



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 474 OF 2013

TOM OMONDI NGOKO.....CLAIMANT

VS

BANK OF AFRICA.....RESPONDENT

AWARD

Introduction

1. Bank of Africa, the Respondent in this case is caught up in a seemingly incomplete transaction with the Claimant, Tom Omondi Ngoko. On 4th October 2011, Ngoko was interviewed by the Bank for the position of Branch Manager, Machakos. He was subsequently issued with an employment contract but his reporting date was not specified. In the intervening period, the Respondent appears to have changed its mind on the Claimant's appointment and the Claimant did not get to report to work at the Respondent Bank.

2. The Claimant therefore came to Court by way of Memorandum of Claim dated 4th April, 2013 and amended on 18th February 2014. The Respondent filed a Memorandum of Reply on 18th September 2013 and the matter proceeded to full hearing with the Claimant and his witness Felix Odongo Oyugi giving sworn evidence. The Respondent's Human Resources Manager, Florence Murerwa testified for the Respondent.

The Claimant's Case

3. The Claimant states that sometime in May 2011, he sent job applications to Standard Chartered Bank, Parapet Cleaning Services as well as to the Respondent Bank. On 15th September 2011, the Claimant resigned from Barclays Bank of Kenya.

4. On 4th October 2011, the Claimant filled an interview form issued to him by the Respondent Bank giving his personal details, academic qualifications, past employment and experience. In the interview form the Claimant indicated that he was available to begin work immediately.

5. On 12th October 2011, the Claimant completed a confidential form giving details of his personal summary and past employers' references. He also signed an employment contract with the Respondent in which he indicated his reporting date as 12th October 2011. The Claimant was subjected to a medical examination and the Respondent facilitated him to open a staff account at its Nairobi Branch. The Claimant states that after signing the employment contract, the Respondent failed to facilitate his reporting for work.

6. The Claimant then reported a labour dispute to the Chief Industrial Relations Officer who appointed a conciliator. The dispute was not resolved prompting the filing of this action.

7. The Claimant submits that by the time the Respondent sought to rescind his employment, the ingredients of offer, acceptance and consideration pertaining to a contract of employment had been satisfied.

8. He therefore claims the following:

- a) A declaration that the contract entered into between himself and the Respondent remains in force
- b) Salary from 12th October 2011 until lawful termination of the contract
- c) One months' salary in lieu of notice.....Ksh.140,000.00
- d) 12 months' salary in compensation for
unlawful termination.....Ksh.1,680,000.00
- e) Medical costs incurred from 12th October 2011
- f) Clearance of the Claimant's loans held with Barclays Bank of Kenya
- g) Exemplary damages
- h) Costs plus interest

The Respondent's Case

9. In its Memorandum of Reply filed on 18th September 2011, the Respondent states that the claim herein is a non starter since the Claimant did not take up employment. The Respondent further states that vide his letter dated 20th September 2011, the Claimant applied for the position of Relationship Manager in the Respondent Bank. In his application the Claimant stated that he was at the time holding a similar position in Barclays Bank of Kenya. This was also reflected in the Claimant's Curriculum Vitae.

10. On the strength of the Claimant's representation that he was working within the banking sector, the Respondent shortlisted and invited him for an interview on 4th October 2011 for the position of Branch Manager. Prior to the interview, the Claimant completed an interview form setting out his employment record. In this respect, the Claimant indicated Barclays Bank of Kenya as his current employer, a position he maintained throughout the interview period. During the interview, the Claimant indicated that he would be available to take up employment with the Respondent upon service of one month's notice as provided in his employment contract with Barclays.

11. Pursuant to the interview, the Claimant was found to be a suitable candidate based on his experience and the Respondent offered him employment in the position of Branch Manager. On 6th October 2011, the Respondent and the Claimant discussed the terms of employment which were then reduced into a draft contract of employment.

12. The Claimant collected the draft contract of employment and other relevant documents on 10th October 2011 on which date he also submitted his payslip for the month of August 2011 to the Respondent's Human Resources Manager. He undertook to return the documents on 12th October 2011 and to notify the Respondent of his anticipated reporting date.

13. On 12th October 2011, the Claimant returned the employment contract duly signed and indicated that he had reported for work on that very day. The Respondent was surprised by this move as it had expected the Claimant to serve his full notice at Barclays before taking up the new appointment. The Respondent

informed the Claimant that preparations for his reporting had not been put in place and he would therefore be contacted at some future date.

14. Jolted by the turn of events, the Respondent decided to conduct a background check on the Claimant by contacting Barclays Bank of Kenya. As it turned out, the Claimant had resigned from Barclays on 15th September 2011 where his last working day was 22nd September 2011.

15. At a meeting convened by the Respondent on 18th October 2011, the Claimant was informed that his offer of employment had been withdrawn and rescinded owing to the false information he had tendered on his employment status. At this meeting, the Claimant indicated that he had just resigned from Parapet Cleaning Services. This information had not featured in past discussions between the Respondent and the Claimant nor was it reflected in any of the documents submitted by the Claimant.

16. It is the Respondent's case that the essential ingredient of performance of contract is lacking in the Claimant's case so as to give rise to the employment rights claimed by the Claimant. According to the Respondent, this Court has no jurisdiction to entertain the Claimant's claim as framed.

