



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO.1795 OF 2011

CATHERINE KINYANY..... CLAIMANT

-VERSUS-

MCL SAATCHI & SAATCHI RESPONDENT

JUDGEMENT

By a Memorandum of Claim dated 21st October 2011 and filed in Court on 27th October 2011, the Claimant alleges that she was wrongfully terminated by the Respondent and that the Respondent failed to give her notice. She alleges that she was employed by the Respondent on 1st September 2003 as General Manager and was promoted to Managing Director in January 2006; that she served in that position until 21st January 2011 when she was suspended to allow the Respondent carry out investigations.

She alleges that the investigations were unwarranted as no complaint had been lodged against her. The Claimant further alleges that on 16th February 2011 she tendered her resignation which she alleges is constructive dismissal.

The Claimant seeks the following orders:-

- (a) Kshs.3,874,087 being award on account of unfair termination.
- (b) Interest

(c) Costs

The Respondent filed its reply to the Memorandum of Claim on 27th July 2012 in which it denies the claim by the Claimant. The Respondent avers that following mismanagement of its affairs by the Claimant who was its Managing Director, the Respondent decided to suspend the Claimant from duty on full pay. That the Claimant resigned before the findings of the audit were acted upon. That the resignation of the Claimant was voluntary and she demanded payment of the following:-

- (a) Five months management pay in arrears
- (b) January 2011 salary.
- (c) Half salary for February 2011.
- (d) Three month's salary in lieu of notice.
- (e) Pension funds.

The Respondent further avers that there were subsequent negotiations following which parties agreed on a settlement of Shs.3,083,501 which the Respondent has settled in full. The Respondent further avers that the Claimant is estopped from making any further claim having fully compromised and settled all issues and claims against the Respondent.

The case was first mentioned in Court on 29th March 2012 before Hon. Justice I.E.K Mukunya (now retired) when the Court gave directions on filing of pleadings and fixed the case for hearing on 18th July 2012. On that date the hearing of the case was rescheduled to 30th September 2012. When the parties appeared before me on 30th September 2012 they informed me that they had agreed to canvass the case by way of written submissions.

The parties appeared before me again on 11th February 2013 when they confirmed having filed their various submissions. In the final submissions both Claimant and the Respondent agree that the Claimant has already received Kshs.3,083,501 from the Respondent.

I have read and considered the pleadings and the submissions filed by the parties together with the appendices and the authorities.

In my opinion therefore the only issues for determination are the following:-

1. Whether the Claimant was constructively dismissed or she resigned freely on her own volition.
2. Whether the Claimant is entitled to the prayers sought.

1. Whether the Claimant was constructively dismissed

From the evidence on record, the Claimant was by letter dated January 2013 suspended on full pay. She replied to the suspension letter on 25th January 2011. In her letter she complained about having been ambushed by the decision and was never given the reasons for the suspension or an

opportunity to defend herself. She asked for a hearing before the Board of Directors and for an expeditious resolution. The Claimant wrote a reminder to the Respondent on 7th February 2011 in which she requested for a meeting with the Respondent's Chairman. In the letter she expressed the desire for an amicable settlement.

On 16th February 2011 the Claimant resigned from employment. In the letter of resignation she demanded 5 months management pay in arrears, salary for January 2011 and half salary for February 2011, 3 months' salary in lieu of notice and processing of her pension.

In a letter dated 22nd February 2011 the Respondent wrote to inform the Claimant about the shortcomings unearthed by the audit of the Respondent Company. The letter acknowledged her resignation and confirmed that the Respondent was willing to settle the matter amicably. The parties had further exchanges of correspondence ending with the Respondents letter dated 27th July and the Claimants reply dated 10th August 2011 in which the Respondent proposed settlement and the Claimant agreed to terms of settlement as reproduced here below:-

27th July 2011

Ms. Catherine Kinyany

P.O. Box 41931

NAIROBI

Dear Catherine,

Re: Letter of Resignation/Final dues

We refer to your letter of resignation dated 16th February 2011 and the more recent meetings held with Bob Dewar and Sheena round-Turner.

