



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 509 OF 2002

WILLIAM OLOTCH..... PLAINTIFF

- V E R S U S -

PAN AFRICAN INSURANCE COMPANY LIMITED.....DEFENDANT

JUDGEMENT

1. William Olotch, the plaintiff herein, was appointed the managing Director of Pan African Insurance Co. Ltd, the defendant herein, on 16th December 1992. The plaintiff was subsequently appointed as a non-executive director of Mae Properties Ltd a property holding and development company wholly owned by the defendant which was incorporated in Kenya on 22nd September 1971. On 6th July 2001, at a board meeting of the defendant, all the directors including the plaintiff were confronted with the fact that majority of legal opinions obtained by the defendant and investigations into the purchase of plots by the directors from Mae Properties Ltd, had confirmed that there were serious breaches of fiduciary duties and possibly, criminal acts committed during the purchase of plots by the directors and revealed overwhelming evidence of personal gain at the expense of the group, which called for action. After long deliberations, it was resolved that all the local directors including the plaintiff would resign immediately. The plaintiff did not resign as resolved forcing the defendant to issue a letter of termination of employment to the plaintiff without notice or pay in lieu of notice for gross misconduct pursuant to Clause 10(a) (i) of the contract of employment. The plaintiff felt aggrieved and therefore opted to challenge the termination via this suit.

2. The plaintiff, vide his amended plaint dated 4th October 2001, sought for the following orders inter alia:

a. A declaration that the plaintiff's summary dismissal was unlawful;

b. Judgement against the defendant for the sum of kshs.23,270,789.00 computed as follows:

i. Six months' salary in lieu of Notice @663,179 ksh.5,979,074.00

ii. Accrued leave ksh.1,572,534.00

iii. Salary arrears ksh.2,230,136.00

iv. Club membership fee ksh. 255,000.00

v. Dues for 8 years of service ksh.5,305,434.00

vi. Severance pay ksh.5,959,074.00

vii. Translocation expenses ksh.1,989,537.00

viii. Amount outstanding ksh.23,270,789.00

c. Interest on (b) above from the 17th July, 2001 being the date of the unlawful summary dismissal until payment in full, and,

d. Cost of the suit.

3. The defendant on the other hand denied the plaintiff 'sclaim by filing an amended defence and a counter claim dated and filed on 19th November 2001, in which it prayed for the following:

a. Delivery of motor vehicle Mitsubishi Pajero 2800 registration number KAM 509M;

b. In the alternative, delivery of motor vehicle Mitsubishi Pajero 2800 registration number KAM 509M, or the payment of ksh.3,575,000.00

c. Damages for loss of use of the said motor vehicle Mitsubishi Pajero 2800 registration number KAM 509M calculated at the rate of kshs.5,000.00 per day with effect from 17th July 2001;

d. General damages

e. Judgement against the plaintiff in the sum of kshs.1,162,187.60

f. Costs in the counterclaim; and,

g. Interest on (b) , (c), (d), (e) and (f).

4. At the hearing of the plaintiff's suit, the plaintiff presented evidence to show that his termination was unprocedural and unlawful. The plaintiff (PW1) told this court that he was employed by the defendant as its managing director. At the hearing, he produced the letter of appointment dated 16.12.92 as an exhibit in evidence. PW1 stated that it was a term of the plaintiff's employment that he would work upto the age of 60 years, with an option to retire, with the company's permission of after attaining the age of 55 years or whichever shall occur first. PW1 avers that he diligently served in the position of managing director until 17th July 2001, when he was unlawfully and unprocedurally terminated through the letter dated 17.7.2001. The letter expressly stated that pursuant to a Board Resolution of 13.7.2001 and in accordance with Clause 10(a)i) of the letter of appointment, the plaintiff was terminated for breach of covenant, condition or provision contained in the letter of appointment. It was also stated that the plaintiff's employment was terminated as a result of misconduct which in the opinion of the directors injured the company and its business. The letter further stated that the termination would take effect from 6th July 2001, without notice or payment in lieu thereof. It is the evidence of the plaintiff that the decision to step down by the Board Members was arrived at in a board meeting of the defendant company held on 6th July 2001 during which meeting all the local directors agreed to step down except for the plaintiff and the chairman and the latter was to remain in office until 31.7.2001 for the sole purpose of considering and approving the plaintiff's terminal dues before his exit. Accordingly, the plaintiff is of the view that he was to step down only after agreeing to the termination dues that were to be proposed by the chairman. PW1 claimed that his terminal dues were assessed by the Human Resource Department at ksh.10,039,171/= . The plaintiff further avers that the proposal was taken by the chairman and handed over to the new shareholders but was rejected.

