



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 488 OF 2013

CHURCHILL ONGALO CLAIMANT

VERSUS

K. K. SECURITY LIMITED RESPONDENT

Mr. Odawa for Claimant

M/S Bubi for Respondent

JUDGMENT

1. By a notice of motion dated 8th April 2013, the Claimant/Applicant sought interim orders to have the matter heard on an urgent basis and pending the hearing of the matter interparties, the Respondent be restrained from varying his terms of service specified in a letter of appointment dated 10th May 2012 and also the purported new terms in a letter dated 26th March 2013, be stayed.

Interim orders were granted and the main suit proceeded to be heard by consent of the parties.

2. **Facts of the case**

The Claimant was employed by the Respondent by a letter of offer dated 10th May 2012 as a Management Trainee at a consolidated salary of Kshs. 280,000/=. The Claimant accepted the terms of employment by appending his signature on the said letter on 11th May, 2012.

In terms of the contract of employment, a schedule of duties and responsibilities were to be given to him upon completion of training. Upon completion of training, the terms remained as per the letter dated 10th May 2012.

3. On 26th March 2013, the Respondent wrote to the claimant changing his terms of service as follows;

- i. The gross consolidated salary was reduced from Kshs. 280,000/= to Kshs. 100,000/=;
- ii. Kshs. 5000/= airtime;
- iii. Kshs. 25,000/= for leave allowance;
- iv. Kshs. 20,000 fuel allowance;

Total Kshs. 150,000/=.

The Respondent also introduced a new term advancing to the Claimant a monthly facility of Kshs. 140,000/= for 6 months which sum was refundable to the Respondent within 6 months, less commissions earned during the period.

The Claimant rejected the change of terms indicating that the terms were not favourable and the Respondent had jeopardised his career prospects by poaching him from a facility management position upon false promises of better terms.

The Claimant submits that the change of terms unilaterally was unlawful and unfair taking all the circumstances of the case into account and was an attempt by the Respondent to use the position of strength to coerce the Claimant to accept inferior terms of service.

4. The Claimant prays the Court to:

- a. declare the Respondent's letter dated 26th March 2013, seeking to vary his terms of employment unlawful, unfair and null and void;
- b. injunct the Respondent from altering the Claimant's terms of employment as aforesaid and that the Respondent continues to remunerate him as per the contract of employment dated 10th May 2012.

5. The Respondent filed a Response to the statement of Response dated 14th May 2013 in which the particulars of employment as per the letter of appointment dated 20th May 2012 are admitted.

Respondent however states that in terms thereof, the Claimant was to be deployed to the available position in management with the Respondent upon completion of his training.

That the Claimant worked as a Management Trainee for 10 months and subsequently, on 26th March 2013, the Respondent offered the Claimant a position as the Relationship Manager corporate Accounts with the Respondent's group of companies on the changed terms contained in the letter of offer dated 26th March 2013.

6. That the Claimant accepted the offer by counter signing the letter on 27th March 2013 and the same is annexed hereto as appendix 4. That this was preceded by a one on one meeting with the Group Human Resource Manager, **Mr. Willis Ayieko** and copies of email exchanged between the Claimant and Mr. Willis Ayieko are annexed as Appendix 6 to the Response.

7. That the Claimant repudiated the agreement dated 26th March 2013 and his advocates demanded a retraction of the letter.

8. That, pursuant to that repudiation, the Respondent offered the Claimant the position of Project Manager on a short assignment with effect from 11th April, 2013 on a gross consolidated salary of Kshs. 330,000/= by a letter dated 16th April 2013. The Claimant accepted the offer by countersigning the letter on 18th April 2013. This letter is Appendix 9 to the statement of Response.

9. The Claimant again repudiated this agreement contained in the letter dated 16th April 2013 by instituting this suit in which he demands reinstatement to the position of a Management Trainee as set out in the letter of offer of 10th May 2012.

The Respondent has denied poaching the Claimant on false pretences so as to derail his career but instead has offered him management positions upon completion of his management Trainee

position.

10. The Respondent has continued to comply with the order of the Court issued on 18th April 2013, by keeping the Claimant in his initial position as employed.

11. **Issues for determination:**

- i. Was the Respondent at liberty to unilaterally vary the terms and conditions of the initial contract?
- ii. Did the Claimant waive his right to decline the variation by accepting the said terms?
- iii. What remedy if at all is available to the Claimant?

12. The contract of employment concluded on 11th May 2012, upon acceptance by the Claimant of the offer of employment dated 10th May 2012 was binding on the parties subject to the service of the three (3) months probation period.

Neither of the parties has purported to terminate the contract in the manner provided in the contract to date.

The purported substantive appointment in terms of the letter dated 26th March 2013, and the subsequent short term offer by a letter dated 16th April 2013 are inconsistent with the substantive contract which still persists to date and has not been terminated.

To the extent that the two subsequent offers to the Claimant contained inferior terms than those contained in the initial contract and the same do not appear to have been negotiated on equal terms between the parties, the same are null and void and cannot be construed to have in law or fact, varied or terminated the initial contract of employment.

However, the contract of employment concluded on 11th May 2012, has room for provision of “A *schedule of duties and responsibilities*” upon completion of the training. The 1st issue is decided in the negative.

13. All that the Respondent needed to do was to designate the Claimant as a manager with specific duties and responsibilities pursuant to the initial contract and not attempt to repudiate the said contract unilaterally.

After all, the Claimant was attracted to the Respondent company upon recognition of specific skills and experience so as to provide specific services to the Respondent.

The attempt to deploy the Claimant to portfolios completely inconsistent with his abilities and on new terms was in the court’s view not done in good faith but was in furtherance of the attempted repudiation of his initial contract of employment upon competitive recruitment.

As long as the contract of employment remains in place, both parties should honour its letter and spirit so as to derive mutual benefit from it. The second issue is also determined in the negative.

14. The Court in arriving at this conclusion has considered the oral evidence by both parties and has noted the wish of the Claimant to continue serving the Respondent in a suitable position. To this extent the Respondent should exercise its prerogative upon consultation with the Claimant to allocate the Claimant a schedule of duties and responsibilities within the confines of the contract of employment concluded on 11th May 2012 between the parties.

15. Accordingly, the Court;

- a. declares that the contract of employment dated 10th May 2012 between the parties and concluded on 11th May 2012 is still in place and the Respondent is directed to honour the same by designating a schedule of duties and responsibilities to the Claimant in terms thereof until the contract is otherwise lawfully terminated by either party.
- b. that the subsequent variation of terms of service by a letter dated 26th March 2013 and 16th April 2013, are inconsistent with the contract of employment concluded on 11th May 2012 and were not executed on equal terms and are therefore null and void.
- c. The Respondent to pay costs of this suit.

Dated and Delivered at Nairobi this 9th day of April, 2014.

MATHEWS. N. NDUMA

PRESIDING JUDGE