



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 848 OF 2011

SAMUEL KAMAU MUHINDI.....CLAIMANT

VERSUS

INVESCO ASSURANCE CO.LTD.....RESPONDENT

JUDGMENT

By a statement of claim dated 31st May 2011 and filed in Court on 3rd June 2011 the Claimant seeks the following orders:-

- a. An order that the Respondent do pay the Claimant his employment and terminal dues amounting to Kshs. 6,430,259/-.
- b. An order that the Respondent do pay the Claimant an equivalent fo a maximum of twelve (12) months' salary as compensation for illegal withholding of the Claimant's lawful dues.
- c. An order that the Respondent do pay into the Respondent's pension scheme being administered by British American Insurance Company (Kenya) Limited Kshs. 399,617/- in favour of the Respondent.
- d. Costs of this Industrial Cause.
- e. Interest on all monetary payments at court rates.
- f. The Claimant prays for any other orders and /or relief that this Honourable Court may deem it fit and in the interests of justice to grant.

The Claimant filed a supplementary statement of claim on 16th August 2011 in which he has annexed the employment contract between him and the Respondent dated 4th August 2005.

The Respondent filed its Memorandum of Defence on 3rd October 2011. In the defence it denies the claim by the Claimant and alleges that it has settled the Claimants terminal dues in full.

By consent dated 19th Novemer 2013 and filed in Court on 20th November 2013 the parties agreed to file written submissions in respect of the case and take a date for highlighting of the submissions.

When the parties appeared before me on 30th January 2014 they decided to rely entirely on their written

submissions and prayed that judgment be prepared on the basis of the written submissions, the pleadings and the documents filed in court.

The background of this case is that the Claimant was employed by the Respondent as Managing Director/Chief Executive by a contract dated 4th August 2005. A copy of the contract has been produced in Court as annexure SM-7 through the Claimants Supplementary Statement of Claim dated 16th August 2011. The Claimant resigned from employment on 9th March 2007. The resignation was accepted the same day by the Respondent's Chairman. A copy of the letter of acceptance has been produced by the Claimant as annexure SM-1 to the Memorandum of Claim. In the acceptance letter the Respondent waived the 3 month notice given by the Claimant and opted to pay the claimant 3 months' salary in lieu of the notice. Parties thereafter agreed on settlement of the Claimants terminal dues in the sum of Kshs. 9,270,259/- . Out of this the Claimant was to retain motor vehicle registration KAN 060K valued at Shs. 2,840,000/- which sum was offset from his terminal dues. The balance was to be paid by an initial payment of Kshs 1 (One) Million payable immediately and the rest by six equal monthly installments of Kshs. 905,043/-.

Parties also agreed that the Claimant's pension dues which were not included in the computation of his terminal benefits would be paid by British American Insurance Company Ltd after August 2007 in accordance with the Scheme Rules. A breakdown of the terminal dues payable was attached to the Memorandum of claim as annexure SM2. The Claimant accepted the computation of his terminal dues and signed the discharge voucher on 16th April 2007 which is appended to the Memorandum of Claim as annexure SM-2 (b). The Claimant in addition wrote to the Respondent on 19th April 2007 accepting the computation of his terminal dues. The letter was returned to the Respondent together with the discharge voucher. The Claimant's case is that the Respondent however failed to pay the Claimant his terminal dues as agreed.

Soon thereafter in 2008 the Respondent was placed under receivership which lasted 22 months. The receivership was lifted and the Respondent was re-issued a trading licence by the Insurance Regulatory Authority on about 18th January 2010.

The Claimant was paid his pension by the Managers of the Pension Scheme in March 2008. He also learnt that the Respondent had defaulted in remitting some contributions to the Claimant's pension's account in the sum of Shs. 399, 617. As a result the Pensions Manager was unable to pay the Claimant his pension arising from the non-remitted contributions.

Arising from the foregoing the Claimant filed this suit against the Respondent seeking payment of the terminal dues and the unremitted pension contributions.

In it's defence the Respondent denied that it entered into an employment contract with the Claimant on 19th August 2005, 4th August 2007 or at all. It further denied that this court has jurisdiction to hear the claim . The Respondent pleaded that the claim should be referred to arbitration as provided in the employment contract and further that the claim is misconceived, an abuse of court process, untenable and incurably defective. The Respondent further averred that the Claimant's salary was pegged on specific monthly production/targets which the Claimant failed to meet and that the Claimant was compelled to voluntarily resign due to professional breach, malpractice and negligence.

I have considered the pleadings by the parties, the bundle of documents filed by each party and the written submission. The issues for determination are the following:-

- i. Whether the Respondent entered into a contract of employment with the claimant.
- ii. Whether the Claimant was paid his terminal benefits.
- iii. Whether the Claimant was guilty of professional breach of duty, negligence and malpractice.

iv. Effect of the words “without prejudice” in the letter dated 13th April 2007 attached as annexure SM-2 (a).

v. Whether Claimant is entitled to costs and interest.

i. Contract of employment

The Respondent denied that it entered into a contract of employment with the Claimant on the basis that the Claimant pleaded 2 different dates, that is 10th August 2005 and 4th August 2007 both of which are the wrong dates.

