



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT KISUMU

CAUSE NO. E021 OF 2024

JACK

OMONDI

OYIEKE.....

.....**CLAIMANT**

VERSUS

KENYA NATIONAL TRADING CORPORATION LTD...**RESPONDENT**

JUDGMENT

1. The Claimant filed this suit alleging unlawful termination of his employment on 6th March 2024 vide a memorandum of claim dated 26th March 2024. He averred that he was employed by the Respondent as a Senior Supply Chain Officer under a contract dated 24th September 2021, earning

a monthly salary of Kshs. 95,044/-. According to him, he diligently executed his duties and maintained a cordial working relationship with the Respondent, which led to his appointment as Secretary to the Ad Hoc Evaluation Committee for Bulk Commodities on 15th November 2022. The Committee, he averred, had been established following a Cabinet meeting held on 12th November 2022, which approved a framework to position the Respondent as the anchor of State initiatives aimed at stabilizing the prices of essential household food items. He averred that as a trading company, the Respondent's role was to maintain strategic reserves of staple food and vital farm inputs, including fertilizer, to ensure stability in the prices of core commodities consumed by Kenyans. The Claimant averred that the Committee convened on 18th November 2022 and prepared an evaluation report recommending fourteen bidders for consideration in the tender process. The Claimant averred that the Committee relied on a direct procurement process approved by the Public Procurement Regulatory Authority (PPRA) through a letter dated 18th November 2022.

2. The Claimant averred that, notwithstanding that no tender was eventually awarded, he was issued with a notice to show cause dated 23rd January 2024, citing irregularities in the procurement process. He averred that he responded on 29th January 2024 and subsequently appeared for a disciplinary hearing on 22nd February 2024, after which his employment was terminated on 6th March 2024. He averred that the termination was unfair, as it was founded on an incomplete and misleading audit report which disregarded crucial documents, including the PPRA letter dated 18th November 2022 and a letter dated 1st December 2022 from the Cabinet Secretary confirming that the Respondent's commercial activities were not strictly subject to the Public Procurement and Asset Disposal Act (PPADA). The Claimant further averred that the Committee's role was purely advisory and that his dismissal was malicious, discriminatory, and unjustified for the following reasons:

- a. The evaluation committee only made recommendations but did not award any tender.
- b. The use of Direct Procurement was expressly sanctioned by PPRA.

- c. The audit report on which his dismissal was based failed to consider official correspondence exempting the Respondent from strict PPADA requirements.
- d. The Cabinet Secretary's letter validated the procurement approach used for commercial trading.
- e. The responsibility for awarding tenders rested solely with the Managing Director, not the evaluation committee.
- f. There was no negligence or misconduct on his part warranting disciplinary action.

3. On the strength of the foregoing, the Claimant sought the following reliefs:

- (i) A declaration that the termination of his employment was unlawful, unprocedural, and discriminatory.
- (ii) A declaration that the termination violated his constitutional right to fair labour practices
- (iii) Payment of general damages for unfair termination, equivalent to 12 months' salary (Kshs. 1,140,528/-).

- (iv) General damages for discrimination and infringement of constitutional rights
- (v) Aggravated damages for mental and psychological anguish
- (vi) Interest on the above sums from the date of termination until payment in full
- (vii) Costs of the cause and interest thereon

4. Vide a Memorandum of Response dated 31st May 2024, the Respondent admitted it had employed the Claimant and acknowledged his appointment as Secretary to the Evaluation Committee. However, it averred that the entire procurement process was riddled with irregularities and procedural improprieties that amounted to gross negligence and breach of procurement procedures. It was the Respondent's averment that although the National Treasury had, through its letter of 1st December 2022, approved the use of a "Specially Permitted Procurement Procedure" under the Public Procurement and Asset Disposal Act (PPADA), 2015 and the attendant 2020 Regulations, the Committee's Evaluation Report of 18th November 2022 wrongly indicated

the use of “Direct Procurement.” This inconsistency, the Respondent argued, reflected negligence and procedural lapses on the part of the Evaluation Committee, including the Claimant. The Respondent further averred that the Claimant failed to:

