



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO. 789 OF 2013

ROBERT NYONGESA
.....CLAIMANT

VERSUS

THE SACCO SOCIETIES REGULATORY AUTHORITY1ST RESPONDENT

HARAMBEE CO-OPERATIVE SAVINGS & CREDIT SOCIETY LIMITED.....2ND RESPONDENT

RULING

By a Notice of Motion application dated 9th June 2014 the Claimant applicant seeks orders directing the 2nd Respondent as employer to reinstate his salary pending the hearing and determination of the main suit. The application is supported by the grounds on the face of the application and the supporting affidavit of the Claimant sworn on 9th June 2014. The application was filed under certificate of urgency on 12th June 2014. There is a similar application dated 11th October 2013 and filed in court on 17th October 2013 which appears not to have been prosecuted.

The application dated 9th June 2014 was heard ex-parte by Justice Marete on 12th June 2014 when he certified the application urgent and referred it to me for hearing as I was already handling the case.

When the parties appeared before me for a mention on 11th July, 2014 the parties were on their request allowed to argue the application by way of written submissions.

The 1st Respondent appears not to have filed any reply to the application by the Claimant.

The 2nd Respondent filed a Replying Affidavit of Gladys Nyaguthi Gichohi sworn on 30th June 2014 and her supplementary affidavit sworn on 11th July, 2014.

The parties filed their written submissions.

I have considered the submissions by all the parties. The gist of the Claimants submissions is that he was dismissed by the 2nd Respondent on 13th November 2013.

He prays for payment of terminal benefits consisting of withheld salary for 13 months, salary in lieu of

notice and gratuity.

The 1st Respondent's position is that the prayers by the Claimant are in the nature of special damages which have not been specifically pleaded, that the Claimant has not made out a prima facie case and that the sums payable are disputed. The 1st Respondent further submits that the monies claimed by the Claimant are from 2nd Respondent's members contributions which the 1st Respondent has a fiduciary duty to protect. The 1st Respondent prays that the prayers by the Claimant should await the conclusion of the case.

The 2nd Respondent in its submissions and affidavits filed in response to the application by the Claimant submits that the Claimant owes the 2nd Respondent substantial amounts of money by virtue of loans advanced to him by the 2nd Respondent and that any money due to the Claimant should be used to offset the loans. The 2nd Respondent further submits that the withheld salary can only be released to an employee who is cleared after suspension. If the employee is not cleared, he is not entitled to withheld salary.

The 2nd Respondent further submits that the circumstances of the Claimant have changed since the filing of the suit. That at the time of filing suit the Claimant was an employee while at the time of filing the application his employment had been terminated. The 2nd Respondent submits that what is currently due to the claimant is therefore terminal benefits and not withheld salary and that this can only be determined at the final determination of the case. The 2nd Respondent further submits that gratuity is not the subject of the Claimants case but relates to a different contract and that there is a misjoinder of the claim for gratuity.

I have considered the pleadings and the oral submissions. I have also considered the written submissions by the parties. According to the Memorandum of claim the Claimant seeks the following orders:

- a. Salary until expiry of contract in the sum of Shs.8,631,648
- b. Two months salary in lieu of notice at Kshs.479,536
- c. Service or severance pay for one year in the sum of Kshs.1,438,608
- d. 12 months salary compensation in the sum of Kshs.2,877,216
- e. Gratuity in the sum of Kshs.1,432,608 and finally
- f. Unpaid leave of Kshs.239,768.

In the application, the Claimant seeks payment of withheld salary and gratuity. In his further affidavit the Claimant breaks down his claim in the application of Kshs.4,769,204 as follows:

- i. Gratuity Kshs.1,172,688.94
- ii. Notice Kshs. 497,536
- iii. Withheld salary Kshs. 3,116,984

From the foregoing, it is evident that what the Claimant is seeking in the application under the head of withheld salary is not part of his claim in the Memorandum of Claim.

The prayer for gratuity in the claim is Kshs.1,432,608 while in the application the Claimant seeks Kshs.1,172,688.94. There is no explanation of the difference between the amount claimed in the memorandum of claim and that claimed in the application. Due to this unexplained discrepancy, it follows that the item, if due, ought to be subjected to a hearing for final determination before payment.

It is only the prayer for pay in lieu of notice which is consistent at Kshs.479,536. The only issue for my determination is whether it can be released to the Claimant at this juncture as prayed in the application. Both Respondents have submitted that it should not, as the 2nd Respondent is entitled to utilize it to offset the loans owed to it by the Claimant. The Claimant does not deny he has liabilities owed to the 2nd Respondent. He however argues that the loans were granted to him in his capacity as a member of the

Co-operative Society and not as an employee of the 2nd Respondent and further that they are not due for payment in lump sum as he is still a member of the SACCO even after ceasing to be an employee and that the loan is payable by installments.

The Claimant further argues that the balance of the liabilities will be off-set from the amounts due after the final judgment.

I find the arguments by the Claimant unconvincing. In the first place, there is no difference between the 2nd Respondent as his employer and the 2nd Respondent as the Co-operative Society to which he was a member. His employer was the Co-operative Society and the loans advanced to him were by his employer in its capacity as the Co-operative Society. If any money is owed to the co-operative Society, it is owed to his employer and the employer can recover it from whatever moneys are payable to the claimant.

The Claimant's other arguments that the SACCO loans are payable by installments and that the same will be recovered from the final judgment are contradictory. The final judgment would, if made in his favour, be a lump sum payment. In any event, this is the issue for determination by the court, which may or may not be in the Claimant's favour. It is speculative at this point to presume that he will be successful and would utilize the proceeds of judgment to off-set his loan.

Further, the Claimant's argument is in contradiction to the doctrine of set-off. A set off is a counter demand arising out of a transaction independent from a Plaintiff's claim. The claimant can therefore not dictate which funds can be used for set-off and which ones cannot. Any monies due to the claimant from the 2nd Respondent may be utilized to off-set any claim due from the claimant.

The 1st Respondent submitted that the claimant has not demonstrated that he has a prima facie case. I agree with the 1st Respondent. This is clearly demonstrated by both the prayer for gratuity and for withheld salary which I have already discussed above.

I would further add that having admitted being indebted to the 2nd Respondent, the court would not elevate his claim over the right of set-off by the 2nd Respondent.

In this respect I agree with the decision of Justice Nduma in **Phillystance Nzaro Vs. Kenya Airways (2014) eKLR** when he stated that **"a court must be very slow to elevate an Applicant to a desired position than that (she) is presently in before the full hearing of the suit."** The court further stated that **"A clear right to the relief sought must be established for a mandatory injunction to be granted"**.

I do not find the other authorities cited by the 1st Respondent relevant to this application that is, the case of **Alfred Nyunyu Kimungui vs. Bomas of Kenya 2013) eKLR** and **Dennis Nyagaka Ratemo vs. Kenya Film Commission and Another (2014) eKLR**.

It is my opinion that the Claimant has not persuaded me that the prayers in his application are merited. The result is that I dismiss the application. The costs will be in the cause.

Dated in open court this 18th day of September, 2014.

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Miss Mathai for 1st Respondent

Mr. Ouma for 2nd Respondent

No appearance for Claimant