



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA

(BIMA TOWERS)

CAUSE NO. 371 OF 2013

(initially Mombasa High Court Civil Case No. 264 of 2005- later Mombasa High Court Civil Case No. 164 of 2006)

SHASHIKANT CHANDUBHAI PATEL.....CLAIMANT

v

ORIENTAL COMMERCIAL BANK LTD.....RESPONDENT

JUDGMENT

1. This case has been in the Courts for inordinately long. Before the transfer of the suit to the Industrial Court from the High Court, it had been handled by about 7 judges, some now in the Court of Appeal and the Supreme Court.
2. Shashikant Chandubhai Patel (Claimant) filed a Plaint before the Mombasa High Court against Oriental Commercial Bank Ltd (Respondent) on 8 December 2005 seeking terminal dues and damages for breach of contract.
3. The Respondent was served and on 24 January 2006, it filed a Statement of Defence. Thereafter two applications (to deposit security and to strike out the Plaint) were filed. The applications were disposed off and notices of appeal filed. The Court was not informed of the fate of the appeals.
4. On 3 September 2009 the Claimant filed his List of Documents and on 30 October 2009 list of issues. The Respondent filed its List of Documents on 6 March 2012 and Supplementary List of Documents on 18 June 2012.
5. On 10 December 2013 after listening to both parties, I directed that the suit proceeds from where it had reached and after a false start, the Respondent's case was conducted on 19 March 2014.

Claimant's pleadings and case

6. The Claimant's case is that he entered into a 2 year renewable contract (contract 1) with the Respondent (then known as Delphis Bank Ltd) on or around 15 October 1992 as a Regional Manager based in Mombasa. The employment was to commence on 7 December 1992 but he started work on 11 January 1993.
7. Contract 1 expired on or around 7 December 1994 but the Claimant continued to work without a written contract until 31 May 1996 when a new contract was entered into (contract 2).The contract was backdated to commence on 6 December 1994 and expire on 6 December 1996.

8. Similarly contract 2 expired but was not formally renewed until 7 May 1999 when the Claimant signed a new 2 year contract (contract 3) to expire on 7 May 2001.
9. Contract 3 expired and a new 2 year contract was signed on 3 April 2001 (contract 4). The commencement date of contract 4 was stated as 6 May 2001 and it was to automatically expire on 7 May 2003.
10. Contract 4 expired and on 7 June 2003 the Respondent's Managing Director wrote to the Claimant informing him that contract 4 had been renewed for a further one year with effect from 8 May 2003 (contract 5). The renewal letter further informed the Claimant of his new consolidated salary of Kshs 425,652/-. The contract tenure expired in May 2004.
11. On 8 August 2004 the Respondent's General Manager wrote to the Claimant advising him that the Board of Directors had agreed to renew his employment for a further 1 year but on revised terms (contract 6). The revision concerned the reduction of the Claimant's salary from Kshs 425,652/- to Kshs 297,956/40 effective from 1 September 2004.
12. The Claimant was not happy with the reduction of the salary and on 6 September 2004 he responded to the General Manager's letter informing him that the change was unilateral and that his employment was still governed by terms of contract 4 signed on 3 April 2001. He sought confirmation that the reduction in salary would not be implemented.
13. The General Manager replied to the letter of complaint on 8 September 2004 and informed the Claimant that he was arranging to appraise the Board of Directors for further guidance.
14. According to the Claimant, there was a lull until 30 March 2005 when the General Manager wrote to him informing him that his contract was expiring on 7 May 2005 and would not be renewed. He was further advised to hand over by close of business on 31 March 2005 and proceed on leave to await his terminal dues.
15. The Claimant pleaded that since he did not accept the renewal advised through the General Manager's letter of 8 August 2004, there was no formal contract in existence after 7 May 2004 and therefore his employment was governed by the Respondent's Bank Operation Manual/ Human Resources Policy Manual and that in case of any conflict between the Manual and Contract of employment, the provisions of the contract were to prevail. In any event, the Claimant pleaded there was no conflict and that on termination of employment he was entitled to severance pay of Kshs 3,960,705/- , three months' salary in lieu of notice of Kshs 1,276,956/- and Kshs 900,000/- for loss of vehicle with driver for 3 months (he used hire rate of Kshs 6,000/- per day).
16. When giving evidence the Claimant stated that he was entitled to three months notice of termination by virtue of clause 17 of contract 4. He also testified that his termination was a redundancy covered by clause 8.3.10 (d) of the Staff Manual and therefore he was entitled to additional compensation. He also stated that his last salary was Kshs 425,000/- and that it was not reduced despite the letter from the General Manager.
17. On the car expenses he stated that he was claiming loss of user from 1 April 2005 to 7 May 2005.
18. In cross examination the Claimant admitted that he was a member of the Respondent's Group Life Pension Scheme (contributory scheme) and he was paid Kshs 1,033,644/- and stated that he was not declared redundant.

