



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 710 OF 2011

SEWIRA FUNDI MAINA.....**CLAIMANT**

VERSUS

INLAND SERVICES COMPANY LIMITED.....**1ST RESPONDENT**

TAITA TAVETA DISTRIBUTORS.....**2ND RESPONDENT**

GASPER M. SHABA.....**3RD RESPONDENT**

JUDGMENT

1. The Claimant filed suit on 9th May 2011 seeking to resolve a dispute he framed as outstanding dues/employment benefits and interest on the dues/employment benefits from the Respondents. The Claimant averred that he was employed by the 1st Respondent as an import and export officer and rose through the ranks and was promoted to the rank of senior level staff/officer in a sister company the 2nd Respondent herein. He averred that he served the Respondents diligently and faithfully. He averred that as at the time of termination of the contract he was entitled to salary balance of Kshs. 148,500/-, pending annual leave Kshs. 67,500/-, unremitted NSSF dues, 5,760/- 3 months salary in lieu of notice Kshs. 40,500/-, 9 years severance pay Kshs. 60,750/-. The Claimant further claimed Kshs. 69,000/- being 3 months salary arrears from the 2nd Respondent as well as interest on the sums claimed. The Claimant averred that the 1st Respondent admitted indebtedness of Kshs. 323,010/- by letter dated 1st August 2004.
2. The Respondents filed a memorandum of reply and counterclaim on 7th June 2011. In the reply and counterclaim, the Respondents denied the averments that the 3rd Respondent was a male of sound mind and a managing director of the 1st and 2nd Respondent who was sued in pursuance of Rule 4(c) of the Industrial Court (Procedure) Rules 2010. The Respondents averred that the Claimant was not entitled to the sums he claimed as principal sums as well as the interest stated to be due. The Respondents averred that the Claimant was guilty of financial and administrative improprieties for which the Respondents were entitled to have him charged for fraud. The Respondents averred that in any event, even if the Claimant was entitled to the dues accruing while he worked for the 1st Respondent, which dues are denied, the same were statutorily time barred. The Respondents denied that Mr. J. M. Ogola authored the letter admitting the dues alleged to be owed to the Claimant. The Respondents demanded by way of counterclaim a sum of Kshs. 69,000/- plus interest as notice from the Claimant.

3. The Claimant filed a reply to memorandum of reply and counter claim on 23rd January 2013. The Claimant averred that the admission of the claims by the Respondents on 2nd January 2004 and again on 1st August 2004 caused the time to run from the said dates. The Claimant averred that the allegations of fraud were an afterthought and an attempt to refuse to settle the Claimant's claim. He averred that the 2nd Respondent accepted the one month notice he gave and were estopped from raising a demand for 3 months notice.
4. The Claimant testified on 16th April 2015 and stated that he was an employee of the Respondents. He testified that he worked for the 1st Respondent from 24th October 1994 till 2003 when the company was closed and he was asked by the 3rd Respondent if he could stay and work for him in Machakos under the 2nd Respondent. He agreed and was at the time owed Kshs. 319,010/- which comprised of salary unpaid for 10 months – Kshs. 135,000/-, balance for February 13,500, pending leave for 3 years 67,500/- NSSF dues unpaid for 2002, notice for 3 months and 9 years service. He testified that this sum had been calculated by Mr. Ogola the accountant. He expected payment and was not worried when he went to work for the 2nd Respondent. He testified that he worked for the 2nd Respondent until 2010 when he resigned as the changes brought by management in effect meant he had been demoted. He testified that he gave notice for one month.
5. In cross-examination he testified he worked for the 1st Respondent from 1994 till 2003 and that he was owed cash by the 1st Respondent. He confirmed that he did not have a document claiming the dues. He testified that he and the 3rd Respondent had a discussion and he knew the 3rd Respondent and they had a mutual respect and he did not expect the 3rd Respondent to refuse to pay. He received a letter from Ogola and did not reply after receipt of the letter. He gave one month notice and was paid for the 4 days he had worked in January from 1st to 4th January. He testified that he did not have a letter of employment but used to get letters on increase in salary. He stated that the 3 months pay came from management. He testified that the 3rd Respondent was the sole director of the 1st and 2nd Respondent. He understood that 2 companies were distinct entities. He testified that he never saw any other director and that when he was employed by the 1st Respondent it was not limited and became a limited company later. He stated that there is no indication that the 3rd Respondent is one and the same as the 2 companies.
6. In re-examination he testified that the 1st and 2nd Respondent were different but were owned by the same person. He testified that they operated almost as one. He stated that he had an understanding with the 3rd Respondent who closed the 1st Respondent and set up the 2nd Respondent and promised the Claimant that the Claimant would be paid once the circumstances improved. He testified that he sought the dues from the manager because the 3rd Respondent refused to speak to him.
7. The Respondents had indicated they would call a witness but after the testimony of the Claimant the counsel for the Respondents indicated that his submissions would be on matters of the law and subject to directions he wished to put in submissions. The counsel for the Claimant had no objection to that request and the Court gave directions on the filing and exchange of written submissions. The Claimant filed submissions on 30th April 2015 while the Respondents filed submissions on 22nd May 2015. In his submissions, the Claimant submitted that he was employed by the 1st Respondent from 24th January 1994 till 31st December 2003 where he worked as an administrative assistant overseeing the transport department, clearing and forwarding of cargo from the port of Mombasa and was subsequently promoted to a senior level in the 2nd Respondent a sister company of the 1st Respondent due to reorganisation of the company. He submitted that on 1st August 2004 a letter was addressed to the Claimant from one J.M. Ogola the group finance and administration manager of the 1st Respondent showing the unpaid dues owed by the company. The letter showed an amount of Kshs. 319,010/- owed to the Claimant and which was to be paid once