5. According to the plaintiff, the defendant's chairman made a different proposal to the plaintiff of ksh.4,652,966/= vide the letter dated 12.7.2001 which proposal the plaintiff rejected. It is said that upon receipt of the plaintiff's letter rejecting his proposal, the chairman responded by issuing the letter of

termination dated 17th July 2001 with immediate.

6. It is the evidence of the plaintiff that the letter of appointment provided for how the contract of employment could be terminated. He says that the defendant was required to give him six months' notice or in default the plaintiff would be paid six months' salary in lieu of notice.

7. The plaintiff is of the view that there was no purported board resolution of 13.7.2001 and that no reasons were attached to the letter of termination nor does it give the plaintiff a chance to go through a disciplinary process.

8. According to the defendant, there were two schemes for the purchase of plots at Runda area by Mae Properties Ltd which the plaintiff abused hence his summary dismissal. The defendant called two witnesses namely Emma Wachira (DW1) and Dennis Kirigwi (DW2). It is the evidence of DW1 that the plaintiff was summarily dismissed for gross misconduct as a result of abuse of the plots purchase scheme provided by one of the defendant's subsidiary company, Mae Properties Ltd. DW1 stated that there was only one scheme and the operative words used made it clear that the scheme was extended to the senior employees of the defendant and at the same terms and conditions given by Mae Properties Ltd. DW1 told this court that the plaintiff and other local directors would purchase the plots cheaply from Mae Properties Ltd and sell them to third parties at much higher prices. This witness further told this court that the plaintiff did not disclose any interest by the plaintiff in respect of the purchases. It's the evidence of DW1 that investigations revealed that there were serious breaches of the directors' corporate duty. She pointed out that the plaintiff being the managing director of the defendant and as a director of Mae Properties Ltd was under a fiduciary duty to prevent and or stop the abuse of the scheme. DW1 stated that the plaintiff not only failed to prevent and or stop the abuse of the scheme but he also actively participated in the abuse hence his summary dismissal when he failed to resign after the board meeting of 6th July 2001. Dennis Kirigwi (DW2) testified in support of the defendant's counter-claim. DW2 told this court that the plaintiff was entitled to the use of a motor vehicle belonging to the company on company duties and for his personal, domestic and social use. He also pointed out that the defendant company would give the plaintiff the option to purchase the car at approximately 10% of the original value at the time of replacement which would not be more than six years from the time of purchase. DW2 confirmed that the plaintiff was provided with motor vehicle registration no. KAM 509M Mitsubishi Pajero 2800CC. DW2 stated that the plaintiff was required to hand over the aforesaid motor vehicle when he was summarily dismissed because the defendant had not offered to sell the motor vehicle to him.

9. At the time of his dismissal, the motor vehicle was valued at kshs.3,575,000/= and was only a year old. DW2 submitted documents in evidence to establish the defendant's claim of kshs.1,162,187/60. He also presented in evidence over the further claim of kshs.470,000/= being damages for loss of user of the aforesaid motor vehicle.

10. In short, DW2 testified that the defendant is entitled to a sum of kshs.1,162,187/60 for the expenses and recoveries together with the sum of kshs.3,575,000/= being the value of the motor vehicle as at 13th July 2001 and a further sum of kshs.470,000/= being damages for loss of user between 17.7.2001 and 19.11.2001. In answer to the aforesaid claims and or evidence, the plaintiff stated that since he was a non-executive director of the subsidiary company (Mae Properties Ltd), he was only answerable to the Board that appointed him and that he rightly bought a plot under scheme (c) as a senior staff and the other as a non-executive director of Mae Properties Ltd. The plaintiff was categorical that there were two schemes under which the plaintiff could purchase the plots on offer, namely: First, under Clause C, as a senior manager of the defendant (only 1 plot) and secondly under scheme (e), where there were no restrictions on the number of plots to buy.

11. At the close of evidence, learned counsels appearing in this matter were invited to file and exchange written submissions. Having considered the evidence tendered and the rival written submissions together with the case law cited, the following issues arose for the determination of this court.

i. Whether or not the plaintiff's dismissal from employment of the defendant was procedural and lawful.

ii. Whether or not the plaintiff is entitled to the claim stated on the amended plaint.

iii. Whether or not the defendant is entitled to claims set out in the counterclaim.

iv. Who should pay costs of the suit.

