



REPUBLIC OF KENYA
THE JUDICIARY
IN THE INDUSTRIAL COURT OF KENYA
CAUSE NO. 892 OF 2012

IRENE MUMINA.....**CLAIMANT**

VERSUS

DEVELOPMENT BANK OF KENYA LIMITED.....
RESPONDENT

JUDGMENT

1. The Claimant seeks various reliefs from Respondent for her alleged wrongful termination of contract. She was employed by a subsidiary wholly owned by the Respondent in 1986 and absorbed by Respondent in April 2004. She thus claimed dues for her 18 years' service to SEFCO and 3 years' service to Respondent making 21 years.
2. The Respondent denied the Claimant was entitled to the reliefs sought and averred that the letter of employment provided all the terms of the contract. It was averred the contract was properly terminated by effluxion of time and all dues paid.
3. The Claimant and Respondent both filed lists of documents to be relied on and the 2 parties presented their witnesses. The Claimant testified on 11th July 2013. She testified that she worked for SEFCO – Small Enterprises Finance Company – a subsidiary of the Respondent from 28th April 1986 till her absorption by the Respondent on 19th April 2004. She testified that she joined the Respondent as a Marketing Assistant. She sought payment of her dues from the company secretary of the SEFCO. Respondent's company secretary relied under letter head of Respondent dated 24th April 2004. She testified that she never got a contract and therefore her terms became permanent and pensionable. She testified that the Respondent terminated her contract on 17th April 2007.
4. The Respondent called George Wachira Wahiga Manager Finance at the Respondent. He testified that he has been in the employ of the Respondent since April 2004. He prior to that worked with SEFCO where he joined on 2nd March 1984. He knew the Claimant who he found at SEFCO where they worked together till they joined the Respondent under similar circumstances. He testified that the Claimant was employed on contract and that there was bi gap between SEFCO and the Respondent. He testified that her contract with SEFCO came to an end. Later in 2007 her contract with Respondent came to an end.
5. When the matter was concluded, the parties filed lengthy submissions the gravamen of which was to point out the regime applicable to the suit. As the contract and its termination took place before

2nd June 2008, the Employment Act 2007 was not applicable but rather the Employment Act Cap 226, Laws of Kenya. The Court appreciates the industry of parties to the suit and the research that was undertaken.

There is a plethora of cases and precedent cited but I will not delve into each of them except where necessary.

6. The case of **Salomon v. Salomon & Co. All ER 1895 – 1899 page 33** cited by the Respondent is the landmark case on corporate identity and recognizes the distinct separate corporate personality of companies. Of notable distinction is the separation of the investors or promoters of the company from the company itself. The dicta of Lord Halisbury and Lord Davey being very instructive. The House of Lords overturned the decision of Vaughan J. who had pierced the corporate veil with aplomb. The 2 entities in the case before me are stated to have a nexus. The Claimant testified that she was absorbed into the Respondent. The Respondent's witness confirmed this in his testimony and the correspondence confirms it. The Claimant had served for 18 years before the Respondent took her and the Manager Finance into the Respondent. The 18 years of service were not compensated by way of payment of gratuity. The letter of appointment issued to the Claimant by the Respondent is as follows:

April 19th 2004

Mrs. Irene K. Mumina

“Confidential”

c/o SEFCO Ltd.

NAIROBI

Dear Mrs. Mumina

RE: APPOINTMENT AS MARKETING ASSISTANT

Following the restructuring of SEFCO and its continued low business activity, it has been decided that you be assigned new duties in the Bank.

You have been therefore appointment Marketing Assistant in the Marketing Department of the Bank.

You will join the Bank in the above capacity on Scale 10 and will be paid a consolidated monthly salary of Shs. 74,456/=.

You will be entitled to 28 days leave and will be admitted to the current DBK Medical Scheme.

Other terms and conditions are as per the existing terms for DBK Staff and you will be advised on your acceptance of the appointment.

Your appointment will be on a 3 year contract basis, whose terms will be indicated in the contractual document that will be signed by yourself and the Bank.

Your appointment is effective from 1st May 2004.

Please sign and return a copy of this letter to the undersigned to signify your acceptance of the appointment.

