



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NO. 1088 OF 2011

JUDGMENT

DANIEL GITHINJI WAIGANO

VERSUS

KENPIPE CO-OPERATIVE SAVINGS & CREDIT

DELIVERED BY

HON. LADY JUSTICE MAUREEN ONYANGO

REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1088 OF 2011

(ORIGINALLY HCCC NO. 92 OF 2008)

DANIEL GITHINJI WAIGANJOCLAIMANT

VERSUS

KENPIPE CO-OPERATIVE

SAVINGS & CREDIT.....RESPONDENT

[C. K. Wari and Associates for Claimant]

[Ben Makasi Simiyu Advocate instructed by Wekesa & Simiyu Advocates for the Respondent]

JUDGMENT

This case was originally filed as Nairobi High Court as HCCC No. 92 of 2008 through a Plaintiff dated 17th March 2008 and filed on 19th March, 2008. The Respondent (then Defendant) filed amended statement of defence and a set-off and counter claim dated 25th April 2008 filed in court on 28th April, 2008.

The hearing of the case commenced in the High Court and the Claimant's case was closed. However the case was by consent transferred to this court 15th June, 2011 following the promulgation of the 2010 Constitution which vested jurisdiction in all employment and labour matters in this court by virtue of Articles 162 (2) and 165(5) thereof.

When the case was transferred to this court the parties were directed to file fresh pleadings in conformity with the Industrial Court (Procedure) Rules 2010. The Claimant filed his statement of claim on 16th March 2012. There is no copy of the reply to the statement of claim. The issues constituting the response to the claim are however summarized in the Respondent's submissions.

The main facts of the case are not contested. The Respondent is a Co-operative Society. The Claimant was employed by the Respondent as an Accounts Clerk on 10th March, 1992. The employment was on a renewable fixed term contract of 3 years. Apart from his basic salary the Claimant was entitled to house allowance, 30 days annual leave and leave allowance, medical allowance and gratuity at the rate of 25% of basic salary upon successful completion of the contract. The contract provided for termination by either party giving 3 months notice or pay in lieu. The contract also provided for service pay at the rate of 3 months current basic salary for every year worked if the contract was terminated by the Respondent on grounds other than gross misconduct. The contract was renewed on 9th April, 1995, and thereafter every subsequent 3 years. The Claimant was paid gratuity at the expiry of each term of contract. The last contract of the Claimant was renewed in March 2007.

During his employment the Claimant rose through the ranks and as at 2007 the Claimant was an Assistant Manager and Accountant of the Respondent. His last salary was Kshs.78,815.15. He was paid fuel allowance of Kshs.33,810, house allowance of Kshs.35,000 and leave allowance of Kshs.43,000/= per year. The claimant testified that he was also entitled to a responsibility allowance of Kshs.4,000/= per month.

On 4th April 2002 the Claimant was sent on force leave to allow for investigations on irregular payments through the Respondent's bank account. The suspension was lifted by letter dated 1st August 2007 signed by the Chairperson. The letter read as follows:

Date: 1st August 2007

Mr. Daniel W. Githinji,

P.O. Box 75539

NAIROBI.

Dear Sir,

REF: LIFTING OF SUSPENSION

This is in reference to the letter dated 2nd May 2007 sending you on suspension.

The CMC meeting held on 19th July 2007 recommended that the suspension be lifted. The Executive meeting on 1st August 2007 reviewed and ratified the recommendation and decided to lift your suspension with effect from 1st August 2007.

You are required to report on duty on 6th August 2007 at 8.00 am. Please come with this letter together with your appointment letter and report to the Chairperson for further instruction.

Yours faithfully,

Mrs. J. W. Owuor

CHAIRPERSON

Upon reporting back to work on 6th August 2007 the Claimant was issued with leave application forms to fill. He filled in 30 days leave and the form was approved by the Vice Chairman Mr. Shadrack Tieng Ouma (RW2). The leave was from 7th August to 17th September, 2007. While on leave the claimant received a letter from the Respondent informing him that the Respondent was restructuring and he will be required to apply for a suitable position. The letter is reproduced below:

Date: 8th August 2007

Daniel W. Githinji

P.O. Box 75539

NAIROBI.