Respondent's pleadings and case

19. The Respondent denied entering into a contract with the Claimant on or around 15 October 1992, terminating his employment without notice or that the Claimant worked at times without a written contract.
20. Contracts 2 to 4 and their terms were admitted save that contract 6 were on the same terms and conditions as contract 4 but on a revised salary and that the Claimant by continuing to work, accepted the reduced salary.
21. The Respondent further denied that the Claimant's terms and conditions of employment were governed by the Bank Operation Manual/Human Resources Policy Manual. In written submissions, the Respondent took the position that the Manual was a draft which was never passed and that the Claimant confirmed the Manual was not signed.
22. The Respondent in paragraph 10 of the Response admitted terminating the services of the Claimant through letter dated 30 March 2005 and taking away his chauffeur driven car but also denied the Claimant was entitled to the reliefs sought.

23. The Respondent called one witness, Josphat Makori Nyamache, a Manager in its Treasury department. The witness confirmed the Claimant was employed on renewable contracts and indeed the contracts were renewed severally.
24. The witness also confirmed the (attempted) revision of the Claimant's salary downwards, and that the Claimant protested in writing and that pending a decision by the Board, the Claimant continued enjoying the contested salary.
25. According to the witness, the Claimant was paid prorated salary for days worked in May 2005, accrued leave and pension, and that the Respondent had opted not to renew the contract upon expiry on 7 May 2005. The Claimant was given a pay slip and letter indicating his final dues, and that the pension amounted to terminal dues.
26. The witness also testified that the Claimant's employment was not governed by the Staff Manual but his contract.
27. In cross examination, the witness stated that the Staff Manual applied to all staff without exception, that he did not participate in deliberations to dismiss the Claimant and that the Claimant was not declared redundant.

Issues for determination

28. Arising from the pleadings, evidence and written submissions, the issues arising for determination in my view are, broadly, what were the terms and conditions of contract 6, or narrowly whether the Bank Operation Manual/Human Resources Policy Manual applied to the Claimant, whether the services of the Claimant were terminated or the contract expired by effluxion of time and whether the Claimant is entitled to the dues/reliefs sought.
29. The Court must disclose that the Respondent inserted the wrong case number in its submissions and the same were brought to the attention of the Court on the eve of pronouncing of judgment on 15 May 2014 hence the postponement to 30 May 2014.

Whether the Bank Operation Manual/ Human Resources Policy Manual was applicable to the Claimant

30. Rather than discuss the broad question specifically, the Court will address the narrow question first but the discussion of the broad question will traverse/overlap the narrow question and whether the contract expired by effluxion of time and remedies.
31. The Court however needs to dispose of the contention by the Respondent in submissions that the Bank Operation Manual was a draft and that the same was confirmed by the Claimant in testimony.
32. The Manual produced was dated January 2003. Clauses 2 and 4 of contract 2 made explicit references to the Claimant being bound by the Bank's Standing Instructions, Manuals and Instruction Circulars and Staff Manuals respectively. Clause 4 of contract 4 had a similar provision. This contract was executed in 1996. This can only mean that there was a Manual in 1996 even if it is not the 2003 Manual. The Respondent's witness did not address the question whether the Manual was a draft. His evidence was that the Manual applied to all staff without exception, but not the Claimant.
33. Contract 1 did not imply or incorporate any terms and conditions from another document into the relationship between the Claimant and the Respondent.
34. Clause 4 of Contract 2 provided that

