



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSENO.118 OF 2014

THOMAS

MAGANJO.....

CLAIMANT

VERSUS

**MWIRUA FARMERS CO-OPERATIVE SOCIETY
LIMITED..... RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 26th June, 2015)

JUDGMENT

The claimant filed the memorandum of claim on 15.09.2014 through Ongicho-Ongicho & Company Advocates. The claimant prayed for:

- a. A declaration that the claimant's dismissal was unlawful and substantively as well as procedurally unfair.
- b. Payment of the claimant's withheld salary during the period of suspension.
- c. Payment of the claimant's leave earned but not taken for 2 and half years at 30 days per year.
- d. Payment of gratuity for 11 years at the rate of 31 working days for every year worked.
- e. Compensation for 12 months.
- f. Costs of the suit.
- g. Any other relief the court may deem fit to grant.

The claimant filed on 01.12.2014 the notice of change of advocates appointing G.V. Mumia to act for the claimant in the suit.

The respondent filed the memorandum of response on 31.10.2015. The respondent prayed that the suit be stayed pending the investigations into alleged claimant's misappropriation of the respondent's funds. The reply to defence was filed on 26.02.2015.

For the respondent, it was submitted that the claimant was entitled to terminal dues as follows:

- a. Gratuity for 11 years worked Kshs. 284, 166.00.
- b. Gratuity for 13 days Kshs. 902.00.
- c. Unpaid leave for 3 years Kshs. 75, 000.00.
- d. Unpaid leave allowance for 3 years Kshs. 6,000.00.
- e. One month pay in lieu of notice Kshs. 25, 000.00.
- f. Total **Kshs.391, 068.00**. The respondent submitted that the payment be withheld pending conclusion of an inquiry and inspection under Part XII and surcharge proceedings under Part XIII

of the Co-operative Societies Act, Cap. 490, Laws of Kenya.

In view of the submission by the respondent, the only pending issues for determination are whether the termination was unfair; whether the claimant is entitled to compensation; whether the claimant is entitled to salary withheld during the suspension; and whether the claimant is entitled to the costs of the suit.

The claimant received the termination letter dated 6.06.2014. The letter stated thus,

“You are hereby being informed that you have been summarily dismissed with effect from 4th June, 2014. The decision to dismiss you was reached during a full management meeting held on 4th June, 2014 vide Min. 129/2013/2014. The action was taken in accordance with section 27(e) (g) and (i) of the CBA.”

The court has considered that letter together with the submissions and materials on record. It is clear that the claimant was not given the reason for termination as envisaged in section 43 of the Employment Act, 2007. There was no evidence that the claimant was given a hearing as envisaged in section 41 of the Act. The court finds that the summary dismissal was therefore unfair both procedurally and in substance. The claimant is awarded 12 months' salaries in compensation making Kshs. 25, 000.00 x 12 being **Kshs.300, 000.00**. While making that finding the court considers that the subsequent letter of 5.08.2014 informing the claimant that his termination was reduced to normal termination shows that the respondent had no valid reason to dismiss the claimant.

The court has found that the termination flowing from the suspension was unfair. There was no justification for the suspension. Thus the claimant is entitled to the withheld salaries during the period of suspension and as prayed for. While making that finding the court uphold its opinion in **Kenya Union of Printing, Publishing, Paper Manufacturers and Allied Workers –Versus- Timber Treatment International Limited,[2013]eKLR, Industrial Cause No. 21 of 2012 at Nakuru, page 10-11**, where the court stated thus **“In making the findings the court considers that the employee is entitled to pay for the period he or she is kept away from work due to unlawful and unfair suspension or termination. In such cases, the employee is entitled to at least partial reinstatement, and therefore compensation whose measure is the proportionate unpaid or withheld salary throughout that period of unlawful or unfair suspension or termination. During such period, the court considers that the employee carries a valid legitimate expectation to return to work and not to work elsewhere until the disciplinary or the ensuing conciliatory and legal proceedings are concluded. In arriving at the finding of entitlement to reinstatement during unlawful or unfair suspension and termination, the court has taken into account the provisions of subsection 49(4) (f) which states that in arriving at the proper remedy, there shall be consideration of, ‘(f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for termination;’. The court is of the opinion that for the period the question of unfairness or fairness of the suspension or termination has not been determined, the employee carries a reasonable expectation that for the period pending the determination of that question, the employment has not validly terminated and the employee is entitled to reinstatement during that period provided the employee is exculpated; with pendency of such serious question, the employee is validly expected to pursue the resolution with loyalty not to work for another employer. It is the further opinion of the court that where the court finds that the suspension or termination was unlawful or unfair, the employee is entitled to at least partial reinstatement, and therefore, a total of the salaries due during that period. The exception (to such entitlement to partial reinstatement for the period pending a final decision on the dispute) is where it is established that during that period, the employee took on other gainful employment or the employee fails to exculpate oneself as charged.”**

The outcome of the inquiry and investigation under the relevant statute, the Co-operative Societies Act, Cap.490 was not established and the court finds that the same shall not have a bearing on this judgment as making such consideration would be speculative.

In conclusion judgment is entered for the claimant against the respondent for:

1. The declaration that the termination of the claimant's employment by the respondent was unfair.
2. The respondent to pay the claimant **Kshs.691, 068.00** plus all salaries withheld during the suspension by 1.09.2015 failing interest at court rates to be payable thereon from the date of this judgment till full payment.
3. The claimant to compute and serve the respondent the salaries withheld as ordered in 2 above, in 7 days from the date of this judgment.
4. The respondent to pay costs of the suit. .

Signed, dated and delivered in court at **Nyeri** this **Friday, 26th June, 2015.**

BYRAM ONGAYA

JUDGE