



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 130 OF 2013

SHLOMO JEROME .....CLAIMANT

VERSUS

HACIENDA DEVELOPMENT HOLDINGS LTD .....RESPONDENT

## **J U D G M E N T**

### **BACKGROUND**

The Claimant was employed by the respondent on 14/8/2007 as a project manager vide a written contract. His monthly salary was USD7000 net of which USD2000 was to be in Kenya shillings. He was also entitled to housing, motor vehicle among other allowances. The claimant now brings this suit accusing the respondent of breach of the said contract and claims US\$ 170,559.12 plus costs and interest or Kenya shillings at the exchange rate prevailing at the time of the judgment.

In her defence, the respondent has denied the alleged breach of contract and avers that a notice was served to all her employees in January 2008 that salary was to be reduced following financial problems due to the 2007 post election violence. The reduced wages called “maintenance pay” for the claimant was set at ksh.150,000/ per month in addition to housing expenses. That the problem ended in January 2009 but recurred shortly thereafter.

According to the defence the claimant voluntarily accepted the reduced pay in preference to losing his job. In addition the defence counterclaims for ksh.982,355 being the amount erroneously paid to him on account of contractual entitlements and from petty cash account.

After many adjournments, th case was heard exparte on 26/11/2013 when the claimant testified as CW1.

### **CLAIMANTS CASE**

He confirmed by a written agreement dated 14/8/2007 that he was employed by the respondent on the said date as a Project Manager at Mwakirunge, Mombasa. His net salary was US\$ 7000 per month. He was also entitled to a double cabin car and 3 bedroomed furnished apartment near Nyali or Tamarid Resort. He was also entitled to a full medical cover by AAR, 2 return air tickets, bonus of of US\$300 per house and US\$200 per apartment. The respondent however breached the contract soon after it started but CW1 did not take any precipitate action because the managing Director was his Bestman in his (CW1) wedding.

The matter worsened when the Director of the respondent differed and the project halted in November

2009 after only 10 houses were finished. By then the respondent had only paid a total of ksh5,300,000 to the claimant. CW1 prayed for US\$230,000 being salary for September 2007 to November 2009 less ksh.5,300,000 paid. He abandoned the other claim and asked the court to award the claim for salary arrears only.

He denied the counterclaim and maintained that he only received ksh.5.3 million which is known by the tax Authority. He referred the court to his calculation on page 13 of his claim. He admitted that due to economic hardships he consented to reduction of his salary on temporary basis to US\$5000 per month between March 2009 and September 2009 and then resumed the salary of US\$ 7000.

### **ANALYSIS AND DETERMINATION**

The issues for determination arising from the pleading and the evidence adduced are:

1. **whether the respondent has breached the contract of employment dated 14/8/2007 by failing to pay the agreed salary.**
2. **Whether the counter claim has merits.**
3. **Whether the claimant is entitled to any remedy.**

#### **Was there breach of contract?**

It has not been denied that the claimant was employed by the respondent for a salary of U\$ 7000 per month. It has also not be contested by evidence that the reduction of salary agreed between the claimant and the respondent was from US\$7000 to US\$5000 per month and only for March to September 2009. The calculations on page 13 of the memorandum of claim shows total salary due to the claimant for the period between September 2007 and October 2009 being USD168000. Out of the said USD168000, the claimant was paid ksh.5.3 million which he has invite the court to factor while making the final decision.

From the foregoing scenario, it is clear the respondent failed to pay the claimant all his due salary as per the contract dated 14/8/2007. consequently the court finds that the respondent breached the contract of employment to the extent of the outstanding salary due to the claimant.

#### **Does the counter claim have merit?**

No evidence was adduced to prove the counterclaim as the matter proceeded exparte. The same is therefore dismissed for want of prosecution. In any event even if the same was prosecuted using the documents already on record, the defence would not succeed in proving that she paid to the claimant a total of US\$ 168000 during the period of his employment.

#### **The remedy available to the claimant**

In view of the court's finds above, the evidence by the claimant was not rebutted. Consequently the claim for US\$168000 less Ksh.5.3 million must succeed. The claimant has added thereto interest of US\$62,790 to make the total claim to US\$230790 less ksh.5.3 million.

The court will not grant the interest of US\$62,790 because it is not based on the contract. The award of the court will therefore be US\$168000 less paid ksh.5.3 million. The claimant asked that an exchange rate of kshs.84 per dollar be applied. The court agrees with that request because it is within the average exchange rate now prevailing. The claimant will therefore get ksh.14,112,000 less ksh.5,300,000 = ksh.8,812,000. The court will not consider the other prayers because the claimant abandoned them voluntarily.

### **DISPOSITION**

Judgment is therefore entered for the claimant against the respondent for Ksh.8,812,000 plus costs and interest at court rate from the date of filing the suit.

**Dated, Signed and delivered this 14<sup>th</sup> day of February 2014.**

**O. N. Makau**

**Judge**