As agreed with them in your meeting of Monday 11th July 2011, we reconfirm acceptance of your resignation. Your final dues are as follows:-

| | | |
|---|---|-----------|
| • 5 months management fees in arrears | - | 1,325.000 |
| • January 2011 salary | - | 390.778 |
| • Half month's salary for February 2011 | | 195,389 |
| • 3 months salary in lieu of notice | - | 1,172.334 |

Total:-

3,083.501

However, as you are very well aware about the company's financial state of affairs, we are unable to pay the total amount in one cheque. To this end, the company has accepted to pay the amount over a ten month period starting from the September 2011, with the breakdown as follows:-

| | | |
|---------------------------------------|---|----------------|
| <i>28th September 2011</i> | - | <i>383,501</i> |
| <i>28th November 2011</i> | - | <i>3,000</i> |
| <i>28th January 2012</i> | - | <i>300,000</i> |
| <i>28th March 2012</i> | - | <i>300,000</i> |
| <i>28th May 2012</i> | - | <i>300,000</i> |
| <i>28th October 2011</i> | - | <i>300,000</i> |
| <i>28th December 2011</i> | - | <i>300,000</i> |
| <i>28th February 2012</i> | - | <i>300,000</i> |
| <i>28th April 2012</i> | - | <i>300,000</i> |

In the event of the company recovering the payments outstanding will be increased accordingly.

Please acknowledge receipt of this letter.

Yours sincerely,

N.M. Kangethe

CHAIRMAN

Copy to:

Bob Dewar

Sheena round-Turner

The Claimant replied to the Respondents letter as follows:-

Catherine Kinyan

P.O. Box 41931

NAIROBI

10th August, 2011

MCL Saatchi & Saatchi

Ideas House

Muthithi Road

P.O. Box 41305-00100

NAIROBI

Dear Sirs,

RE: CLAIM OF DUES DUE ME FROM YOURSELVES

Reference is made to your letter dated 27th July 2011 in pursuant to the meetings between your Vice Chairperson Mrs. Sheena round-Turner and your Director Mr. Bob Dewar, with a view to settle my claim based on the demand letter from my lawyers dated 13th June, 2011.

With a view to amicably settle the matter herein I am acceptable to receive, in full and final settlement of my claim as per the demand letter dated 13th June, 2011, the sum of Kshs.3,083,501.00, which sum of money shall be paid to me in the manner proposed in your proposal dated 27th July 2011 with one correction: payment of 28th November 2011 to be 300,000/- and not 3,000/- as stated in your letter.

In the event of any default thereof, my advocates are under irrevocable instructions to summarily recover the sums due by way of the court process without any further recourse to your.

Yours faithfully,

CATHERINE KINYANY

Copy to:

Mohammed Muigai Advocates

K-Re Centre, 4th Floor

Wood Avenue

NAIROBI

Apparently the Respondent did not pay as agreed leading to the filing of this claim.

In the letter of resignation the Claimant demanded 5 months management pay in arrears, salary for January 2011 and half salary for February 2011, 3 months' salary in lieu of notice and processing of her pension. This is what she was eventually paid by the Respondent.

From the foregoing there is no evidence of constructive dismissal. For a claim of constructive dismissal to succeed, the Claimant must show that the Respondent acted in a way that made it extremely hard for the Claimant to continue working.

In the present case, the Respondent actually sent the Claimant on suspension to enable it carry out investigations. This was the beginning of a disciplinary process that may have led to disciplinary action being taken against the Claimant. The Claimant however did not wait for the disciplinary process to be concluded. As stated above, she is the one who invited the Respondent to discuss settlement and what was eventually agreed upon is what she had asked for in her letter dated 16th February 2011.

I therefore find that the Claimant voluntarily resigned from employment.

2. Whether the Claimant is entitled to the prayers sought.

The Claimant prayed for the following:-

- a) Kshs.3,083,501 being terminal dues
- b) Kshs.4,770,336 being award on account of unfair termination
- c) Interest
- d) Costs

As already stated above, the Claimant has already been paid the sum of Kshs.3,083,501 which is claimed in prayer (a). The Court is therefore to consider only the prayers under (b) (c) and (d).

The Claimant prays for maximum compensation of 12 months' salary in prayer (b).

As I have already found, the Claimant was not constructively dismissed. She voluntarily resigned. A claim for compensation can only be granted if the Court finds that there was unfair termination or dismissal.

This is not the case here. The Claimants prayer for compensation must therefore fail. Consequently I dismiss the claim for compensation.

The Claimant prayed for interest under prayer No. (c). The Respondent agreed to pay the Claimant the sum of Kshs.3,083,501 by letter dated 27th July 2011.

The payment was to be by installment and the final installment was to be paid on 28th June 2012. The Claimant agreed to the payment plan as proposed by the Respondent.

Had the Respondent paid as agreed, there would have been no reason for the Claimant to file this claim.

For this reason I award the Claimant interest on the agreed sum of Kshs.3,083,501 from the date of filing her case to the date on which payment was made to her at the rate of 12% p.a.

For the same reasons as in prayer (c), prayer (d) is for costs of the suit. I award the Claimant costs of this suit.

Orders accordingly.

Read in open Court and signed on this 15th day of May 2013.

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:-

NYAOSI

_____ for Claimant

NO APPEARANCE

_____ for Respondent