



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU
CAUSE NO. 132 OF 2013

SIMON KIPROTICH CHEPCHOWOI..... CLAIMANT

v

NANDI TEA ESTATES LIMITED.....RESPONDENT

RULING

1. Simon Kiprotich Chepchowoi (Claimant) commenced legal proceedings against Nandi Tea Estates Ltd (Respondent) on 21 May 2013 alleging unlawful termination and seeking

- a) general damages for loss of employment.
- b) A declaration that the termination of the employment of the Claimant is contrary to the Employment Act No. 11 of 2007.
- c) A compensation of Kshs 525,594.00.
- d) Costs of the suit.
- e) Interest on c) at court rates.
- f) Any other relief this Honourable Court may deem fit to grant.

2. The Respondent filed a Response on 17 June 2012. On 23 September 2013, the Claimant filed an Amended Memorandum of Claim amending the amount claimed to read Kshs 596,352.00 and further a Declaration that the Claimant's employment contract with the Respondent remained in force for the period between 2nd November 2008 to 5th October 2012 and that the same was constructively and unlawfully terminated by the letter dated 14th March 2013 by S K Kitur & Co. Advocates and that the claimant is entitled to full salary for the said period.

3. The Respondent filed an Amended Response to Claim on 8 November 2013 and the Cause was heard on 1 April 2014. The Respondent opted not to call any witnesses and informed the Court it would rely on the pleadings and submissions.

4. Ongaya J delivered judgment on 31 July 2014 in which he granted a declaration and orders

- 1) The declaration that the constructive termination of the employment of the claimant was contrary to the Employment Act No. 11 of 2007 and the CBA signed on 26.11.2008.

2) The respondent to pay the claimant a sum of Kshs 562,559.00 by 1.09.2014, failing, interest at court rates to be payable from the date of this judgment till full payment.

3) The respondent to deliver to the claimant the certificate of service by 1.09.2014.

4) The respondent to pay costs of the suit.

5. The Respondent was not satisfied with the judgment and on 8 September 2014, it filed an application for review which is the subject of this ruling.

Respondent's case/submissions on review application

6. Upto time of judgment, the Respondent was represented by J K Kitur & Co. Advocates. On 3 September 2014, the Federation of Kenya Employers filed a Notice of Change of Advocate. It is not clear whether leave was sought or was necessary but because no objection was raised, no more need to be said.

7. The Respondent attacks the judgment on the basis that the award of Kshs 562,559/- was in breach of the Employment Act and the Industrial Court (Procedure) Rules, 2010.

8. The Respondent proffered three grounds.

9. The first ground was that the Court based the award of terminal benefits on the provisions of a Collective Bargaining Agreement which was signed on 26 November 2008 and registered on 6 May 2009.

10. The Respondent contended that the Claimant had separated with it on 6 November 2008, long before the signing/registration of the Collective Bargaining Agreement.

11. According to the Respondent, the Collective Bargaining Agreement could not be applicable by dint of section 59(5) of the Labour Relations Act and rule 35(5) of the Industrial Court (Procedure) Rules, 2010.

12. The Respondent further urged that the award of underpayments which formed part of the Kshs 562,559/- was based on the Collective Bargaining Agreement and was thus in breach of section 54(5) of the Labour Relations Act and rule 35(5) of the Court's rules.

13. Further, the Respondent submitted that in awarding the Claimant wages for the period he did not work amounted to partial reinstatement and this was contrary to section 49 of the Employment Act. Reference was made to the principle of *no work no pay*.

14. The Respondent raised another issue to the effect that the Cause was statute barred and offended section 90 of the Employment Act. It was submitted that the services of the Claimant was terminated on 6 November 2008 and the proceedings were only commenced on 23 September 2013, outside the allowed three years.

15. In this regard, the Respondent submitted that the Court lacked jurisdiction and the Court ought to have *suo moto* addressed the issue and struck out the claim.

Claimant's response

16. For the Claimant, it was urged that the review application was fatally defective and an abuse of the Court process and that the application was an appeal brought through the back door.