- a. Ascertain whether the tender opportunity had been advertised on the Respondent’s website prior to evaluation;
- b. Advise the Accounting Officer to notify the Public Procurement Regulatory Authority (PPRA) within fourteen (14) days after award of the direct procurement contract as required under Regulation 90 of the PPAD Regulations, 2020; and
- c. Undertake registration and prequalification of suppliers of bulk commodities as required under section 34(1) of the PPADA and the Respondent’s Trading Policy.

5. Additionally, the Respondent accused the Committee of fabricating the evaluation process by failing to produce actual bid documents from the bidders. It also alleged that the Claimant unlawfully used “scouting” to source

warehouses in Nairobi and Mombasa—an unrecognized method that led to inflated costs and financial loss to the Corporation. The Claimant and his team were further faulted for failing to conduct Supplier Quality Approval (SQA) as required under the Draft Trading Policy, 2023. On the termination procedure, the Respondent averred that due process had been observed. The Claimant was served with a show cause letter, his response was considered, and a disciplinary hearing was held on 22nd February 2024, after which the Board found his dismissal warranted. The Respondent therefore urged the Court to dismiss the claim with costs as being without merit and an abuse of the court process.

6. At the hearing the Claimant testified on his own behalf while two witnesses testified for the Respondent. The Court has duly considered their testimony and evidence on record.

Claimant's Submissions

7. The Claimant submitted that the Respondent had failed to prove valid reasons for terminating his employment or to demonstrate that due process had been followed, citing

sections 43, 44, and 45 of the Employment Act. He drew attention to the fact that the show cause letter cited three grounds of contemplated disciplinary action yet the termination letter contained eleven grounds, which amounted to trial by ambush and denial of an opportunity to defend himself. The Claimant further submitted that alleged procurement irregularities had already been sanctioned at higher Government levels and the Evaluation Committee's role was merely to formalize the decisions made. He asserted that as a junior officer there was nothing, he could do to influence the process. To buttress this position, he cited: the letter dated 15th November 2022 by Hon. Moses Kuria, Cabinet Secretary Ministry of Trade, which indicated that at least two supplies had been identified; the letter dated 18th November 2022 by the Director General Public Procurement Regulatory Authority addressed to the Principal Secretary National Treasury indicating that procurement transactions for purposes of trading could be progressed outside procurement law; and the letter dated 1st December 2022 from the Cabinet Secretary National Treasury and Economic Planning addressed to the Respondent's Managing

Director Ms. Pamela N. Mutua, indicating that trading did not constitute procurement within the meaning of section 2 of the Act. All of which indicated that the transaction had been sealed in the big offices and the work of the Committee was just to rubberstamp.

8. On the Disciplinary process the Claimant submitted that it was contrary to the Respondent's Human Resource Manual. He asserted that according to the manual, disciplinary proceedings for officers of his level were supposed to be conducted by a management committee, with appeals lying to the Board. He thus contended that by presenting him directly to the board, the Respondent denied him the right to appeal infringing on his right to a fair hearing under Articles 41 and 47 of the Constitution. Moreover, the Claimant faulted the Respondent for failing to consider alternative disciplinary measures such as a surcharge, given that no prior warning had been issued. The Claimant further submitted that the procurement process had been undertaken under "specially permitted procedure" pursuant to section 114A of the Public Procurement and Asset Disposal

Act, hence reference to “direct procurement” in the termination documents was merely a typographical error.