Yours sincerely

(signed)

C.A. Otieno(Mrs)

Company Secretary/

Human Resource

7. It made provision for the acceptance or rejection and the Claimant accepted the offer on 23rd April 2004 as evinced by the signature on the second page of the letter. Both the Claimant and Respondent readily admit there was not contract that was signed contrary to the expectations in the letter of offer. On 27th April 2004, a letter dated April 27th, 2004 was written to the Claimant in response to her letter dated 22nd April 2004 to the Company Secretary of Small Enterprises Finance Co. Ltd.

The Claimant by that letter stated that in relation to the offer of employment she in principle accepted the offer but sought Gratuity for 2004(4 months), leave days and leave allowance for 2004 and a warm “handshake” for the 18 years she had worked for SEFCO since 1986.

In response the Respondent, not SEFCO, wrote to the Claimant on 27th April 2004 indicating that the letter of 22nd April 2004 was noted. The letter confirmed receipt of the letter of 22nd April 2004. The reply was on the letterhead of the Respondent. The author C.A. Otieno(Mrs) signed and stated that the Claimant should note the Bank will do the following:

- i. You will be paid gratuity for the four months of year 2004.
 - ii. You will be paid leave allowance for four months of year 2004.
 - iii. Your leave days will be transferred to DBK. All other issues remain as per the letter of 19th April 2004.
8. The Claimant was issued with an employee handbook which she acknowledged receipt thereof. Be that as it may, in the absence of the contract the terms of the employment are as per the letter of offer and the letter of offer is by no means a contract of service in terms of Section 14 of the Employment Act Cap 226 (now repealed). As such, there was no contract of service entered into. The net effect is that the Claimant’s service was one under categories of Appointment clause 4.2 (i)(d). There was agreement though no contract was signed. She was not on probationary/casual or temporary terms. She was holding an agreement being the letter. As much as the letter was not a contract of employment it provided terms. The terms were set out and other than issues of working hours and other details of employment – the letter bore the semblance and terms of a contract. It suffices for purposes of employment and did not of itself create a position of permanent and pensionable employment. If that was the case she would have been an employee under pension scheme of the Respondent. She was not.
 9. That said, the overlay of the 2 companies does not accord with acceptable practice. On 2 occasions correspondence was issued on behalf of the Respondent in place of the company known as SEFCO. The Respondent by letter of 27th April 2004 took on the leave due to the Claimant from SEFCO. What was to become of the Claimant’s service for 18 years? The 3 years served under the Respondent would not act as sufficient recompense to the Claimant for service under the predecessor of the Respondent. The witness of the Respondent testified that the contract under SEFCO came to an end. The liabilities thus were taken up by the Respondent. In the letter of 19th April reproduced above, the Respondent stated:

“Following the restructuring of SEFCO and its continued low business activity, it has been decided that you be assigned new duties in the bank”

The fact that she was assigned new duties suggests very strongly that she was transferred to the Respondent. It is anathemic to logic to assume that upon transfer all her liabilities and dues were extinguished. The Employment Act Cap 226 did not provide for service except for redundancies

declared. The restructuring and attendant changes to SEFCO amounted to redundancy. The plain reading of the provision of Section 16A(f) of the Employment Act Cap 226 as read with Section 2 of the Trade Disputes Act (now repealed) all show that the move from SEFCO to the Respondent is on account of redundancy. The Claimant is entitled to recover.

10. I am however presented with a dilemma. Though the redundancy was under SEFCO a part of the Respondent in all intents and purposes, the Claimant did not join the said SEFCO. If I order payment of the dues who will settle them? The company in the thick of things is not a party to the suit. The Respondent though incestuously connected to the said company denies being liable to the Respondent.

11. The Claimant's agreement with Respondent ceased upon the effluxion of time as her contract was not renewed. The Respondent alleges that it paid all the dues to the Claimant. As far as it can be discerned, the dues paid were in respect to her new engagement.

12. In the letter of 27th April 2004, the Respondent assumed liability for the Claimant's leave days, the Gratuity for the months in 2004. These were liabilities of the former employer SEFCO.

In the premises, I would order that the redundancy pay which I set at 15 days for each of the 18 years worked be paid by the Respondent. All the other claims are unsuccessful and will not lie. The Claimant to have costs on the 18 years gratuity based on her last salary with SEFCO.

13. The Respondent assumed great risk in not issuing a contract to the Claimant. Employers run a risk of liabilities if they do not follow the law. She received a certificate of service from the Respondent covering her service from SEFCO to DBK (the Respondent) further affirming the decision I have reached.

It is so ordered.

Dated and Delivered at Nairobi this 11th day of December 2013

NZIOKI WA MAKAU

JUDGE