Dear Mr. Githinji,

REF: RESTRUCTURING OF KENPIPE SACCO

Kenpipe Sacco will be commencing a restructuring of its organizational structure with the intention of improving internal control and efficiency in service delivery to members. In this regard, the Central Management Committee has developed a Human Resource Policy document which has been approved and registered with the Ministry of Cooperative Development and Marketing. The said document contains new terms and conditions of employment to be implemented.

The CMC appreciates that you have been serving under different terms and will therefore ensure that there is smooth transition from the old structure to the new structure. In this regard, the CMC wishes to reassure you that any dues payable to you under your existing contract will be settled in full. You will however need to apply of a suitable position under the new terms if you wish to continue in the employment of the SACCO. While preference will be given to current staff, you will be interviewed alongside other applicants.

Joyce Owuor

Chairperson- Kenpipe Sacco

On 17th September, 2007 the Respondent terminated the employment of the Claimant. It was on the last day of his leave. The letter gives the reasons for termination of the Claimant's employment as restructuring. The letter further states he failed to submit a copy of his letter of appointment, and that he failed to apply for any position after being informed to do so.

The letter of termination states that the Claimant would be paid 1 months salary in lieu of notice, accrued gratuity up to date of termination and balance of emoluments owed to him up to the date of termination. The letter reads as follows:

Date: 17th September 2007

Daniel W. Githinji

P.O. Box 75539

NAIROBI.

Dear Sir,

RE: TERMINATION OF EMPLOYMENT CONTRACT

Following the restructuring of Kenpipe Sacco, as was advertised in the Daily Nation of 13th and 14th August, 2007, and subsequent interviews held at both KUSCCO (31st August, 4th September, 2007) and Kenpipe Plaza (7th September, 2007) officers; we regret to inform you you're your services with the Sacco are terminated with effect from 18th September, 2007.

We further wish to draw your attention to our letter of 1st August 2007 wherein we requested you to furnish us with a copy of your appointment letter. To date, you have not provided the said letter. We also make reference to our letter of 8th August 2007 wherein we informed you of the intended restructuring, and advising you to apply for any position you consider yourself suitable for. We note that you did not apply for any of the positions advertised.

By this letter, the Sacco will pay you the following as terminal dues:-

1. 1 month's salary in lieu of notice.
2. Accrued gratuity benefit up to the date of termination of contract.
3. The balance of emoluments owed to you up to the date of termination.

We observe that your indebtedness to the Sacco is way above your accrued benefits plus shares in the Sacco. Notice of 30 days is hereby given within which you should clear your debts to the Sacco, failure to which we will revert to your guarantors.

In the event that you are able to produce admissible documentary evidence to support any additional claims you may have against the Sacco, we will be willing to apply it in rec-computing your monies.

Yours faithfully,

J. W. Owuor

CHAIRPERSON

It is this termination of employment contract that the Claimant alleges was wrongful, irregular and unlawful. He seeks the following remedies:-

- a. **A declaration that the termination of the Claimants' services by the respondent was wrongful, irregular and unlawful.**
- b. **Payment of the following:**
- c. **Kshs.7,832,718.00**
- d. **General damages for breach of contract**
- e. **Punitive, exemplary and aggravated damages**
- f. **Costs of this suit**
- g. **Interest on (b), (c), (d) and (e) above and court rates**
- h. **Any such other relief or further relief as this honourable court may deem fit and just to grant.**

The issues for determination are therefore whether the termination of claimant's employment was unfair and if he is entitled to the prayers sought.

1. **Whether the termination of the Claimant's employment was unfair**

The Claimant has submitted that the termination of his employment was unfair because the Claimant's contract had not expired as he was not informed by way of letter, phone call or otherwise the positions available so that he could tender his application.

The Respondent argues that the claimant's contract was lawfully termination by giving appropriate notice.

The law applicable to the termination of the Claimant's employment is the repealed Employment Act which was in force at the time of his termination on 17th September, 2007.