9. On the reliefs sought the Claimant submitted that he was entitled to General damages for unfair termination equivalent to twelve months’ salary, on the basis of the decision in **Chrispo Zachariah Ogugo v Airtel Networks Kenya Ltd [2012] eKLR**, which made a similar award. On general damages for discrimination and infringement of his rights the Claimant submitted that he was entitled to Kshs. 1,500,000/-. He cited the difference in the number of grounds in the show cause letter and his termination letter as well as his denial to exercise appeal. In respect of aggravated damages, the Claimant submitted that he was entitled to Kshs. 3,000,000/-, based on the decision in **Patel v Max Cure Hospitals Limited (Cause E047 of 2022) [2023] KEELRC 3002 (KLR)**, where the Court held that aggravated damages may issue where the employer’s conduct causes distress and intolerable anxiety.

Respondent’s Submissions

10. The Respondent submitted that this Court lacked jurisdiction to entertain this suit on account of non-compliance with the exhaustion doctrine. It maintained that the doctrine of exhaustion was mandatory and that no exceptional circumstances had been demonstrated to warrant deviation. Flowing from the foregoing, the Respondent asserted that the Claimant should have first appealed to the Board of Directors through the Managing Director as provided by clause 11.23 of the Kenya National Trading Corporation Ltd. Human Resource Policy and Procedures Manual, 2018, after which a second appeal would lie to the Public Service Commission under section 74 of the Public Service Commission Act and Regulation 68(1) of the Public Service Commission Regulations, 2020. In support of this position, the Respondent cited the decision in the case of the **Owners of Motor Vessel Lillian 'S' v Caltex Oil (Kenya) Limited [1989] eKLR**, which held that jurisdiction of a court is everything and without it a court has no power to make any one more step. The Respondent also cited the decision in the case of **Mutanga Coffee Company Limited v Shikara Limited & another [2015] eKLR**, which held:

“However, we entertain no doubt in our minds that the reasoning of the court must apply with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by the Constitution or Statute, to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court.”

11. Regarding proof of the reason for termination, the Respondent submitted that the audit report had established the absence of evidence of competitive sourcing of suppliers as required under the Public Procurement and Asset Disposal Regulations, 2020, and that tender documents were neither properly shared nor received by the Corporation, contrary to section 74 of the Public Procurement and Asset Disposal Act 2015. Further, the evaluation committee, of which the Claimant was a member, had used direct procurement without following the procedures prescribed under section 104 of the Act. It therefore contended that these findings amounted to grave breaches of procurement law, providing sufficient justification for the termination of the Claimant’s

employment. To buttress its position, it highlighted the notice to show cause that raised allegations of falsification of tender evaluation documents, failure to ensure proper scrutiny of bid documents, and negligence of duty as a member of the Tender Evaluation Committee. Additionally, it drew attention to the uncontroverted internal audit report that met the threshold of expert evidence, for being objective, factual, and independent based on the decision in the case of **Kagina v Kagina & 2 others (Civil Appeal No. 21 of 2017) [2021] KECA 242 (KLR)**. In view of the foregoing, it submitted that it had discharged its duty under section 43 of the Employment Act. On procedural fairness, the Respondent submitted that the Claimant was accorded a fair hearing in full compliance with Article 47 of the Constitution and section 41 of the Employment Act. It was asserted that the Claimant was given a detailed Notice to Show Cause on 23rd January 2024, to which he responded on 29th January 2024. Thereafter, he was invited for a disciplinary hearing scheduled for 23rd February 2024, giving him fifteen days to prepare his defence. The Respondent further asserted that the hearing duly took place, the

Claimant attended, and the committee found him culpable. Regarding the prayers sought the Respondent submitted that the Claimant was not entitled to any as he had not discharged his burden of proof. It submitted that the Claimant had failed to controvert the allegations raised in the expert report. In conclusion, the Respondent urged the Court to find that the termination was lawful, valid, and procedurally fair, and to dismiss the Claimant's suit.

