



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 669(N) OF 2009

ONCHONGA ENOCK E. NYAMBOKE.....CLAIMANT

VERSUS

EASTERN AFRICA COATINGS LIMITED.....RESPONDENT

**JUDGMENT**

1. The Claimant filed the suit on 10<sup>th</sup> November 2009 against the Respondent his former employer seeking resolution of a dispute he framed as unlawful termination of employment and refusal to pay terminal benefits to him. The Claimant annexed in support of his claim the letter of Appointment, the letter of termination and the letter he wrote after the termination where he disagreed with the calculations made on his dues as well as his lawyer's demand letter.
2. The Respondent denied the claim and filed a Statement of Defence on 18<sup>th</sup> December 2009. In it, the Respondent averred that the Claimant's employment was on probation which was extended. The Respondent further averred that the Claimant wrote two letters demanding payment of 72,500/- as the final dues.
3. When the matter came up for hearing, Mr. Nyabena for the Claimant presented the Claimant who testified on the employment and its termination. The Claimant testified that he was terminated without notice and that he did not receive payment due to him. The Claimant sought payment of one month's salary in lieu of notice, salary for work done in June and 12 month's pay as compensation. The Claimant disputed the payments made to him by the Respondent as being the full and final settlement and even wrote a letter protesting the calculations made by the Respondent.
4. In cross-examination the Claimant testified that he signed the contract exhibited. The postal address in the contract was given as 12751 code 00400 Nairobi. Which was the Claimant's postal address. The duties and responsibilities set out in para 4 and there is a termination clause in para 6. He stated that notice as per the contract was 3 months while Probation was 6 months in which Notice was 1 week by either party. He stated that the Respondent was satisfied with his work though there were times the Claimant was called by Managing Director of the Respondent who said the Claimant was never communicating with him.
5. In performing of his duties, the Claimant stated he did not always communicate with MD. He provided reports to Managing Director. He claimed he did not do product costing. It was the MD's responsibility. When he was asked to refer to the contract para 4 he stated that the duties listed included review product costings and report to management. He however wanted the Court to note he was not doing product costing but did stock taking and prepared reports, coordinate

annual stock take and communicate the same. Though he stated he used to keep record of communication, he did not have any of the communication in Court.

6. Mr. Oyatta who appeared for the Respondent presented Mr. Okelo Jaramba who was the Manager of the Respondent. He testified that the Claimant's probation period of 6 months was extended by a further 6 months because the service by the Claimant was poor. The letter extending the probation is stated to have been given to the Claimant. The Respondent then terminated the Claimant's services summarily within the extended probationary period. In his testimony, Mr. Okeyo stated that sometimes in 2008 the Respondent was looking for an accountant and contacted a company known as Management Consultants which availed persons for interview. After interviewing the Claimant the Respondent agreed to hire him as accountant and around 22<sup>nd</sup> August signed the letter of offer and he was to start on 1<sup>st</sup> September 2008. It is not correct to say he joined on 1<sup>st</sup> July 2008. He was interviewed him in mid-August 2008 and he signed letter on 22<sup>nd</sup> August and the letter of appointment is dated 21<sup>st</sup> August 2008 and it offered him employment with effect from 1<sup>st</sup> September 2008. The letter made provision on annual leave where it provided he would be entitled after 1 year of service to 22 days leave.
7. The parties closed their respective cases after the testimony of their witnesses and made written submissions to bolster and emphasise the positions taken. I have considered these as I prepare the decision.
8. The Claimant is in short seeking recompense for services rendered and the termination suffered under the hands of the Respondent. He claims the termination was unlawful and seeks compensation being payment of 12 months, 1 month salary in lieu of notice and salary for work done in June.
9. He denied receipt of the letter dated 26<sup>th</sup> April 2009. The letter informed him that performance was unsatisfactory and the probation was extended for a further 6 months. The lawyer for the Claimant Mr. Nyabena was served with document no action taken to deny the existence of the letter and there was no rebuttal.
10. The Claimant admitted having discussions on his performance. The dismissal emanated from the performance which the Respondent says was wanting. The Claimant did not prove that he was entitled to the sums sought and in the premises did not prove his claim. Even the miscalculations were not articulated sufficiently or proved and thus cannot be awarded.
11. The Respondent had the upper hand in the employment but chose to exercise the power it had without mercy. Though the contract provided for 1 weeks notice, the fact that the probation was extended in a circuitous way shows lack of good faith on part of the employer. The contract permitted the extension of the probation period for a further 6 months.
12. As the Claimant has lost the case, I have to consider the issue of costs. Ordinarily, costs follow the event. The Claimant suffered some indignity in having the contract terminated without notice. The payment of 1 week is hardly notice but be that as it may, it was lawful to terminate the services of the Claimant but given the manner the extension of the probation was handled I will not award the Respondent any costs.

It is so ordered.

**Dated and delivered at Nairobi this 3<sup>rd</sup> day of December 2013**

**Nzioki wa Makau**

**JUDGE**

