



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 118/2013

(BEFORE HON. JUSTICE HELLEN WASILWA ON 1ST APRIL, 2014)

DR. ERASTO OMOLLO CLAIMANT

-VERSUS-

UZIMA UNIVERSITY COLLEGE 1ST RESPONDENT

CATHOLIC UNIVERSITY OF EASTERN AFRICA..... 2ND RESPONDENT

JUDGMENT

The claimant herein Dr. Erasto Omollo filed his plaint on 7.5.2013 through the firm of Angu Kitigin & Co. Advocates. It is the claimant's contention that by a letter dated 3.6.2012, the 1st respondent Uzima University College, a constituent college of the 2nd respondent, the Catholic University of Eastern Africa offered him employment as an Associate Professor in the Department of Behavioral Sciences and Social Sciences. The claimant's duties were stated as follows through this appointment letter:-

- (a) To contribute towards the achievement of the mission and vision of the University.**
- (b) To support development of a robust and sustainable department of Behavioral and Social Sciences and related disciplines at Uzima University.**
- (c) To contribute effectively to the creation and circulation of knowledge by providing effective support to teaching, development, of research competencies and promotion of publishing.**
- (d) To enrich the intellectual development of students through interaction and academic counseling in his area of specialization.**
- (e) To support and promote institution building and extra – curriculum activities of the college in order to create a rich and vibrant intellectual environment at Uzima University.**

In his evidence, the claimant informed court that prior to taking up this appointment, he applied and was granted leave of absence from his then employer Moi University. He then joined the respondents employment in December 2012 and he worked there upto August 2013 for 9 months. The claimant further contends that he was expected to be paid Ksh 356,823/= per month but in the time he worked, he was only paid Ksh 584,505 leaving Ksh 2,626,902 unpaid which he now claims from the respondents.

In cross – examination by 1st respondent, the claimant told court that he received the letter on Sabbatical leave dated 26.11.2012 and he reported on duty on 3.12.2012. That the contract was for 1 year but he

served 9 months only because he didn't ask for more Sabbatical time. He told court that he taught students as expected and administered exams in July 2013. He however stated that he retained the results of the students so that he could be paid. He still retains the results and states he will only release them when he is paid.

Cross – examined by 2nd respondent, he told court that he didn't interact directly with the Catholic University of Eastern Africa and that he never wrote a demand notice to Catholic University of Eastern Africa.

The 1st respondent filed their defence on 31.5.2013 through the firm of Wasuna & Company Advocates. They also called one witness, their Principle who relied fully on his witness statement filed in court and dated 31.5.2012. It is the 1st respondent's evidence that the claimant was employed by them vide a letter dated 3.6.2012 and the contract was to commence on the date the claimant reported for duty. By then the claimant was an employee of Moi University and thus had to obtain Sabbatical leave from Moi University. The claimant failed to obtain Sabbatical leave until 26.11.2012 6 months later. The claimant was thus given 9 months Sabbatical leave from Moi University effective 3.12.2012 to run until 2.9.2013. The respondents contend that the letter granting the claimant leave was only received by the 1st respondent on or about the 22nd March 2013.

He stated that, in the meantime, the claimant was given a contract to work part-time from August 2012 and was paid on hourly basis. That however, the claimant failed to deliver on expectations as he didn't devote himself full-time to the service of 1st respondent, he was unable to be consulted by the students during working hours, he was unable to teach more than a few hours per teaching day. That he only made technical appearances whereas as a head of Department he was expected to be full-time. He therefore failed to contribute towards the achievement of the vision and mission of the University. They asked court to dismiss his case accordingly.

The 2nd respondent on the other hand filed their defence on 28.6.2013 through the firm of Muthoga Gaturu and Company Advocates. They also filed a witness statement of their witness Angela Kiptoo who told court that the 2nd respondent does not deal with the administrative and staff matters of the 1st respondent and that this is in line with the Constituent College Convention. She stated that Section 15 of the Constituent College Convention deals with staff of the Constituent College and that the Section provides that all members of the Constituent College are appointed by the Board of Governors where membership is outlined in Section 10 of the said Convention. Further it is the witness's contention that Section 2 and 6 of the Charter of the Catholic University of Eastern African (Legal Notice No. 397 of 1992) state firmly that Constituent Colleges act autonomously in administrative functions, and are only subject to the University in academic matters. That the 2nd respondent is therefore a stranger to the facts of this case and asks the court to dismiss the case against them accordingly. The 2nd respondent was able to annex the Catholic University of Eastern Africa Constituent Colleges Convention as exhibit before court.