Findings and Determination

17. The issues for determination in this case are as follows:

- a) Whether there was a valid employment contract between the Claimant and the Respondent on the basis of which the Claimant could lay a claim;
- b) Whether the Claimant is entitled to compensation for unfair termination of employment.

Employment Contract

18. The Respondent's defence against the Claimant's claim revolves around the assertion that since the Claimant had not been deployed, there was no employment contract on the basis of which the Claimant could lay a claim against the Respondent. It is not contest that owing to the Respondent's change of mind the Claimant did not actually work for the Respondent. The question then is whether the contract of employment signed by the parties in this case was invalidated by this fact.

19. The Court was referred to various authorities on both commercial and employment contracts. It is my view however that commercial and employment contracts differ in material respects. Unlike a commercial contract, an employment contract gives rise to a relationship with far reaching implications on the lives of the parties.

20. For an employee, employment is not only a source of livelihood but also part of their essence and purpose in life. It follows therefore that once one is offered a job, they of necessity make certain adjustments in their life in order to take up the appointment; the most obvious being resignation from their current employment, relocation and financial adjustment. These adjustments cannot just be wished away on the basis of change of mind by a prospective employer.

21. The Respondent submitted that the contract of employment issued to the Claimant was a draft offer of employment and that the Claimant's acceptance thereof did not create a binding contract between the parties. I have examined the employment contract issued to the Claimant and do not find any indication that it was a draft offer of employment. The contract was duly signed and initialed on every page by the Respondent's Senior Human Resources Manager, F. Murerwa and the Deputy Managing Director, J-G Pastouret. It carried full details of the Claimant's terms and conditions of employment.

22. In the South African case of *Wyeth SA (Pty) Ltd Vs Manqele and Others (JA 50/03)[2005] ZALAC 1 (23 March 2005)* the Labour Appeal Court of South Africa held that a contract of employment duly signed and executed creates an employment relationship capable of enforcement. The South African Court went further to hold that the definition of an employee includes a person who has signed a contract

of employment with an employer and it matters not that the employee is not actually deployed.

23. I fully associate myself with the finding in the *Wyeth Case* (supra) and hold that the contract of employment issued to the Claimant was binding upon the parties from the date of the Claimant's acceptance and the mere fact that the Claimant was not deployed did not vitiate the contract.

24. In the written submissions filed on behalf of the Respondent, it is submitted that the Claimant never became an employee of the Respondent as defined in the Employment Act, 2007. The Respondent's reasoning in this regard is that since the Claimant did not work so as to earn a salary, he was not an employee and could not therefore lay a claim against the Respondent.

24. Section 2 of the Act defines an employee as:

“ a person employed for wages or salary and includes an apprentice and indentured learner.”

25. The contract of employment issued to the Claimant clearly sets out the Claimant's remuneration as Kshs.119,000 in basic salary and Kshs.21,000 as house allowance. The Court does not find anything in the definition in Section 2 of the Employment Act, 2007 that excludes the Claimant from the category of an employee. At any rate, it would be absurd to hold that a person who is duly employed but not deployed does not enjoy protection from unfair labour practices as provided under Article 41 of the Constitution of Kenya, 2010.

26. In view of the foregoing the Court finds that the Claimant was indeed an employee of the Respondent and his claim is therefore properly before this Court.

Rescission of Appointment

27. The Respondent's witness, Florence Murerwa told the Court that the decision to rescind the Claimant's appointment was informed by discovery that the Claimant had given false information regarding his employment status and last salary with Barclays Bank of Kenya. In the course of the hearing, it emerged that the Claimant had indeed given false information on this account. The Respondent therefore had a valid reason to change its mind.

28. The Court was however unable to understand why the Respondent chose not to communicate its decision to the Claimant in writing. Murerwa's testimony that the Claimant was notified of the decision to rescind his appointment in a meeting held on 18th October 2011 was controverted by the Claimant and in the absence of a written record, the Court could not verify whether such a meeting in fact took place.

29. The Court therefore finds that the Respondent's action of rescinding the Claimant's appointment did not follow due process and amounted to unfair termination of employment within the meaning of Section 45 of the Employment Act, 2007.

Remedies

30. Having found that the Respondent's action of rescinding the Claimant's appointment amounts to unfair termination of employment, I award him three months' salary in compensation. I also award him one month's salary in lieu of notice in accordance with his contract of employment.

31. The Court found no basis for the claims for salary arrears, medical costs, clearance of the Claimant's loans held with Barclays Bank of Kenya and exemplary damages which are hereby dismissed.

32. Ultimately I make an award in favour of the Claimant in the following terms:

a) 3 months' salary in compensation for unfair

termination.....Kshs.420,000.00

b) 1 month's salary in lieu of notice.....Ksh.140,000.00

Total.....Ksh.560,000.00

33. I further award the Claimant the costs of this case.

34. The award amount will attract interest at court rates from the date of the award until payment in full.

35. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 18TH DAY OF MARCH 2015

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JUDGE

Appearance:

Mr. Kubai for the Claimant

Mr. Nyaburi for the Respondent