According to the Employment Act (1976) (now repealed) an employer could terminate the employment of an employee by giving notice as stipulated in the employee's terms of employment and if none was provided for, one month's notice or salary in lieu of notice.

The Claimant's employment was terminated, according to his letter of termination, on account of restructuring. There are other peripheral reasons given in the letter of termination, but all of them revolved around restructuring. Termination of employment on account of restructuring is not a normal termination but a redundancy as was provided for under section 16A of the repealed Employment Act as follows:

16A (1) A contract of service shall not be terminated on account of redundancy unless the following conditions have been complied with:

- a. The union of which the employee is a members and the Labour Officer in charge of the area where the employee is employed shall be notified of the reasons for and the extent of the intended redundancy.
- b. The employer shall have due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;
- c. No employee shall be placed a disadvantage for being or not being a member of the trade union;
- d. Any leave due to any employee who is declared redundant shall be paid off in cash;
- e. An employee declared redundant shall be entitled to one month's notice or one months salary in lieu of notice;
- f. An employee declared redundant shall be entitled to severance pay at the rate of not less than fifteen days pay for each completed year of service.

The Respondent having failed to comply with the Act, the termination of claimant's employment amounted to an unlawful redundancy. The Respondent has relied on the case of **Benson Odhiambo Onyango vs. Instarect Company Limited (2013) eKLR** and **Samuel Chacha Mwita vs. Kenya Medical Research Institute (2014) eKLR**. Both of these cases refer to contracts terminated under the Employment Act, 2007 and therefore are not applicable to this case. I also find the cases irrelevant to the issue herein as they refer to cases where fixed term employment contracts were not renewed. In the case of the Claimants contract herein, the fixed term contracts were renewed and gratuity paid at the expiry of each contract term. It is the Respondent who failed to issue the letter of renewal of contract, but the renewal was implied by the conduct of the parties especially the Respondent, by continuing to honour the terms of the fixed term contract through payment of gratuity at the expiry of each term. The argument by the Respondent that the fixed term contract was not renewed either expressly or by implication is not correct, as the Respondent acknowledges that the fixed term contract was renewed severally, albeit without issuance of the letter of renewal of contract.

2. Whether the claimant is entitled to his prayers

I will now consider each of the Claimants prayers.

a. 3 months salary in lieu of notice.

The Claimant submitted that his employment contract provided for 3 months notice or pay in lieu by

either party, but the Respondent offered to pay one months salary in lieu of notice, which has not yet been paid.

The Respondent submits that the claimant is not entitled to the notice as his fixed contract term expired. The Respondent relied on the case of **Kenya Revenue Authority vs. Menginya Salim Murgani (2010) eKLR** where the Court of Appeal stated that the period of notice is that specified in the contract, and if not specified, a reasonable notice.

As I have already stated herein above, the Claimant's contract was renewed continuously by the conduct of the parties by payment of gratuity specified in his contract. The same contract provided for 3 months notice or pay in lieu as per contract terms in the letter of renewal of contract dated 9th April, 1995. The terms of the Claimants contract in respect of notice were never changed until his employment contract was terminated.

The Respondent also submitted that the basis of giving the Claimant one months notice was by virtue of operation of clause 26 of the Employee Handbook of June 2007.

The Respondent has however not stated when the handbook came into force and how it was communicated to the Claimant. A handbook cannot change the terms of the Claimant's contract to his detriment without expressly amending the terms of his contract. In any event, the handbook is dated June 2007 when the Claimant was on forced leave and there is no evidence that the contents of the handbook was brought to his attention.

For the foregoing reasons I find that the Claimant is entitled to 3 months salary in lieu of notice in the sum of **Kshs.469,725/=** which I award him.

b. Days worked and not paid

The Respondent in the letter of termination offered to pay the claimant the balance of emoluments owed to the date of termination. I therefore award the Claimant the sum of **Kshs. 93,945/=** being salary and allowances owed to 18th September, 2007 as offered by the Respondent in the letter of termination.

c. Leave earned but not utilized

The Claimant claimed leave of 206 days. He produced the leave form he filled when proceeding on forced leave which he alleges was given to him by the Respondent indicating the leave days outstanding as those claimed. The Respondent on the other hand has produced the same leave form but blank in the space for outstanding leave days. RW2 admitted signing both leave forms but avers that when he signed the form it was in the state of the one produced by the Respondent which according to him is the genuine form. The Respondent produced several letters in which the claimant applied for annual leave but none of them states the number of leave days due to the Claimant at the time of leaving employment.