12. The first issue as to whether or not the plaintiff's summary dismissal was procedural and lawful

It is not in dispute that the plaintiff was summarily dismissed without notice and pay. The defendant has sought to justify its action. It is also not in dispute that under Clause 10(a) (i) of the contract executed by the plaintiff with the defendant and under Section 17 of the Employment Act (now repealed), that the defendant was entitled to summarily dismiss the plaintiff if he is found to have committed gross misconduct. It is not disputed that the plaintiff was the managing director of the defendant and a director with Mae Properties Ltd. The plaintiff therefore had a fiduciary duty to the aforesaid companies. In the arbitration case of **Mae properties Ltd =vs= Subash Chander Kohli and Federal Distributors Ltd**, it was found by **Ken Fraser**, an arbitrator, that the local directors in their dealings with Mae Properties Ltd amounted to serious breaches of their fiduciary duties. This decision was produced by the defendant as one of its authorities. It is apparent from the evidence tendered that the issue of abuse of the scheme was the very basis of the resolution by the defendant that all the local directors of the defendant, including the plaintiff should resign immediately. When the plaintiff failed to resign as agreed at the board meeting of 6.7.2001, the defendant made a decision to hand him summary dismissal. The plaintiff has claimed that he was entitled to purchase the plots using two schemes. A careful look at Sections 191 and 200 of the Companies Act would reveal that the plaintiff and the local directors could not purchase the plots based on the market value. Section 191 prohibits loans by a company to its directors or a director of the holding company. On the other hand Section 200 requires a disclosure of interest by the directors in contracts or proposed contracts, whether directly or indirectly with the company at the directors meetings. I am satisfied that the defendant has proved that the plaintiff was guilty of gross misconduct hence the defendant was entitled to summarily dismiss the plaintiff without notice or pay in lieu of notice. The assertion by the plaintiff that he was unlawfully and unprocedurally dismissed cannot stand. Under Section 17 of the repealed Employment Act (Cap 226 Laws of Kenya)(repealed) which was the applicable law to this matter, the giving of reasons for termination and the rules of natural justice were not a requirement as the contract of employment did not provide for them. The rules of natural justice were enacted in 2007 under Section 41 and 45 of the Employment Act no. 11 of 2007, which in this case cannot be applied retrospectively.

13. Though there was no requirement to give reasons for the termination under the repealed Act, it is apparent from the letter of termination dated 17.7.2001 that the dismissal was in accordance with Clause 10(a) (i) of the letter of appointment.

14. The second issue is whether or not the plaintiff is entitled to the claims set out in the plaint. This court has considered the evidence and the rival submissions over this question. I have already stated that the defendant was entitled to summarily dismiss the plaintiff for gross misconduct. Under Clause 10(a) (i) of the letter of appointment and Section 17 of the Employment Act (Cap. 226 Laws of Kenya) the plaintiff was not entitled to any notice or pay in lieu of notice. The plaintiff's employment was terminated in accordance with the contract and statute.

15. The third issue is whether the defendant is entitled to the claim set out in the counter claim. It is not in dispute that the plaintiff was in possession of motor vehicle registration KAM 509M, Mitsubishi Pajero which was purchased by the defendant in 2000. It is also apparent from the evidence that the defendant had not given the plaintiff the option to purchase the motor vehicle under Clause 3(b) (ii) of the letter of appointment. Applying the normal depreciation of 25% per year the motor vehicle's value was assessed kshs.3,575,000/= at the time of the plaintiff's dismissal. The plaintiff therefore unlawfully continued to hold the motor vehicle yet ownership had not been passed to him. It is obvious that the motor vehicle's value has since then depreciated hence the only fair order is to direct, which I hereby order, the plaintiff to pay the defendant ksh.3,575,000/= as the value of the motor vehicle which the plaintiff continued to hold unlawfully. Having given the order for payment of the aforesaid amount, I think it will be prejudicial to

the plaintiff to again order him to pay damages for loss of user of the same motor vehicle. I do not think it is also fair and appropriate to award the defendant general damages.

16. I have considered the evidence of DW2 and I am convinced that the defendant has on a balance of probabilities proved that it is entitled to payment of kshs.1,162,187/60. Consequently the defendant is entitled to be paid to the aforesaid amount.

17. The final question to be determined is who should pay costs. It is trite law that costs follow the event. The defendant is a successful litigant. It is awarded costs.

18. In the end and for avoidance of doubt, the plaintiff's suit is ordered dismissed with costs to the defendant.

19. As regards the defendant's counter-claim, judgment is entered in favour of the defendant and against the plaintiff as follows:

i. The plaintiff to pay ksh.4,737,187/60 i.e (3,575,000+1,162,187/60=4,737, 187/60)

ii. Costs of the counter-claim is awarded to the defendant.

Dated, Signed and Delivered in open court this 9th day of March, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant