



**Anang'a v Landmark Holdings Limited & another (Cause E653 of 2021)
[2024] KEELRC 102 (KLR) (1 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 102 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E653 OF 2021
L NDOLO, J
FEBRUARY 1, 2024**

BETWEEN

EVANS ONG'WENA ANANG'A CLAIMANT

AND

LANDMARK HOLDINGS LIMITED 1ST RESPONDENT

HARVEER SINGH SETHI 2ND RESPONDENT

JUDGMENT

Introduction

1. By a Memorandum of Claim dated 10th August 2021, the Claimant seeks relief for unlawful termination of employment and payment of terminal dues. The Respondents filed a Response dated 9th September 2021, to which the Claimant responded on 30th September 2021.
2. At the trial, the Claimant testified on his own behalf and the 1st Respondent called its Human Resource Manager, Stephen Mwangi Kamau. The parties also filed written submissions.

The Claimant's Case

3. The Claimant states that he was employed by the 1st Respondent in the position of Quantity Surveyor from 1st June 2014 until 19th January 2021 when he was issued with a 30-day termination notice by the 2nd Respondent. At the time of termination, the Claimant earned a monthly salary of Kshs 249,280.
4. On 21st April 2020, the Claimant received communication from the 1st Respondent, through the 2nd Respondent that managerial staff and directors' salaries would be slashed up to the month of June 2020, as a measure to contain the negative effects of the COVID-19 pandemic. The Claimant's salary was thus reduced to Kshs 142,863 up to January 2021, when his employment was terminated.



5. The Claimant claims that salaries of the other staff were restored to the original figures and accuses the Respondents of irregularly, unfairly and discriminatively keeping him on a reduced salary.
6. The Claimant further accuses the Respondents of unlawfully and unfairly terminating his employment. The Claimant cites the following particulars in this regard:
 - a. Terminating the Claimant's employment while he had active duties he was undertaking;
 - b. Failing to issue a three-month notice of termination as stipulated under the Claimant's contract of employment;
 - c. Discriminatively reducing the Claimant's salary in the period leading to the termination of his employment;
 - d. Hostility from the 2nd Respondent in the period leading to the termination;
 - e. Failing to pay service pay to the Claimant on termination;
 - f. Failing to pay severance pay to the Claimant on termination;
 - g. Failing to pay accrued and unutilised leave days to the Claimant on termination.
7. The Claimant avers that the termination of his employment was motivated by bad faith and ill will on the part of the Respondents. He claims that at the material time, the 1st Respondent's business was thriving with various major multi-billion projects around the Country.
8. The Claimant seeks the following remedies:
 - a. A declaration that the termination of his employment was unlawful, unfair, un-procedural and discriminatory;
 - b. Kshs 2,991,360 being 12 months' salary as damages for unlawful termination;
 - c. Kshs 744,919 being unpaid salary arising from discriminative reduction for the months of July 2020 to January 2021;
 - d. Kshs 2,953,968 being unpaid house allowance for the entire duration of employment;
 - e. Kshs 747,840 being severance pay for completed years of service;
 - f. Kshs 199,424 being pay for accrued and unutilised leave days for the year 2020;
 - g. Kshs 747,840 being service pay for 6 years;
 - h. Kshs 747,840 being 3 months' pay *in lieu* of notice
 - i. Certificate of service;
 - j. Costs plus interest.

The Respondents' Case

9. In their Response to Claim dated 9th September 2021, the Respondents admit the existence of an employment relationship between the Claimant and the 1st Respondent, as pleaded in the Memorandum of Claim.



10. The Respondents state that the Claimant's gross monthly salary was Kshs 248,890. They justify the pay cut effected on the Claimant's salary, among other employees, including directors, which was occasioned by the adverse effects of the COVID-19 pandemic.
11. The Respondents assert that the pay cut was discussed and agreed upon between the Company and the employees with the general consensus that laying off employees during a pandemic would cause untold suffering and economic hardship to the employees.
12. The Respondents deny the Claimant's allegations of discrimination and state that all employees were treated equally and no salary of any employee was restored to the original amount.
13. Regarding the termination of employment, the Respondents state that there were valid reasons which were conveyed to the Claimant vide letter dated 19th January 2021. In this regard, the Respondents state that the projects being handled by the Claimant were all nearing completion.
14. The Respondents maintain that the Claimant was paid all his terminal dues, which he duly acknowledged.
15. The Respondents' case is that the Claimant is not entitled to the reliefs sought in the Memorandum of Claim for the following reasons:
 - a. The termination of employment was justified;
 - b. The salary reduction affected all the employees of the Company as well as the directors and was necessitated by the adverse effects on the business by the COVID-19 global pandemic;
 - c. The claim for house allowance has no basis as the Claimant was being paid a consolidated monthly salary as per his letter of employment;
 - d. The Claimant was paid service pay of Kshs 746,670 upon termination;
 - e. Having been paid service pay, severance pay was not payable as that would amount to duplication of payment;
 - f. Upon termination, the Claimant was paid outstanding leave days to the tune of Kshs 631,798;
 - g. The salary *in lieu* of notice payable, if any, can only be for 2 months as 30 days' notice was given and consequently, the notice shortfall would be 2 months.
16. The Respondents contend that the claim against the 2nd Respondent is misconceived and an abuse of the court process. The Respondents urge that this segment of the claim be struck out.

