



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NO. 428 OF 2014
SAMMY MAINA MACHARIA.....CLAIMANT
VERSUS
WELD-CON LIMITED.....RESPONDENT
J U D G M E N T

INTRODUCTION

1. This is a case of premature termination of a fixed term contract. The facts of the case are that the Claimant was employed by the respondent as the Heavy Equipment Mechanic/ Store Keeper based in D.R. Congo. The employment contract was for 3 months and it is dated 30.6.2014 signed between the claimant and the respondent's Human Resources Manager. The contract was terminable by either party serving 14 days notice in writing or payment of salary in lieu of the Notice. The contract also entitled the claimant to monthly salary of \$900 plus top-up (hardship allowance) of 75% of the \$900 which amounted to kshs 138,725 using kshs.87 as the exchange rate then. He was further entitled to a daily allowance of \$20. Lastly the claimant was entitled to 2 leave days for every month served.

2. The claimant worked without any disciplinary issues until 31.7.2014 when the respondent calculated his salary at kshs.56,765 instead of the said kshs.138,725. The claimant protested to the site Manager about the low pay and he was given a fresh contract with different terms to sign but he refused and was send back to Kenya. He therefore blames the respondents for breach of the employment contract through refusal to pay the lawful salary and terminating the contract without the requisite notice. Consequently he prays for damages amounting to kshs.2,080,875 including one months' salary in lieu of notice, salary for July and August 2014, and maximum compensation based on the contract salary of kshs. 138,725 per month.

3. The Respondent admits that she had employed the Claimant as alleged above but denies that he was entitled to any hardship allowance of 75% of the normal salary. According to the respondent, the claimant had completed another fixed term contract in which he was earning \$900 per month without any additional hardship allowance. That the contract dated 30.6.2014 was based on the same terms as in the former contract and as such the additional 75% hardship allowance stipulated in the new contract was a genuine mistake that renders the contract voidable.

4. On the other hand the respondent contends that her HR manager had no authority to negotiate terms of employment with employees and as such the claimant's contract of employment signed by the HR manager was invalid. In addition to the foregoing the respondent contents that she terminated the claimant's contract of employment after he refused to perform his duties. In conclusion the respondent

maintains that the suit is bereft of merits because the dispute was settled amicably and the claimant was paid all his dues under the said contract.

5. The suit was heard on 8.12.2014 and 16.6.2015 when the Claimant testified as CW1 and the Respondent called Charles Omoke Songoni as RW1. Thereafter the counsel for both parties filed written submissions.

ANALYSIS AND DETERMINATION

6. After considering the pleadings, evidence and submissions, it is clear that CW1 was employed by the Respondent as the a Heavy Equipment Mechanic/Store Keeper at D.R.Congo for a renewable 3 months fixed term contract. It is not in dispute that the claimant and the respondent through her HR manager signed a contract dated 30.6.2014 which led the claimant to travel to D.R. Congo on 2.7.2014 in performance of his part of the contract. There is also no dispute that the claimant did his work until a dispute regarding his salary and allowances arose as a result of which the claimant was replaced with another person and send back to Kenya on 4.8.2014. The issues for determination are:

a. Whether the premature termination of the Claimant's contract of employment by the respondents wrongful and unfair.

b. Whether the reliefs sought should be granted.

Wrongful and unfair termination of contract

7. Cw1 testified that he travelled to Congo on the basis of a contract dated 30.6.2014 signed between him and the respondent through her HR manager. That the said contract entitled him to \$900 salary plus hardship or out of station allowance of 75% of the said salary per month. That after working for the whole month of July 2014, the respondent purported to pay him only the salary of \$900 less the hardship allowance. That after protesting the claimant was given a new contract less hardship allowance and when he refused to sign he was terminated without notice and deported back to Kenya.

8. He therefore contends that the respondent has breached the express terms of the contract dated 30.6.2014 by refusing to pay the lawful salary and by terminating the contract without the requisite 14 days notice. He maintained that the contract was validly signed by the Rw1 on behalf of the respondent because the Managing Director (MD) Mr. Bhanji was abroad then. He denied that the dispute was amicably settled on 20.8.2014 and clarified that he endorsed on the purported agreement that he received the pay stated therein on without prejudice basis.