By his supplementary memorandum of claim the Claimant submitted a copy of the contract between the Claimant and the Respondent which confirms date of contract as 4th August 2005. The Respondent has not denied that the contract that has been produced in court is genuine. The argument that the Claimant is bound by it's claim which plead two different dates is resolved by the copy of the actual contract which confirms the correct date.

The parties having consented to have this case determined by way of pleadings cannot contest a fact that is proved by a document which is not contested by any other evidence. Pleadings can be confirmed or controverted by evidence. The two different dates pleaded are clearly mistakes which have been clarified by the production of the contract document.

I find that there was a written contract entered into between the Claimant and the Respondent on 4th August 2005.

ii. Was the Claimant paid his terminal benefits?

The Respondent although contesting that there was a contract between the parties, has submitted that the Claimant has been paid his full terminal benefits. It pleads that the discharge voucher is evidence of payment.

I have looked at the copy of discharge voucher annexed as Claimant's Appendix SM2(b). The words of the discharge voucher annexed to the Claimant's memorandum of claim are clear. It confirms the computation of terminal dues. It does not confirm the payment of terminal dues.

The letter forwarding the discharge voucher for the Claimant is also clear. It states:-

“Please sign the discharge voucher in the space provided signifying the agreement to the computations”

It does not refer to payment. The mode of payment is agreed to be in six equal installments payable from end of May 2007 and monthly thereafter.

This is after the initial payment of Shs. 1 (one) million. The Respondent has further referred to its bundle of documents which it alleges confirm that the “Respondent” was paid his dues. I presume the Respondent wished to refer to the “Claimant” having been paid his dues.

A cursory look at the list of documents shows that the documents contain payment vouchers for marketing fee, communication payment vouchers to Safaricom, fuel payment receipts, Nairobi Club statement of account and payment vouchers, entertainment payment vouchers and receipts, British American Insurance Co. Ltd. documents and the curriculum vitae of the Claimant. All of the documents in the bundle are for dates prior to the Claimant's resignation when his terminal dues became due. Needless to say, none of them is evidence of payment of the Claimant's terminal dues.

From the foregoing I find that the Respondent did not pay the Claimant his terminal dues amounting to Kshs . 6,430,259/- .

The Claimant further claims pension contributions not remitted to the pension scheme manager by the Respondent. The Respondent does not deny that the remittances were not made. The Respondent only argued that the pension dues should be remitted to the scheme administrator to be disbursed in accordance with the trust deed and the applicable rules.

The Scheme already paid the Claimant what was available and due to him from the scheme. The Claimant is no longer a member of the scheme having withdrawn upon leaving the Respondent's employment. The Respondent has not pleaded that it is going to pay the money into the pension scheme.

The Claimant is not expected to make peace-meal claims over his terminal benefits by demanding that the Respondent first pays the money it failed to remit to the pension scheme so that the pension scheme can then pay it to the Claimant.

Since the Claimant is no longer a member of the scheme he is entitled to be paid the unremitted pension funds by the Respondent directly.

iii. Whether the Claimant was guilty of professional breach, negligence and malpractice.

No evidence was adduced by the Respondent to prove the allegations of professional breach, negligence and malpractices. In any event, even if the allegations were proved, it would have no impact on the Claimant's terminal dues which arose from his resignation from employment and which are due whether such resignation is voluntary or due to compulsion by the Respondent. These payments were agreed upon and a payment of initial Shs. 1 (one) million made with agreement to pay the balance in 6 installments. I therefore find no merit in this plea by the Respondent.

iv. Effect of the words "Without Prejudice".

I agree with the sentiments of Justice Wa Makau in the Case of **Millicent Wambui V Nairobi Botanica Gardening Limited,[2013] eKLR** when he stated as follows:- (copy from case)

In this case, my understanding of the meaning of the words "without prejudice" is that the offer was made on a without prejudice basis. This means that the Respondent would not be prejudiced by the offer should an agreement not be reached. The Claimant having accepted the offer, and there being other documents which confirmed the offer, the use of the words became spend upon the acceptance of the offer. The use of the words therefore have no effect on the Claimant's entitlement to his terminal dues.

v. Arbitration

The Respondent submitted that the agreement was subject to Arbitration.

According to Section 6 of the Arbitration Act, the issue of arbitration can only be raised before a defence is filed. The Respondent should have raised the issue and applied for stay of these proceedings pending reference of the dispute to Arbitration. It is therefore too late to raise that issue at the point of written submissions after filing its defence.

vi. Limitation Period

The Claimant submitted that the limitation for this case is 3 years according to Section 90 of the Employment Act. The Act is not applicable to this case as the issues in this case arose before the Employment Act 2007 was enacted. It is therefore subject to limitation period of 6 years as provided in the Limitation of Actions Act in respect of contracts. It was filed before expiry of limitation period, the Claimant having resigned on 9th March 2007 while the Claim was filed on 3rd June 2011, just over 4 years from the date on which the cause of action arose.

vii. Costs and Interest

Having been successful in his claim the Claimant is entitled to costs of his claim. He is also entitled to interest from date of judgment at court rates.

I therefore enter judgment for the Claimant against the Respondent in the sum of Kshs. 6,829,876 with costs and interest.

Orders accordingly.

Delivered and signed in open court on 15th May, 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Kazungu for Claimant

Ms. Obiero hold brief for Chigiti for Respondent