Disposition

12. The matter herein relates to procurement. In light of this, a small discourse on the Public Procurement and Disposal Act is necessary especially as relates to the parameters for public procurement. In public spending, there are strictures established under the Public Procurement and Disposal of Public Assets (PPDA) Act. The Act mandates strict adherence to its procedures to ensure probity and fairness as well as transparency and value for money in public procurement. The Act does indeed provide for alternative, less competitive procurement methods to be used in limited and specific

circumstances. These circumstances are clearly spelt out in the Act and include:

- a. Direct procurement also known as single sourcing, may be used when there is an urgent need for goods, works, or services and the time required for other procurement methods would be impractical. The method is used in cases of extreme urgency or in emergency situations. In this case the circumstances giving rise to the urgency must be unforeseeable and not the result of the procuring entity's own negligence or delay.
- b. When there is only one person or entity that can supply the required goods, works, or services, and no reasonable alternative or substitute exists, direct procurement can be used.
- c. Where the procurement relates to funds from a donor that is not a public entity, and the conditions by the donor conflicts with the PPDA Act, the donor's conditions will prevail for that specific procurement.
- d. Restricted tendering may be used for complex or specialized requirements where only a few pre-qualified contractors are suited for the procurement (defence

contracts for instance) and where the time or cost of a full open tender would be disproportionate to the value.

e. For very low-value items where the sums are below the ceiling, simplified procedures (micro-procurement) are permitted, as detailed in the relevant regulations and guidelines.

13. The Act exempts certain actions that are not considered to be subject to the Act. These are:

i. Transfer of assets between state organs without financial consideration.

ii. Acquisition and sale of shares or securities.

iii. Procurement under specific bilateral or multilateral agreements with foreign governments/agencies, unless otherwise prescribed.

14. In all these cases, the use of the alternative method or exemption must be justified, approved by the relevant authority such as the Contracts Committee or Accounting Officer, and these exemptions must be properly documented with reasons. The fundamental principles of transparency and accountability nevertheless always apply. The use of

these alternative methods can never be a means for avoiding competition or for discriminatory purposes.

15. In the case before me, the Claimant asserts that the Committee convened on 18th November 2022 and prepared an evaluation report recommending fourteen bidders for consideration in the tender process. The Claimant averred that the Committee relied on a direct procurement process approved by the Public Procurement Regulatory Authority (PPRA) through a letter dated 18th November 2022.

16. The opinion expressed in the letter of 18th November 2022 was misleading as it suggested the Respondent could procure items for supply to Kenyans or for stockpile without adherence to the law. It suggested the Public Procurement and Disposal Act could be waived. As shown above there are very few exceptions to the requirements to strictly adhere to the law. The last person who can offer an opinion on the legal aspects of the Public Procurement and Disposal Act is the Director General as legal opinions in Government are to be issued by the Attorney General.

17. The fact the Claimant relied on a misleading letter to deviate from the provisions of the law therefore means the Respondent was justified in initiating the disciplinary process against the Claimant. The Audit report dated 17th January 2024 set off the chain of events culminating in the show cause letter dated 23rd January 2024 to which the Claimant wrote a response to show cause letter dated 29th January 2024. Upon consideration of the response, the Claimant was issued an invitation for meeting with Departmental Committee dated 29th January 2024. Thereafter there was a Special Ad-hoc Disciplinary Committee whose deliberations indicate the Claimant was heard in early February 2024. The Claimant was issued a summary dismissal letter dated 6th March 2024 upon the Disciplinary Committee having found him culpable. The specifics of the dismissal comprised of irregular award of tenders, making false statements and negligence of duty as contained in his dismissal letter. The Claimant was therefore accorded his rights under section 41 of the Employment Act and under Article 41 of the Constitution. He was therefore dismissed in accordance with provisions of the law. His suit is therefore unmerited and no

elements of unfairness or breach of procedure and the Claimant's rights discerned. The suit is dismissed albeit with no order as to costs since the Respondent has repeatedly declined to make payments to the Judiciary for documents filed.

Orders accordingly.

Dated and delivered at Kisumu this 5th day of November

2025

**Nzioki wa Makau, MCI Arb.
JUDGE**

Original. Do not remove from the file