



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 338 OF 2013

RICHARD KENEL..... CLAIMANT

VERSUS

SOVEREIGN GROUP LIMITED1ST RESPONDENT

KENYA BIXA LIMITED2ND RESPONDENT

J U D G M E N T

INTRODUCTION

1. This is a case of premature termination of a fixed term employment contract. The facts of the case are that the Claimant was employed by the 1st respondent as the General Manager (GM) of the 2nd respondent (her subsidiary company) for 3 years renewable contract starting from 1.5.2011. The contract was however terminable by either party serving 3 months notice in writing or payment of salary in lieu of the Notice. The claimant worked without any disciplinary issues until 12.4.2013 when his services at the 2nd respondent were terminated with 8 days notice. He therefore blames the respondents for breach of the employment contract through an unlawful transfer from the 2nd respondent to the 1st respondent and prays for damages amounting to kshs.3,105,260 including 3months' salary in lieu of notice, salary for 12 days worked in April 2013, 150 leave day outstanding, and accrued employment benefits. His gross salary at the time of termination was kshs.224,800 per month.
2. The 1st Respondents admits that she had employed the Claimant as the GM for the 2nd respondent for a period of 3 years but she avers that the contract was terminated by the Claimant through resignation without the required 3 months notice. It is her case that the said resignation amounted to breach of the contract of employment which provided for the transfer of the claimant to any other company within the 1st respondent's group of companies. The respondents have therefore counterclaimed 3 months' salary in lieu of notice.
3. The claimant has however denied the respondents' counterclaim and maintained that it is the 1st respondent who terminated the contract through a purported transfer from the 2nd respondent to herself. That the said transfer had the effect of terminating the claimant's contract with the 2nd respondent without serving a prior notice of 3 months and moving him to another independent entity without clear terms. He has therefore prayed for the respondent's counter claim to be dismissed.
4. The suit was heard on 11.9.2014, 25.2.2015 and 12.5. 2015 when the Claimant testified as CW1 and the Respondent called Getrude Muta as RW1. Thereafter the counsel for both parties filed

written submissions.

ANALYSIS AND DETERMINATION

5. After considering the pleadings, evidence and submissions, it is clear that CW1 was employed by the 1st Respondent as the GM for the 2nd respondent for a renewable 3 year fixed term contract. It is not in dispute that on 2.4.2013 he was called to meet the 1st respondent's Group CEO at Nairobi and who told him that his services with the 2nd respondent had been terminated and a new GM was to report on 8.4.2013. That the claimant was however to be transferred to the 1st respondent's Nairobi office to work as the manager for Special Projects with effect from 8.4.2013, but no job status and description for his new assignment was given to him. There is further no dispute that the claimant handed over to the new GM on 8.4.2013 as instructed but declined the offer for the transfer to the new job vide his email to the CEO dated 8.4.2013. The issues for determination are:
 - a. Whether the premature termination of the Claimant's contract of service was through breach by the respondents or the claimant.
 - b. Whether the reliefs sought in the suit and the counterclaim should be granted.

Breach by the respondents or the claimant

6. The claimant testified that his employment contract was in respect of a specific and that his purported transfer from the 2nd respondent to another separate entity was a termination of his employment contract as GM for the 2nd respondent in disguise. He therefore contended that under clause 13 of the contract he was entitled to 3 months notice in writing before the said termination and replacement by another GM. He denied ever terminating the contract by his email dated 8.4.2013 as alluded to in the counterclaim and maintained that his contract had earlier been terminated by the transfer letter dated 2.4.2013. According to him the transfer letter was also an offer for another job at the 1st respondent of which he declined.
7. Rw1 has however denied that the claimant was terminated by the respondents and contended that it is the claimant who resigned from his employment without notice protesting a lawful transfer. According to her the contract of employment for the claimant as the GM for the 2nd respondent was for 3 years, but maintained that the claimant was transferable to any other company owned by the 1st respondent, just any other employee within the group of companies. She admitted that after the claimant declined the transfer to the new job, the Group HR manager advised him to tender a formal resignation but he also declined.
8. She maintained that the transfer of the claimant from the second to the first respondent, did not amount to any breach of the contract of employment. She explained that the claimant was given one month to induct the new GM for the 2nd respondent and then go on leave for 2 months before proceeding on the transfer to the 1st respondent. She did not however confirm whether or not there was any resolution of the respondent's board of directors to transfer the claimant from the 2nd respondent to the 1st respondent.
9. The jurisdiction of the court in a suit like this is limited to enforcing the intention of the parties to the contract in relation to the express and implied terms of the contract. This court is bound by the Court of Appeal decision in the *National bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd [2002] 2 EA 503* where it was held that:

“ A court of law cannot rewrite a contract between parties. The parties are bound by the terms of their contract, unless coercion, fraud, or undue influence is pleaded and proved. ... save those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain.”

10. The court has perused the whole contract and did not see any stipulation therein that entitled the respondents to transfer the claimant from his job as the GM for the 2nd respondent to the 1st

respondent or at all. Clause 3.2, 13 and 15 of the contract are the only relevant provisions to the main dispute herein. Clause 3.2 states as follows:

“ The General Manager shall work in the company’s head office at Tiwi - Kwale but he may be required to travel on business of the company or any of its associated companies anywhere in Kenya or elsewhere.”

Clause 13 on the other hand entitles each party to terminate the contract by serving the other a notice of 3 months in writing or salary in lieu of the notice.

Lastly clause 15 provided that:

“If the employment of the General Manager under this contract is by reason of liquidation of the company for the purpose of reconstruction or amalgamation and the General Manager is offered employment with any concern or undertaking resulting from the reconstruction or amalgamation on terms and conditions not less favourable than the terms of this contract then the general Manager shall have no claim against the company in respect of the termination of his employment under this contract.”

11. Clause 3.2 above, only provided for temporary assignment, on behalf of the 2nd respondent or the associated companies, away from his Tiwi station while Clause 15 provided for loss of job or job status as a result of reconstruction or amalgamation of the 2nd respondent with any other concern. In this case however, the transfer was permanent in nature and was not occasioned by any reconstruction or amalgamation of the 2nd respondent with any other concern. Without any express or implied stipulation in the written contract, the court finds on a balance of probability that the parties herein did not intend that the claimant would be transferred from the 2nd respondent to any associated company without his consent during his contract term.
12. Consequently the court agrees with the claimant that the purported transfer from the 2nd respondent to the 1st respondent amounted to termination of his employment contract without the requisite 3 months notice as provided under clause 13 of the contract. The effect of the foregoing finding is that the defence and counterclaim by the respondent is dismissed. Even if the court was to find, which it does not, that the claimant resigned by his email to the CEO dated 8.4.2013, the court could still have made a finding that the resignation was not voluntary but constructive termination by the employer..

Reliefs

13. In view of the foregoing findings, the claimant is awarded his claim for salary in lieu of 3 months notice being kshs.674,400 calculated at the rate of kshs.224,800 per month based on the pay slips produced by the claimant as exhibits. He is also awarded kshs.89,920 being the salary for the 12 days worked in April 2013. The court has assessed the cash for the 147 leave days admitted for the period ending 2012 by the respondents plus 3 other days earned in 2013 at kshs.1,124,000. The claimant is however awarded the sum prayed being kshs.1,089,000.
14. The claimant has further prayed for gratuity based on clause 5.4 of the contract which provided for payment of gratuity at the rate of 12.5% of the taxable salary at the end of the contract. The period of the contract served was 24 months multiplied by 12.5% of the monthly salary at the end of the contract being kshs.224,800 amounts to kshs.674,400. The claimant is however kshs.657,540 as prayed.
15. The claim for salary underpayment and acting allowance is however dismissed for want particulars and evidence. As correctly contented by Rw1, the claimant never produced any written appointment to act outside his normal duties between July and October 2007 as alleged by him. Likewise the counterclaim by the respondents for kshs.540,000 being salary in lieu of 3 months notice is dismissed for lack of merits as noted above.

Disposition

16. For the reasons stated above, judgment is entered for the Claimant, against the respondents, in the sum of Kshs.2,510,860 plus costs and interest from the date of filing the suit. The respondents are however entitled to recover the money allegedly deposited at the labour office directly from the said office at any time after paying the claimant the sum awarded above.

It is so ordered.

Signed, dated and delivered at Mombasa this 25th day of September 2015.

O.N. MAKAU

JUDGE