



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 200 OF 2013

NJONJO M. ITOTIA CLAIMANT

VERSUS

KENYA CHAMBER OF COMMERCE AND INDUSTRYRESPONDENT

JUDGEMENT

This is a claim that was filed on 12th February 2013 by the claimant Njonjo M. Itotia against the respondent the Kenya Chamber of Commerce and industry for wrongful termination and non-payment of terminal dues. After summons was served, the respondent entered appearance on 6th March 2013 but has not filed any defence herein and did not attend the scheduled hearings. Hearing was scheduled for 24th May 2013 and 17th July 2013, these Hearing Notices were served upon the respondent who acknowledged receipt and an Affidavit of service filed by Simon Kioko Kathumbi on 16th July 2013 . The court being satisfied that the respondent had dully been served proceeded to hear the claimant's case on the 17th July 2013 but further rescheduled the same on the 20th of August 2013. The claimant filed his written submission dated 30th August 2013.

In the claim the claimant stated that the Respondents being a limited liability company carrying out business as a business membership organisation comprising the business community employed him in various capacities and positions, the last being the chief executive office but was wrongfully terminated on 3rd February 2012. The leadership and management of the respondent being vested on the Management Committee that comprise members elected from the paid-up members of the organisation and headed by a national chairman with power to hire and fire the employees. That the respondent leadership has for five years been the subject of acrimonious disputes resulting in numerous court cases between various factions some resulting in physical violence and takeovers of the respondent premises in Ufanisi House.

On 30th January 2012, while the claimant was on official duties abroad, one faction invaded the respondent offices and physically threw out the sitting management by occupying the offices and proceeded to appoint a new chief executive officer who was installed in the place of the claimant and by this reason the claimant position was effectively terminated wrongfully as upon return to the country he was not allowed access to his office or resumption of his duties and thus claims damages. That at this time he had salary areas, unpaid leave days and allowances all amounting to kshs.689,407/-. He was also not given a termination notice or any payment in lieu of such notice. That while he was aboard he earned per diem amounting to kshs.158,000/- and a further per diem of Kshs.22,000/- to Ethiopia and Sudan respectively but this was never paid to him by the respondent.

He now claims for the unpaid dues and compensation for the wrongful termination.

In his sworn evidence, the claimant stated that being an employee of the respondent he served for a period of over 10 years within which time the respondent suffered serious turmoil resulting in change of leadership through undemocratic means and it became difficult to function effectively. That in each takeover by a new faction, the chief executive officer would also be changed without regard to contractual obligations as between the respondent and its employees.

In January 2012, the claimant was away on duty to Addis Ababa when there was a faction takeover of the respondent offices and when he returned, he was not allowed access to his office where his personal and official documents were kept. He had been appointed on 10th February 2009 as the respondent technical advisor and on 29th March 2009 he was appointed as the acting chief executive officer for 90 days pending the recruitment of a chief officer but was later confirmed to this position. All these records were however withheld by the respondent new officers who took over the offices while he was away on duty and due to the hostility directed at him, he has been unable to get these documents or any copies.

At the time of his unprocedural termination, he was owed per diem allowances amounting to Kshs.288,884/- and he was owed salary arrears amounting to Kshs.368,573/- on the basis that due to the acrimonious changes of leadership the respondent had been unable to raise membership fees to support the officers at its secretariat hence the workers were owed huge salary balances. That the claimant had not taken his leave and had 53 days computed at amounting to Kshs.220,834/- and in his contract he was to get a leave allowance of Kshs.100,000/-. Termination was to be by giving each party a notice of 3 months which was not given to him when the respondent wrongfully terminated him and was thus owed Kshs.360,000/- being salary for 3 months and a house allowance of 20,000 per month all being Kshs.100,000/- that the per diem balance owing at the time of termination was Kshs.180,000/-

Having been the respondent chief executive officer, the claimant tried to discuss the issues with the current chair and chief officer before filing this claim, but they have failed to make amends or settle his dues. Due to the unfair circumstances of his termination, he now claims damages for the termination.

Under the Employment Act, an employer can terminate the employment of an employee where there is a valid reason that is fair in the circumstances of the case. Failure to have a valid and fair reason for termination, such termination will be unfair. Beyond having a valid and fair reason for termination, an employer must also write such reason or reasons in the notice of termination to the employee. The requirement to have this notification in writing is important as from this notice; an employee has a right to challenge the validity of the termination and the fairness of it. Where it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee, then the Court can award compensation to the employee or any other remedy found to be fair, just and equitable.

Section 35(1) (c) of the Employment Act, states;

(c) Where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing. [Emphasis mine].

Even where this written notice is issued, an employee can dispute the lawfulness and fairness of such termination as stipulated under section 35 (4) (a);

(4) Nothing in this section affects the right—

(a) Of an employee whose services have been terminated to dispute the lawfulness or fairness of the termination in accordance with the provisions of section 46;

Further to the above, the reasons given in the notice of termination must comply with the provisions of section 45 of the Act;

(2) A termination of employment by an employer is unfair if the employer fails to prove—

(a) That the reason for the termination is valid;

(b) That the reason for the termination is a fair reason

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In this case, the claimant was not given any termination notice nor was the reasons for his termination communicated to him. He was simply locked out of his office due to what he stated to be leadership wrangles within the respondents membership and membership. It should however be noted that, whatever an employer is going through, profits or losses, where they have employees involved, due process for termination of these employees services must be done in accordance with the law. Whether there is new management in force or changes in leadership, the rights of the employee must be protected whatever the problems or changes. Notice for termination can be issued as per the law or the reasons for such termination and notice is given to the affected employees. Where this is not done and an employee is terminated, then this court will not hesitate but sanction such an employer. This is an unfair labour practice as under the provisions of section 45 of the Employment Act. The court will make an award of 6 months pay, this being a fair and reasonable compensation to the claimant.

All dues accruing and unpaid at the time of termination are payable to an employee so terminated. These include any benefit, expense or allowance owed as at the date of termination. In this case the allowances or per diem due to the claimant for duties undertaken in the course of his employment and that related to the time he was in employment are payable to him. The salary arrears due will be awarded herein all amounting to Kshs.368,573.00.

The leave days due at the time of termination are computed at 53. This will be 220,834. From the terms and conditions of employment, the claimant had the benefit of leave allowance at Kshs.100, 000.00 which will be awarded.

Where notice is not given before termination, a payment in lieu of such notice is due. The claimant has claimed for 3 months pay, however from his letter of offer of employment, this was not an agreed terms of his service. I will therefore grant one month pay as under the provisions of section 35 of the Employment Act. I will award the sum of Kshs. 120,000.00 being one month salary.

The allowances outstanding unpaid at the time of termination amount to Kshs.180,000.00. This will be awarded.

Judgement is hereby entered for the claimant as against the respondent in the following terms;

- 1. A declaration that the termination of the claimant was unfair in the circumstances of this case**
 - a. Compensation for unfair termination at 6 months pay all amounting to Kshs.720,000.00;**
 - b. Notice pay at kshs.120,000.00;**
 - c. Unpaid salary at Kshs.368,573.00;**
 - d. 53 leave days and allowance at kshs.320,834.00; and**
 - e. Allowances as due at kshs.180, 000.00.**
- 2. Costs of the case.**

Delivered in open Court this 16th day of September 2013.

M. Mbaru

Judge

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