



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1504 of 2010

SAID TUKENA & 7 OTHERS.....CLAIMANT

VERSUS

HEROLA INVESTMENT COMPANY LTD..... 1ST RESPONDENT

MARSABIT LODGE (K) LTD..... 2ND RESPONDENT

JUDGMENT

The Claimants Said J. Tukena, Peter K. Umun, Dima J. Kampare, Kubi Wako Banta, Warko Jarso Kito, Kalicha Sora Jillo, Kalicha Jarso Kito and Duba J. Kampare filed the memorandum of claim on 19/07/2012 through Wandabwa Advocates. The Respondents Herola Investment Company Limited and Marsabit Lodge (K) filed the Reply to memorandum of claim on 05/11/2012 through Kiogora Mutai & Company Advocates.

This case was commenced by the plaint filed on 17/09/2003 and the defense was filed on 19/12/2003 in the High Court at Nairobi. The case was transferred to this Court in view of the Court Jurisdiction over the dispute.

The claimants are praying for judgment against the Respondents for Ksh.3,322,412/= and costs of the case. It is the Respondent's prayer that the claimant's claim be dismissed with costs. The case came up for hearing on 05/11/2012.

The 1st Claimant Said J. Tukena gave evidence to support Exhibit C2 being authority of the other claimants for the 1st claimant to give evidence on their behalf. The testimony was as follows:

1. That as staff of the Respondents the Claimants stopped working on 1/8/1998.
2. He received a letter dated 01/08/1998 from Kenya Tourist Development Corporation. The letter at folio 23 of the memorandum of claim stated as follows.

"01 October 1998

The Manager

Marsabit Lodge Limited.

P.O.Box 45

MARSABIT

Dear Sir,

SALE OF KTDC SHARES IN THE ABOVE LODGE

Further to your discussion with our Messrs Koros and Mwenda, this is to confirm that KTDC has sold its shares in the Lodge Company to M/s Herola Investment Limited.

You are therefore requested to co-operate and assist in the smooth handing over of the Lodge to the representatives of M/s Herola Investment Limited.

The shares have been sold on a going concern and M/s Herola Investment Ltd have taken over all the existing liabilities including staff of Marsabit Lodge Ltd.

Yours faithfully

R.M. KIATTU

GENERAL MANAGER (F)

FOR MANAGING DIRECTOR”

3. That the claimant handed everything to the Herola Investment Ltd as per inventory lists at folios 20, 21 and 22 of the memorandum of claim. The 1st Respondent was represented by one Stephanie Majuma and the 2nd Respondent was represented by the witness as the Manager. The Kenya Tourist Development Corporation was represented by one David K. Koross. Folio 22 on the staff establishment for the 2nd respondent as at 1/10/1998 includes:

- a) Said Jillo Tukena - Manager
- b) Peter K. UmUn - Accountant
- c) Dima Jillo Kampare - Cook
- d) Kalicha Jarso Kito – Bar Man
- e) Kalicha Sora Jillo- Kitchen Hand
- f) Duba Jillo Kampare –Dhobi
- g) Kubi Wako Banta – Watchman
- h) Wako Jarso Kito- Room steward
- i) Jillo Duba Jillo- casual (General)

4. It was the arrangement that after the handover all staff would vacate their residence at the 2nd Respondent’s Hotel, reside in Marsabit town and the 1st Respondent would renovate the Hotel and thereafter recall the staff. The Hotel was renovated and the staff were never recalled.

5. As at 01/08/1998 the claimants’ salaries had not been repaid. The computation is at folio 24 of the memorandum of claim. It shows that before the 1st Respondent bought the shares of Kenya Tourist Development Co-operation’s Management, the claimants were owed Ksh.533,528.00/=. It also shows that orders of the management of the 1st Respondent from October 1998 to July 2001 the Claim for unpaid

wages was a sum of Ksh.1,755,964.00/=. At folio 25 of the memorandum of claim, the 1st respondent wrote to the General Manager of Kenya Tourist Development Corporation as follows:

“5th October, 1998

Mr. R.M. Kiattu

General Manager (F)

P.O. Box 42013

NAIROBI

Dear Sir,

RE: STAFF MATTERS

Reference to your letter dated 1st October 1998 on sale of K.T.D.C. shares to M/s Herola Investment Ltd who have taken over all the existing liabilities including staffs.

Enclosed herein please find a list of all staff dues including GRATUITY totaling to Ksh.2,244,577.90 for your easy reference.

We have patiently waited for our monthly wages from August 1997- Sept'98 totaling to Ksh.533, 523. 90. Kindly please let who ever is paying, pay us our dues the soonest possible. We have faced several difficulties during the said period.

Yours faithfully

(SAID J. TUKENA)

MANAGER

CC. Ijaz Ganjee

Herola Investments Ltd,

Nairobi.

6. The witness stated that the Claimants had never been terminated and they had not been paid their emoluments as claimed in this case.