funds were available. The Claimant submitted that under Section 74 of the Employment Act cap 226 laws of Kenya there was provision that an employer shall keep a written record of all employees with whom he has entered into a contract under the Act. The Claimant submitted that from the foregoing it could only be presumed that the 1st Respondent kept a record as per the Act and it was on that basis that they had calculated the amounts owing to the Claimant as indicated in the letter by Mr. Ogola. The Claimant submitted that the Respondent had a duty to pay the dues as per Section 5(4)(a) of the Employment Act a duty that the 1st and 2nd Respondent refused and/or ignored despite making countless promises from 2004 to pay the amount owed to the Claimant till the time he terminated his employment contract. The Claimant submitted that the Respondent did not avail any witness or documentary proof in support of its defence or the counterclaim. The Claimant submitted that the counterclaim should be dismissed. He relied on the cases of **Peter John Mwangi Kamau v Autolitho Limited [2013] eKLR** and **Gharib Hashim Rashid v Wilhelmsen Ships Services Limited [2013] eKLR**.

8. In their submissions, the Respondents submitted that the 1st Respondent is a registered business name owned by the 3rd Respondent while the 2nd Respondent is a limited liability company. It was submitted that the 3rd Respondent is one of the directors at the 2nd Respondent company. The Respondents submitted that the Claimant was a former employee of the 1st Respondent from January 1994 till December 2003. It was submitted that the Claimant was similarly a former employee of the 2nd Respondent from January 2004 to December 2009. The 1st Respondent denied the claim of Kshs. 323,010/- and asserts that the Claimant cannot pursue the claim since the time within which the Claimant ought to have filed the claim had lapsed. The 2nd Respondent denied owing the Claimant any arrears as alleged by the Claimant. The Respondent submitted that the issues for determination were whether the claim of Kshs. 323,010/- was statute (time) barred, whether the claim of 69,000/- is viable against the Respondents and whether the Claimant has any viable claim against the 3rd Respondent. The Respondents submitted that according to Section 90 of the Employment Act 2007, a claim arising from an employment contract is required to be filed within 3 years of the date when the cause of action arose. The Respondents submitted that the claim for Kshs. 323,000/- which accrued in 2003 ought to have been filed within 3 years of December 2003. The Respondents relied on the cases of **Rawal v Rawal [1990] KLR 275**, **Iga v Makerere University [1972] EA 65** and **Gathoni v Kenya Co-operative Creameries Limited [1982] KLR 104**. The Respondents submitted that the claim by the Claimant is barred by Section 90 of the Employment Act and is incompetent. The Respondents submitted that the claim for Kshs. 69,000/- being three months' salary arrears is not described such as to enable an understanding of what arrears the Claimant is referring to. The Respondents submitted that the Claimant has not set out facts or particulars sufficient to enable the 2nd Respondent respond to the claim. The Respondents relied on the case of **Steven Kariuki v George Mike Wanjohi & 2 Others [2013] eKLR**. The Respondent's submitted that there was no termination of employment by the 2nd Respondent to entitle the Claimant to seek payment of notice. The Respondents submitted that the Claimant has no viable claim against the 3rd Respondent as the Claimant has levelled his claims against the 1st and 2nd Respondents.
9. Part of the Claimant's claim before the Court is incompetent for having being brought outside prescribed statutory limits. The claims the Claimant was competent to make in relation to his previous employment were time barred in terms of the repealed Employment Act cap 229 of the laws of Kenya. Under that law, there was no express provision on limitation of actions and the fall back was to the Limitation of Actions Act cap 2 of the laws of Kenya. In the Limitation of Actions Act, Section 4(1) provided a period of 6 years limitation for a contract. In the premises the cause of action that accrued in December 2003 could only be presented by December 2009. The Respondents arguments on Section 90 of the Employment Act 2007 are misplaced as this law is not retrospective in application. The joinder of the 3rd Respondent to the action is also misplaced as he was not *strictu sensu* a party that ought to have been joined. Had the cause of action against the 1st Respondent been competent then the 3rd Respondent could properly have been joined as he traded in the name of the 1st Respondent.

10. The suit against the 2nd Respondent however has some aspects that are necessary to go into. The Claimant claimed arrears of Kshs. 69,000/- as notice to him as unpaid salary. The Respondents raised a hue and cry regarding the failure of the Claimant to particularise the claim. The Claimant resigned from employment on 4th December 2009. This was precipitated by the 2nd Respondent's letter undated letter. The letter in *pare materia* stated as follows:-

SUBJECT: REORGANIZATION OF RESPONSIBILITIES

As from 1st December 2009 while you remain the manager of Machakos office, your duties will include a day to day running of a smooth operation of our main business of the distribution of the NMG Newspapers, Magazines and Parcels as usual, visiting our bulk centres & agents, creating new markets in collaboration with NMG.....Office administration and payments to NMG will also remain under you.

Hassan S. Kipimo on a free hand will now take control of petty cash, collections, bankings, daily running and maintenance of the entire fleet of vehicles, freights, refunds and claim. He will also maintain log-books to record all movements of vehicles.....

Hassan will also ensure that expenditures are controlled to the minimum level.....

I will expect you two to exchange documents and inform the other staff on the new arrangements accordingly.

11. The Claimant took this to be a demotion and wrote a letter of resignation on 4th December 2009. In his letter he stated that he welcomed the changes made but thought that the same would create a conflict of interest between him and his colleague (Hassan) and at the same time jeopardize his responsibility as manager to whom Hassan is answerable for day to day company operations and management.

12. From the realignment of responsibilities outlined in the 2nd Respondent's letter issued circa December 2009, the Claimant's position was undermined by the creation of a parallel centre of management. The employee that was assigned key roles had responsibilities that overlapped those of the Claimant. The resignation of the Claimant in response to the changes is what amounts to constructive dismissal. Constructive dismissal is defined as the situation where an employer commits a serious breach of contract or conducts itself in such a manner as to entitle the employee to resign in response to the employer's conduct. The employee is entitled to treat himself or herself as having been dismissed by the employer and the employer's conduct is often referred to as a repudiatory breach. In the Claimant's case, the overlap of responsibilities and the whittling of the Claimant's control of the operations as well as the free hand given to the employee Hassan undermined the position of the Claimant and his resignation was therefore constructive dismissal. In the case of **Emmanuel Mutisya Solomon Vs Agility Logistics (Industrial Court Cause No 1448 of 2011)** Mbaru J defined constructive dismissal as:

“a situation in the workplace which has been created by the employer, and which renders the continuation of the employment relationship intolerable for the employee to such an extent that the employee has no other option available but to resign.”

13. Under ILO Convention, Termination of Employment Convention 1982 (No. 158) there is an imperative placed on the employer to terminate with cause and to accord the employee various rights including an opportunity to be heard. In relation to the Claimant, no cause was demonstrated by the employer to have warranted the dismissal. The Claimant gave reasons for his refusal to accede to the new arrangement, gave notice of 1 month and after the one month ceased rendering services to the 2nd Respondent. He thus was unfairly terminated. For this I would award him compensation for 12 months bearing in mind the treacherous conduct of the 3rd Respondent and 1st Respondent regarding the dues he was owed by them. I would dismiss the counter claim with

costs as no evidence was led to prove the claims by the Respondents. In the final analysis I enter judgment for the Claimant against the 2nd Respondent for Kshs. 162,000/-. There is no order as to costs on this sum but the Claimant is entitled to costs in relation to the counterclaim.

Orders accordingly.

Dated and delivered at Nairobi this 13th day of July 2015

Nzioki wa Makau

Judge