



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 476 OF 2012

JOHN OGUTU RAGAMACLAIMANT

VERSUS

ELIMU CO-OPERATIVE SAVINGS & CREDIT

SOCIETY LIMITEDRESPONDENT

JUDGEMENT

This is a claim dated 12th March 2012 by the claimant John Ogutu Ragama for premature termination of his contract and non-payment of his terminal dues by the respondent Elimu Co-operative Savings and Credit Society limited. The respondent on the other hand filed their defence and counter-claim dated 28th May 2012 where they admit that the claimant was their employee but was terminated due to gross misconduct and claim against him the sum of kshs. 861,710.90 being an amount owing and payable by the claimant to the respondent at the time of termination.

In the claim the claimant states that he was employment on fixed term contract of 36 months by the respondent on 24th April 2006 and the same was to be terminated upon 3 months notice by either party. That he was to be paid 25% gratuity of the total basic salary upon completion of the contract term and 30 days leave. That on 27th July 2007, he received a letter from respondent alleging gross misconduct and insubordination and was sent on compulsory leave which was illegal and not based on any good ground or according him natural justice as he had not conducted himself in a gross manner or committed acts of insubordination in breach of his contract terms. He therefore outline his claim for contract term not served, notice pay, leave day, severance pay and gratuity all amounting to kshs. 2,491,525.45.

The claimant further claims that he was surcharged by the respondent a sum of kshs.73,960.00 which was wrong and claims the same as due to him.

In defence the respondent stated that the claimant's contract of service was terminated due to gross misconduct and therefore not entitle to notice. The respondent subsequently lodged a counter-claim against the claimant stating that the claimants claim was out of time at the time of its presentation against section 90 of the Employment Act. that while employed as the respondent Chief Executive Officer (CEO) the claimant was in breach of his contract forcing the respondent to terminate it and by then he was owing the respondent in terms of a car loan, society loan, unsurrendered imprest, BOSA loan, FOSA loan and staff welfare monies due all amounting to kshs. 861,710.90 Which the respondent now claims as payable by the claimant.

Despite filing the claim the claimant never took a date for the hearing of his claim. The matter came for hearing on several occasions at the instance of the respondent and despite the claimant being served and

an affidavit of service filed, he did not present himself for hearing of the case.

A mention notice was issued to the claimant dated 22nd January 2013 and an Affidavit of Service sworn by Mark Okinda dated 8th February 2013 filed in court and the claimant failed to attend the mention date on 12th February for directions and the Court entered judgment for the respondent as against the claimant for the counterclaim subject to formal proof and further granted a hearing date for the 25th of March 2013.

The matter came for hearing on 25th March 2013 but both parties were absent.

A hearing notice dated 6th May 2013 was issued to the claimant and an Affidavit of Service sworn by Mark Okinda dated 10th May 2013 filed in court for hearing on 14th May 2013 but the claimant failed to attend the hearing. The court directed the respondent to proceed with the hearing of the Counter-claim as against the claimant.

In evidence the respondent called Mrs. Mary Wawira Kinyua the acting CEO of the respondent and the duly authorized officer of the respondent to represent their case in court. The witness stated that the claimant was terminated by the respondent for gross misconduct and insubordination and unethical behavior, he was sent on compulsory leave and upon investigations the respondent took a decision to terminate his contract in accordance with the terms of his contract and a notice was sent to him with stating the reasons for termination. He was given a chance to appeal but failed to do so.

That at the time of termination the claimant had liabilities and a demand was sent to him for the sum of Kshs. 861,710.90 where he replied and admitted owing for the loan of Kshs.100,000.00, salary advance of Kshs.12,000.00 and a FOSA advance of kshs50,000.00 but failed to mention the other liabilities that he owed the respondent. Thus the respondent computed the number of days owed to the claimant for leave at Kshs.82,576.00 and these were off-set from the liabilities owed to the respondent. That the FOSA advance was off-set at Kshs12, 000.00 as admitted and owing at Ksh.54,000.00 and this was set off as well as due from the staff welfare. That the claimants claim was dismissed for want of prosecution and the respondent in their counter-claim seek to recover monies owed and not off-set from the terminal dues to the claimant set out as;

The car loan due amounting to kshs. 1000,000.00;

Society loan due amounting to kshs.672,040.00; and

Unsurrendered imposts amounting to kshs.79,625.15.

The witness further stated that the claimant applied for a loan in accordance with the terms and conditions of his contract and his grade and as the most senior employee he was entitled to the highest benefits from the respondent. He took a loan for the purchase of a motor vehicle as he was entitled to this. The procedure was to make an application for a loan which he submitted and applied for the sum of kshs.350, 000.00 and was approved and disbursed to him in a payment voucher dated 24th November 2003. That they started repaying the loan on a monthly check off but he had not cleared the loan repayment by the time of his termination and had a balance of kshs.1000, 000.00 due and had paid Kshs.250, 000.00. This sum was admitted by the claimant as owing from him.

That the claimant had a society loan as an employee of the respondent he was entitled to a loan upon application and he applied for kshs.964,000.00 as a development loan to be repaid back in 64 months and this was paid in two cheques No. 052662 amounting to kshs.632,755.00 and cheque No. 052680 amounting to kshs.331,045.00.

That the claimant had unsurrendered imprest at the time of termination being cash issued to staff for official duty which must be accounted for or surrendered under the terms and conditions as set out by the respondent of which the claimant was aware of. That the claimant had an imprest of Kshs.79, 625.15 which

imprest was given on different dates and evidence attached as annexure marked "4" in the statement of response. This was a tabulation of imprest not surrendered at different dates all amounting to Kshs.79, 625, 15.

That further to this imprest, the respondent did a demand notice to the claimant to surrender imprest for taxi hire amounting to Kshs.25,000.00 which was found to have been improper but failed to account or surrender the same to the respondent. The witness outlined the statement of account for the claimant as at the time of his termination on all the outstanding issues and he owed the respondent the sum total of Kshs.859, 200 which was recovered from his guarantors and what is due is the sum of Kshs.672, 040.00 and together with the outstanding unaccounted imprests the total dues from the claimant to the respondent amounted to Kshs.861, 710.90 as the net liability and the costs of the suit.

The respondent therefore in their counter-claim seek the repayment of the sum of Kshs.861,710.90 and the costs of the suit since a demand has been made to the claimant and he has failed to make good the demand.

A counterclaim is a fresh suit where a claimant should be given a chance to reply. It is an independent action by the respondent as against the claimant. It is a cross-claim and the principles of pleadings which govern a counter-claim are substantially the same as those, which would apply to a statement of claim in a cross-action brought by the respondent against the claimant. Where a claim must comply with the Rules of the Industrial Court or in the case where Order VII, rule 1(2) of the Civil Procedure Rules, then by parity of reasoning a counter-claim must equally comply with the mandatory provisions of Order VII and the relevant rules therein.

The claimant was served with the statement of response the counter-claim but failed to reply to it or attend the hearing to prosecute his claim and defend himself against the counter-claim. This court proceeds to enter judgment against the claimant in terms of the court-claim and directed the respondent to proceed with formal proof.

The evidence of the respondent is therefore uncontroverted in any material way and noting that In making payments to any employee, an employer must ensure that all the statutory deductions due are removed from the gross pay as well as in law entitled to make a deduction of any amount which is authorized by any written law for the time being in force, collective agreement, wage determination, court order or arbitration award; as under Section 19 of the Employment Act.

Employees who out of their own free will join employees welfare associations, Sacco, Union do so by virtue of their employment and do authorize the employer to make deductions from their salaries to the Sacco for their welfare and for the collective good of all. An employee whose employment is terminated, and at the same time is owing and has not made a repayment from their savings without taking into consideration the collective agreement under their Sacco and or cooperative society must have this deducted from terminal dues and where these are not sufficient, this becomes a debt recoverable directly from himself. Where an employee has enjoyed a loan facility from the collective kitty he is equally under a duty to make good any dues where his relationship with the collective is severed by virtue of the termination of his relationship with the principal.

I therefore enter judgment for the respondent as against the claimant for the sum of Kshs. 861, 710, 90;

The judgment amount is payable with interest from the date the counter-claim was filed; and

Costs of the suit and the counterclaim granted to the respondent herein.

Delivered in open court and dated today the 31st day of May 2013.

M. Mbaru

Judge

In the presence of:

Court Clerk: Jacob Kipkirui

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