7. The claimants record of employment is at folios 1-18 of the Annexure to the memorandum of claim. The claimants were employed by Kenya Tourist Development Corporation which was the owner of the 2nd respondent. The 1st Respondent bought the corporation's shares. The witness referred to folio 2a being annexure on the letter dated 26/07/2001 by the Corporation to the District Commissioner, Marsabit. The letter stated as follows:

26/07/2001

The district Commissioner

Marsabit, Eastern Province

MARSABIT

Dear Sir,

This is to acknowledge receipt of your letter ref 2704/402 dated 10 July 2001. KTDC sold its shares in Marsabit Lodge Limited in 1998 to M/s Herola Investment Limited. The shares were sold on going concern basis whereby M/s Herola Investment Limited took over the liabilities existing before the sale.

Moreover, the employees were employed by Marsabit Lodge Limited in which KTDC was a shareholder. The employees should therefore demand their dues, if any, from Marsabit Lodge Limited.

Yours faithfully

R.M. KIATTU

GENERAL MANAGER (F)

For: Managing Director

Cc District Labour Office

P.O.Box 580

MERU

KUDHEIHA Workers

P.O BOX 41763

NAIROBI

The Respondents' witness was one Sarah Talaso Bonaya who stated that she worked with East Africa Community and was a Director of the 1st Respondent. She testified as follows.

1) That on 16/4/1998 she was one of the Directors of the 1st Respondent and her co-director was her late husband Honourable Bonaya Godana. At the time they purchased the shares of the Kenya Tourist Development Corporation in the Hotel, the Hotel was owned between the corporation and the 2nd Respondent. The shareholding of the Corporation was 88.7% and which the 1st Respondent bought.

2) At the time the 1st Respondent purchased the corporations shares, the same was at a set price and that included the liabilities. Annexure SG1 on the reply to the memorandum of claim is the letter from the corporation to Late Honorable Dr. Bonaya Godana dated 16/04/1998 and it shows:

a) As at 30/06/1996 and as per schedule the creditors and outstanding loans were Ksh.11,874,792.00/=. As relates to staff matters the creditors schedule included: union dues Ksh.23,895/=, coin Ksh.16321/= Trade Creditors Ksh.523,537/= and PAYE 127,162/=.

b) Assets were at Ksh.17,430,000/=

c) The corporation shareholding in the lodge which was 146,135 shares represented 88.7% ownership. The letters then stated thus;

“The above assets and liabilities would be shared in the same proportion with Marsabit County Council who own the remaining 18750 shares (11,3%)”

d) Going concern valuation Using ***“free cash flow”*** method is stated at Kshs.11,305, 000/= broken down as follows:

Corporations 88.7% shares – Ksh.10,027,535

Marsabit County Council - Ksh.1,277,465

Total - Ksh.11,305,000/=

4. It was further stated in that letter,

“A going concern valuation presupposes that a new owner will acquire existing assets and liabilities, in addition to paying the above price.”

5. The letter concluded as follows:

“Clearly your offer is only 20% of the net assets and less than 10% of the going concern valuation of the business.

In view of the foregoing concern we are willing to propose a counter offer, on a net asset as follows:

Proposed selling price of assets- Ksh.12,874,792

Less liabilities - Ksh.11,874,792

net purchases Price as per

Your bid – Ksh.1,000,000/= - Ksh.1,000,000

You will then need to negotiate with the creditors on acceptable payment arrangements.”

The letter was signed by one W.K.B. Arap Chelashaw, Managing Director.

6. The witness stated that when the 1st Respondent took over the lodge the place was not habitable and they had to renovate the place. There was nobody working at the lodge. The 1st Respondent was not given any list of employees. No creditors list was validated. There was a letter of zero balance from the corporation so that the employees had no claim.

7. There was no any handover report as alleged by the claimants’ witness. The employees were not handed over to the 1st Respondent

8. The late husband of the witness did all the transactions and the witness stated that she did not know how the actual take over happened – she had become involved after the death of her husband when the handover had already taken place. It was possible that her husband could have delegated the handover. Nevertheless, she had signed the agreement which she did not produce in evidence. Her advocate undertook to file it by 6/11/2012 at 5.00 pm but the undertaking was not honoured.

9. The witness stated that she had not been shown the liabilities after the purchase of the shares. The trade creditors of Ksh.523,537 would not be the staff salaries even if the figure tallied the amount claimed.

10. The witness confirmed that the 1st Respondent bought with liabilities from the corporation. The liabilities, the witness stated she understood, would include the staff pay and pensions. The witness agreed with all the communication from the corporation as being true. However, she did not agree that there was an agreement that staff would be retained.

The court has considered the pleadings, document on record and the evidence and makes the following findings:

1. The claimants have established that at all material times they were employed to serve at Marsabit Lodge (k) Limited which was initial co-owned between the Kenya Tourist Development Corporation and Marsabit County Council and later between the Council and the 1st Respondent. The court finds that the

claimants were staff of 2nd Respondent at all material times.

