



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1313 OF 2012

NATHAN NGWILI MUANGE.....CLAIMANT

VS

MUKA MUKUU FARMERS

COOPERATIVE SOCIETY LTD.....RESPONDENT

AWARD

Introduction

1. Nathan Ngwili Muange brought this action against the Respondent by way of a statement of claim dated 1st August and filed in Court on 2nd August 2012. The Respondent's defence is contained in a reply dated 28th September 2012 and filed in Court on 1st October 2012.

2. The Claimant testified on his own behalf and thereafter called Philip Syele Kivevelo and Thomas Masila Ndaiya. On its part, the Respondent called Mwangangi Kitavi, Michael Mutote Muthukui and Joseph K. Maina. Both parties filed written submissions.

The Claimant's Case

3. The Claimant states that he was first employed by the Respondent in the position of Accountant at a monthly salary of Kshs.8,000.00 from November 1985 which was increased to Kshs.10,000.00 after probation. In August 1987, the Claimant was suspended and later dismissed. After following up the matter of his dismissal with the Respondent, the Claimant was paid Kshs.380,000.00 being salary during suspension and compensation for wrongful dismissal. According to the Claimant, there is an outstanding balance on this account and the Respondent has retained some of his property.

4. In the year 2000, the Respondent, through its Chairman, F.M. Nthunthi wrote to the Claimant on 17th October 2000 re-engaging him in the position of Chief Accountant. The Claimant commenced his new duties from 1st November 2000. His re-entry salary was Kshs.120,000.00 and was to be increased annually at the rate of 5% as stated in letter dated 2nd August 2006. In addition, the Respondent undertook to pay the Claimant his claim for retained property as well as dues owed after his dismissal in 1987. The Claimant further states that the Respondent was undergoing financial difficulties and he could not therefore be paid his salary from the onset of his re-engagement.

5. The Claimant worked until the year 2009 when the Respondent failed to assign him duties despite the fact that there was no letter terminating his services. The Claimant claims the following:

a) Salary and allowances from the year 2000.....Kshs.29,316,359.00

- b) Impounded motor vehicle.....500,000.00.00
- c) Impounded household goods.....105,500.00
- d) Unpaid claim for year 1987.....194,000.00
- e) Costs and interest

The Respondent's Case

6. In its reply filed on 1st October 2012, the Respondent admits having employed the Claimant in November 1985 at a monthly salary of Kshs. 8,000. The Claimant was dismissed on 10th September 1987 on grounds of gross misconduct. During his employment with the Respondent, the Claimant had been granted a loan and at the time of his dismissal, he had an outstanding unpaid balance of Kshs.77,562.00 inclusive of interest. The Claimant also owed the sum of Kshs.149,420.00 in unauthorised imprests.

7. The Respondent states that after the Claimant's dismissal in 1987, he did not resume employment. The Respondent avers that the following documents produced by the Claimant are unauthentic:

- a) Copy of the minutes of meeting held on 13th October 2000;
- b) Copy of reinstatement letter dated 17th October 2000;
- c) Copy of letter stating re-entry salary dated 2nd August 2006.

8. The Respondent goes on to state that between January 2005 and August 2007, the Society was facing extensive internal wrangles, mismanagement and a series of court cases. In addition, there was no legitimate Management Committee in place during this period and any actions taken were therefore not properly authorised. Pursuant to this state of affairs, an interim Management Committee was appointed for an initial period of three months which was variously extended until August 2007 when elections were conducted.

9. The Respondent contends that this claim is fraudulent and has been brought through collusion by some former members of the Management Committee with the sole intention of defrauding the Society.

Findings and Determination

10. The issues for determination in this case are as follows:

- a) Whether there was an employment relationship between the Claimant and the Respondent capable of enforcement by this Court;
- b) Whether the Claimant is entitled to the remedies sought.

Employment Relationship?

11. It is not in contest that the Claimant was in the Respondent's employment between 1985 and 1987. What is in issue is whether the Claimant was re-engaged as an employee in the year 2000. In support of his claim, the Claimant produced a letter dated 17th October 2000 stating as follows:

“Dear Sir,

RE: REINSTATEMENT AS SOCIETY ACCOUNTANT

Following the management committee meeting on 13th October 2000, your case was discussed at length and the decision that you be reinstated was arrived at.

You are therefore required to report to the Society on 1st November 2000. Your terms and salary will be subject to negotiation after consultations with the relevant institutions.

Your claim for your property and unpaid dues is acceptable and will be paid when funds will be available.

Yours faithfully

(Signed)

F.M. NTHUNTHI

(CHAIRMAN)”

12. This letter was apparently written on the strength of a decision taken at a meeting of the full Management Committee held on 20th October 2000. Minute 4(c) of the said minutes states as follows:

“After long deliberations the chairman floated the idea of recalling Mr. Nathan Muange if he is willing but was afraid that he might be expensive, however members felt that the case is a big one and if the society succeeds, it can afford an accountant of any calibre because the case needs a good adviser.”

13. The Respondent cast doubt on the authenticity of both the letter and the minutes cited above. There was however evidence that the Claimant actually did some work for the Respondent after the cessation of his first employment in 1987. The fundamental question should therefore be whether this constituted an employer/employee relationship as defined in law.

14. If indeed the Claimant was employed by the letter dated 17th October 2000, his employment would have been governed by the repealed Employment Act (Cap 226). That Act defines an employee as:

“an individual employed for wages or salary and includes an apprentice and an indentured learner”

15. The same statute defines an employer as:

“any person, or public body or any firm, corporation or company, who or which has entered into a contract of service to employ any individual, and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company”

16. The question then is whether the letter dated 17th October 2000 created an employment relationship as known in law. Significantly, the letter did not specify the monthly salary payable to the Claimant. It seems to me therefore that this letter is no more than a good wish and the fact that a salary figure was given six years later by letter dated 2nd August 2006 deepens the Court's doubt on the existence of an employment relationship between the Claimant and the Respondent.

17. In *John Kamau Mburu v Program for Appropriate Technology in Health (PATH) & Another [2015] eKLR* this Court held that an employment relationship is not the same as a work relationship and the mere fact that parties have some form of a work arrangement does not necessarily give rise to an employment relationship.

18. The Claimant himself told the Court that he started operating a private professional office from as far back as 1987. He added that the Respondent's Management Committee allowed him to carry the Society's books of account for updating in his private offices in Tala and Machakos. The Claimant further testified that apart from the Respondent, he had other clients.

19. The Claimant's testimony in this regard was corroborated by his witness, Philip Syele Kivevelo who

also told the Court that the Claimant was hired mainly to give technical advice on a court case between the Society and the Cooperative Bank of Kenya. The Claimant's third witness, Thomas Masila Ndaiya testified on similar lines.

20. From the foregoing, it seems to me that after his initial employment with the Respondent which terminated in 1987, there was no other employment relationship although there was a work relationship whereby the Claimant worked as an independent contractor. By dint of Article 162(2)(a) of the Constitution as read together with Section 12 (1) (a) the Employment and Labour Relations Court Act, this Court has no jurisdiction to entertain claims arising from a work relationship that is not otherwise an employment relationship.

21. With regard to the claims arising from the Claimant's initial employment with the Respondent, the only thing to say is that these claims are not only statute barred but were also not proved. The result is that the Claimant's entire claim fails and is dismissed with costs to the Respondent.

22. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 11TH DAY OF DECEMBER 2015

LINNET NDOLO

JUDGE

Appearance:

Mr Munoko for the Claimant

Mr. Nthiwa for the Respondent