17. The Claimant also submitted that the Respondent had not satisfied the conditions for review.

18. It was further urged that the Claimant's services were not terminated on 6 November 2008, and in

regard to the Collective Bargaining Agreement, it was submitted that clause 36 provided that the effective date was 1 January 2008.

Evaluation

The limitation question

19. The Claimant's case as set out in the Amended Memorandum of Claim at paragraph 10 was that

The Claimant further avers that the period between 5th November 2008 and 3rd October 2012 when the Claimant was acquitted in the criminal case the Claimant remained an employee of the Respondent and that he is entitled to half salary.

20. In response, the Respondent asserted that the Claimant had deserted work and failed to report for work from 5 March 2008 to 3 October 2012 and thus committed gross misconduct.

21. The pleadings did not set out clearly the date of termination. In dealing with the exact time of separation, the Court found that The Court finds that the claimant was entitled to consider himself terminated once the respondent made a complaint leading to the arrest and the prosecution. The Court finds that the claimant was constructively terminated from employment.

22. It is clear from the pleadings and record that the report to the Police was made on 5 November 2008. With the Court having made a finding of fact that the termination was at the time of reporting to the Police on 5 November 2008, that is the time the Claimant suffered a legal injury and the Claimant had three years within which to commence legal action. He did not.

23. The Respondent did not raise the issue of limitation in its pleadings. However, the Respondent now contends that limitation is a fundamental legal issue going to jurisdiction and even if it was not raised, the Court ought to have considered it *suo moto*.

24. The Respondent has placed reliance on the authority of *Owners of the Motor Vehicle M.V. Lillians v Caltex Oil Kenya Ltd* (1989) KLR 1 as cited in Nairobi Civil Appeal No. 161 of 1999, *Abok James Odera t/a A.J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates*.

25. But is the position taken by the Respondent the correct legal position. Generally yes, that limitation is an issue of law cannot be gainsaid and a question of jurisdiction can be raised by a party or the Court on its own motion.

26. But do the same principles apply where a party does not raise the issue of limitation and the Court proceeds to hear the suit on the merits and pronounces judgment without considering the issue *suo moto*? This requires an examination of role of pleadings and bringing cases to finality.

27. The Employment Act, 2007 and the Industrial Court (Procedure) Rules, 2010 have not provided how limitation should be pleaded. Because of the lacuna, the Court can look at the Civil Procedure Rules.

28. Order 2 rule 4 of the Civil Procedure Rules require a statutory limitation to be specifically pleaded.

29. For the Respondent it is strongly urged that even though it was not raised, because of jurisdictional considerations, the Court ought to have addressed it or that it is a fit issue for consideration under a review application.

30. Rather than accept the invitation by the Respondent, I am more persuaded by the decision of the Court of Appeal in *Achola & Ar v Hongo* (2004) 1 KLR 462 where the Court held that the second respondent having failed to plead limitation in its defence, it was not entitled to rely on that issue and base a preliminary objection on it and it was not entitled to rely on that defence during the trial of the suit unless it amended its defence.

31. In the instant case, the Respondent is raising the issue of limitation after hearing on the merits and delivery of judgment, though in submissions it was stated that the issue was raised in the Response. I have perused the Response but have not been able to pin point the paragraph where the issue of limitation was raised.

32. In my view, it is not open to a party to raise the issue of limitation, when it was not pleaded under the review jurisdiction of the Industrial Court, after judgment has been pronounced.

33. I would decline the invitation to review the judgment on the basis of limitation. The horse bolted on delivery of judgment and cannot be brought back to the stable.

Partial reinstatement

34. The Respondent also attacked the judgment on the basis that the Court awarded the Claimant wages of Kshs 380,164/- from 5 November 2008 to 3 October 2012.

35. Section 49(3) of the Employment Act, 2007 has provided for reinstatement with no loss of benefits as one of the primary remedies where there is a finding of unfair termination or wrongful dismissal.

36. In the instant case, the Court did not order reinstatement and therefore in so far as an award was made of wages up to 3 October 2012, there appear to have been no legal or statutory basis for the award.

37. But the Court quoted at length from its decision in *Kenya Union of Printing, Publishing, Paper Manufacturers & Allied Workers v Timber Treatment International Limited* (2013) eKLR on the utility of partial reinstatement and the proportionate measure of damage and made reference to section 49(4)(f) of the Employment Act, 2007.

38. My own view has been that any legal injury suffered by an employee occurs either at point of termination, whether the termination is found unprocedurally or substantively unfair.

39. In the case at hand, there appears to be a legal issue on the effect of uncommunicated dismissal or termination and effective date of termination. But that is a debate which better wait an appropriate case.

40. In my view, the challenge against partial reinstatement and award of wages during that period in the instant case should be taken up on appeal, the Court having given extensive reasons for reaching that conclusion.

41. The Respondent further submitted that because of the specialist nature of the Industrial Court and the need to limit litigation and costs in disputes of this nature, the Court should exercise its review powers in the instant case.

42. But in my view, a review based on rule 32(1)(c) and (d) should be resorted to in cases of decisions which are glaring in breach of a written law and not where the Court is required to go into an interpretative discourse.

Applicability of the Collective Bargaining Agreement registered in 2009

43. The Respondent has cited sections 54(5) and 59(5) of the Labour Relations Act to challenge the award on gratuity and underpayments. Section 54 of the Act deals with recognition agreements and is not applicable to the instant application.

44. Pursuant to section 59(5) of the Labour Relations Act, a collective bargaining agreement becomes enforceable only after registration by the Industrial Court.

45. The Collective Bargaining Agreement which the Court relied on to make awards of gratuity and underpayments was registered in 2009.

46. The process of negotiating collective bargaining agreements or renewals in Kenya tend to spill over the expiry dates of the lapsing agreements.

47. In the case under consideration, the parties voluntarily and mutually agreed that the effective date of the agreement would be 1 January 2008.

48. In *KUDHEIHA v Impala Club*, Nairobi Cause No. 1256 of 2010, addressing a not too dissimilar question, I observed that Section 11 of the Trade Disputes Act required the then Industrial Court to maintain and register Collective Bargaining Agreements and that these agreements would not take effect until accepted for registration. The section also placed an obligation upon an employer or organisation of employers to ensure a copy of the Collective Bargaining Agreement was lodged with the Minister responsible for Labour within 14 days after which the Minister was to transmit the Collective Bargaining Agreement to the Industrial Court for registration. Failure by an employer or employer's organisation to furnish the Minister with a copy of a Collective Agreement within 14 days was made an offence.

49. In the case before me therefore I do hold that there was a statutory obligation upon the Respondent, Impala Club and or the Federation of Kenya Employers to furnish the Minister with a copy of the 1999 Collective Bargaining Agreement executed on 26 May 1999 and stated to be effective from 1 January 1999 for registration purposes and that any failure to furnish a copy thereof and any legal consequences must be examined within the obligation placed upon them.

49. I say so because the Court is confronted with a situation where an employer urges the Court to ignore and not enforce an unregistered collective agreement without stating what steps or measures it took to ensure it complied with the law to ensure it was registered.

50. This Court is both a Court of law and a Court of equity. Equity always moves in to moderate and constrain unfair dealing consequences arising from the conduct of a party such as the Respondent herein where a statutory obligation was placed upon it but for unexplained reasons it failed to fulfill such statutory obligations.

51. Closely interlinked to the principles of equity, it is open to the Court to resort to the common law to provide an alternative to the statutory scheme with a view to meeting the ends of justice. Justice should not be disregarded at the expense of technicalities. In industrial relations, the parties are referred to as social partners who are expected to act in good faith towards and with each other. Being social partners the parties should not lightly go back on explicit promises made to each other whether registered or not. Although the parties did not address me on the issue, I would think that the general principles of law governing the enforceability of common law agreements could be invoked by any of the parties to non registered collective agreements. Statute law should not constrain such common law agreements relating to employment/labour relationship. The Collective Bargaining Agreement though not registered would remain valid based on the general common law principles.