The Employee shall be bound by the rules of employment of the Bank as set out in the Staff Manual and the Staff Loans Manual save that in the event of a conflict between such rules and regulations with the terms and conditions of this contract of employment then this contract shall prevail.

35. Contract 3 retained clause 4 on the Claimant being bound by the Staff Manual and Staff Loans Manual save for conflicts. When contract 3 expired the Respondent renewed it on the same terms and conditions except for salary which was consolidated. This was also signified to the Claimant when a further renewal was considered through letter dated 28 August 2004.
36. Considering clause 4 in the contracts alluded to, it is obvious to the Court that the Claimant's

- employment was subject to the Bank Operation/Human Resource Staff Policy Manual except in instances of conflict where the contract of employment would prevail. And there must have been a Manual as early as 1996 otherwise the reference to it would have been superfluous.
37. In my view, the Respondent cannot run away from the 2003 Manual on the basis that it was a draft or was not applicable to the Claimant.
 38. The sources of terms and conditions governing an employment relationship can be either express or implied. Express terms find their base in a written contract document between the parties. It can be a contract between the parties or a collective bargaining agreement/workforce agreement. Express terms may also be found/incorporated from statutory provisions or statements. The parties expressly incorporated the terms of a Manual into their relationship.
 39. Terms may also be Implied as a result of statute or common law. Terms implied by the common law serve to fill in factual gaps or effect the mutual intention of the parties as a matter of business efficacy or reasonableness.
 40. Management practices, custom or policies may also become implied terms.
 41. Were my conclusion on the applicability of the Manual wrong, I would find that the relationship between the parties during 'contract 6' was impliedly an employment at will governed by the common law (employment at will is a controversial doctrine and in recent times has been discredited in academic writings and altered by statute-see for example section 45 of the Employment Act, 2007). This would be so because at the material time of separation, an employer could dismiss an employee without cause provided appropriate reasonable/damages in notice was given or paid.

Whether the services of the Claimant were terminated or the contract expired by effluxion of time

42. There can be no dispute that the relationship between the Claimant and the Respondent was encapsulated in written fixed contracts which were renewed severally, at times after expiry.
43. The last substantive contract (contract 4) the parties signed was the Memorandum of Agreement dated 3 April 2001. Clause 8 of the agreement provided expressly that the contract would be for two years commencing 6 May 2001 and expiring 7 May 2003.
44. Contract 4 was renewed through a letter dated 7 June 2003 (contract 5) from the Respondent's Managing Director to the Claimant. The Claimant signified his acceptance of the contract. The letter was clear that save for consolidation of salary, all other terms and conditions of the contract would remain.
45. In my view, the terms and conditions provided for in the Memorandum of Agreement signed on 3 April 2001 (contract 4) remained valid and applicable during the term of contract 5 except that the salary was now a consolidated salary.
46. Contract 5 was renewed for one year and therefore the relationship should have come to an end on or around 8 May 2004. On 28 August 2004, about three months after the contract was meant to come to an end, the Respondent's General Manager wrote to the Claimant informing him that the Board of Directors had agreed to a further one year renewal but on a revised salary (contract 6). The salary was reduced from Kshs 425,652/- to Kshs 297,956/40. All other terms were to remain unchanged.
47. The Claimant protested what he referred to as a unilateral change of one of the terms and conditions of employment. The question which arises is whether the Respondent was acting within the terms of the expired contracts (contracts 4 and 5) to revise the remuneration.
48. To my mind, contract 5 which had imported the terms of contract 4 had expired and it was open to the parties to agree new terms and conditions of employment. And therefore when the Respondent wrote to the Claimant on 28 August 2004 (contract 6), it was well within its party autonomy to inform the Claimant that it would renew the contract but with/under revised (new) terms. The Claimant, also exercising his party autonomy was free to accept or reject the renewal on revised (new) terms.
49. He did so and wrote to the Respondent on 6 September 2004. In the letter, the Claimant was informing the Respondent that what it had done was illegal and unilateral. The authority for the Claimant's assertions was clause 21 of contract 4 which provided