The parties herein also filed their respective submissions. In their submissions, the claimant asked court to find for him as prayed whereas the respondents asked court to dismiss the claim accordingly. Upon consideration of evidence and submissions, issues for determination are as follows:-

Issues for determination:-

- 1. Whether the claimant was engaged by the 1st respondent.**
- 2. What were the terms and conditions of that engagement.**
- 3. Whether there was any engagement between the claimant and 2nd respondent.**
- 4. Whether there was any breach of contract between claimant and respondents.**
- 5. Whether claimant is entitled to remedies sought.**

On 1st issue, from the contract letter between claimant and respondents is the one dated 3.6.2012 stating that the appointment is effective from the date the claimant reports to work and it is a one year contract with a salary of Ksh 356,823 per month. The letter is dated and signed by the claimant however on

29.11.2012 showing that the appointment effectively took place after the 29.11.2012. In the same letter the claimant indicated that he will report on duty on 3.12.2012. The Sabbatical leave of the claimant was also approved with effect from 3.12.2012 which coincides with that proposition that the effective day of the engagement was 3.12.2012.

The terms of the engagement are as contained in the appointment letter dated 3.6.2012 – a salary of Ksh 356,823 all inclusive and other terms are contained in Uzima University Terms of Service.

On 3rd issue, there is no evidence that there was a contract between claimant and the 2nd respondent. The Catholic University of Eastern Africa Constituent College Convention at Section 15(5) is explicit that:-

“All members of staff of the Constituent College shall;

(a) be subject to the general authority of the Board of Governors and of the Principal.

(b) be deemed to be employed on a full-time basis except as otherwise specifically provided for by the statutes or by the terms of a particular appointment.”

Further Section 2 of the Charter for the Catholic University of Eastern Africa defines a Constituent College as **“an academic institution which though autonomous administratively is conceptually an integral part of the main University for academic purposes”**

There is no proof whatsoever that the claimant and 2nd respondent had any contractual relationship and it is the finding of this court that they were unprocedurally enjoined to this suit. The suit against the 2nd respondent must therefore fail accordingly. I order claimant to pay 2nd respondent costs of this suit.

On the 4th issue, it is claimed by the claimant that he was employed by the 1st respondent as an Associate Professor. The letter of appointment discussed above bears that evidence. Terms and conditions of service of that engagement explain the remuneration payable and the other terms to govern the relationship including duties of the claimant. The respondent contend that the claimant didn't perform his duties as expected. However prior to this case, there is no complaint levelled against the claimant of his inadequacy to perform his duties or his unavailability or any other complaint of any nature. The contention that he didn't perform his work is therefore an afterthought raised after he complaints of not being paid as per the contract terms. In any case if he was not performing his part of the bargain, the 1st respondent should have exercised the terms in Uzima University Terms of Service and terminated his contract. This was never done. It is therefore this court's findings that indeed the claimant served the 1st respondent but he was not remunerated as expected. I therefore find the 1st respondent breached their part of the bargain.

It is therefore established that the claimant didn't receive his wages as expected. For the 9 months he worked, he was entitled to be paid;

$$9 \times 356,823 = \text{Ksh } 3,211,407/=$$

He told court that he was paid Ksh 584,505 leaving a balance of **Ksh 2,626,902/=**. I therefore enter judgment for the claimant as against the 1st respondent for the said amount of **Ksh 2,626,902/=** plus costs and interest. The claimant on his part must as of necessity and immediately release results of the exams he administered to students.

HELLEN WASILWA

JUDGE

1/4/2014

Appearances:-

Angu for claimant present

Lore for 1st respondent present

Lore h/b Okeyo for 2nd respondent present

CC. Wamache