The Respondent alleges that the Claimant had only worked for 6 months during his last contract. The Respondent however did not produce any evidence to show that the Claimant had taken leave or been paid in lieu thereof for previous years or past contract terms.

It was the Respondents duty under the law to keep records and to produce such records. Failure to produce such records means that the Respondent failed to controvert the allegations of the Claimant that the Claimant had 206 unutilized leave days.

This leaves me with no option but to find in favour of the claimant. I therefore find that the Claimant is entitled to 206 leave days. This multiplied by his daily rate of pay at Kshs.2,627.16 [78815÷30] amounts to **Kshs.541,196.30**. I award the Claimant the said sum of **Kshs.541,196.30** in lieu of unutilized leave.

d. Gratuity

In the letter of termination the Respondent offered to pay the Claimant accrued gratuity for the period served to the date of termination. As observed in the Respondent's submissions, the claimant had served for 6 months of the new contract.

Gratuity was payable at the rate of 25% of basic salary for the period worked. The Claimant made a claim for Kshs.709,335 in the Memorandum of claim but does not state how that was computed. The Respondent however submitted that the Claimant is not entitled to gratuity as it had already been paid. This is in contradiction to the offer in the letter of termination to pay the gratuity to the date of termination.

I find that it is the Respondent who terminated the contract and the termination was not on disciplinary grounds but due to reorganization. The payment of gratuity is admitted in the witness statement of RW1 where the calculations are attached as Kshs.123,048.75 and after tax at Kshs.86,134.13. I award the claimant the said sum of Kshs.86,134.13 as offered by the Respondent.

(e) Severance pay for 14 years

The claimant worked continuously from March 1992 to 17th September 2007 when his contract was terminated on account of restructuring. Section 16A of Employment Act (1776) (now repealed) provided for payment of severance pay to an employee who is declared redundant at the rate of not less than 15 days salary per completed year of service irrespective of the nature of employment.

I find that the claimant was declared redundant and is entitled to severance pay at 15 days salary for each year worked. At a consolidated salary of Kshs.156,575.00, 15 days salary would be Kshs.78287.50. For the 15 years he worked from March 1992 to July 2007, this amounts to (78287.50 x 15) Kshs.1,174,312.50 which I award the Claimant on account of severance pay.

f. Personal Savings (shares)

The shares of the Claimant were utilized to off-set the loans he owed to the Respondent and is therefore not available for refund to him. The claim is dismissed.

g. General Damages for breach of contract

The law applicable at the time when the claimant's employment was terminated did not provide for damages beyond the notice period. This was the holding in the case of **Kenya Revenue Authority vs. Menginya Salim Murgani [2010] eKLR** in which the court of Appeal reviewed previous decisions on the same issue and relied heavily on the case of **Central Bank vs. Nkabu [2002] EA 34**. I find that the claimant is not entitled to the payment of damages. The claim is dismissed.

h. Punitive, Exemplary and Aggravated Damages

The Claimant did not make any submissions in relation to this head of claim. It is however a well settled principle of the law that exemplary or punitive damages are not payable in contracts, including employment contracts. This issue was a subject for the decision of the court in the case of **Kenya Revenue Authority vs. Menginya Salim Murgani** (ibid) where it was rejected. I find that the claim is not payable in the circumstances of the claimant's case and dismiss the same.

i. Costs and interest

Having been successful in his claim, I award the Claimant costs of his case. The Claimant will also be entitled to interest at court rates from date of judgment should his claim not be settled within 30 days from date of judgment.

Orders accordingly.

Read in open Court this 30th day of September, 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Kariuki Owese holding brief for Simiyu Respondent

No appearance for Claimant