Any amendments to, alterations of the terms and conditions herein contained shall be made in writing, signed by the Employer and employee and annexed hereto.

50. In my humble view, clause 21 applied only to amendments during the currency and validity of contract 4 and 5 in view of the letter dated 7 June 2003. When the Respondent was proposing to enter into contract 6 by renewing contract 5, albeit *post facto*, contract 5 had expired and its terms and conditions did not bind any of the party unless they agreed.
51. The Respondent's letter of 28 August 2004 was trying to incorporate but with a revision on salary the terms and conditions of contract 4 into a new contract (contract 6). But there was no agreement of minds on the remuneration. The Claimant wrote a letter protesting the setting of unilateral terms.
52. The Respondent on receiving the protest letter from the Claimant dated 6 September 2004 informed him that the Respondent's Board of Directors would give further guidance on the matter.
53. It appears that the Board of Directors did not give any guidance on the matter and more importantly, the Respondent allowed and accepted the Claimant to continue offering his services and paid him a salary equivalent to what it was paying him under the expired contract 4 and 5.
54. By allowing the Claimant to work beyond the end date contract 5 before negotiating and consummating/agreeing on terms, the Respondent was giving an implied agreement that the employment relationship was one at will subject to the Bank Operation Manual.
55. On this basis, the Court readily finds that the terms and conditions of contracts 4 and 5 were implied into the relationship between the parties based on management practice and custom and the said terms were applicable pending guidance or repudiation from the Respondent's Board.
56. The discussion therefore now turns to termination provisions in contracts 4 and 5 and their implication regarding termination of contract 6. Clause 17 (b)(ii) of the Memorandum of Agreement provided for either party giving three months notice in writing or three months pay in lieu of notice. If either party wished to terminate the contract, the Court finds that there was an implied term to comply with clause 17(b)(ii) or give reasonable notice.
57. The Claimant's primary objection was on the revision of salary downwards. But the question arises whether that was the only objection (remuneration) and that the Claimant had agreed to a one year extension.
58. Remuneration is one of the *essentialia* of a valid employment contract. Remuneration is at the core of the employment contract.
59. The legal consequence of the rejection of an *essentialia* of an employment contract as proposed by the Respondent in its letter of 28 August 2004 is that the duration of the relationship between the parties was at large. There was no formal contract.
60. The contract did not expire by effluxion of time and either way the Claimant was entitled to reasonable notice. And notice of termination should be clear and unambiguous.
61. I say so because the rejection of the *essentialia* of remuneration, to my mind cannot be severed from the tenure/term of the contract. When the Claimant rejected the unilateral change to the remuneration, equally the tenure/term proposed by the Respondent fell by the wayside.
62. The Court now turns its attention the issue of notice.
63. Where there is no express provision for notice, the Courts have been ready to determine what would be reasonable notice in the circumstances of each case.
64. What is a reasonable notice has been the subject of numerous decisions. In the instant case there is sufficient material to decide on what period would have entailed reasonable notice.
65. All the written contracts between the parties provided for 3 months notice or pay in lieu of notice. The Bank Operation Manual/ Human Resources Policy Manual at clauses 8.3.5, 8.3.8, 8.3.9 and 8.3.10 dealt with separation under various circumstances.
66. The Court, on this issue finds that the Claimant's services were terminated without giving him notice as provided for in the Bank Operation Manual/Human Resources Policy Manual.
67. The Court has perused the case law cited by the Respondent. The case of *Margaret A Ochieng v National Water Conservation & Pipeline Corporation* (2014) eKLR is not very helpful because it was decided on the basis of the Employment Act, 2007 while the present Cause is governed by the Employment Act, cap 226 (repealed) and the common law. Further, in the present Cause, the Respondent allowed the Claimant to continue working on the assumption the Board of Directors would give guidance.