2. The court finds that the 1st Respondents bought the shares of the corporation on the basis of a going concern and the purchase agreement was that the 1st Respondent would take over all the existing liabilities including staff of Marsabit Lodge Limited, the 2nd Respondent. The court particularly refers to folio 23 being the letter dated 01/10/1998 on the memorandum claim by which the Corporation conveyed to the 2nd Respondent's Manager the relevant information that the 1st Respondent took over all the existing liabilities including the staff.

3. As confirmed by the Respondents' witness, the Respondents would be willing to pay the claimants provided the claims are established and the agreement for the purchase of the Corporation shares by the 1st Respondent clearly addressed the issue of staff being part of the liabilities or to be taken over by the 1st Respondent. The letter by the Corporation dated 16/04/1998 marked SG1 on the reply to the memorandum of claim was clear in concluding, **"you will need to negotiate with the creditors on acceptable payments arrangements."** The staff were such creditors and the court finds that it was the obligation of the 1st Respondent to negotiate with them on such payment arrangement.

4. The Respondents' witness stated that she was waiting for verification and confirmation of the staff claims from the Corporation. The court finds that the 1st claimant Said . J. Turkena was the manager for the 2nd Respondent and his record of the staff matters cannot be doubted. In particular, his letter dated 05/10/1998 at folio 25 on the memorandum of claim and reproduced in this judgment is clear on the issue of staff matters. The letters made a claim of Ksh.2,244,,577.90/= being staff gratuity of which Ksh.533,528.90 being the monthly wage from August 1998. The computation is attached to the letter and the court finds that it was the obligation of the 1st Respondent to negotiate with the staff on the payment arrangement as per the agreement with the Corporation following the 1st Respondent's purchase of the Corporation's shares in the 2nd Respondent company. The court finds that as the manager engaged by the Corporation and the 2nd Respondent to run the Lodge, there would be no better source of the staff claims as documented at folio 25 on the memorandum of claim. The 1st claimant was the agent for the Corporation and the Corporation and 2nd Respondent as the principals they are bound by the actions and evidence given by the manager. The court therefore finds that the claims have been proved on the basis of the evidence on record and the computation was not disputed by the Corporation or the 2nd Respondent.

5. The court also finds that the Respondents particularly admitted liability to pay staff subject to the agreement with the Corporation and proper computation of the claims as per the letters at folio 30 on the memorandum of claim dated 28/04/2002 addressed to the Marsabit District Commissioner.

6. The Court finds that the claimants' monthly wage was as provided for in the computation attached to folio 25 of the memorandum of claim and included:

- | | | |
|------------------------|---|--------------|
| (a) Said Jillo Tukena | - | Ksh.11,884/= |
| (b) Peter Kimanyi Umun | - | Ksh.6,696/= |
| (c) Dima Jillo Kampare | - | Ksh.3,490/= |
| (d) Kalicha Sora Jillo | - | Ksh.2,681/= |
| (e) Kalicha Jarso Kito | - | Ksh.3,121/= |
| (f) Wako Kubi Banta | - | Ksh.2,690/= |
| (g) Wako Jarso Kito | - | Ksh.2,956/= |

(h) Duba Jillo Kampare - Ksh.3,666/=

Total - Ksh.37,184/=

The court has found that the 1st Respondent was obligated to take over the staff and to pay any liabilities arising from the service by the staff. The Respondents' witness testified that there was no intention to retain the staff. The court finds that the Respondents were guilty of conduct that was a significant breach going to the foundation of the employment contract and the court further finds that the Respondents by their conduct, clearly showed that they were no longer interested and did not intend to be bound by the employment relationship with the claimants. The claimants are entitled to treat themselves as discharged from any further employment on account of constructive dismissal. The claimants are entitled to leave employment with or without notice for the unreasonable conduct of the Respondents in failing to recognize and honour the claimants' continued employment. The court also finds that the claimants in leaving are entitled to claim compensation for unfair dismissal. Accordingly the court grants the claimants a sum of Ksh.446,208/= being twelve months gross salaries for unfair constructive dismissal. The sum is awarded to the claimants proportionate to their respective monthly wage as set out earlier in this judgment.

7. The court finds that the Claimants are also entitled to the sum of **Ksh.2,244,577.90/=** as per folio 25 to the memorandum of claim and the computation attached thereto.

8. In view of the award for unfair constructive dismissal, the court finds that the claimants are not entitled to incomes from October 1998 to date.

In conclusion judgment is entered for the claimants against the Respondents for-

- (a) a declaration that the Respondents constructively and unfairly terminated the employment of the Claimants;
- (b) The Respondents to pay the Claimants a sum of **Ksh.2,690,785.90/=** plus interest at court rates from 01/10/1998 until full payment, and
- (c) The Respondents to pay the costs of the case.

Signed, dated and delivered in court at Nairobi on the 30th day of November, 2012.

JUDGE

BRYAM ONGAYA