

REPUBLIC OF KENYA

EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 866 OF 2015

CHARLES MUNYUA.....CLAIMANT

VERSUS

MARIE STOPES KENYA.....RESPONDENT

RULING

1. Before me is the Claimant/Applicant's Notice of Motion Application dated 19th May 2015. In it, the Claimant seeks the sum of Kshs. 892,948.72/- being an admitted sum of the terminal dues for the Claimant/Applicant. The Claimant/Applicant seeks the deposit of the funds into Court in the alternative. The Application is supported by the affidavit of the Claimant sworn on 19th May 2015. The Respondent is opposed and filed a Replying Affidavit sworn on 28th July 2015 by Dennis Radak the Respondent's Director Corporate Services. In it, he deposes that the Claimant upon resignation was advised of the Respondent's acceptance of the resignation and by letter of 6th January 2015 was informed of the amount he would be entitled to which was salary for the notice period 1 month, annual leave days – 2, less relevant statutory deductions and any amounts owed to the Respondent. He deposed that there was a loan the Claimant/Applicant was servicing at the time of resignation and that the loan agreement specifically provided for an irrevocable instruction to deduct Kshs. 30,315.36 monthly. He deposed that it was also a specific term of the agreement that in the event of termination of the Claimant/Applicant's employment for any reason, the Respondent would transfer any final dues except those prohibited by law to the loan account. He deposed that the Respondent duly transferred the applicant's final dues to the bank to service whatever balance owed in respect of the loan. He denied the Respondent ever admitted owing the Claimant/Applicant the sum of Kshs. 893,984.72 in respect of terminal dues.
2. Mr. Kirimi urged the application for the Claimant/Applicant on 30th July 2015. He submitted that the Claimant/Applicant sought the order for payment of the sum of Kshs. 893,984.72 admitted to be due by the Respondent. He submitted that it was not contested that the Claimant was employed by the Respondent on 1st March 1980 and worked for 25 years before he left the Respondent's employ. He submitted that the Claimant/Applicant's claim related to his terminal dues which included the Claimant's service pay at the rate of 15 days for each year worked. He submitted that the Claimant sought early retirement by letter dated 3rd April 2014 and there was no response till 14th August 2014. The communications were contained in emails exchanged between the Claimant and the Director of HR Odhiambo Rodah. She apologized for the late response to Claimant's request and urged him to continue working as the issue of early retirement was under consideration. In one of the email correspondence there was an Excel worksheet attached which showed the sum of Kshs. 893,984.72. Counsel submitted that in the calculation of dues there was no mention of severance pay and that there was no reason for the discrimination and non-payment of the severance pay. He urged that the application be allowed.
3. Miss Oyombe opposed the application on behalf of the Respondent. She submitted that in order to determine if the Claimant/Applicant is entitled to the sum of Kshs. 893,984.72, it is important to look into the circumstances. She submitted that the figures calculated as dues were in relation to the Claimant's request for early retirement in April 2014. That request was turned down. She

submitted that even from the communication between the parties no admission of the sum of Kshs. 893,984.72 was ever made as being due or payable to the Claimant. She submitted that the figure subject of the present application was one of the sums claimed in the main Claim and there had been no demonstration that the Respondent was incapable of paying it should he prove his case against the Respondent. She submitted that it was not fair to bind the Respondent to pay figures made in a proposal made but later rejected and thus urged that the Court do dismiss the application with costs.

4. In a brief reprise, Mr. Kirimi for the Claimant/Applicant submitted that there was acknowledgement that there were calculations and that there was no communication that these proposals were no longer payable. He submitted that it was unfair for the Claimant to be denied what is rightfully due to him. The change in position was termed discriminatory to the Claimant and counsel submitted that in absence of a resolute denial, the sum which is not contested should be ordered.
5. The Claimant/Applicant has made an argument for payment of a sum stated to be admitted by the Respondent as being owed to the Claimant. I have reviewed the documents attached to the application being the emails of 28th July 2014 and 9th May 2014 as well as the tabulation of the sums payable. In these documents there is no indication whatsoever that the sum of Kshs. 893,984.72 was admitted as dues to the Claimant. It is clear there was a calculation of terminal dues and it would be stretching it to the outmost limit to suggest that the calculation of sums or figures that may be payable as terminal dues is an admission. In order to benefit from the provisions of Section 12 of the Industrial Court Act 2011, the admission must be express and unequivocal. The emails suggest there was no acceptance of the resignation and that the calculation was done pending resolution of the Claimant/Applicant's status. He subsequently gave notice on 17th December 2014 and this notice was accepted, albeit with regret. The Respondent therefore at the time of resignation did not make any admission as to the sums due and indicated in its letter that the Claimant was entitled to salary for the notice period of 1 month as well as annual leave days due. He was to communicate with the P & D department for the refund of his personal pension contribution from Jubilee and CFC Insurance. The upshot of the foregoing is that the Claimant/Applicant's application is devoid of merit and is dismissed with costs to the Respondent.

Orders accordingly.

Dated and delivered at Nairobi this 21st day of September 2015

Nzioki wa Makau

Judge