Findings and Determination

17. There are three (3) issues for determination in this case:
 - a. Whether the 2nd Respondent is properly joined in these proceedings;
 - b. Whether the Claimant has made out a case of unlawful termination of employment;
 - c. Whether the Claimant is entitled to the remedies sought.

The 2nd Respondent's Joinder

18. The Respondents contend that the 2nd Respondent is not a proper party in these proceedings as there was no employment relationship between him and the Claimant.



19. In their written submissions, the Respondents make reference to the persuasive decision in *Moir v Wallersteiner* [1975] 1 ALL ER 849 at p. 857 where Lord Denning MR stated as follows:

“It is a fundamental principle of our law that a company is a legal person with its own corporate identity, separate from the directors or shareholders and with its own property rights and interests to which alone it is entitled.”

20. The Claimant’s decision to join the 2nd Respondent, who at the material time was the Chief Executive Officer of the 1st Respondent, appears to have been informed by the role played by the 2nd Respondent in handling the Claimant’s case. While directors and officers of a body corporate may be joined in proceedings on account of their actions, they ought not to be dragged to court for every action taken in the discharge of their official functions.

21. In this case, the 2nd Respondent was not accused of any action taken outside his official mandate. The simple answer to the question of his joinder is therefore that he has been improperly sued. He is therefore discharged from these proceedings.

The Termination

22. The termination of the Claimant’s employment was communicated by letter dated 19th January 2021, stating as follows:

“Dear Sir,

RE: Notice For Termination Of Employment

Reference is made to the above.

As you are aware, the projects that you have been handling are almost complete, and due to the fact that there is no new project where your services can be transferred to, your Employment engagement with us shall be terminated on expiry of 30 days from the date of this letter.

You are hereby advised to get in touch with the Site Agent, Chief Quantity Surveyor and the Construction Manager, for handing over of any pending tasks and information in your possession before that date.

We appreciate your contribution for the period that you have worked for Landmark Holdings ltd. We wish you well in your future endeavors.

Yours Faithfully,

Landmark Holdings ltd

(signed)

Harveer Singh Sethi”

23. A reading of this letter reveals that the termination of the Claimant’s employment was on account of redundancy.

24. Section 2 of the *Employment Act*, 2007 defines redundancy as:

“the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where



the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.”

25. In their final submissions, the Respondents made a spirited effort to run away from the strictures of redundancy, they even sought to introduce an element of frustration of contract by force majeure. The Court was however not convinced; first, the issue of force majeure was not pleaded and no evidence was adduced on this score; second, the termination letter issued to the Claimant had all the stamps of a redundancy as defined in law.

26. Section 40 of the [Employment Act](#) lays out the law on termination of employment on account of redundancy as follows:

40.

(1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions –

- (a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;
- (b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;
- (c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;
- (d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;
- (e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;
- (f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages *in lieu* of notice; and
- (g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

27. The first 2 conditions under Section 40 require every employer declaring redundancy to issue a one-month notice of intention to the affected employee(s), their union (where applicable) and the local Labour Officer. By definition, this notice, should set out the reasons for and the extent of the intended redundancy.

28. It is now well settled that the redundancy notice is separate and distinct from the termination notice provided under Section 40(1)(f) (see [Thomas De La Rue v David Opondo Omutelema](#) [2013] eKLR and [Kenya Airways Limited v Aviation & Allied Workers Union of Kenya & 3 others](#) [2014] eKLR.)

29. Section 40(1)(c) requires the employer to demonstrate objective selection criteria and the last three conditions instruct the employer to settle all outstanding statutory dues.



30. As held by this Court in its decision in *Fatma Ali Dabaso v First Community Bank Limited* [2018] eKLR, a redundancy that ignores any of the conditions under Section 40 of the *Employment Act*, amounts to an unfair termination of employment as defined in Section 45 of the Act.
31. In this case, the employer not only breached all the conditions under Section 40 of the *Employment Act*, but also violated the Claimant's employment contract, which provided for a three (3) months' notice period.
32. In light of the foregoing findings, I have no difficulty in reaching the conclusion that the termination of the Claimant's employment was unlawful and unfair.

Remedies

33. I therefore award the Claimant, ten (10) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service and the employer's unlawful conduct in executing the termination.
34. I further award, the Claimant two (2) months' salary *in lieu* of the termination notice shortfall as per his contract of employment.
35. In addition, I award the Claimant severance pay as required under Section 40(1)(g) of the *Employment Act*, which is distinct and separate from service pay provided under Section 35(5) of the Act.
36. The Claimant's claim on account salary reduction in the wake of the COVID-19 pandemic is based on allegations of discrimination, which were not proved. This claim therefore fails and is disallowed.
37. The Claimant also claims house allowance. However, his letter of appointment dated 1st June 2014, provides for a consolidated monthly salary, which would ordinarily be inclusive of house allowance. This claim therefore also fails and is disallowed.
38. The claims for leave pay and service pay were abandoned in the course of the trial.
39. Finally, I enter judgment in favour of the Claimant as follows:
 - a. 10 months' salary in compensation.....Kshs 2,492,800
 - b. 2 months' salary *in lieu* of notice shortfall.....498,560
 - c. Severance pay for 6 completed years.....747,840Total.....3,739,200
40. This amount will attract interest at court rates from the date of judgment until payment in full.
41. The Claimant is also entitled to a certificate of service plus costs of the case.
42. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 1ST DAY OF FEBRUARY 2024

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JUDGE

Appearance:

Mr. Ogutu for the Claimant

Mr. Maina for the Respondent

