



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE 996 OF 2011

JOHN MUSYOKI NDISO.....CLAIMANT

VERSUS

ECOBANK KENYA LIMITED.....RESPONDENT

JUDGMENT

The claimant has sued the Respondent, his former employer seeking payment of Kshs.100,000/= unlawfully withheld from his retirement benefits. He also seeks interest thereon plus costs.

In her defence, the Respondent had admitted that the Claimant was her employee until 31-7-2010 when he retired voluntarily. She, however disputes the indebtedness of Kshs.100,000/= as claimed and avers that the Claimant voluntarily authorised the withholding of the said Kshs.100,000/= as security pending investigations by the Banking Fraud Investigations Department and settlement of the matter in court.

The matter came up for hearing on 19-9-2012 when the Claimant testified as CW1 while the Respondent did not attend the Court and as such no evidence was adduced for the defence.

The Claimant told the court that he was employed by the Respondent in 1989 when she was known as East African Building Society (EABS) and left in July 2010 on Voluntary Early Retirement. That he was paid Kshs.900,000/= by the Retirement Benefits Authority (RBA) as his retirement dues. That the cheque was paid in his account at the Respondent's Bank which account was unilaterally opened by the Respondent. That after cashing the cheques, the Respondent retained Kshs,100,000/= as payback for financial loss of the same amount. The amount was held as security for the said loss pending investigation and settlement of a case in Court. That he was never served with any court commons or the case number. That the Memorandum of Response filed by the Respondent to the claim, did not plea any such case nor did it attach copies of the pleadings if any.

He relied on Appendix 4 & 5 to show the withholding of the Kshs.100,000/= for payback of financial loss. That the alleged money was only to act as security but it was not an admission of the loss or any wrongdoing. That he did not lose any money for the employer during his employment and there was never any complaint or demand receiver retirement.

Appendix 6 was relied on by the Claimant to prove that the bank did not loose any money because a Mr. John Otieno Kadhinja who admitted the erroneous withdrawal of Kshs.100,000/= had in fact been re-deposited to the bank account in dispute.

He prayed the Court to order the Respondent to release the Kshs.100,000/= plus costs and interest.

I have considered the pleadings and the evidence adduced in support of the claim and framed the following issues:-

- (a) whether it is this court's jurisdiction to entertain the dispute?
- (b) whether the claim has been proved on a balance of probability?

On the first issue, I find that it is obvious that I have jurisdiction over the matter because the dispute as framed on the body of the claim is one of the failure by the Respondent (employer) to pay the Claimant (employee) all his employment terminal benefits. According to the preamble to the Industrial Court Act 2011, this court has the jurisdiction "*with respect to Employment and Labour Relations and for connected purposes*".

As regards the second issue, I have considered the unchallenged oral evidence of the Claimant and Appendix 4, 5 and 6 to the claim and I am satisfied that the claimant was paid Kshs.900,000/= by the RBA out of which Kshs.100,000/= was withheld by the Respondent as security in a pending court case.

I am also satisfied that no case was ever filed against the claimant in any court in which he pleaded guilty or was proved guilty of any loss of money in connection with his employment. I am also convinced that the Respondent did not lose any money because there is no evidence adduced to prove that. That even if there was any money lost, the same was lost through a Mr. John Otieno Kadhinja who admitted the same and re-deposited it to the relevant account of the Respondent.

The failure by the Respondent to attend court and tender evidence can only be deemed that she did not have any evidence to offer.

In the circumstances, I believe the evidence of the claimant and hold that he has proved his claim on a balance of probability. It was unfair Labour Practise on the part of the Respondent to continue holding the Kshs.100,000/= when there was no lawful ground against the claimant.

The following shall, therefore be my orders:-

- (a) The Respondent do release the Kshs.100,000/= withheld as payback for financial loss to the Claimant forthwith.**
- (b) The Respondent to pay the Claimant interest on the Kshs.100,000/= at Court rates from 30-7-2010, the date it was withheld until payment of the debt in full.**
- (c) The Respondent to pay costs of the claim.**

Orders accordingly.

DATED and DELIVERED at Nairobi this 27th day of September, 2012.

Onesmus N. Makau
JUDGE