52. I would further suggest that equity and common law would come into play because freedom of contract is a basic right in our constitutional system and it should not be taken as having been removed or excluded by statute. Article 41(4)(c) of the Constitution provides that '*every trade union and every employers' organisation and employer has the right to engage in collective bargaining*' while Article 36 enshrines the right of every person to freedom of association and therefore to completely shut out a party from relying on a Collective Bargaining Agreement as is suggested by the Respondent here because it did not cause it to be registered would lead to unfair consequences in as far as the rights of workers are concerned. Indeed the Labour Relations Act does not expressly prohibit or prevent a trade union and an employer or employers' organisation from concluding a common law agreement on employment matters.

53. Articles 20 and 259 of the Constitution also enjoin the Courts to develop the law to the extent that the law does not give effect to a right or fundamental freedom and to interpret the Constitution in a manner that promotes its values and principles and permits the development of the law.

54. In my view, the Collective Bargaining Agreement would be enforceable as a common law contract

between two parties who had voluntarily and mutually entered into it. The parties made explicit promises to each other on the effective date of the Collective Bargaining Agreement.

55. With the conclusion reached, the review of the judgment awards on gratuity and underpayments should fall by the wayside, but I need to very briefly mention about the *no work no pay principle*, and review powers of the Industrial Court.

55. The Respondent made reference to a principle of *no pay no work*. I presume the basis of the submission, though not stated by the Respondent is section 19(1) (c) of the Employment Act, 2007. My understanding of the provision is that an employee should not be paid when he is absent from work without permission or lawful cause.

56. The circumstances of the case under consideration do not really fall under that statutory provision.

57. On the other hand, under the common law, the obligation of the employer has always been to pay wages and not to provide work to the employee.

58. The powers of the Industrial Court to review its judgments is found in Section 16 of the Industrial Court Act which provide that The Court shall have power to review its judgments, awards, orders or decrees in accordance with the Rules and rule 32 of the Industrial Court (Procedure) Rules, 2010 provide that (1) A person who is aggrieved by a decree or an order of the Court may apply for a review of the award, judgment or ruling-

(a) if there is a discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made; or

(b) on account of some mistake or error apparent on the face of the record; or

(c) ***on account of the award, judgment or ruling being in breach of any written law; or***

(d) ***if the award, judgment or ruling requires clarification; or***

(e) for any other sufficient reasons.

59. Under Order 45 rule 1 of the Civil Procedure Rules, a party may seek a review on three grounds namely, *discovery of new and important matter or evidence, mistake or error apparent on the face of the record or for sufficient reasons*.

60. It is apparent that the Industrial Court judge has been vested with a more extensive mandate of review unlike the powers granted under the Civil Procedure Rules. The Industrial Court judge can review a judgment ***on account of the award, judgment or ruling being in breach of any written law; or if the award, judgment or ruling requires clarification***.

61. With the extensive review powers and the hierarchical system of Courts established in Kenya, the Court will need to carefully examine and set the parameters of its powers of review.

62. This is especially so where the Judge whose decision is sought to be reviewed is not able to hear the review application. The law is susceptible to different interpretations and it is very possible that two judges would have a different interpretation of a particular written law. A judge may as well misapprehend law.

63. The realities of administration of justice appear to leave room for such an eventuality. Judges may get transferred or due to other reasons may not be able to review their decisions.

64. In my view, this case is not an appropriate one for the Court to review the challenged decision.

Conclusion and Orders

65. The review motion is therefore declined and the Court dismisses it with no order as to costs.

Delivered, dated and signed in open Court in Nakuru on this 28th day of November 2014

Radido Stephen

Judge

Appearances

For Claimant Mr. Wamaasa instructed by Wamaasa & Co. Advocates

For Respondent Mr. Masese, Senior Legal Officer, Federation of Kenya Employers