9. Rw1 admitted that he was asked to prepare contracts for all the workers including the claimant. He then called the MD through the General Manager (GM) Mr. James Opindi and confirmed that Cw1 was entitled to Hardship allowance of 75% of the normal salary of \$900 per month just like any other Kenyans working with him in D.R.Congo. Rw1 then prepared the contract for the claimant providing for monthly pay of \$900 plus hardship allowance of 75% of the \$900 just like the other employees of the respondent in Congo. He however contended that the said provision of hardship allowance was an error on his part because he had no authority to negotiate salary with employees on behalf of the respondent. He explained that when he sought to correct by preparing another contract the claimant declined to sign it, refused to work and returned to Kenya. That on arrival to Kenya Cw1 signed a settlement agreement and received his dues plus Certificate of service. He denied that the claimant was terminated by the respondents and contended that it is the claimant who resigned from his employment without notice protesting over unpaid hardship allowance.

10. 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.”

11. The court has perused the whole contract signed by the parties dated 30.6.2014 which is the basis for this suit. Clause 3 of the contract stipulated as follows:

“You will be paid USD 900 per month. The company will also pay 75% top up on your current basic salary as out of station benefit...the gross salary will be subjected to Statutory deductions by the Kenya Revenue Authority. You will also earn a daily allowance of USD 20.”

The foregoing express term of the contract is not ambiguous in any way and the court must enforce it as it is. In this courts view the respondent has not proved any mistake as alleged by the Rw1.

12. According to the Rw1’s testimony, the claimant refused to sign the contract without provision of the 75% out of station allowance prompting Rw1 to consult his seniors as to whether the claimant would be given the said allowance. That in the words of Rw1 under oath, the GM confirmed that the claimant was entitled the allowance and hence Rw1 include the allowance in the contract and the claimant signed. The Rw1 was therefore conscious of the terms of the contract when he drafted and signed it on behalf of the respondent.

13. In addition to the foregoing the court is satisfied on a balance of probability that the Rw1 had the authority to sign the contract on behalf of the respondent. In his testimony he confirmed that he was asked to prepare the contracts on behalf of the respondent while the MD was abroad. That the GM and the MD of the respondent were all aware of the said authority and did not testify in this case to deny that. The respondent is therefore bound by the contract signed by the Rw1 because he got the confirmation of the terms of the contract from the GM of whom the court takes judicial notice that he had general authority as a general agent of the respondent to commit the company to contractual obligations. Consequently the court finds that the respondent breached a valid contract through failure to pay a lawful benefits and by terminating his employment without serving 14 days notice.

Reliefs

14. In view of the foregoing findings, the court makes declaration that the termination of the claimant’s employment by the respondent was unfair and wrongful and that the claimant is entitled to damages. It is trite law that damages for breach of a fixed term, contract through premature termination, is the salary for the un-expired period of the contract plus any accrued employment benefits. In this case the contract was for three months and the salary was \$900 plus out of station allowance of 75% of the normal salary which equal to kshs. 138,600 based on the exchange rate of kshs 88 per dollar that was used by the respondent in paying the claimant on 20.8.2014.

15. The claimant is therefore awarded kshs.415,800 being salary for the contract period of 3 months from July to September 2014 less kshs.79,200 paid on 20.8.2014 leaving a net of kshs.336,600. There is no dispute on leave and overtime worked and as such the sum paid on 20.8.2014 in that respect will not be affected by this decision. The claim for unfair termination is however dismissed because the foregoing award has put the claimant to the position he would have been had worked for the whole contract period. In addition there was no guarantee that the claimant was to continue working beyond the 3 months contract period to warrant any award for unfair termination. Such award should only be made to employees who are hired on a contract of indefinite period when unfairly dismissed in order to cushion them while looking for another employment.

Disposition

16. For the reasons stated above, judgment is entered for the Claimant, against the respondents, declaring the termination of his employment wrongful and awarding him the sum of Kshs.336,600 plus costs and

interest from the date of filing the suit.

It is so ordered.

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

O.N. MAKAU

JUDGE