68. The case of *Sammy Japheth Kavuku v Equity Bank Ltd & another* (2014) eKLR was dealing with commercial contracts and injunctions. In any case the Court is not attempting to rewrite the employment contract between the parties but to determine under what terms and conditions of employment the parties related and what their rights were.
69. The Court will now proceed to determine whether any of the reliefs sought by the Claimant have a foundation in law, contract or Respondent's Bank Operation Manual/Human Resources Policy Manual.

Whether the Claimant is entitled to the dues/reliefs sought.

Severance pay of Kshs 3,960,705/-

70. The Claimant seeks severance pay on the basis of clause 8.3.10(d) of the Human Resource Policy Manual.
71. The contracts signed by the parties did not make any provision for payment of dues upon expiry of the contract or termination except for pension. In this regard the Court finds no conflict between the contract and the Manual.
72. Clause 8.3.10(d) relied on by the Claimant makes provision for additional termination compensation for employees declared redundant.
73. I have gone through the pleading by the Claimant and I am unable to place my fingers on redundancy as a cause of action or gravamen of the action by the Claimant.
74. Section 16A of the Employment Act, cap 226 (now repealed) provided for redundancy. Severance pay in the context of employment law has never been given a general meaning. It refers to payment made to an employee who has been declared redundant. The Claimant was not declared redundant.

3 months salary in lieu of Notice

75. Considering the conclusion reached on the termination question and that the Bank Operation Manual/Human Resources Policy Manual was applicable to the Claimant, or that the employment was at will, the Court would find that 3 months notice or pay in lieu of notice was reasonable and award the equivalent of 3 months pay in lieu of notice based on the monthly pay the Claimant was earning before termination of Kshs 425,652/- at Kshs 1,276,956/-.

Loss of use of vehicle with driver for 3 months

76. The Claimant, during the tenure of the employment relationship was entitled to the use of a vehicle and a driver. There is no dispute that his contract ended on or around 7 May 2005. The letter dated 30 March 2005 informed him to proceed on leave with effect from 1 April 2005. The question therefore is whether the Claimant was entitled to the benefit of the vehicle and driver for the 2 (not 3) months he was on terminal leave.
77. Clause 4 of contract 1 entitled the Claimant to a motor vehicle loan and running costs and a driver (see letter dated 10 November 1992 clarifying the position that if Claimant used own vehicle installment element would be removed). The Claimant was entitled to Kshs 200,000/- to cover the loan repayments.
78. In testimony, the Claimant stated that the Respondent had given him a fuelled vehicle with a driver.
79. The Claimant has not provided any evidence that he hired a car during the period he was on terminal leave.
80. The vehicle was also facilitative. It was for official use. The Claimant did not suggest that he carried any official duties while on leave. He has not made out a case for this relief.
81. Before concluding the Court wishes to note that this is one of the rare cases where both parties' counsel were at home with the practice and procedure of the Industrial Court and were precise and to the point on what was expected of them.

Conclusion and Orders

82.From the foregoing the Court finds that the Respondent's Bank Operation Manual/Human Resources Policy Manual was applicable to the Claimant and if not, it was employment at will, and holds that the Claimant was terminated without proper notice and that 3 months pay in lieu of notice was reasonable and awards him Kshs 1,276,956/-

83.The Claimant to have costs.

Delivered, dated and signed in open court in Mombasa on this 30th day of May 2014.

Radido Stephen

Judge

Appearances

Mr. Ouma instructed by Cootow & Associates for Claimant

Ms. Anyumba instructed by A.B. Patel & Patel Advocates for Respondent