereof. To this extent, there is distinction between the Claimant's case and the *Ngoko Case* where there was no evidence of formal notification of withdrawal of appointment.

Remedies

24. In light of the foregoing, the only remedy I will grant to the Claimant is the sum of Kshs. 626,340.80 being notice pay due to the Claimant's former employer which the Respondent had undertaken to pay plus the sum of Kshs. 70,000 being seven (7) days' probationary notice pay as per contract.

25. Each party will bear their own costs.

26. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 9TH DAY OF DECEMBER 2016

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JUDGE

Appearance:

Mr. Kamotho for the Claimant

Miss Oyombe for the Respondent